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Commonwealth v. Raiber

Commonwealth of Pennsylvania v. Albert Raiber, Jr., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch,
Criminal Law No. 1524-2012

HEADNOTES

Criminal Law; Mandatory Minimum Sentence for Prior Sexual Offenses

1. Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9799.14 (relating to sexual offenses and tier system) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9799.14 or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement.

Criminal Law; Equivalent Offenses

1. When determining whether an out-of-state offense is equivalent to a Pennsylvania offense, the Court must carefully identify and analyze the elements of the foreign offense in terms of classification of the conduct proscribed, its definition of the offense, and the requirements for culpability.

2. An out-of-state offense is equivalent to a Pennsylvania offence when they are "substantially identical in nature and definition."

3. When determining whether an out-of-state offense is equivalent to a Pennsylvania offense, the Court's analysis should be on the statute that triggered the conviction, not the facts supporting the conviction.

4. An analysis of the policy considerations underlying the offenses is appropriate but not controlling.

Appearances:

Michael J. Toms, Esq., *Counsel for Defendant*

Lauren E. Sulcove, Esq., *First Assistant District Attorney*

OPINION AND ORDER OF COURT

Before Van Horn, J.

STATEMENT OF THE CASE

After a two day trial on January 16th and 17th of 2013, the jury found the above captioned Defendant, Albert Raiber, guilty of Involuntary Deviate Sexual Intercourse,[1] Indecent Assault,[2] Indecent Exposure,[3] Corruption of a Minor,[4] Simple Assault,[5] and False Imprisonment.[6] On July 29, 2013, the Defendant was determined to be a sexually-violent predator (SVP), given a lifetime Megan's Law registration requirement, and sentenced to an aggregate of twenty-nine years (29) and three (3) months to seventy-two (72) years.[7] This Court applied the twenty-five (25) year mandatory sentence for the Defendant's Involuntary Deviate Sexual Intercourse and Indecent Assault convictions pursuant to 42 Pa.C.S. § 9718.2(a)(1) due to his prior 1986 sexual offense conviction in Maryland. On August 8, 2013, the Defendant filed a Post-Sentence Motion pursuant to Pa.R.Crim.P. 720(B), arguing that this Court erred in applying the twenty-five (25) year mandatory sentence based upon the Defendant's previous Maryland conviction.[8]

1 18 Pa.C.S. § 3123(b).
2 18 Pa.C.S. § 3126(a)(7).
3 18 Pa.C.S. § 3127(a).
4 18 Pa.C.S. §6301(a)(1)(ii).
5 18 Pa.C.S. § 2701(a)(1).
6 18 Pa.C.S. § 2903(a).
7 Tr. of Proceedings of SVP Hearing and Sentencing, July 29, 2013 at 36
8 The Defendant's Post-Sentence Motion also asked for a judgment of acquittal, or in the alternative, a new trial because the evidence presented at trial was insufficient to support the guilty verdicts, the verdicts were against the weight of the evidence, and this Court erred when it denied the Defendant's Rule 600 Motion. However, at the hearing, the Defendant withdrew his sufficiency and weight arguments and conceded to address the Rule 600 issue on appeal.

The Commonwealth filed its Answer on August 30, 2013, and a hearing was held on October 22, 2013. The matter is now ripe for decision, rendered in this Opinion and Order of Court.

DISCUSSION

In 1986, the Defendant was convicted in Maryland of a sexual offense in the third degree.[9] The Defendant's criminal history record shows he was convicted under MD. ANN. CODE art. 27, § 464B (repealed 2002). However, his criminal history record only shows the general statute under which he was convicted, not the specific subsection. At sentencing, due to this prior conviction, the Commonwealth asked to apply the mandatory minimum pursuant to 42 Pa.C.S. § 9718.2(a)(1) which states:

> Mandatory sentence.-- (1) Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9799.14 (relating to sexual offenses and tier system) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9799.14 or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense *or an equivalent crime in another jurisdiction,* be sentenced to a minimum sentence of at least 25 years of total confinement . . . .

