NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DARCY WILLIS GORRON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 592 MDA 2012

Appeal from the Judgment of Sentence February 21, 2012
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0002475-2011

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J. Filed: March 15, 2013

Darcy Willis Gorron appeals from the judgment of sentence entered against him following his conviction on charges of aggravated indecent assault, indecent assault of a child and corruption of minors.[1] Gorron was sentenced to an aggregate term of 10 to 20 years' incarceration, based upon the 10 year mandatory minimum sentence in 42 Pa.C.S.§ 9718(3). Gorron claims the trial court erred in denying him the opportunity to cross-examine the victim, K.S., during the competency hearing regarding the possibility of taint and in denying his request to call K.S. as a witness during the tender years hearing. After a thorough review of the submissions by the parties,

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§3125(b), 3126(a)(7), and 6301, respectively.

relevant law, and official record, we determine Gorron is not entitled to relief on those issues. However, we note, *sua sponte*, that Gorron was given an illegal sentence and therefore, we vacate the judgment of sentence of remand for resentencing.[2]

At approximately 9:00 p.m., March 20, 2011, A.G., Gorron's wife, (hereafter "Mother") returned home from shopping and found Gorron in bed with his stepdaughter, K.S., an eight year-old. They were both under the covers. Another stepchild was sitting on the foot of the bed playing a video game. Upon seeing his wife, Gorron immediately jumped out of bed and ran downstairs. Mother noticed Gorron had an erection.

The next morning, while taking the children to school, Mother asked her children how they liked Gorron as a stepfather. At that point, K.S. started crying. Mother stopped the car and spoke with K.S. outside of the vehicle. K.S. told her mother that Gorron had been touching her sexually, both over and under her clothes, on multiple occasions. Further, he made her touch his genitals. Mother dropped her children off at school and went to the police.

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[2] An illegal sentence may be addressed by our Court *sua sponte*. ***See Commonwealth v. Provenzano***, 50 A.3d 148, 157 (Pa. Super. 2012.) Gorron was properly convicted under Section 3125(a)(7), a second-degree felony, not Section 3125(b), a first-degree felony, under which he was sentenced.

Later that day, Mother took K.S. to the Children's Alliance, where K.S. was interviewed by forensic interviewer, Kari Stanley. Although the interview was difficult, in that K.S. did not want to talk about what Gorron had done, she eventually retold her story to Stanley.

During his interview with the police, Gorron denied any impropriety with K.S. but admitted he had an erection when he got out of the bed and went downstairs.

Prior to trial, a tender years and taint hearing was held. Mother, Stanley and a pediatrician, Dr. Cathy Hoshauer testified. The testimony of Mother and Stanley are relevant to the issues raised in this appeal. Both testified regarding the substance of K.S.'s report as well as to the circumstances attendant to K.S. telling her story. Gorron was able to cross-examine both witnesses about their interaction with K.S. Gorron sought to have K.S. testify at that time, but the request was denied. The trial court then determined that K.S.'s statements to her mother and Stanley would be admissible pursuant to the Tender Years Doctrine.

After the determination was made regarding the application of Tender Years, a competency hearing was held. K.S. testified and was determined to be competent to testify at trial. However, because Gorron had been unable to show evidence of taint, he was not allowed to pursue the issue with K.S.

Mother, Stanley, Dr. Hoshauer, K.S. and police officers testified at trial and Gorron was convicted by a jury of all charges. This timely appeal followed.

"Evidentiary rulings are committed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion." ***Commonwealth v. Cohen***, 605 A.2d 1212, 1218 (Pa. 1992).

> A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. ***Rosche***[***v. McCoy***, 165 A.2d 307], at 309 [(Pa. 1959)]. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder. [***Commonwealth v.***] ***Washington***, 722 A.2d [643] at 646 [(Pa. 1998)]. An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility. Where it can be demonstrated that a witness's memory has been affected so that their recall of events may not be dependable, Pennsylvania law charges the trial court with the responsibility to investigate the legitimacy of such an allegation.

Commonwealth v. Delbridge, 855 A.2d 27, 40 (Pa. 2003).

