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Commonwealth v. Hauman

COMMONWEALTH OF PENNSYLVANIA
v. DARIN LEE HAUMAN, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
No. 115 of 2001

Sexual abuse of children — possession of computer depictions of child pornography, 18 Pa.C.S.A. §6312(d)(1); Megan's Law, 42 Pa.C.S.A. §9795.4

1. Denial of a motion to dismiss was proper where: (a) the motion was untimely; (b) the section of the Crimes Code making it illegal to possess pornographic computer depictions of children is constitutional because it provides an exception for material with a bona fide educational, scientific, governmental or judicial purpose; and (c) the Commonwealth met its burden of proving that the images were of actual children, as opposed to computer-generated images of non-existent children, or of adults altered to resemble children.

2. It was proper to admit the testimony of a physician with specialties in obstetrics, gynecology and pediatrics to opine that some of the photographs depict children under age 18 based on a scale that measures physical and sexual maturation where that scale has been used widely in the medical community for decades.

3. It is the court as trier of fact that decides, based on all the evidence, whether the Commonwealth has proven beyond a reasonable doubt every element of the crime, including the minority status of the victims; the court can use its own experience and powers of observation to decide whether the persons in the photographs are below age 18.

4. The Commonwealth proved by clear and convincing evidence that the defendant is a sexually violent predator where it showed that he has a mental abnormality or personality disorder — pedophilia — as shown by his recurring and intense sexual preference for prepubescent children.

5. The court did not err in refusing to merge the 11 convictions for sentencing purposes insofar as each photograph depicted a separate child victim and/or another victimization of the same child, making each photograph a separate criminal act under Section 6312(d)(1) of the Crimes Code.

Appearances:

District Attorney of Fulton County

Clinton T. Barkdoll, Esq., *Counsel for Defendant*

Opinion sur Pa.R.A.P. 1925(a) and Order of Court

OPINION

Herman, J., May 19, 2004

Introduction

The defendant was convicted of 11 counts of sexual abuse of children following a bench trial on October 2, 2003. The court found the defendant to be a sexually violent predator at a hearing on March 15, 2004 and sentenced him that same date. The defendant filed a timely notice of appeal. The court directed him to file a concise statement of matters complained of on appeal, which he did.

Background

The defendant was charged by the State Police in Fulton County with 27 counts of sexual abuse of children. The charges arose from an investigation by the State Police in Allegheny County into computer crimes. The police, posing as a 12-year-old girl in an on-line chat room, made contact with the defendant who used an assumed name to make an appointment with the purported child in order to photograph her, have sex with her, and possibly film her in a pornographic movie. Police arrested the defendant when he arrived for the appointment. After his arrest, the defendant admitted to the on-line conversations with the person he believed was the child, and also admitted that he came to the meeting place, a motel in Allegheny County, in order to have sex with her. Allegheny County charged him with two crimes as a result.

Using detailed information about the undercover operation, the State Police in Fulton County obtained a warrant to search the defendant's home. The warrant allowed police to search for and seize computer equipment and printed materials related to child pornography. The police found pornographic photographs of children hidden under the bathroom rug. The defendant was charged with 27 counts of sexual abuse of children — possessing computer-depictions of child pornography, a felony of the third degree.18 Pa.C.S.A. §6312. The defendant moved to suppress the evidence found during the search. The Honorable John R. Walker denied the motion in an Opinion dated April 19, 2002.

After the case was continued four times at the defendant's request, the undersigned held the bench trial on October 2, 2003 and found the defendant guilty of 11 counts of sexual abuse of children — possessing computer depictions of child pornography. "Any person who knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act commits an offense." 18 Pa.C.S.A. §6312(d)(1).

