[J-172A-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	84 W.D. Appeal Docket 1997
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Erie County, Criminal
	:	Division, at No. 922 of 1997 entered
v.	:	September 23, 1997.
	:	
	:	
DONALD FRANCIS WILLIAMS	:	
	:	ARGUED: September 16, 1998
Appellee	:	
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	14 W.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 2466PGH97 entered 3/9/98
	:	transferring case to Supreme Court from
v.	:	the Judgment of Sentence of the Court of
	:	Common Pleas of Erie County, Criminal
	:	Division, entered October 1, 1997 at No.
DONALD FRANCIS WILLIAMS	:	900 of 1997.
	:	
Appellant	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: JUNE 30, 1999**

I respectfully dissent because I do not believe that the provisions of the Registration of Sexual Offenders Act, commonly known as Pennsylvania's Megan's Law, 42 Pa.C.S. §§ 9791-9799.6, ("Act"), which impose the presumption that a person

convicted of a sexually violent offense is a sexually violent predator and require the offender to rebut the presumption by clear and convincing evidence, violate the procedural due process guarantees of the Fourteenth Amendment to the United States Constitution.[1] The majority espouses that these provisions of the Act create an additional element to the predicate offenses which subjects the offender to additional punishment. Therefore, according to the majority, an offender subjected to these provisions is entitled to due process of law, which the Act fails to provide.

I agree with the majority that the Act is punitive insofar as it mandates sentences of imprisonment.[2] However, contrary to the majority, I believe that the Act is a mere sentencing scheme and does not create a separate criminal offense. Therefore, while an offender subject to the Act is entitled to due process, I believe that the Act provides all the process that is due.

Under the Act, if an offender is convicted of one of the predicate offenses listed in section 9793(b)(1),[3] the State Board
to Assess Sexually Violent Predators ("Assessment Board") conducts an assessment of the offender prior to the imposition of sentence.[4] The Act defines a sexually violent

---

[1] The majority opinion rests solely on the Fourteenth Amendment to the United States Constitution and does not address the due process provisions of the Pennsylvania Constitution.

[2] Sections 9799.4 (a) and (c) require a mandatory maximum sentence of life imprisonment for sexually violent predators, and an automatic life sentence for sexually violent predators who are convicted of a subsequent sexually violent offense.

[3] The predicate offenses are broken down into those involving minors and those involving victims of any age. The predicate offenses involving minors include kidnapping by someone other than a parent, rape, involuntary deviate sexual intercourse, aggravated indecent assault, promoting prostitution, and crimes relating to obscene and other sexual materials and performances. 42 Pa.C.S. § 9793(b)(1). The offenses involving a victim of any age include rape, involuntary deviate sexual intercourse, aggravated indecent assault, spousal sexual abuse and indecent assault which constitutes a first degree misdemeanor. 42 Pa.C.S. § 9793(b)(3).

predator as "[a] person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa.C.S. § 9792. Accordingly, not all individuals who commit crimes of sexual violence are ultimately deemed sexually violent predators.

The Assessment Board gathers information on the offender for the purpose of determining whether the offender is a sexually violent predator. The Assessment Board considers the various factors set forth in section 9794(c), including the circumstances surrounding the crime, the defendant's psychological evaluations, participation in treatment programs, ages of the offender and victim, the offender's prior criminal record, drug history, behavioral characteristics and relationship to the victim. 42 Pa.C.S. § 9794(c).

The trial court then conducts a hearing wherein the offender has the burden to overcome the presumption that he is a sexually violent predator by clear and convincing evidence. The offender is entitled to and is afforded notice prior to the hearing. At the hearing, the offender has the right to have counsel present and to have counsel appointed if needed, as well as the right to present evidence, to call witnesses, to cross-

(…continued)

[4] The Assessment Board consists of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3 (a).

examine the witnesses against him and to present expert testimony. 42 Pa.C.S. § 9794(c).

