IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 98, 11,664

VS :

NORMAN DEAN HAMILTON :

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 Order dated June 22, 1999, wherein the Defendant was sentenced to undergo incarceration for a minimum of twelve (12) months and a maximum of twenty-four (24) months on the charge of indecent assault. The Court noted for the record that although the Sentencing Guidelines would have provided for a greater time of incarceration due to the Defendant's high prior record score, the statutory maximum for this offense which is a misdemeanor of the second degree is only two years. The Defendant filed an appeal to the sentence on July 19, 1999. On July 26, 1999, the Court ordered that the Defendant file a concise statement of matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). The Defendant filed his statement of matters complained of on November 15, 1999. On appeal the Defendant alleges that the evidence presented at trial was insufficient to sustain a conviction, that the conviction was against the weight of the evidence, and that the counsel was ineffective by failing to file post sentence motions raising the sufficiency and the weight of the evidence.

The Court summarizes the evidence presented at the trial as follows. The victim, Melissa Donahue, testified that she knew the Defendant because she had dated his

cousin. After the two broke up, she and the Defendant remained in close contact. She testified that the two of them called each other, and the Defendant came to her home on occasion. (N.T. 3/23/99, p.11). She testified that the Defendant mentioned on four or five occasions that he was interested in a relationship with her, but she had told him that she was not ready for a relationship. The Defendant came to her home early in the day on May 31, 1999, to try to fix her washing machine. She stated that they all left when she had to go to work. When she returned to her home that evening, she and the Defendant pulled up to her home at the same time. The Defendant helped her get her children out of the car and into their beds.

The couple eventually sat down in the living room of her home. She sat on the loveseat and he sat on the couch. The Defendant asked her to come and sit with him on the sofa, and when she declined, the Defendant got up and sat down next to her on the loveseat. (Id., p.17). The Defendant told her how much he liked her and her children, and he tried to put his arms around her. She said that he told her that he did not want to get sexual, he just wanted to hold her. (Id., p. 18). He also tried to kiss her neck. (Ibid.) She testified that she told him that she wanted to be friends, and that she wanted him to stop. (Ibid.). She also told him that she wanted him to leave. (Id., p.19). She testified that he tried to unzip her shirt, at which point she told him to knock it off or she would call the cops. The Defendant stopped his advances then, but approximately 15 minutes later the Defendant tried to proceed again. On the second attempt, the Defendant's hand went into her shirt, into her bra, and touched her left breast. (Id., p. 19). She testified that she made it very clear that she did not want to participate, and the Defendant left her residence.

The Defendant testified that when he asked Ms. Donahue, she voluntarily sat next to him on the couch. While sitting on the couch they held hands (Id., p.61). He stated that he did not try to touch Ms. Donahue's breast that evening. He did, however, see her breast. He said that after he complimented her on the shirt that she was wearing, she pulled her shirt down revealing her chest, and asked him whether he liked what he saw (Id p.63). Some time after that, the Defendant asked her whether she was using him to get to his cousin. He stated that his question made her "flip out" (Ibid.). He testified that she became hysterical, throwing her arms and yelling. He stated that he tried to calm her down, but that he left when she asked him to leave.

SUFFICIENCY OF THE EVIDENCE

The Defendant first alleges that there was insufficient evidence to find the Defendant guilty of the charge of indecent assault beyond a reasonable doubt. The Court does not agree. "The test of the sufficiency of the evidence in a criminal case is whether, viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the [crime] charged beyond a reasonable doubt." Commonwealth v. Jones, 449 Pa. Super. 58, 672 A.2d 1353, 1354, (Pa. Super. 1996), citing, Commonwealth v. Carter, 329 Pa. Super. 490, 495-96, 478 A.2d 1286, 1288 (1984); Commonwealth v. Peduzzi, 338 Pa. Super. 551, 555, 488 A.2d 29, 31-32 (1985).

Applying the foregoing standard, in order to have found the Defendant guilty of indecent assault, the Commonwealth must have proven beyond a reasonable doubt that

the Defendant had indecent contact with a person without her consent. Indecent contact is defined in 18 Pa.C.S.A. §3101 as any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire in the other person. Instantly, when viewing the evidence presented in the light most favorable to the Commonwealth, the Count finds that the Defendant's conduct of touching Ms. Donahue's breast and kissing her neck was sufficient to establish that the Defendant touched an intimate part of her person. Ms. Donahue further testified that she told the Defendant several times that she was not interested in his advances and she told him several times to stop. The Court finds this evidence sufficient to establish that the contacts were without her consent. The Court finds the Defendant's challenge to the sufficiency of the evidence to be without merit.

WEIGHT OF THE EVIDENCE

The Defendant next alleges that the verdict was against the weight of the evidence. The Court does not agree. The test for determining whether the verdict is against the weight of the evidence, is not whether the Court would have decided the case in the same way, but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail. Commonwealth v. Whiteman, 336 Pa.Super. 120, 485 A.2d 459 (1984). Instantly, the Court cannot conclude that the verdict was so contrary to the evidence that the award of a new trial is imperative so that justice may have another opportunity to prevail. The Commonwealth did present evidence to support the charge, such as the

Defendant's conduct of touching the victim's breast. The Court therefore finds the Defendant's challenge to the weight of the evidence to be without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Defendant next alleges that his trial counsel was ineffective for failing to file post trial motions raising the sufficiency and weight of the evidence presented at trial. In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Beasley, 544 Pa. 554, 678 A.2d 773, 778, (1996). Instantly, based on the foregoing opinion, the Court finds that the Defendant's underlying claims of sufficiency and weight of the evidence have no arguable merit. As the first prong of the test for ineffectiveness has not been met, the Court finds that the Defendant has not demonstrated that his counsel was ineffective, and would find that his argument is without merit.

The Defendant last alleges that his counsel was ineffective for failing to file a timely appeal of the sentence imposed by the Court as requested by the Defendant. A review of the file indicates that the sentence in this matter was entered on June 22,

1999. Defendant's counsel filed and appeal of the sentence on July 19, 1999. As the appeal was filed within the time allotted for the filing of appeals, the Court finds the Defendant's argument that his appeal was not timely filed is without merit.

Dated: December 23, 1999

By The Court,

Nancy L. Butts, Judge

xc: J. Michael Wiley, Esquire
Lori Rexroth, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges