

2010 PA Super 161

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LESTER MASKER,	:	
	:	
Appellant	:	No. 2931 EDA 2009

Appeal from the PCRA Order of September 18, 2009  
 In the Court of Common Pleas of Pike County,  
 Criminal Division, Nos. CR-0000003-07, CP-52-CR-0000026-2007

BEFORE: DONOHUE, SHOGAN, and LAZARUS, JJ.

**\*\*\*Petition for Reargument Filed September 20, 2010\*\*\***

OPINION BY LAZARUS, J.:

Filed: September 7, 2010

Lester Masker appeals from the trial court’s order denying his petition, after a hearing, filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9741-46.<sup>1</sup> Masker pled guilty<sup>2</sup> to one count each of involuntary deviate sexual intercourse, incest, indecent assault (M-1), corruption of minors, and indecent assault (M-2). The charges stemmed from Masker’s admission that he engaged in oral sex and penetrated the genitals with his tongue of his 13-year-old victim, his adopted daughter, touched her breasts with his hand, masturbated in front of her while at the same time touching and

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<sup>1</sup> In reviewing the denial of a PCRA petition, this Court is limited to determining whether the PCRA court’s findings are supported by the record and whether the order is free of legal error. *Commonwealth v. Van Horn*, 797 A.2d 983, 986 (Pa. Super. 2002).

<sup>2</sup> Pursuant to the plea agreement, the Commonwealth dismissed twenty counts of various sexual offenses in Masker’s criminal information.

licking her, and touched her between her legs with his hands and licked her body. The inappropriate conduct occurred on and off for almost six years when the victim was eight until she was fourteen-years-old.

On appeal Masker contends that the trial court erred in determining that: (1) the consequences of a sexual offenders' evaluation were collateral consequences and not cognizable claims under the PCRA; (2) trial counsel was effective at the sentencing phase; and (3) his amended PCRA did not have merit.

Counsel failed to inform Masker that he was entitled to an expert witness on his behalf at his sexually violent predator (SVP) hearing. As a result, Masker was unable to present a full and fair defense to the Commonwealth's evidence. Because the trial court took Masker's SVP status into account when fashioning his sentence, we must vacate the order denying PCRA relief and remand for a new SVP hearing where Masker may call an expert witness, and resentencing.

## **FACTS**

Prior to sentencing, a hearing was held to determine whether Masker was a "sexually violent predator"<sup>3</sup> under our Commonwealth's version of Megan's Law.<sup>4</sup> Members of a Sexual Offenders Assessment Board (SOAB) interviewed

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<sup>3</sup> A sexually violent predator is defined as a person who has been convicted of a sexually violent offense as set forth in 42 Pa.C.S.A. § 9795.1 and who is, due to a mental abnormality or personality disorder, likely to engage in predatory sexually violent offenses. 42 Pa.C.S.A. § 9792.

<sup>4</sup> **See** 42 Pa.C.S.A. §§ 9791-9799.7

Masker and prepared a formal assessment. Counsel from the public defender's office was appointed to represent Masker during the interview process and subsequent SVP hearing; counsel advised his client to cooperate fully with the process. Mary E. Muscari, a member of the SOAB and a professor of Forensic Science at Binghamton University, testified at the SVP hearing that in her professional opinion Masker satisfied the statutory criteria for an SVP. Counsel cross-examined Muscari regarding her findings and conclusions, but did not present either an expert witness or any other witnesses to rebut the Commonwealth's evidence.

After listening to the evidence and taking into account the SOAB's written SVP assessment, the court sentenced Masker to an aggregate sentence of 7-20 years. Masker filed an unsuccessful motion for reconsideration and direct appeal. ***See Commonwealth v. Masker***, 2270 EDA 2007 (Pa. Super) (memorandum decision filed April 21, 2008). On September 2, 2008, Masker filed the instant PCRA petition, *pro se*,<sup>5</sup> and was appointed counsel. Counsel filed an amended petition on Masker's behalf and the court held a hearing to determine whether an evidentiary hearing was required to decide the many claims of trial counsel's ineffectiveness alleged in the petition. The court ultimately held a hearing on Masker's PCRA petition at which plea/SVP hearing

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<sup>5</sup> In an order dated September 3, 2008, the trial court permitted Masker to proceed *in forma pauperis* (IFP) and appointed PCRA counsel. ***See*** Pa.R.Crim.P. 904 (G) (when a defendant satisfies to the judge that he or she is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed IFP).

counsel, Matthew Galasso, Esquire, and Masker testified. After the hearing the court denied Masker's petition finding that the claims raised were not cognizable under the PCRA and, in the alternative, were meritless. This timely collateral appeal follows.

