

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTHONY M. TOBIN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 637 EDA 2012

Appeal from the Judgment of Sentence January 30, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No.: CP-46-CR-0008032-2010

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

MEMORANDUM BY PLATT, J.

Filed: February 21, 2013

Appellant, Anthony M. Tobin, appeals from the judgment of sentence following his conviction after a bench trial of three counts of unlawful contact with a minor, and one count of criminal use of a communication facility. Appellant claims he should have been convicted of a lesser offense, and challenges the constitutionality of the statute establishing the offense gravity score. We affirm.

The facts of this case are not in dispute. Appellant solicited oral and vaginal sex over the Internet from a supposed thirteen-year-old-girl (Evilemma) who was actually a Pennsylvania Attorney General undercover agent posing as a minor. In addition to sexually explicit online chatting,

* Retired Senior Judge assigned to the Superior Court.

Appellant sent three images to Evilemma, including one of his exposed penis. When Appellant arrived at the designated rendezvous point, he was arrested. Appellant waived his *Miranda*¹ rights and provided a statement to the police. (**See** Trial Court Opinion, 4/10/12, at 1-2).

On September 30, 2011, after a stipulated bench trial, the court convicted Appellant of all the charges previously noted. On January 30, 2012, the court sentenced Appellant to an aggregate term of not less than four nor more than eight years' incarceration, with credit for time served.² Appellant filed a timely notice of appeal and a statement of errors pursuant to Pennsylvania Rule of Appellate Procedure 1925. **See** Pa.R.A.P. 1925(b).

Appellant raises three questions on appeal:

1. Whether Title 18 of the Pennsylvania Consolidated Statutes , Section 6318 and Section 303.15 of the Sentencing Code are unconstitutional because they are ambiguous as to how the Offense Gravity Score should be determined, that is, whether the Offense Gravity Score should be based upon the actual underlying conduct of an offender or the underlying conduct for which the offender contacted the minor?

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² Specifically, Appellant was sentenced as follows: on count one, (unlawful contact with a minor; F1), four to eight years' incarceration; count two, (unlawful contact with a minor; F2), one to eight years' incarceration; count three (unlawful contact with a minor; F3), one to seven years' incarceration; count four (unlawful use of a communication facility; F3), one to seven years' incarceration. (**See** N.T. Sentencing, 1/30/12, at 32-33). All sentences were concurrent. (**See id.** at 32). Appellant was also required to register for ten years. (**See id.** at 33). Appellant was not designated to be a sexually violent predator. Appellant was not RRRRI eligible.

2. Whether the Sentencing Court erred and/or abused its discretion in determining [A]ppellant's Offense Gravity Score because Section 303.15 of the Sentencing Code , as it relates to Title 18, Pennsylvania Consolidated Statutes, Section 6318, calls for an offense gravity score based upon the underlying offense, which was Criminal Attempt to Commit Involuntary Deviate Sexual Intercourse , and the [c]ourt sentenced [Appellant] to an Offense Gravity Score equivalent to the substantive offense?

3. Whether the Sentencing Court erred and/or abused its discretion in determining that Count One (1) and Count Two (2)of the Bill of Informations, Unlawful Contact with a Minor, in violation of Title 18, Pennsylvania Consolidated Statute, Section 6318(a) & (b), respectively, should be graded as felonies of the First and Second degree, respectively?

(Appellant's Brief, at 2-3).

Appellant argues, in effect, that his offense should have been downgraded to attempted involuntary deviate sexual intercourse (IDSI), because the actual act was never completed. (**See** Appellant's Brief, at 6). He maintains that 18 Pa.C.S.A. § 6318 and Section 303.15 of the Pennsylvania Sentencing Code are unconstitutional and "void for vagueness" because they are ambiguous as to whether the Offense Gravity Score (OGS) should be calculated based on the actual underlying conduct of the offender, or the conduct for which he contacted the supposed minor. (**Id.** at 5). He asserts that the applicable OGS should be eleven rather than twelve, and therefore, the trial court improperly graded his offenses as felonies of the first and second degree. We disagree.

We address overlapping Appellant's issues together.