42 Pa.C.S. § 9718.29(a)(1) (emphasis added). In support, the Commonwealth averred that the Maryland offense was equivalent to felony two (2) sexual assault[10] in Pennsylvania because both offenses impose a penalty of imprisonment not exceeding ten (10) years.[11] The Defendant protested the application of his 1986 Maryland conviction because it was unknown what specific subsection he was convicted under in 1986.[12] The Maryland statute[13] covered a wide range of prohibited conduct; conduct considered to be both felonies and misdemeanors under Pennsylvania law.[14] The Defendant argued further that basing the equivalency determination solely on the statutory penalties was incorrect because *Commonwealth v. Northrip* requires an analysis of the type of behavior prohibited by the statutes.[15] *See Commonwealth v. Northrip*, 985 A.2d 734 (Pa. 2009). Despite the Defendant's contentions, this Court found the application of the mandatory minimum pursuant to 42 Pa.C.S. § 9718.2(a)(1) appropriate for the convictions of Involuntary Deviate Sexual Intercourse and Indecent Assault.[16]

The issue before us now is whether this application of the mandatory minimum sentence due to the Defendant's 1986 Maryland conviction was proper. Thus, we must decide whether the 1986 Maryland crime of a sexual offense in the third degree[17] is an equivalent offense to the Pennsylvania crime of sexual assault.[18] When analyzing whether an out-of-state offense is equivalent to an in-state offense:

> [A] sentencing court [must] carefully review the elements of the foreign offense in terms of classification of the conduct proscribed, its definition of the offense, and the requirements for culpability. Accordingly, the court may want to discern whether the crime is malum in se or malum prohibitum, or whether the crime is inchoate or specific. If it is a specific crime, the court may look to the subject matter sought to be protected by the statute, e.g., protection of the person or protection of the property. It will also be necessary to examine the definition of the conduct or activity proscribed. In doing so, the court should identify the requisite elements of the crime-the actus reus and mens rea-which form the basis of liability.
>
> Having identified these elements of the foreign offense, the court should next turn its attention to the Pennsylvania Crimes Code for the purpose of determining the equivalent Pennsylvania offense. An equivalent offense is that which is substantially identical in nature and definition [to] the out-of-state or federal offense when compared [to the] Pennsylvania offense.

Commonwealth v. Shaw, 744 A.2d 739, 743 (Pa. 2000) (quoting *Commonwealth v. Bolden*, 532 A.2d 1172, 1175-76 (Pa. Super. 1987)). The "analysis of policy considerations is appropriate, though not controlling." *Northrip*, 985 A.2d at 740. Importantly, our attention should "not [be] on the facts underlying a conviction, but rather on the statute that triggered the conviction." *Id*. at 741.

9 MD. ANN. CODE art. 27, § 464B (repealed 2002).
10 "Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." 18 Pa.C.S. § 3124.1.
11 Tr. of Proceedings of SVP Hearing and Sentencing, July 29, 2013 at 21-23.
12 *Id*. at 22-23
13 At sentencing and at the Post-Sentence Motion hearing, the parties referenced the current version of this statute enacted in 2002.
14 Tr. of Proceedings of SVP Hearing and Sentencing, July 29, 2013 at 22-23.
15 *Id*. at 24.
16 *Id*. at 31-32.
17 MD. ANN. CODE art. 27, § 464B (repealed 2002)
18 18 Pa.C.S. § 3124.1.

This Court has found what we believe to be the Maryland statute under which the Defendant was convicted in 1986. Article 27 § 464B of the Maryland Code reads as follows:

> (a) A person is guilty of a sexual offense in the third degree if the person engages in sexual contact:
>
> (1) With another person against the will and without the consent of the other person, and:
>
> (i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or
>
> (ii) Inflicts suffocation, strangulation, disfigurement or serious physical injury upon the other person or upon anyone else in the course of committing that offense; or
>
> (iii) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> (iv) Commits the offense aided and abetted by one or more other persons; or
>
> (2) With another person who is mentally defective, mentally incapacitated, or physically helpless, and the person knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or
>
> (3) With another person who is under 14 years of age and the person performing the sexual contact is four or more years older than the victim.
>
> (b) Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 10 years.

MD. ANN. CODE art. 27, § 464B (1976) (repealed 2002); *see Biggus v. State*, 593 A.2d 1060, 1063 (Md. 1991).[19] Comparatively, Title 18 § 3124.1 of the Pennsylvania Crimes Code states: "[e]xcept as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." 18 Pa.C.S. § 3124.1.

