

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
STEVEN DALE PREJEAN,	:	
	:	
Appellant	:	No. 606 MDA 2012

Appeal from the Judgment of Sentence entered on March 13, 2012
in the Court of Common Pleas of Cumberland County,
Criminal Division, No(s): CP-21-CR-0001596-2010,
CP-21-CR-0002517-2010

BEFORE: MUSMANNO, BENDER and COLVILLE*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 11, 2013

Steven Dale Prejean ("Prejean") appeals from the judgment of sentence entered following his plea of *nolo contendere* to one count each of involuntary deviate sexual intercourse, sexual abuse of children and unlawful contact with a minor.¹ We affirm.

In its Opinion, the trial court summarized the relevant history underlying the instant appeal, which we incorporate herein by reference.

See Trial Court Opinion, 6/8/12, at 2-3.

Prejean presents the following claims for our review:

- I. Whether the trial court erred in finding [Prejean] to be a sexually violent predator?
- II. Whether the trial court erred in denying [Prejean's] Motion for a change of venue or venire?

¹ 18 Pa.C.S.A. §§ 3123, 6312, 6318.

*Retired Senior Judge assigned to the Superior Court.

Brief for Appellant at 9.

Prejean first claims that the trial court erred in finding him to be a sexually violent predator (“SVP”). *Id.* at 13. In support, Prejean challenges the testimony of Dr. Robert Stein of the Pennsylvania Sexual Offenders Assessment Board. *Id.* at 14. Prejean first directs our attention to Dr. Stein’s testimony that Prejean’s commission of the offenses listed at CP-21-CR-2517-2010 (wherein Prejean engaged in sexual communications with two teenage girls), taken alone, would not constitute a “paraphilia condition[.]” *Id.* Prejean next directs our attention to Dr. Stein’s testimony that, when those offenses are considered with the offenses listed at CP-21-CR-1596-2010 (involving Prejean’s sexual conduct with his adoptive daughter), the offenses indicate Prejean’s sexual interest in a “child or non-consenting person[.]” thereby satisfying the criteria for Paraphilia Not Otherwise Specified (“Paraphilia NOS”). Brief for Appellant at 14. Considering the allegations specified in CP-21-CR-1596-2010, based upon Prejean’s commission of more than 20 acts of sexual misconduct, Dr. Stein opined that Prejean satisfied the criteria for Paraphilia NOS. Brief for Appellant at 17.

To challenge Dr. Stein’s testimony, Prejean relies upon the testimony of his own expert, Dr. John M. Hume. Prejean directs our attention to Dr. Hume’s testimony that there was no evidence that Prejean suffered from a lifetime condition. *Id.* Rather, Dr. Hume testified, Prejean suffered from

hebephilia, a treatable condition. *Id.* at 16. Prejean also relies on Dr. Hume's testimony that Prejean's conduct began at age 53, and that the onset of Paraphilia NOS diminishes with age. *Id.*

Finally, Prejean argues that the facts in the instant case are similar to those weighed by this Court in *Commonwealth v. Plucinski*, 868 A.2d 20 (Pa. Super. 2005), in that the Commonwealth failed to show that he suffered from a lifetime condition and was likely to re-offend. Brief for Appellant at 17.

Prejean's claim challenges the sufficiency of the evidence underlying his classification as an SVP. In such cases, questions of evidentiary sufficiency present questions of law; thus, "our standard of review is *de novo* and our scope of review is plenary." *Commonwealth v. Meals*, 912 A.2d 213, 218 (Pa. 2006).

We do not weigh the evidence presented to the sentencing court and do not make credibility determinations. Instead, we view all the evidence and its reasonable inferences in a light most favorable to the Commonwealth. We will disturb an SVP designation only if the Commonwealth did not present clear and convincing evidence to enable the court to find each element required by the SVP statutes.

Commonwealth v. Whanger, 30 A.3d 1212, 1215 (Pa. 2011) (quoting *Commonwealth v. Feucht*, 955 A.2d 377, 382 (Pa. Super. 2008)).