The court directed the Sexual Offenders Assessment Board to evaluate the defendant to determine if he meets the criteria of a sexually violent predator under Megan's Law, 42 Pa.C.S.A. §9791-9799. Dr. Stephen Overcash, a licensed clinical psychologist and member of the Board, evaluated the defendant and submitted a report to the court on or about December 30, 2003 in which he concluded that the defendant is a sexually violent predator. After a hearing, the court found that the defendant is a sexually violent predator and is therefore subject to the registration requirements of the statute.

The court sentenced the defendant as follows:

Count 1: 24-84 months, to be served at the expiration of previous Fulton County Action No. 50 of 1992, count 8, for endangering the welfare of children.

Count 2: 24-48 months, to be served at the expiration of count 1.

Count 3: 21-36 months, to be served at the expiration of count 2.

Count 4: 21-36 months, to be served at the expiration of count 3.

Count 5: 36 months probation, to be served at the expiration of count 4.

Count 6: 18 months probation, to be served at the expiration of count 5.

Count 7: 18 months probation, to be served at the expiration of count 6.

Count 8: 18 months probation, to be served at the expiration of count 7.

Count 9: 12 months probation, to be served at the expiration of count 8.

Count 10: 12 months probation, to be served at the expiration of count 9.

Count 11: 12 months probation, to be served at the expiration of count 10.

In summary, the court sentenced the defendant to serve 7½ years at a state correctional institution, followed by 10½ years probation. As stated on the sentencing Orders, each count was based on a specific, corresponding Commonwealth trial exhibit. Those exhibits are computer print-outs of photographs downloaded from the internet.

Discussion

The defendant raises 10 grounds for this appeal. We address them below.

Motion to Suppress

Appeal issues #3, #4, and #5 pertain to the motion to suppress which Judge Walker denied. They are: (3) the search warrant was improperly drafted and was insufficient to form a basis for probable cause to believe the items sought would be found in the defendant's home; (4) improper language from the warrant should have been redacted, which would have resulted in the suppression of the seized evidence; and (5) the defendant had a reasonable expectation of privacy in any items found under his bathroom carpet. After reviewing the transcript of the hearing, the briefs submitted by counsel and Judge Walker's Opinion, it is clear that Judge Walker carefully considered and then rejected these very same arguments and we detect no errors in his rulings.

Other Pre-Trial Matters

(A) Validity of Section 6312(d)(1) of the Pennsylvania Crimes Code.

In appeal ground #7, the defendant maintains that the statute under which he was charged is illegal in two respects. First, there is no proof the images of children are of real children, as opposed to images created or altered by computer technology. Second, the Commonwealth presented no evidence of the identity of the children in those images. The defendant raised these objections at the time the court commenced trial, urging the court to dismiss the charges pursuant to Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). In that case, the United States Supreme Court struck down portions of the Child Pornography Prevention Act of 1996, 18 USCS §§2251 *et seq*. as overbroad and violative of the First Amendment to the Federal Constitution. One offending provision banned "virtual child pornography" produced using computer technology without actual children. Another provision expanded the definition of child pornography to include material which "conveys the impression" of containing images of a minor engaged in sexual conduct. This latter provision made no exception for material which might have literary, artistic, political or scientific value.

Although we were not given the opportunity to read the United States Supreme Court Opinion before trial, we heard argument from defense counsel and counsel for the Commonwealth before taking evidence. Based on those arguments, as well as the untimely manner in which the motion to dismiss was brought to the court (the Free Speech Coalition case was decided after the State Police filed the instant charges, but well before the October 2, 2003 bench trial), we denied the motion and proceeded with the trial. The record clearly shows that defense counsel was able to cross-examine witnesses as to genuineness of the images, as well as the Commonwealth's efforts to specifically identify the particular persons in those images. Counsel also addressed these issues during closing argument and we considered those arguments carefully during our deliberation.

Although by now we have had the opportunity to review Free Speech Coalition, we will not discuss every issue in that case. Instead we focus on the defendant's view that the Free Speech Coalition decision supports his motion to dismiss and also justified his acquittal on the charges under § 6312(d)(1) of the Pennsylvania Crimes Code. The defendant argues that section suffers from the same defects as the Federal law struck down by the Free Speech Coalition court, specifically, that the Pennsylvania statute is too broad because it criminalizes the knowing possession of certain types of images of children without proof that those images depict actual children, as opposed to computer-generated images of non-existent children.

