IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**No. 96-11,755**
	:	
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
HARRY CLARK,	:	
Defendant	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence issued on or about September 10, 1998. The relevant facts are as follows. On or about July 6, 1996, the defendant and the victim, A. V., were at the flea market at Powy's Taxidermy. A., the daughter of the defendant's girlfriend, was working at the defendant's produce stand. At this time, the defendant was sixty-one (61) years old and the victim was thirteen (13) years old. During the course of the day, the victim became friends with Sheila Hurlbutt and her sister, who were other teenagers working at the flea market. The victim told Sheila, as well as Sheila's sister and foster mother that the defendant had sex with her on several occasions and she began to cry. Sheila called the police. A crisis center was also called and they advised Sheila's foster mother, Kristen Toon to take custody of A. since she had a licensed foster home. The defendant, who had been drinking, came over to Ms. Toon's stand at the flea market and made statements in the presence of Sheila and Ms. Toon in which he admitted having sex with the victim on several occasions and there was nothing they could do about it. He also indicated that they could not take custody of A.. Sheila then made a comment that A. was only twelve (12) or thirteen (13) years old and the defendant replied he didn't

care. Ms. Toon described the defendant's demeanor as loud, abusive and obnoxious. Also, he seemed to be bragging about his contact with A. and claiming that Ms. Toon was just jealous or something to that effect.

Trooper Thomas Truzal and another trooper responded to the call Sheila made to the police. When they arrived, they believed they were investigating a physical assault as opposed to allegations of sexual assault. The other trooper spoke to the defendant while Trooper Truzal began speaking with other people to see if there were any witnesses to the assault. The individuals with whom Trooper Truzal spoke indicated that the individual who had been struck was A.. Trooper Truzal then spoke to A.. She stated that the defendant merely yelled at her and denied that he struck her although he had hit her in the past regarding her school work. Because some individuals indicated that the defendant had sexually assaulted A., Trooper Truzal asked her about any actions done by the defendant which would make her uncomfortable such as touching or fondling her and she replied he had never done anything like that. However, later that night at A.'s request, Trooper Truzal went to the residence where she was staying and she informed him that the defendant had sexually assaulted her. The victim explained at trial that she initially denied any sexual contact with the defendant to Trooper Truzal because she was embarrassed and did not want to get in trouble. She also admitted denying any sexual involvement with the defendant to a Children and Youth caseworker because her mother did not want her to tell the caseworker. N.T., June 11, 1998, at pp. 30-31.

At trial, A. testified that the defendant had sexual relations with her two (2) to three (3) times per week beginning in September 1995 through July 1996. During that time, she was thirteen (13) years old and the defendant was sixty-one (61) years old. A.'s mother and the defendant had her watch them engage in sexual intercourse so that when she went to have sex with the defendant

she "did it right." N.T., June 11, 1998, at p.25. The victim also testified that the defendant engaged in oral sex with her. She stated that the defendant placed his mouth in her vagina and he also put his penis in her mouth. N.T., June 11, 1998, at p.27. These sexual activities occurred on one occasion.

In exchange for engaging in sexual acts with the child, the defendant would give the child's mother money . He also would give the child money, candy or similar items.

The victim's mother did not have a problem with the defendant engaging in sexual acts with her daughter provided he took precautions so that she did not get pregnant. To that end, the defendant used his fingers to insert suppositories into the child's vagina.

At the conclusion of a jury trial held June 11-12, 1998, the jury found the defendant guilty of aggravated indecent assault, statutory sexual assault, indecent assault, and corruption of minors.

On or about September 10, 1998, the Court held a sentencing hearing in this case. The Court sentenced the defendant to an aggregate indeterminate period of incarceration in a State Correction Institution, having a minimum of six (6) years and a maximum of life plus six (6) years. The defendant filed a timely appeal.