The proper grading of [a] convicted offense is an issue of statutory interpretation by which we determine the lawfulness of the sentence imposed. As it is purely a question of law, our

scope of review is plenary, and our standard is *de novo*. ***Commonwealth v. Colavita***, 993 A.2d 874 (Pa. 2010) (review of purely legal questions is plenary and *de novo*); ***Commonwealth v. Patton***, 604 Pa. 307, 985 A.2d 1283 (2009) (same). When interpreting a statute, we are guided by the Statutory Construction Act, 1 Pa.C.S. § 1501 *et seq.*, and our task is to effectuate the intent of the General Assembly. **See** 1 Pa.C.S. § 1921(a). When the words of a statute are clear and free from all ambiguity, the letter of the law is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b); ***Commonwealth v. Dellisanti***, 583 Pa. 106, 876 A.2d 366 (2005). Further, we construe statutory language according to its common and approved usage, unless particular words and phrases have acquired a peculiar and appropriate meaning. 1 Pa.C.S. § 1903(a); ***Commonwealth v. McClintic***, 589 Pa. 465, 909 A.2d 1241, 1245 (2006). Moreover, the “General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1). Finally, penal statutes are to be strictly construed, 1 Pa.C.S. § 1928(b)(1); thus, any ambiguity must be interpreted in favor of the defendant. ***Commonwealth v. Jarowecki***, 604 Pa. 242, 985 A.2d 955, 959 (2009) (citing ***Commonwealth v. Bullock***, 590 Pa. 480, 913 A.2d 207, 212 (2006)).

Commonwealth v. Reed, 9 A.3d 1138, 1142 (Pa. 2010).

In reviewing the constitutionality of a statute, we presume the Legislature did not intend for the statute to violate either the United States or this Commonwealth’s Constitution. [W]e uphold the constitutionality of a statute unless it clearly, palpably, and plainly violates constitutional rights. Furthermore, [a]ll doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.

Estate of Fridenberg v. Commonwealth, 33 A.3d 581, 591 (Pa. 2011)

(citations and internal quotation marks omitted).

In this case, Section 6318 provides in pertinent part:

§ 6318. Unlawful contact with minor.

(a) Offense defined.—A person commits an offense if he is intentionally in contact with a minor, **or a law enforcement**

officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

(1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

* * *

(b) Grading.—A violation of subsection (a) is:

(1) **an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor**; or

(2) a felony of the third degree; whichever is greater.

18 Pa.C.S.A. § 6318 (emphases added).

Here, on review, we conclude that the plain meaning of the statute is clear and unambiguous. The Legislature explicitly graded offenses committed while in communication with a law enforcement officer posing as a child the same as the underlying offense the actor sought to perform. **See** 18 Pa.C.S.A. § 6318(b)(1). We agree with the Commonwealth that Appellant's argument relies on "a manufactured confusion." (Commonwealth's Brief, at 7). There is no doubt what the Legislature intended to do, and Appellant's professed bewilderment does not make it otherwise. The OGS for 18 Pa.C.S.A. § 3123 (IDSI), is twelve. Accordingly, we agree with the trial court that the clear and unambiguous language of 204 Pa. Code 303.15 mandated that an OGS of "12" be applied. (**See** Trial Ct. Op., at 5). Appellant's constitutional challenge fails.

Additionally, Appellant's reliance on *Reed, supra* is misplaced. (See Appellant's Brief, at 18-19). *Reed* merely held that when the Commonwealth **does** charge the defendant with an underlying Chapter 31 offense, and the defendant is **acquitted**, an acquittal is relevant for sentencing purposes under subsection 6318(b). *See Reed, supra* at 1146. Here, Appellant was not charged with the underlying offense, and not acquitted.

Moreover, *Reed* reaffirms that "once [an a]ppellant contacts or communicates with the minor **for the purpose of** engaging in the prohibited activity, the crime of unlawful contact with a minor has been completed." *Id.* (quoting *Commonwealth v. Morgan*, 913 A.2d 906, 911 (Pa. Super. 2006)) (emphasis in original). The trial court properly graded the offenses at issue, and assigned the proper OGS.

Appellant also purports to raise a challenge to the discretionary aspects of his sentence. (*See* Appellant's Brief, at 7-8). However, all of Appellant's arguments, except for the Rule 2119(f) statement itself, address improper grading based on the supposedly unconstitutional defective statute, and the resultant grading. (*See* Appellant's Brief, at 9-19). A challenge of improper grading of an offense raises an issue of legality of sentence, which we have already addressed. *See Reed, supra* at 1142. Accordingly, we decline to address Appellant's undeveloped challenge to the discretionary aspects of his sentence.

Appellant fails to overcome the presumption of constitutionality. To the contrary, the plain meaning of the pertinent statutes establishes the OGS for the offense. The trial court properly sentenced Appellant.

Judgment of sentence affirmed.