Further,

> In order to trigger an investigation of competency on the issue of taint, the moving party must show some evidence of taint. Once some evidence of taint is presented, the competency hearing must be expanded to explore this specific question. During the hearing the party alleging taint bears the burden of production of evidence of taint and the burden of persuasion to show taint by clear and convincing evidence. Pennsylvania has always maintained that since competency is the presumption, the moving party must carry the burden of overcoming that presumption. ***Rosche***. As this standard prevails in cases where the witness's memory may have been corrupted by insanity, mental retardation or hypnosis, we see no reason to alter it in cases where the memory of the witness is allegedly compromised by tainted interview techniques. Further, as the burden in all other cases alleging incompetency is clear and convincing evidence, we will continue to apply that existing legal requirement for cases involving taint.

Id.

> The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy. Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.

Commonwealth v. McLaurin, 45 A.3d 1131, 1139 (Pa. Super. 2012) (citation omitted).

The trial court heard the testimony of Mother and Stanley and viewed the DVD recording of Stanley's forensic examination of K.S. It found that Gorron had not demonstrated any evidence of taint sufficient to require examination of K.S. on the topic.[3] We have reviewed both the notes of testimony for the hearing and viewed the DVD and we find no abuse of discretion or error of law on the part of the trial court. While it is clear that K.S. would have preferred not talking about what had happened, she related the facts without coercion and in her own words, without any answer being suggested to her. There is no indication of record to suggest the

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[3] Gorron specifically complains about promises made to K.S. The "promise" was Stanley telling K.S., toward the end of the interview, there would only be a few more questions. There was nothing coercive or suggestive about this. Stanley also gave K.S. a "high-five" at one point. This was after K.S. put a marking pen back in the bucket it had been taken from. It was not done in reward of any particular answer. There was nothing untoward within the forensic interview.

implantation of false memories or the use of unduly suggestive or coercive interview techniques. Gorron in not entitled to relief on this issue.

Next, Gorron claims the trial court erred in not allowing him to examine K.S. during the "Tender Years" hearing. He claims he needed to question the child to adequately explore the reliability of her out-of-court statements.

The rules regarding the application of the "Tender Years" exception are found at 42 Pa.C.S. §5985.1, and state in relevant part:

> **(a) General rule.--**An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
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> > (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
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> > (2) the child either:
> >
> > > (i) testifies at the proceeding; or
> > >
> > > (ii) is unavailable as a witness.

42 Pa.C.S. § 5985.1(a).

The statute contains no requirement that the child be subject to examination and cross-examination for the trial court to make its

determination. Here, the trial court heard testimony from Mother, Stanley, and Dr. Hoshauer and viewed the DVD recording of the forensic interview. Gorron was able to cross-examine all witnesses regarding the circumstances in which K.S. made the statements. Further, K.S. testified at the trial and was subject to cross-examination, thereby fulfilling requirement (a)(2)(i) of the statute. We find no abuse of discretion or error of law regarding the Tender Years hearing or the ruling that allowed introduction of the statements. Gorron is not entitled to relief on this issue.

Although Gorron is not entitled to relief on the claims raised in his appeal, our review of the official record leads us to the realization that Gorron was improperly sentenced to a ten-year mandatory minimum sentence pursuant to 42 Pa.C.S. § 9718(a)(3).[4] This ten-year mandatory minimum is applicable where a defendant has been properly convicted of violating 18 Pa.C.S. § 3125(b). The record demonstrates that Gorron was properly convicted of violating 18 Pa.C.S. § 3125(a)(7). The mandatory minimum sentence for that crime is five years' incarceration.

The statute describing aggravated indecent assault is found at 18 Pa.C.S. § 3125.

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[4] Questions regarding the application of a mandatory minimum sentence are challenges to the legality of a sentence. ***See Commonwealth v. Kittrell***, 19 A.3d 532 (Pa. Super. 2011).

(a) Offenses defined.--Except as provided in sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if:

> (1) the person does so without the complainant's consent;
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> (2) the person does so by forcible compulsion;
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> (3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
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> (4) the complainant is unconscious or the person knows that the complainant is unaware that the penetration is occurring;
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> (5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
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> (6) the complainant suffers from a mental disability which renders him or her incapable of consent;
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> (7) the complainant is less than 13 years of age; or
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> (8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

(b) Aggravated indecent assault of a child.--A person commits aggravated indecent assault of a child when the person violates subsection (a)(1), (2), (3), (4), (5) or (6) and the complainant is less than 13 years of age.