In its Opinion, the trial court addressed Prejean's claim and concluded that it lacks merit.² Trial Court Opinion, 6/8/12, at 5-8. We agree with the sound reasoning of the trial court, as set forth in its Opinion, and affirm on this basis.³ *See id.*

In his second claim, Prejean challenges the trial court's denial of his Motion for a change of venue or *venire*. Brief for Appellant at 18. Prejean argues that four articles from The Patriot News and eight articles from The Sentinel resulted in actual prejudice to him, warranting a change of venue/*venire*. *Id.* at 19, 21. Prejean argues that the articles (a) were derived from police reports; (b) referred to his criminal record and pending criminal charges; (c) referred to confessions and admissions by both Prejean and his co-defendant; and (d) mentioned that a wiretap recorded Prejean admitting to sexually abusing a victim. *Id.* at 21. According to Prejean, the pretrial publicity was so pervasive and extensive as to warrant the change of

² We note that a citation set forth in the trial court's Opinion has a typographical error. The citation at issue should read "***Commonwealth v. Dengler***, 890 A.2d 372 (Pa. 2005)." *See* Trial Court Opinion, 6/8/12, at 7.

³ In *Meals*, our Pennsylvania Supreme Court expressly disapproved of this Court's comparative weighing of the assessment factors set forth at 42 Pa.C.S.A. § 9795.4(b), when determining the sufficiency of the evidence underlying an SVP designation. *Meals*, 912 A.2d at 220; *see also* 42 Pa.C.S.A. § 9795.4(b) (setting forth the factors to be considered during the SVP assessment). Similarly, in *Commonwealth v. Morgan*, 16 A.3d 1165 (Pa. Super. 2011), this Court recognized that in *Meals*, our Supreme Court effectively overruled this Court's decision in *Plucinski*. *Morgan*, 16 A.3d at 1173. Accordingly, we conclude that Prejean's reliance upon *Plucinski* is misplaced.

venue or *venire*, as there was not sufficient time for the prejudice to have dissipated. *Id.*

Upon review, we must conclude that Prejean waived his challenges to the venue and *venire* when he tendered his guilty plea. "A plea of guilty constitutes a waiver of all nonjurisdictional defects and defenses. When a defendant pleads guilty, he waives the right to challenge anything but the legality of his sentence and the validity of his plea." *Commonwealth v. Jones*, 929 A.2d 205, 212 (Pa. 2007) (citation omitted). Even if Prejean had not waived his claim, we would agree with the reasoning set forth in the trial court's Opinion. *See* Trial Court Opinion, 6/8/12, at 8-10.

Judgment of sentence affirmed.

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COMMONWEALTH

: IN THE COURT OF COMMON PLEAS OF
: CUMBERLAND COUNTY, PENNSYLVANIA

:
:
: CP-21-CR-2517-2010

: CHARGES: (1) SEXUAL ABUSE OF
: CHILDREN
: (2) UNLAWFUL CONTACT
: WITH MINOR

v.

: AFFIANT: TPR. STEVEN NESBIT
: OTN: K775733-0

: CP-21-CR-1596-2010

: CHARGE: (2) INVOLUNTARY DEVIATE
: SEXUAL INTERCOURSE

STEVEN DALE PREJEAN
OTN: L559415-3

: AFFIANT: TPR. STEVEN NESBIT

IN RE: OPINION PURSUANT TO Pa. R.A.P. 1925(a)

EBERT, J., June 8, 2012 –

Steven Dale Prejean (“Defendant”) pled *nolo contendere* to the charges of (1) Sexual Abuse of Children and (2) Unlawful Contact with Minor at the information filed at CP-21-CR-2517-2010 and guilty to (2) Involuntary Deviate Sexual Intercourse at the information filed at CP-21-CR-1596-2010. After hearing he was found to be a sexually violent predator (“SVP”), and sentenced. Defendant appeals to the Superior Court for the reasons described in his Statement of Matters Complained of on Appeal:¹

1. Whether the Trial Court erred in finding Appellant to be a sexually violent predator.

¹ Def.’s Statement of Matters Complained of On Appeal, filed Apr. 12, 2012.

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2. Whether the Trial Court erred in denying Appellant's motion for change of venue or venire.

Background

On August 5, 2010, Defendant was charged with numerous sex offenses including, *inter alia*, Sexual Abuse of Children, Unlawful Contact with Minor, and Involuntary Deviate Sexual Intercourse. On August 24, 2011, Defendant's motion for change of venue or venire was denied. On August 26, 2011, Defendant pled *nolo contendere* to Sexual Abuse of Children and Unlawful Contact with Minor in full satisfaction of the other pending charges at CP-21-CR-2517-2010.

On August 30, 2011, after trial had begun and the victim testified, Defendant pled guilty to Involuntary Deviate Sexual Intercourse in full satisfaction of the 14 other charges pending at CP-21-CR-1596-2010. After pleading *nolo contendere* and guilty to sexual crimes delineated in 42 Pa.C.S.A. § 9795.1(a)(1), this Court ordered Defendant to submit to a Sexually Violent Predator Assessment by the State Sexual Offenders Assessment Board (the "Board").

On November 4, 2011, after receiving a report from the Board which found the Defendant to meet the criteria of a Sexually Violent Predator, the Commonwealth filed a praecipe to hold a hearing to determine whether Defendant should be classified as a Sexually Violent Predator ("SVP"). On February 28, 2012, a SVP hearing was held where the Commonwealth presented the testimony and report of Robert M. Stein, Ph.D., a member of the Board, who was qualified as an expert in the treatment of sexual offenders and their assessment with regards to the statutory requirements of SVPs.² Defendant presented the testimony and report of John M. Hume, M.D., a physician/attorney, who was qualified as an expert in the field of psychiatry.³ Following the SVP hearing, and after a review of the record, the expert testimony and the expert reports, this Court found by clear and convincing evidence that Defendant is an SVP. On March 13, 2012, in

² Transcript of Proceedings, In Re: Sexually Violent Predator Hearing, filed Mar. 27, 2012, 9-11 [hereinafter TP ____].

³ TP 48.

accordance with a negotiated plea, Defendant was sentenced to an aggregate of 11-25 years imprisonment.

SEXUALLY VIOLENT PREDATOR DETERMINATION

Discussion

I. Standard of Review

The Superior Court has a well-established standard in reviewing an SVP designation:

In order to affirm an SVP designation, we, as a reviewing court, must be able to conclude that the fact-finder found clear and convincing evidence that the individual is a sexually violent predator. As with any sufficiency of evidence claim, we view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. We will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element of the statute has been satisfied.

Commonwealth v. Baker, 24 A.3d 1006, 1033 (Pa. Super. 2011).

II. Sexually Violent Predator

A SVP is defined as a person who has been convicted of a sexually violent offense and after an assessment is deemed a sexually violent predator due to a "mental abnormality"⁴ or "personal disorder" that "makes the person likely to engage in predatory⁵ sexually violent offenses."

Commonwealth v. Baker, 24 A.3d 1006, 1030 (Pa. Super. 2011).

A SVP determination is statutorily mandated for a person convicted of a sexually violent offense as set forth in Megan's Law II. See Commonwealth v. Baker, 24 A.3d 1006, 1029 (Pa. Super. 2011) (citing 42 Pa.C.S.A. § 9795.1)). A trial court then orders an assessment by a member of the Board to determine if the individual should be classified as an SVP. Id. (citing 42

⁴ A "mental abnormality" is defined as: A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person of the commission of criminal or sexual acts to a degree that makes the person a menace to the health and safety of other persons. 42 Pa.C.S.A. § 9792.

⁵ "Predatory" is defined as: An act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization. 42 Pa.C.S.A. § 9792.

Pa.C.S.A. §9795.4). Finally, a hearing is held where the trial court must determine whether the Commonwealth has proven through clear and convincing evidence that the convicted individual is an SVP. Id. at 1030 (citing 42 Pa.C.S.A. § 9795.4(e)(1)-(3)).

Section 9795.4(b) of Megan's Law II provides that an assessment shall include, but not be limited to, the following:

(1) Facts of the current offense, including:

- i. Whether the offense involved multiple victims.
- ii. Whether the individual exceeded the means necessary to achieve the offense.
- iii. The nature of the sexual contact with the victim.
- iv. Relationship of the individual to the victim.
- v. Age of the victim.
- vi. Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
- vii. The mental capacity of the victim.

(2) Prior offense history, including:

- i. The individual's prior criminal record.
- ii. Whether the individual completed any prior sentences.
- iii. Whether the individual participated in available programs for sexual offenders.

(3) Characteristics of the individual, including:

- i. Age of the individual.
- ii. Use of illegal drugs by the individual.
- iii. Any mental illness, mental disability or mental abnormality.
- iv. Behavioral characteristics that contribute to the individual's conduct.

(4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of re-offense.

42 Pa.C.S.A. §9795.4(b).

Analysis

In the case *sub judice*, the female victim was the adopted daughter of Defendant.⁶ She was sexually assaulted by Defendant from the ages of 12-14. The sexual molestation of the victim is described as follows:

She indicated that Prejean touched her breasts, vagina, and buttocks and kissed her on numerous occasions. He would force his hand up her shirt and into her pants. He made her touch his penis until he ejaculated and made her give him oral sex, on numerous occasions. She would try to get away, and he would grab her arm and pull her toward him. Acts of touching her breasts and vagina started in September 2008, when she was age 12. It progressed to having her masturbate him and give him oral sex. The last time they had any contact was February 2010, when she would have been age 14. She indicated that he touched her private area over the clothes about 20 times. On about 4-5 occasions, he put his fingers in her vagina. He forced her to touch his penis "a lot." He forced her to masturbate him "many times." He forced her to give him oral sex 3-4 times.⁷

With respect to the specific statutory factors enumerated in Section 9795.4(b) to be considered during an SVP hearing, Dr. Stein testified to the following facts:

Facts of the Current Offense: The offense involved a single victim.⁸ Defendant did not exceed the means necessary (*i.e.*, gratuitous violence) to achieve the offense.⁹ The victim was the adopted daughter of Defendant.¹⁰ The victim was 12 years of age when the sexual acts started and 14 when the acts ended.¹¹ The victim was of normal mental capacity.¹² There was no unusual cruelty (*i.e.*, sadistic types of behaviors).¹³

Prior Offense History: Defendant has a criminal record for burglary, theft, and DUI and admitted to almost 20 instances of non-recorded DUI.¹⁴ There was possible revocation of probations.¹⁵ Dr. Stein found that Defendant's criminal history greater than four criminal sentencing dates is associated with an increased risk for nonsexual and sexual crimes.¹⁶ Considering Defendant had not been

⁶ TP 11, Commonwealth Ex. 2, 4.

⁷ TP 11, Commonwealth Ex. 3, 3-4.

⁸ TP 14.

⁹ TP 14-15.

¹⁰ TP 15.

¹¹ TP 15.

¹² TP 15.

¹³ TP 15.

¹⁴ TP 15.

¹⁵ TP 16.

¹⁶ TP 17.

previously charged and convicted of a sex crime there was no reason for him to attend treatment.¹⁷

Characteristics of the Individual: Defendant was 53-55 years of age at the time of the sexual contact with the victim.¹⁸ Dr. Stein testified that the large age difference between Defendant and the victim would be associated with sexual deviance.¹⁹ Defendant as a teen used marijuana, but Dr. Stein found illegal drug use to not be particularly relevant in this case.²⁰ Defendant most likely suffers from alcohol abuse disorder based upon the repeated DUIs.²¹ Defendant's history indicates he suffered from a previous brain injury that is not necessarily relevant.²² Dr. Stein found that there was no additional behavior characteristics that contribute to Defendant's conduct not already covered in the previously mentioned factors,²³ however, he viewed the later discovered facts of case CP-21-CR-2517-2010 as an aggravating factor.²⁴