The first issue raised by the defendant in his statement of matters complained of on appeal is that the trial court erred in failing to allow the introduction of evidence of prior sexual relations by the victim citing the Rape Shield Law. The Rape Shield Law provides:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S.A. 3104(a). The only instances of prior sexual relations by the victim of which the court is aware is prior instances of molestation perpetrated by the victim's brothers. Initially, the defense sought to introduce such evidence by introducing notations in a Children and Youth Services report which defense counsel believed indicated the victim's brothers were the perpetrators of the conduct at issue in this case. The Court conducted an in camera review with Children and Youth caseworker Margaret Jagella to determine if her proposed testimony would support defense counsel's assertions. N.T., June 11, 1998, at pp. 70-75. However, Ms. Jagella's in camera testimony clearly indicated that the statements regarding the victim's sexual contacts with her brothers were in reference to the victim's prior history and not the conduct which became the subject of the charges against the defendant. Since the victim was not accusing her brothers of the conduct in question, the statement in the Children and Youth report was not a prior inconsistent statement by the victim nor evidence which would exculpate the defendant. Defense counsel offered no other basis to admit this evidence. In fact, defense counsel did not object to the court's failure to allow such evidence. Therefore, this issue has not been preserved, and/or the evidence was within the purview of the Rape Shield Law and was properly excluded from the defendant's trial. In the alternative, even if the evidence was not barred by the Rape Shield Law, it was not relevant or material to this case. See Commonwealth v. Johnson, 536 Pa. 153, 638 A.2d 940, 942 (1994).

The defendant next contends that the trial court erred in sentencing the defendant above the standard guideline range for these offenses. Again, this Court cannot agree. With the defendant's prior record score of zero, the sentencing guidelines for the convictions in this case were as follows:

offense	standard range	aggravated	mitigated
aggravated indecent assault	8-20 months	20-26 months	2-8 months
statutory sexual assault	4-12 months	12-18 months	RS-4 months
indecent assault	RS-3 months	3-6 months	~
corruption of a minor	RS-6 months	6-9 months	~

The Court sentenced the defendant to an aggregate indeterminate period of incarceration in a State Correction Institution, having a minimum of six (6) years and a maximum of life plus six (6) years. This aggregate consisted of a minimum of three (3) years and a maximum of life on the aggravated indecent assault charge, a Megan's Law offense; a minimum of one and one-half (1 1/2) years and a maximum of three (3) years on the statutory sexual assault charge; a minimum of six months and a maximum of twelve months on the indecent assault charge; and a minimum of one (1) year and a maximum of two (2) years on the corruption of minors charge, with all these sentences to be served consecutive to each other. The Court readily acknowledges that the sentences for statutory sexual assault and indecent assault were in the aggravated range and the sentences for aggravated indecent assault and corruption of minors exceeded the aggravated ranges of the sentencing guidelines. However, the Court believes the following facts and circumstances of this case, among others, justify the lengthy sentence imposed:

(1) The ages of the victim and the defendant. At the time of the sexual contact, the victim was thirteen (13) years old and the defendant was sixty-one (61). Since the victim was the daughter of the defendant's girlfriend, he was well aware that the victim was only thirteen (13).

(2) The duration of the sexual contact. The defendant engaged in sexual activities with the victim approximately twice per week for a ten month period beginning in September 1995 and ending in July 1996.

(3) The exploitive and demeaning manner in which the defendant treated the victim. The defendant and the child's mother had the child observe them engage in sexual activities so that when the child went to have sex with the defendant she would do it right. N.T., June 11, 1998, at p.25. The defendant also paid the child's mother for the opportunity to engage in sexual activities with the victim and would give the child candy or money. In essence, the defendant and the child's mother were training her to become a prostitute. This utterly repulsive behavior alone should justify the length of the sentence imposed.

(4) The defendant's lack of remorse. When given the opportunity to speak on his own behalf at sentencing, the defendant began to complain about his attorney's representation of him, implying that he did not have any improper contact with the victim. N.T., September 10 ,1998, at p. 44. In the pre-sentence investigation report, though, the defendant admitted to having sexual relations with the victim. When the Court mentioned this admission, the defendant stated, "Yes, I was propositioned by a prostitute. . . . " N.T., September 10, 1998, at p.45. The defendant did not see anything wrong with his behavior even though he knew the victim was a minor.

The defendant's third issue on appeal is that Pennsylvania's version of Megan's Law, 42 Pa.C.S.A. 9791 et seq., is unconstitutional in that it deprives the defendant of Due Process and unconstitutionally places the burden on him to prove that he is not a violent sexual predator. The court acknowledges that the Pennsylvania Superior Court has concluded that Pennsylvania's Megan's Law violates federal procedural due process because it improperly places the burden of persuasion on a defendant. Commonwealth v. Hayle, No. 2183 Philadelphia 1997, 1998 WL 686022 (Pa.Super. October 6, 1998). However, the court is aware that the constitutionality of Megan's Law is currently before the Pennsylvania Supreme Court. Therefore, the court will address whether the defendant was properly designated a sexually violent predator in the event the

Pennsylvania Supreme Court finds Megan's Law constitutional.

Under Megan's Law, a defendant is presumed to be a sexually violent predator. 42 Pa.C.S.A. § 9794(b). This presumption arises from the defendant's conviction of any offense set forth in § 9793(b). The defendant was convicted of aggravated indecent assault, an offense contained in § 9793(b). Therefore, the defendant is presumed to be a sexually violent predator. This presumption can only be overcome by clear and convincing evidence to the contrary. 42 Pa.C.S.A. 9794(b). No such contrary evidence was presented at the hearing. Even without the presumption, though, the court would have designated the defendant a sexually violent predator based on the testimony presented. Both the assessors found that the defendant was a sexually violent predator based on the criteria set forth in Megan's Law. The most significant factors in this case were the age of the offender, the age of the victim, the nature of the sexual contact with the victim, the demonstrated pattern of abuse, and exploitive and demeaning manner of the abuse. In fact, one assessor made the following comment: "Out of the various assessments this writer has done, this circumstance ranks with the most egregious in both the level of exploitation and the length of time it occurred." N.T., September 10, 1998 at p.22. Moreover, the defendant's daughter testified that he molested her when she was about the same age as the victim in this case. N.T., September 10, 1998 at pp. 32-35. Given the defendant's lack of remorse, his apparent interest in adolescent girls, and the duration and exploitive manner of the abuse, the Court had no difficulty whatsoever finding that the defendant was a sexually violent predator; it also would not have had any difficulty making such a finding even if the burden of proof were on the Commonwealth.

The defendant next asserts that trial counsel was ineffective for failing to request a change of venue due to the pretrial publicity of the case. In order to establish counsel's ineffectiveness, the defendant must show that (1) his claim has arguable merit; (2) there was no

rational basis for counsel's action or inaction; and (3) the defendant suffered prejudice as a result. Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 475-76 (1998); Commonwealth v. Henry, 550 Pa. 346, 706 A.2d 313, 323 (1997); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). In order to prove prejudice, a defendant must plead and prove that counsel's commission or omission was so egregious that, but for counsel's ineffective representation, the outcome of the trial would have been different. Commonwealth v. Shultz, 707 A.2d 513, 519 (Pa. Super. 1997). There is nothing in the record to indicate that the jury panel had knowledge of any pre-trial publicity or that any such publicity was of a nature or degree to render the jury unable to reach a fair and impartial verdict. The Court notes that it is the appellant's burden to request any transcript necessary for his appeal. Pa.R.App.Pro. 1911. The voir dire examination of jurors is recorded but not transcribed unless ordered. The defendant did not order or request such a transcript. Therefore, there is no support in the record for his assertions. Moreover, the Court does not recall any problems with pretrial publicity when the jury was selected in this case.

The defendant also contends that trial counsel was ineffective for failing to call defense witnesses who would have testified concerning the victim's appearance and demeanor prior to and on the date of the defendant's arrest. In order to establish counsel was ineffective for failing to call a witness, a defendant must show the following in addition to meeting the general standard for an ineffectiveness claim: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness' testimony was so prejudicial as to have denied the defendant a fair trial. Commonwealth v. Henry, 550 Pa. at 379, 706 A.2d at 329. The defense has failed to even assert any of these elements. He has not specified any witness nor indicated what any such witnesses would state. He has not shown that

any witness would have been available to testify on his behalf or that his counsel knew of the existence of these alleged witnesses. However, even if the defendant set forth this information, the Court does not believe he can satisfy the prejudice prong of the test for ineffective assistance of counsel. At sentencing the Commonwealth presented a photograph of the victim from the time frame that the defendant was having sexual relations with her. In this photograph, the victim does not appear to be over the age of sixteen; rather, she appears to be in her early teens. See Commonwealth's Exhibit 3. Moreover, the victim testified that she told the defendant she was only thirteen years old and going into the seventh grade. Thus, even if the victim had appeared older, the defendant knew how old she was regardless of her appearance.

Next, the defendant claims trial counsel was ineffective for failing to call as a witness the Children and Youth caseworkers regarding statements given by the victim prior to the arrest of the defendant where she denied any sexual assaults. The Court is aware of two Children and Youth caseworkers who spoke to the victim: Ms. Margaret Jagella and Ms. Beth Malone. As previously discussed, the Court held an in camera hearing regarding Ms. Jagella's proposed testimony. During that hearing, Ms. Jagella indicated that the victim did not deny that the defendant had sexual relations with her. The references in Ms. Jagella's report regarding sexual contacts with other individuals related to the victim's prior history and not the sexual contacts under investigation.

With respect to Ms. Malone, trial counsel attempted to call her as a witness but there was a problem with her subpoena. Trial counsel took the subpoenas over to Children and Youth Services. Ms. Malone's supervisor took the subpoenas from trial counsel and indicated he would see that the individuals received them. When Ms. Malone failed to appear to testify, trial counsel telephoned Children and Youth Services and discovered Ms. Malone was on maternity leave. Trial was postponed for over an hour and a half while efforts were made to contact her and try to secure

her appearance. While these efforts were being made, counsel for the Commonwealth and the defense discussed Ms. Malone's proposed testimony and reached a stipulation. N.T., June 12, 1998, at pp. 3-7. The stipulation which was read to the jury stated the following: The victim denied that the defendant touched or sexually abused her. It was almost a programmed response. This worker suspects that this may have occurred and the victim doesn't want to go to foster care. Given the facts and circumstances set forth above, the Court finds that counsel was not ineffective. The witness was not available to testify; she was on maternity leave and unable to be reached. The court also does not believe the defense was prejudiced by her failure to appear. The information sought to be elicited from this witness was introduced by stipulation and the victim admitted that she initially denied that the defendant had sexual contact with her to Ms. Malone and Trooper Truzal. Therefore, calling Ms. Malone as a witness in this case as opposed to presenting her testimony by stipulation would not have affected the outcome of this case.

The defendant's final contention is that trial counsel was ineffective for failing to seek a continuance so that witnesses who were needed could be obtained for trial and failing to subpoena those witnesses. Since the defendant has not enumerated any specific witnesses, this claim is somewhat difficult to address. However, to the extent the witnesses may be Children and Youth caseworkers or individuals who would testify regarding the appearance of the victim, the Court would rely on its previous discussions regarding the defendant's allegations of trial counsel ineffectiveness.

In conclusion, with the exception of the issue regarding the constitutionality of Megan's Law which only affects the defendant's sentence for aggravated indecent assault, the Court finds that the defendant's assertions of error are meritless and the defendant is not entitled to a new trial.

DATE: _____

By The Court,

_____
Kenneth D. Brown, J.

cc: Lori Rexroth, Esquire (ADA)
James Protasio, Esquire
Law Clerk
Superior Court (original & 1)
Gary Weber, Esquire (Lycoming Reporter)
Work File