When evaluating the constitutionality of any statute, there is a strong presumption in the law that legislative enactments do not violate the constitution. Commonwealth v. Barud, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). Moreover, there is a heavy burden of persuasion upon one who challenges the constitutionality of a statute. Id. In order to successfully challenge a statute, the challenger must prove that the statute "clearly, palpably and plainly violates the Constitution." Appeal of Torbik, 548 Pa. 230, 239, 696 A.2d 1141, 1145 (1997). Any uncertainty must be resolved in favor of the validity of the statute. Id. While penal statutes are to be strictly construed, the courts are not required to give the words of a criminal statute their narrowest meaning or disregard the evident legislative intent of the statute. Barud, at 304, 681 A.2d at 165. It is with these standards in mind that I find fault with the majority's conclusion that the provisions of the Act in question are violative of due process. Initially, the Act does not deprive an offender of due process of law by presuming that he is a sexually violent predator following his conviction for a sexually violent offense. A statutory presumption may be sustained if there is a rational relationship between the fact proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463, 467 (1943). "The process of making the determination of rationality is, by its nature, highly empirical." United States v. Gainey, 380 U.S. 63, 67 (1965). This Court must give significant weight to the conclusions of the legislature concerning matters that are commonplace or not within specialized judicial competence. Id.

Here, the presumption that one who commits a sexually violent crime is a sexually violent predator is a sound presumption supported by rational legislative findings. Section 9791(a)(2) of the Act provides that "sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest." The legislature's determination regarding the risk of recidivism among sexually violent criminals merits our deference under the rational relationship standard.

The presumption that an offender is a sexually violent predator is rebuttable. The Act affords due process to the offender by providing him with an opportunity to be assessed by members of an Assessment Board whose findings are reviewed by the trial court. The offender is afforded a hearing wherein he has the right to counsel, the right to present evidence, to call witnesses, to present expert testimony, to confront and cross-examine the witnesses against him, and to have counsel appointed if he cannot afford private counsel. If the offender rebuts the presumption by clear and convincing evidence, application of the legislatively enacted maximum penalty is avoided.

In determining that the statutorily afforded opportunity to rebut the presumption is constitutionally insufficient, the majority first concludes that the determination of whether an offender is a sexually violent predator is a separate factual question which commences following a conviction and which subjects the offender to heightened criminal punishment. On this basis, the majority determines that the issue of the constitutionality of the provisions of the Act in question is controlled by Specht v. Patterson, 386 U.S. 605 (1967).

In Specht, the United States Supreme Court reviewed Colorado's Sex Offenders Act and determined that the Act violated due process. The Sex Offenders Act did not

make the commission of a specified crime the basis for sentencing. Rather, it made one conviction the basis for commencing another proceeding wherein the trial court determined whether the defendant, if at large, would constitute a threat of bodily harm to members of the public, or was a habitual offender and mentally ill. If the trial court so determined, the defendant could be sentenced to an indeterminate term of imprisonment ranging from one day to life. The United States Supreme Court reasoned that, because invocation of the Colorado statute caused the initiation of a new charge leading to criminal punishment, the defendant was entitled to due process, which that statute failed to provide.

I believe that Specht does not mandate the majority's finding that the Act is violative of due process. The crucial difference between the Act and the Colorado statute is that the Colorado statute failed to provide a defendant with notice and a full hearing before the statute was invoked. The United States Supreme Court stated in Specht that "due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to cross-examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." Specht, 386 U.S. at 610. Here, the Act affords an offender **every single** protection which the United States Supreme Court mentioned in Specht. Under the Act, an offender is provided notice and is entitled to be present, to have counsel, either private or court-appointed, to be heard, to confront the witnesses against him, to cross-examine, and to present his own evidence including expert testimony. The trial court is required to set forth its determination on the sentencing order for purposes of appeal. 42 Pa.C.S. § 9794(e).

The fact that the Act provides for every protection which the Specht Court identified as necessary to satisfy due process renders the majority's conclusion that Specht is controlling untenable. The United States Supreme Court struck down the

Colorado statute only because it lacked the precise procedural due process safeguards which the Act in question provides to offenders.

The majority's conclusion that a convicted sex offender is entitled to the full panoply of relevant protections with respect to the determination of whether he is a sexually violent predator is equally unsupportable. The majority concludes that, because an offender is already presumed to be a sexually violent predator upon being convicted of a predicate offense, he is afforded no due process regarding this finding. However, under the Act, the presumption that an offender is a sexually violent predator arises only **after** an offender has been found guilty beyond a reasonable doubt or has entered a knowing and voluntary plea to one of the enumerated predicate offenses. Thus, the convicted offender to whom the presumption applies has forfeited certain legal rights which would be maintained by a defendant not yet convicted. Once the presumption of innocence has been overcome, the constitutional requirements relative to due process are of a lesser standard. See Commonwealth v. Wright, 508 Pa. 25, 39, 494 A.2d 354, 361 (1985), *aff'd sub nom.* McMillan v. Pennsylvania, 477 U.S. 79 (1986)(once convicted, a defendant's right to remain free from incarceration has been extinguished, and he is subject to punishment).