## **DISCUSSION**

### **Cognizable Claims Under the PCRA and Megan's Law**

In his PCRA petition, Masker claims counsel was ineffective for failing to advise him of his right to remain silent during his SOAB assessment hearing and for failing to call an expert during that hearing. Both the trial court and the Commonwealth contend that these issues are not cognizable claims under the PCRA.

Our Supreme Court has determined that the registration, notification and counseling provisions that attach to SVPs under Megan's Law are non-punitive in nature. ***See Commonwealth v. Williams***, 832 A.2d 962 (Pa. 2003). As a result, for purposes of availability of post-conviction relief, these same provisions have been found to be collateral consequences of guilty plea convictions and, thus, non-cognizable claims under the PCRA. ***Commonwealth v. Price***, 876 A.2d 988 (Pa. Super. 2005).

Despite the holdings of these cases, we conclude that the right to call an expert witness at the SVP hearing is a fundamental right tied so inextricably to a defendant's defense at that proceeding, that it is distinguishable from the non-cognizable PCRA claims rooted in the non-punitive provisions of Megan's Law. Without expert assistance, a defendant is left with no defense to rebut

the Commonwealth's evidence regarding his or her mental condition and likelihood of future dangerousness which are the central focus of an SVP hearing and which, instantly, played a significant part in the trial court's ultimate sentence for Masker.

(a) Right to Call Expert Witness

In addition to the right to counsel at an SOAB assessment hearing, *a defendant shall be given "an opportunity to be heard, the right to call witnesses, the right to call expert witnesses, and the right to cross-examine witnesses."* 42 Pa.C.S.A. § 9795.4(e)(2) (emphasis added). Our Court has held that an indigent defendant is entitled to have an expert appointed on his or her behalf at an SVP hearing and that a trial court's refusal to appoint such an expert is a due process violation as it impedes the right to a full and fair defense. ***See Commonwealth v. Curnutte***, 871 A.2d 839 (Pa. Super. 2005); ***see also Commonwealth v. McWilliams***, 887 A.2d 784 (Pa. Super. 2005).

In ***Curnutte***, the trial court refused a defense attorney's request to appoint an expert for the defendant at his SVP proceeding; on direct appeal our Court vacated the court's SVP determination, remanded the case for the appointment of an expert, and ordered a new SVP hearing. Now retired Superior Court Judge Richard B. Klein, writing for the majority in ***Curnutte***, went so far as to state that "concomitant with the right to representation at a Megan's Law hearing is a defendant's right to "call expert witnesses[.]" 871 A.2d at 843-34. Thus, our Court has acknowledged the significance of a defendant's right to an expert witness at SVP hearings.

At Masker's PCRA hearing, Attorney Galasso testified that he did not remember whether he told Masker that he had the right to an expert (independent) evaluator to counter the SOAB's expert evaluators. N.T. PCRA Hearing, 6/25/2009, at 5. Moreover, counsel admitted that he was not aware of the fact that defendants have the right to petition the court for an independent expert evaluator for an SOAB assessment. *Id.* at 6.

In *Commonwealth v. Hague*, 840 A.2d 1018 (Pa. Super. 2003), our Court vacated the defendant's judgment of sentence after he filed a PCRA petition claiming ineffectiveness of counsel for failing to object or to raise the issue of allocution on appeal. Specifically, our Court found that because of the significant impact that the right of allocution has in terms of its potential to sway the court toward leniency prior to imposition of sentence, the effect of counsel's misfeasance "could never be known with such certainty that a reviewing court can conclude that there was no prejudice in its absence." *Id.* at 1020.

Similarly, the ultimate effect on a defendant's sentence when he or she has been denied the opportunity to call an expert witness at an SVP hearing to counter the Commonwealth's evidence could be significant and prejudicial. Despite the line of cases that deem the registration, notification and counseling provisions of Megan's Law non-punitive in nature and, thus, not cognizable under the PCRA, we find that the right denied to Masker in this case – the statutory right to call an expert at his SVP hearing – is so important that it cannot be denied review at this stage. Moreover, by virtue of the fact that

counsel testified he was not even *aware* that defendants had such rights at an SVP hearing, it seems more likely than not that Masker was not even *advised* of his right to an expert.<sup>6</sup>

Accordingly, we find that Masker's issue regarding the right to call an expert has arguable merit and we can see no reasonable basis for counsel's failure to either advise him of the right and/or to call an expert witness on his behalf to counter the Commonwealth's evidence at the SVP hearing. ***Dugan, supra***. Finally, with regard to the prejudice prong of the ineffectiveness test, we are unable to conclude with certainty that Masker did not suffer prejudice in the absence of such expert testimony. ***Hague, supra; Commonwealth v. Thomas***, 553 A.2d 918 (Pa. 1989).