Dr. Stein formed an opinion to a reasonable degree of professional certainty that Defendant suffers from a mental abnormality that would make him likely to engage in predatory sexually violent offenses.²⁵ Dr. Stein based his opinion on, *inter alia*, the large age difference between Defendant and victim, victim's physical development, non-consensual sexual acts over an extended period of time, and that Defendant engaged in over 20 acts of sexual misconduct during that time period.²⁶ Defendant's conduct can be classified as paraphilia which is an incurable condition where Defendant could not control his deviant sexual urges.²⁷ Dr. Stein found that Defendant suffered from a mental abnormality/personality disorder and Defendant's conduct to be of a predatory nature.²⁸

¹⁷ TP 16.

¹⁸ TP 16.

¹⁹ TP 16.

²⁰ TP 16.

²¹ TP 16.

²² TP 16.

²³ TP 16-17.

²⁴ TP 20-21.

²⁵ TP 19.

²⁶ TP 18.

²⁷ TP 19.

²⁸ Commonwealth Ex. 2, 6.

Dr. Stein's opinion was countered by the testimony of Dr. John M. Hume, who is recognized as an expert in the field of general psychiatry. Dr. Hume based his opinion on the technical differences between pedophilia (sexual preference for prepubescent children), hebephilia (sexual preferences for individuals in the early years of puberty (generally ages 11 through 14)) and paraphilia (recurrent, intense sexually arousing fantasies, sexual urges or behaviors generally involving (1) non-human objects, (2) the suffering or humiliation of one self or one's partner, or (3) children or other non-consenting persons.) In this case, some of the acts perpetrated by the Defendant related to two girls who were still children but had reached the ages of 14 and 15. Accordingly, Dr. Hume opined that the Defendant was actually a hebephile and hebephilia is not recognized or acknowledged as a fully accepted diagnosis in the Diagnostic and Statistical Manual of the American Psychiatric Association.

In this case, this Court found Dr. Stein's testimony and opinion more credible. While evaluating the testimony of witnesses, the fact finder is free to accept or reject the credibility of expert and lay witnesses alike, and may believe all, part or none of the evidence. "The credibility of witnesses, professional or lay and the weight to be given their testimony is strictly within the proper province of the trier of fact." Summers v. Certaineed Corp., 997 A.2d 1152, 1161 (Pa. 2010). While the Court recognizes Dr. Hume as a well-qualified expert, it simply finds his analysis of the Defendant's behavior unpersuasive. The question of SVP status is a statutory question and not a question of "pure science." The statute does not require proof of a standard of diagnosis that is commonly found and/or accepted in the mental health diagnostic paradigm. Commonwealth v. Dengler, 890 A.2d 373, 383 (Pa. 2005).

In accepting Dr. Stein's opinion that the Defendant was a SVP, this Court cannot lose sight of the fact that the victim, who was the Defendant's adopted daughter, provided some 49 pages

of sworn testimony in the Defendant's trial on the charges docketed to CP-21-CR-1596-2010. While this case ended in a guilty plea by the Defendant on August 26, 2011, this Court heard extensive testimony from the victim that the Defendant began sexually assaulting her at age 12. The Defendant was in his 50s at this time and his depravity led to actually having the child's natural mother perform oral sex on the victim and having the victim use a dildo to penetrate her mother's vagina. These acts, of course, were in addition to having the victim perform oral sex on him and he performing oral sex on her.²⁹ Again, considering the fact that SVP status is a statutory construct, the type of conduct described above clearly and convincingly persuades this Court that this Defendant is and always will be a Sexually Violent Predator as defined in the statute. This Defendant was already reaching out to another child on the internet, and there is little doubt that this Defendant has a mental abnormality/personality disorder which is predatory and will continue to promote his desires to sexually victimize children.

Conclusion

After a thorough review of the reports and testimony presented at the SVP hearing, this Court finds that the Commonwealth has proven by clear and convincing evidence that Defendant is likely to engage in predatory sexually violent offenses and thus, should be classified as an SVP.