While it is unquestionable that an offender subject to the Act is entitled to due process of law, due process is a flexible concept. The United States Supreme Court has stated:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

In the instant matter, a jury convicted appellee of numerous predicate offenses stemming from acts he committed against a nine-year-old boy. Thus, "unlike cases in which a fundamental liberty interest is at stake, . . . the defendant's fundamental right, i.e., freedom from confinement, has already been forfeited." Wright, at 41, 494 A.2d at 362. Accordingly, while appellee was entitled to due process with respect to the determination of whether he was a sexually violent predator, by providing notice and by affording him the right to counsel, the right to be present, to present evidence including expert testimony, to confront the witnesses against him and to cross-examine witnesses, the Act provided appellee with sufficient due process.

The majority further determines that the provision of the Act which places the burden upon the defendant to prove by clear and convincing evidence that he is not a sexually violent predator violates the Due Process Clause of the Fourteenth Amendment. The Due Process Clause prevents a court from giving the Commonwealth the benefit of a presumption which would have the effect of relieving the Commonwealth of its burden of proving every element of a crime beyond a reasonable doubt. See Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality decision recognizing that the constitution is not violated by placing the burden upon a defendant to prove mitigating circumstances sufficiently substantial to call for leniency, so long as a state's method of allocating the burden of proof does not lessen the state's burden to prove every element of the offense charged). Under the Act, the Commonwealth has already met its burden of persuasion in securing the conviction on which the offender's status is based. Thus, the defendant's status as a sexually violent predator is not an element of the crime, but is instead a sentencing consideration.

The majority reasons that the determination of whether an offender is a sexually violent predator is a separate factual question following conviction and, therefore, the

burden should be on the Commonwealth to establish that an offender is a sexually violent predator beyond a reasonable doubt. However, the Act does not create a separate criminal offense. Rather, the Act merely instructs the trial court how an offender who has committed a predicate criminal act is to be sentenced. I agree that, insofar as the Act prescribes the sentencing options facing offenders, it does establish punishment. See 42 Pa.C.S. § 9799(a)& (c). However, it is the province of the legislature to determine the punishment imposable for criminal conduct. Wright, at 40, 494 A.2d at 361. The legislature has the right to fix the maximum penalty, and likewise, can if it sees fit, name the minimum. Commonwealth v. Glover, 397 Pa. 543, 544, 156 A.2d 114, 116 (1959). Here, the legislature could have acted within its authority and simply increased the maximum penalty for the predicate crimes. Instead the legislature drafted a detailed statute which affords a convicted criminal sex offender an opportunity to avoid the maximum penalty of life imprisonment.

With respect to placing the burden on the defendant to prove that he is not a sexually violent predator, the Act is not unlike other sentencing statutes which place the burden upon defendants to present factors to mitigate their sentences, a process which this Court has found to be constitutional. See Commonwealth v. Zettlemoyer, 500 Pa. 16, 66, 454 A.2d 937, 963 (1982), cert. denied, 461 U.S. 970 (1983), rehearing denied, 463 U.S. 1236 (1983) (capital sentencing scheme which requires the accused to prove, by a preponderance of the evidence, any mitigating circumstances that might convince a jury that the sentence should nevertheless be set at life imprisonment, is not offensive to due process).

In the Act, the legislature has taken one factor that has always been relevant when sentencing, the risk that an individual poses to society, and has legislated the consequence if the trial court determines that an offender poses such a risk. In this regard, the Act is similar to the sentencing provisions which this Court upheld in Wright. In Wright this Court upheld the portion of the Mandatory Minimum Sentencing Act, 42 Pa.C.S. § 9712 ("Sentencing Act") which mandated the imposition of a five-year minimum sentence when the preponderance of the evidence demonstrated that a defendant was in visible possession of a firearm during the commission of certain felonies. The appellants in Wright argued that visible possession of a firearm was an element of the crimes for which they were being sentenced and, therefore, the Commonwealth should have been required to prove the possession beyond a reasonable doubt.