(b) Right to Remain Silent

Masker's counsel testified at the PCRA hearing that he did not remember whether he advised his client that he had the right to remain silent at his SVP hearing. The Board's final assessment, however, indicates that:

Written, informed consent was obtained from Mr. Masker by SOAB Investigator Frank Molar. Consent includes notification of the right to counsel and to have counsel present for the investigation and assessment, *as well as the right to not participate in the interview.*

Sexually Violent Predator Assessment, 7/27/2007, at 4 (emphasis added). The assessment also states that Masker verbally consented to conducting the

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<sup>6</sup> To prevail on a claim of ineffective assistance of counsel, appellant must show (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that appellant was prejudiced as a result. ***Commonwealth v. Dugan***, 855 A.2d 103, 105 (Pa. Super. 2004).

interview without the presence of his attorney and that counsel did arrive for the end of the interview. *Id.*

While Masker made admissions during the SOAB interview, he had already pled guilty to the crimes for which he was later sentenced and had given a detailed admission of those crimes in a prior written statement. At the assessment hearing Masker stated to the court, in the presence of his family, his deep remorse for actions. N.T. SOAB Assessment Hearing/Sentencing, 8/24/2007 at 42. His statement, however, came *after* the court had already sentenced him. Thus, to the extent that counsel claims Masker made certain admissions during the assessment, we find no merit to this claim as we fail to find that he suffered any prejudice.

## **CONCLUSION**

Finding that the PCRA court's determination regarding Masker's right to an expert at his SVP hearing is neither supported by the record nor free of legal error, *Van Horn, supra*, we must reverse that order and remand for a new SVP hearing and resentencing.<sup>7</sup> Masker shall be given the opportunity to call an expert on his behalf at the new SVP hearing.

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<sup>7</sup> In the interest of fairness, we suggest that the PCRA court appoint a different judge to preside over Masker's new SVP hearing and his re-sentencing. We are well aware of the dictates of *Commonwealth v. Whitmore*, 912 A.2d 827 (Pa. 2006), which holds that our Court lacks the authority to *sua sponte* order a new judge preside over re-sentencing. However, because the instant judge presided over Masker's prior SVP hearing, his continued involvement in the case after a *new* SVP hearing creates a potential appearance of impropriety for re-sentencing purposes.



J. S36036-10

Order reversed. Case remanded to the PCRA court for proceedings consistent with this decision. Jurisdiction relinquished.<sup>8</sup>

SHOGAN, J., files a Dissenting Opinion.

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<sup>8</sup> Our holding today does not speak to whether Masker is, in fact, an SVP as defined under Megan's Law. That issue shall be revisited at the new SVP hearing where he shall be afforded the statutory right to call an expert.

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BEFORE: DONOHUE, SHOGAN and LAZARUS, JJ.

DISSENTING OPINION BY SHOGAN, J.:

I respectfully dissent. As recognized by the Majority, precedent establishes that the registration, notification, and counseling requirements of Megan’s Law are non-punitive in nature and considered to be collateral consequences of a conviction. ***Commonwealth v. Williams***, 574 Pa. 487, 832 A.2d 962 (2003); ***Commonwealth v. Price***, 876 A.2d 988 (Pa. Super. 2005). As such, challenges to such requirements are not cognizable under the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. **See** 42 Pa.C.S.A. § 9542 (“[The PCRA] is not intended to . . . provide relief from collateral consequences of a criminal conviction.”); **see also *Commonwealth v. Williams***, 977 A.2d 1174, 1177 (Pa. Super. 2009) (concluding that reporting requirements of Megan’s Law cannot be considered part of a sentence, and PCRA cannot provide relief; citing ***Price***); 42 Pa.C.S.A. §

9543(a)(2) (“To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the **conviction or sentence** resulted from one or more of the following . . .”) (emphasis supplied).

Appellant challenges his status as a sexually violent predator (“SVP”) and requests relief from the SVP determination. He does not challenge his conviction or his sentence. **See** PCRA Petition, 1/15/09, at ¶¶ 6-12. I fail to see how ***Commonwealth v. Curnutte***, 871 A.2d 839 (Pa. Super. 2005), which was a direct appeal, or ***Commonwealth v. Hague***, 840 A.2d 1018 (Pa. Super. 2003), which was a PCRA challenge to a sentence of imprisonment, permit us to deviate from the above cited law. Accordingly, I would affirm the denial of relief by the PCRA court.