In *Commonwealth v. Shaw*, the Supreme Court addressed an equivalency question but in the context of the defendant's prior New York DWAI conviction. *Shaw*, 744 A.2d at 740. The court compared the New York DWAI statute to the comparable Pennsylvania DUI statute and determined the two were not equivalent. *Id*. at 744. The court reasoned that "[i]t logically follows that although both Pennsylvania's DUI offense and New York State's DWAI offense are designed to protect the person and prohibit drunk driving, New York State's DWAI offense protects the public from a broader range of reckless behavior than does Pennsylvania's DUI offense." *Id*. The New York statute prohibited driving after "any impairment" while the Pennsylvania statute prohibited driving after "substantial impairment." *Id*.

In *Commonwealth v. Northrip*, the court analyzed whether a New York arson statute was equivalent to a Pennsylvania one. *Northrip*, 985 A.2d at 736. Applying the above test from *Shaw* to compare the two statutes, the court held that they were not equivalent. *Id*. at 741-42. The court reasoned:

> At first glance, the laws appear to have similar elements and burdens of proof. Both punish a person

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19 As noted above, during sentencing and at the Post-Sentence Motion hearing, the parties were referencing the current version of this statute enacted in 2002. Fortunately, the statute has not changed significantly and the current version states:

> (a) A person may not:
>
> (1)(i) engage in sexual contact with another without the consent of the other; and
>
> (ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> 2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;
>
> 3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> 4. commit the crime while aided and abetted by another;
>
> (2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;
>
> (3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;
>
> (4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or
>
> (5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.
>
> **Penalty**
>
> (b) A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

MD. CODE ANN., CRIM. LAW § 3-307 (West 2002). "House Bill 96, which became ch. 523 of the Laws of 1994, added subsections (a)(4) and (a)(5) to section 464B." *Starkey v. State*, 810 A.2d 542, 548 (Md. Ct. Spec. App. 2002).

> for intentionally setting a structure on fire and both define the word structure to include a place of business. However, the framework of the two statutory schemes reflects striking differences in terms of the classification of the conduct proscribed and the subject matter sought to be protected. . . . First, the NewYork statute describes a third-degree felony; the Pennsylvania provision describes a felony of the first-degree. Moreover, the New York law focuses plainly on the protection of property. The Pennsylvania law decidedly does not. Significantly, the Pennsylvania subsection is titled arson endangering persons and a different, separate subsection is titled arson endangering property. . . . Pennsylvania punishes, as a second-degree felony, the deliberate starting of a fire with the intent to destroy or damage a building or structure adapted for carrying on business. Likewise significant is the fact that New York's other arson statutes specifically address injury to persons and assign higher grades to those offenses.

Id. (internal quotations omitted). Although neither of the cited cases involves an equivalency analysis of sexual offense statutes, they are important examples of the very detailed inquiry this Court must conduct when deciding whether an offense from another jurisdiction is equivalent to an offense in Pennsylvania.

In the instant case, both the Pennsylvania and Maryland statutes have a similar underlying policy of protecting persons against non-consensual sexual conduct. However, the similarities seem to end there. Pursuant to *Shaw*, we must compare the elements of the two offenses. *See Shaw*, 744 A.2d at 743. Turning to the 1986 Maryland statute, the primary element of Maryland's third degree sexual offense is "sexual contact." MD. ANN. CODE art. 27, § 464B (1976) (repealed 2002). "Sexual contact" as defined in 1986 is the:

> Intentional touching of any part of the victim's [or actor's anal or] genital areas [or other intimate parts] for the purposes of sexual arousal or gratification or for abuse of either party and includes the penetration, however slight, by any part of a person's body, other than the penis, mouth or tongue, into the genital or anal opening . . . if that penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party.

Dillsworth v. State, 503 A.2d 734, 736 (Md. Ct. Spec. App. 1986); *see also Starkey v. State*, 810 A.2d 542, 547 (Md. Ct. Spec. App. 2002). Comparatively, the primary elements in the Pennsylvania statute are "sexual intercourse" or "deviate sexual intercourse." 18 Pa.C.S. § 3101. The definition of "sexual intercourse," "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S. § 3101. "Deviate sexual intercourse" is defined as:

> Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

18 Pa.C.S. § 3101.

First, comparing these elements, the Maryland statute protects individuals against a broader range of sexual behavior by defining the element of "sexual contact" to include intentional touching and penetration. The Pennsylvania statute seems to limit the offense of sexual assault only to encounters where there has been penetration. Based upon similar Maryland statutes in effect in 1986, we know the specific language, "sexual contact," was purposefully used in § 464B to criminalize a wide array of sexual conduct. For example, in 1986, a person was guilty of a sexual offense in the second degree if he "engage[d] in *a sexual act* with another person . . . ." *Partain v. State*, 492 A.2d 669, 671 (Md. Ct. Spec. App. 1985) (quoting MD. ANN. CODE art. 27, § 464A(a)(3) (1982)) (emphasis added). § 464B criminalized "sexual conduct" while § 464A criminalized "sexual acts."[20] "Sexual act" is the "more strictly defined term," and "sexual contact" is "the more broadly defined term." *Vogel v. State*, 543 A.2d 398, 403 n.4 (Md. Ct. Spec. App. 1988). Therefore, similar to the rationale in *Shaw*, here we have a Maryland statute that "protects the public from a broader range of . . . behavior" than Pennsylvania's sexual assault statute. *Shaw*, 744 A.2d at 744. It is possible that certain "sexual conduct" criminalized under Maryland's sexual offense in the third degree statute would be insufficient to support a conviction under Pennsylvania's sexual assault. *See Northrip*, 985 A.2d at 740.

Second, not knowing what specific subsection of Maryland's statute the Defendant was convicted under

20 "Sexual act" was defined as:

> [C]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Emmission of semen is not required. Penetration, however slight, is evidence of anal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes.

Partain v. State, 492 A.2d 669, 671-72 (Md. Ct. Spec. App. 1985) (quoting MD. ANN. CODE art. 27, § 461(e) (1982)).

requires us to compare all of its subsections to Pennsylvania's statute. Maryland's statute has "three subsections that set forth alternative theories under which a person could be convicted" for criminal sexual behavior. *Starkey v. State*, 810 A.2d 542, 548 (Md. Ct. Spec. App. 2002). Although both statutes criminalize non-consensual sexual behavior, Maryland goes a step further under (a)(1) to criminalize that behavior only when combined with one of the enumerated aggravating factors. *See Id*. Such factors include employing or displaying a dangerous weapon, inflicting suffocation, strangulation, disfigurement, or injury, threatening fear or imminent death, or committing the non-consensual sexual contact with the aid of another person. MD. ANN. CODE art. 27, § 464B (1976) (repealed 2002); *see Biggus*, 593 A.2d at 1063. The Pennsylvania statute does not require any aggravating factors for a conviction.

The differences between the statutes are further highlighted when we look at Maryland's subsections (a)(2) and (a)(3). These subsections do not mention consent, and criminalize sexual contact with an individual who is mentally incapacitated or physically helpless or with a child less than fourteen years of age when the defendant is four or more years older. MD. ANN. CODE art. 27, § 464B (repealed 2002); *see Biggus*, 593 A.2d at 1063. Again, the Pennsylvania statute contains nothing similar.

Finally, *Shaw* does not direct us to compare the statutory penalties. As defense counsel correctly argued, determining whether the two statutes are equivalent based solely upon a comparison of their penalties is improper. To be equivalent, the Pennsylvania statute must be "substantially identical in nature and definition" to the Maryland statute. *Shaw*, 744 A.2d at 743 (quoting *Bolden*, 532 A.2d at 1175-76). Such is not the case here. Therefore, applying the twenty-five (25) year mandatory minimum to the Defendant's sentence pursuant 42 Pa.C.S. § 9718.2(a)(1) due his 1986 Maryland conviction under MD. ANN. CODE art. 27, § 464B (repealed 2002) was incorrect.

CONCLUSION

Sentencing the Defendant to the mandatory minimum of twenty-five (25) years pursuant to his 1986 Maryland conviction of a sexual offense in the third degree was improper because the Maryland crime is not equivalent to Pennsylvania's crime of sexual assault. The Defendant's Post-Sentence Motion is granted.

ORDER OF THE COURT

AND NOW, this 20th day of November, 2013, after consideration of Defendant's Post-Sentence Motion, the Commonwealth's Answer, argument at hearing, and the applicable law;

IT IS HEREBY ORDERED THAT Defendant's Motion is GRANTED.

Pursuant to Pa. R. Crim. P. 114(B), (D) and (C), the Clerk of Courts shall immediately docket this Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.