In rejecting the claim that the Sentencing Act effectively made visible possession of a firearm a separate element of the underlying felonies, this Court cited Patterson v. New York, 432 U.S. 197 (1977), where the United States Supreme Court held that the reasonable doubt standard had always been dependent upon how a state defines the offense.[5] Wright, at 34, 494 A.2d at 358. This Court noted in Wright that, in enacting the Sentencing Act, the legislature specifically stated that visible possession "shall not be an element of the crime." Id. at 29, 494 A.2d at 356 (quoting 42 Pa.C.S. § 9712 (b)). This Court further noted that the mandatory minimum sentence did not come into play until after a defendant had been convicted of an enumerated felony. "In making visible

[5] In Patterson, the United States Supreme Court held that a New York law which placed the burden on murder defendants to prove the affirmative defense of extreme emotional disturbance did not violate due process.

possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt." Id. at 35, 494 A.2d at 359.

The United States Supreme Court affirmed this Court's holding in Wright. See McMillan v. Pennsylvania, 477 U.S. 79 (1986). Like this Court, the United States Supreme Court cited its decision in Patterson v. New York for the proposition that the state need not "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or punishment." Id. at 84 (quoting Patterson, at 207). In McMillan, the United States Supreme Court agreed with this Court that, because visible possession of a firearm was not an element of the underlying felony, but instead was a sentencing provision that came into play only after the defendant had been found guilty, the Commonwealth did not have to prove visible possession beyond a reasonable doubt.

I do not find the majority's attempts to distinguish the instant matter from Wright and McMillan persuasive.[6] The majority reasons that, unlike in Wright, where a defendant found to be in visible possession of a firearm was required to be sentenced to a minimum of five years, a sentence encompassed within the purview of the sentencing guidelines for the crimes charged, here, an offender is subjected to heightened criminal punishment because the Act expands the maximum sentence to be imposed for the predicate crimes to life imprisonment if the offender is found to be a sexually violent predator. This argument fails simply because, as discussed supra, it is the province of

[6] One way in which the majority attempts to distinguish Wright from the instant matter is by concluding that the issue of whether an offender is a sexually violent predator is a separate element of the crime. I believe that this argument fails because as discussed supra at pp. 10-11, the Act is a mere sentencing scheme and does not create a new offense.

the legislature to determine the boundaries of the punishment imposable for criminal conduct. Further, the United States Supreme Court, in dicta in McMillan stated that, if a finding of visible possession had, in fact, exposed defendants to greater or additional criminal punishment, this fact would have given the arguments raised by the defendants in McMillan "superficial" appeal. McMillan at 88. The fact that the Sentencing Act in question in Wright and McMillan did not create any presumptions is of no moment because, as discussed supra, the presumption created by the Act is reasonable.

Finally, I disagree with the majority's conclusion that, even if this Court were to view the post-conviction proceeding set forth in the Act to be a mere sentencing provision, the Act would still not be constitutionally deficient. The majority reasons that the risk of error in the assessment of whether an offender is a sexually violent predator is great and involves a subjective determination by the trial court. The majority then compares this determination to the question present in Wright/McMillan, whether one was in visible possession of a firearm; which the majority deems an objective determination where the risk of error was slight.

In support of the proposition that placing the burden on the offender makes a Megan's Law hearing more unreliable than if the burden of persuasion rested with the Commonwealth, the majority cites the Third Circuit Court of Appeals' decision in E.B. v. Verniero, 119 F.3d 1077 (1997), cert. denied, 118 S. Ct. 1039 (1998). In E.B. v. Verniero, the Third Circuit held that New Jersey's version of Megan's Law violated procedural due process by placing the burden on the defendant at a Megan's Law hearing to establish by a preponderance of the evidence that his classification was in error. I do not find E.B. v. Verniero persuasive due to the significant differences between Pennsylvania's and New Jersey's versions of Megan's Law.

Under the New Jersey statute, the risk of re-offense is assessed by prosecutors. The prosecutors utilize extensive guidelines in order to classify offenders under a three-

tier system, with the first tier representing a low risk of recidivism and the third tier representing a high risk of recidivism. The extent of public notification is linked to the risk of re-offense.[7] If an offender opts to challenge his classification, he is limited to presenting the issues of whether the Registrant Risk Assessment Scale[8] has been accurately applied and whether there is something extraordinary about his particular case that takes it out of the "heartland" of cases within the scope of the tier that would have otherwise been indicated. Id. at 1108.[9] In determining that the New Jersey statute violated procedural due process, the E.B. v. Vernerio court seemed particularly concerned over the role that the prosecutors played in weighing such factors as the offender's physical and mental condition, whether the offender had received counseling or treatment or was under supervision, and the offender's criminal history. See E.B. v. Vernerio at 1107-1110.