> **(c) Grading and sentences.--**
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> (1) An offense under subsection (a) is a felony of the second degree.
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> (2) An offense under subsection (b) is a felony of the first degree.

18 Pa.C.S. § 3125.

In order to convict a person under subsection (b), the Commonwealth must prove a number of elements: (1) there was penetration, (2) there was no good faith reason for the penetration, (3) the victim was under 13 years of age, and (4) any of the first six elements listed in subsection (a). If none of the first six elements are proven, and the victim is under 13 years of age, then the defendant is properly guilty of violating subsection (a)(7), not subsection (b).

Here, the jury was asked to determine only whether there was penetration, a good faith reason and the age of the victim. The jury was specifically told that consent, element (a)(1), was not an element for their consideration.[5] Further, the jury was not asked to consider any of the other required elements for conviction under Subsection (b).

The entire charge regarding aggravated indecent assault follows:

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[5] We note that there were no allegations or proof that elements (a)(2)-(6) were at issue. The trial count only specifically mentioned consent.

> Now, again, Count 1 is the aggravated indecent assault. To find the defendant guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt: First, that the defendant penetrated, however slightly, the genitals of [K.S.] – I'll refer to her as K.S. throughout this – with his finger or fingers.
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> Now entrance into the labia or lips of the vagina is sufficient to prove penetration however slight. But the serious gravity level of the aggravated indecent assault is the penetration, penetration of the victim's genitals.
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> The second element is that the defendant did not do this act for good faith, medical, hygienical or for law enforcement procedure purposes; and, third, that the victim, K.S., was less than 13 years old at the time.
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> Now, as my statement of the elements indicate, it is immaterial whether the child consented to the contact. Consent of the child is no defense. When I say it is what my statement indicates, it is because my statement never said anything about consent. Consent is not an element of any of these. It is not something you even think about.
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> Here aggravated indecent assault occurs, first, if there is penetration of the genitals of the victim; second, they did so not for good faith, medical, hygienical, law enforcement purposes and; third, the victim was less than 13. Those are the only things you can consider as to whether or not the Commonwealth has proved those elements beyond a reasonable doubt.
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> If you find they have proven each of the elements beyond a reasonable doubt, you should find him guilty.
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> If you find they have not proven any one of those elements beyond a reasonable doubt, you should find him not guilty of the charge of aggravated indecent assault.

N.T. Trial, 11/17/11, at 385-386.

Because the trial court did not ask the jury to determine the presence of elements (a)(1)-(6),[6] and because the existence of at least one of those elements is required to convict a defendant of violating Section 3125(b), the jury could have convicted Gorron only of violating Section 3125(a)(7). Therefore, the ten-year mandatory minimum sentence represents an illegal sentence. We are required to vacate the sentence and remand for imposition of a new sentence recognizing the fact Gorron was convicted of violating 18 Pa.C.S. § 3125(a)(7), a felony of the second degree carrying a mandatory minimum sentence of five (5) years.[7] The official record must also be corrected to reflect the proper grading of the crime.

Judgment of sentence vacated in part, affirmed in part. This matter is remanded for imposition of a new sentence and correction of the official record. Jurisdiction relinquished.

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[6] There is some confusion over element (a)(1) consent. The statute lists lack of consent as an element to be considered in determining guilt under subsection (b)(2). The Suggested Standard Jury Instructions for Section 3125(b) do not include a reference to lack of consent. ***See*** Pa. SSJI (crim) 15.3125C. While the trial court was correct that consent was not a defense to the crime, it was a possible element of the crime under Subsection (b). Regardless of element (a)(1), the jury was not asked to consider *any* of the additionally required elements, and so it was error to sentence under Subsection (b).

[7] The trial court is free to fashion the sentence it feels is appropriate; our ruling recognizes the illegality of imposing a ten-year mandatory minimum sentence.