CHANGE OF VENUE OR VENIRE

Discussion

I. Waiver

The entry of a guilty plea or *nolo contendere* plea constitutes a waiver of all non-jurisdictional defects and defenses except invalidity of the plea and illegality of the sentence. See Commonwealth v. Main, 6 A.3d 1026, 1027 (Pa. Super. 2010). "Non-waivable jurisdictional defects as encompassed by the above axiom include only those which undermine a court's

²⁹ Notes of Victim's Testimony, 8/29/11 p. 17-20, 31-34.

subject-matter jurisdiction.” Commonwealth v. Thomas, 506 A.2d 420, 422 (Pa. Super. 1986). A refusal to transfer venue is not directed at the subject-matter jurisdiction of the trial court and thus, is waived. Id. at 423; Cf. Commonwealth v. Dobrolenski, 334 A.2d 268, 270-272 (Pa. 1975) (reviewing appellants claim of an erroneous denial of a change of venue as it relates to possible coercion of guilty pleas.)³⁰

II. *Venue or Venire*

As previously stated by the Pennsylvania Supreme Court:

A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury.

Commonwealth v. Robinson, 864 A.2d 460, 484 (Pa. 2004).

Analysis

In the case *sub judice*, Defendant does not appeal his guilty plea or the legality of his sentence, therefore, Defendant’s pleas have effectively waived his appeal of the trial court’s denial of motion to change venue or venire. Assuming, *arguendo*, Defendant did not waive his claim for a change of venue, the trial court did not err in refusing to change venue or venire.

During the *voir dire* process 45 prospective jurors were asked if they had been exposed to the present case through the media. Six members of the jury said they had been exposed through the media to this case. Two of the six jurors were excused due to their inability to be fair because of the nature of the crimes charged. The remaining four jurors were individually brought into chambers and asked whether they had formed any fixed opinions based upon the previous media exposure to this case. All four jurors answered that they had not formed any fixed opinions.

³⁰ In Dobrolenski, the defendant challenged the denial of a change of venue as it related to being coerced into entering a guilty plea, whereas in the present case, Defendant has not alleged the invalidity of his guilty plea, but merely challenges the previous denial for a change of venue or venire. See 334 A.2d at 270.

Also, the four jurors were asked whether they could base a verdict strictly on the testimony and evidence presented at trial. All four jurors answered that they could base a verdict strictly on the testimony and evidence presented within the courtroom.³¹ At the conclusion of the individual questioning of jurors regarding their exposure to pre-trial publicity, the District Attorney asked the Defendant's counsel if "he had any comments about the press situation? Are we good to go?" Defendant's counsel candidly stated "I think we are good to go."³² Therefore, all remaining jurors available for empanelling, including the four exposed to previous media surrounding the case were shown to be fair and impartial and without any prejudice toward Defendant.

Again, the charges against the Defendant were filed on August 5, 2010. Trial in the matter did not begin until over a year later. It is clear from the questioning of the jurors that pre-trial publicity was not so extensive or persuasive so as to require a change of venue. The process was fair, and in the final analysis the Defendant chose to waive his right to a full jury trial and on August 30, 2011, he entered a plea of guilty to the charge of Involuntary Deviate Sexual Intercourse, a felony of the first degree in exchange for a set sentence of 10 – 20 years in State Prison.

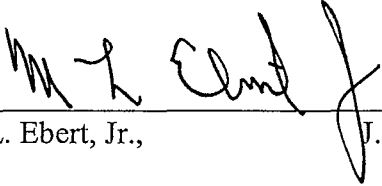
³¹ Notes of Jury Selection dated 8/29/11.

³² Notes of Jury Selection dated 8/29/11, p. 46.

Conclusion

Defendant has waived his claim that the trial court erred in denying his motion to change venue or venire. Additionally, after a review of the record, this Court finds that a change of venue or venire was not necessary. Defendant would have received a fair trial from the empaneled impartial jury had he not chosen to plead guilty.

By the Court,



M. L. Ebert, Jr.,

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Attorney for Defendant

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