The E.B. v. Vernerio court determined that resolution of the issue of whether the scale had been accurately applied required fact-finding which posed more than a normal risk of error because it involved a subjective determination by the court regarding the degree and nature of the risk posed by the particular registrant. Id. at 1108. The court stated: "Thus, in resolving these issues, the court is necessarily required to assess future dangerousness. While the state is clearly entitled to require a

[7] Under the New Jersey statute, only law enforcement officials are notified of the whereabouts of an offender who has been classified in the first tier. If an offender is classified in the second or third tier, more extensive public notification is required. See E.B. v. Verniero at 1082-87 (describing in detail the notification and registration requirements of the New Jersey statute).

[8] The scale is a numerical scoring system designed with the assistance of mental health and law enforcement professionals to evaluate the degree of risk of the sex offender. E.B. v. Verniero, at 1083-84.

[9] The E.B. v. Verniero court further noted that if an offender challenged not just the tier classification but also the reasonableness of the prosecutor's notification plan, the court must also exercise a judgment about whether the scope of the proposed notification is appropriate to the risk presented by the particular registrant.

court to undertake such an assessment, it is an undertaking involving substantial uncertainty." Id.

There is much less uncertainty surrounding a Megan's Law hearing under the Pennsylvania statute. The risk of re-offense is not assessed by prosecutors. Rather, the legislature has already determined that there is a great likelihood that one convicted of a violent sexual offense will offend again. "[I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67 (1965). After a person is convicted of a predicate offense, an independent review board conducts an assessment of the offender and issues a report to the court. The Assessment Board is comprised of psychiatrists, psychologists, and criminal justice experts, each of whom is an expert in the field of behavior and treatment of sexual offenders. 42 Pa.C.S. § 9799.3(a). The Assessment Board considers factors similar to those considered in any pre-sentence report. See 42 Pa.C.S. § 9794(c). After receiving the Assessment Board's report, the court holds a full and complete hearing in order to determine whether the offender is a sexually violent predator.

Unlike the New Jersey statute, the Act links the determination of whether one is a sexually violent predator not only to registration and notification, but also to the offender's maximum sentence. Accordingly, the offender is not only entitled to, but has a significant incentive to present as much mitigation evidence as possible to the trial court, thereby reducing the risk of error in the fact-finding process. A certain degree of risk is always present in any sentencing proceeding. However, a defendant's liberty interest is no more threatened by the Act's provisions than it is by any other mandatory incarceration provision. As Wright makes clear, although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire

panoply of criminal trial procedural rights." Wright at 36, 494 A.2d at 360 (quoting Gardner v. Florida, 430 U.S. 349, 358 n. 9 (1977)).

When evaluating the specific dictates required by the Fourteenth Amendment, this Court must consider: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and (3) the value of the government's interest, including the function involved and the burdens that an additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Here, the majority correctly notes that the state has a compelling interest in protecting its citizens by providing prompt information to potential victims concerning sexually violent predators. I further agree that a defendant has a private interest in avoiding the mandatory maximum life sentence applicable to sexually violent predators.

However, before an offender can invoke a due process claim for a violation of his liberty interests, there must be a protectable interest. As discussed supra, a defendant's fundamental right to be free from confinement has already been forfeited by the fact of his conviction for the predicate offense. Thus, the government's interest in the safety and welfare of children and other potential victims far outweighs an offender's reduced liberty interest in avoiding a mere enhancement to a prescribed prison sentence. Preventing danger to the community is a legitimate regulatory goal, and the government's regulatory interest in community safety can often outweigh an individual's liberty interest. United States v. Salerno, 481 U.S. 739, 748 (1987)(holding that the Bail Reform Act of 1984 was not unconstitutional and that the Act's presumption that individuals arrested for certain serious offenses are far more likely to be responsible for dangerous acts in the community after arrest was not irrational or arbitrary). Further, an offender's reputation and personal life pales in comparison to the government's interest in the protection of the public from the high risk posed by sexually violent predators.

Thus, I see no constitutional violation in placing the burden of persuasion on the offender, since it is he who often times is the only person in possession of the information needed to rebut the presumption.

Accordingly, I believe that while an offender is entitled to due process, the Act provides all the process that is due.[10] For the aforementioned reasons, I dissent.

[10] In my opinion, the Act is actually a defendant friendly enactment. Instead of providing an offender with the opportunity to avoid a life sentence as it has done in the Act, the legislature could have merely increased the maximum penalties for the predicate offenses to life imprisonment.