We rejected this allegation of unconstitutionality for three reasons. First, unlike the Federal law, the Pennsylvania statute (which was enacted after the High Court handed down the Free Speech Coalition decision) provides an exception for material with "a bona fide educational, scientific, governmental or judicial purpose." §6312(f). Commonwealth v. Savich, 716 A.2d 1251 (Pa.Super. 1998).

The second reason we rejected the defendant's argument is that the Commonwealth at the outset acknowledged its burden to prove the images were of real children and presented credible testimony along those lines from Trooper John LaRoche and Dr. Earl Greenwald, M.D. Trooper LaRoche, a member of the State Police for twelve years and the principal investigator in the Allegheny County sting operation, is formally trained in computer forensics relating to sex crimes, including those involving minors. He testified that the materials in the case at bar were photographs scanned into a computer or digital camera,

transmitted over the internet and then printed out. Trooper LaRoche credibly testified under cross-examination that the photographs depict real children rather than software-manipulated images of adults "morphed" to look like children. He based his conclusion on many years of examining photographs and computer-based images of children engaged in sexual acts. Dr. Greenwald, a physician specializing in pediatrics and child abuse and neglect, credibly testified that he has examined 10,000-15,000 pornographic images of children and found no evidence of image manipulation here.

Thirdly, in a related vein, the defendant argues that the Commonwealth failed to prove the identities of the persons in the photographs. However, Trooper LaRoche credibly testified that it is extremely difficult to link a particular photograph to a particular child because the photograph can be posted on the internet from any location in the world. The specific identity of a person appearing in the photograph is not key to a prosecution under the statute; what **is** key is that the person is under the age of 18 — a fact which the Commonwealth proved beyond a reasonable doubt, as discussed below.

(B) Denial of Defendant's Request for Delay

Appeal ground #6 is that this court erred in refusing to continue the case until the resolution of other matters pending against the defendant in Allegheny County. The defendant raised this issue in a motion for continuance filed on or about September 22, 2003. At that time, the Allegheny County case had not yet been listed for trial and the defendant was in the process of challenging that prosecution after terminating the services of his first attorney. The defendant maintained that the Allegheny County arrest provided the information then used by the State Police in Fulton County to obtain a search warrant for his Fulton County home. He contended that "but for the Defendant's Allegheny County charges, there would arguably not be a Fulton County prosecution." (¶ 6 of the motion.) The District Attorney opposed the continuance.

We denied the motion because it contained insufficient grounds for relief. The instant complaint was filed August 6, 2001 and as noted above, the case had already been continued four times at the defendant's request. Without a clear indication of when the Allegheny County case would be resolved, this court could not in good conscience wait for an indefinite period of time for Allegheny County to move its matter forward in an expeditious manner. The defendant has not shown how denying his motion caused him prejudice.

Trial: Expert Evidence

Appeal ground #8 challenges the testimony of the Commonwealth's expert, Dr. Earl Greenwald. Dr. Greenwald is a medical doctor with specialties in obstetrics, gynecology, and pediatrics. He also concentrates on issues of child abuse and neglect. The defendant stipulated to Dr. Greenwald's qualifications as an expert in these areas. The Commonwealth's purpose in offering his testimony was to establish that the persons in the photographs were under the age of 18.

Dr. Greenwald examined the photographs before trial. One tool at his disposal was the Tanner Staging Scale developed by physician Dr. Tanner to determine whether a child has reached 18. Using this method, which has been generally accepted and used by the medical community for several decades, a physician can discern whether a child has reached age 18 by reference to signs of physical and sexual maturation, such as breast and genital development. Dr. Greenwald used the Scale, along with other information, to support his conclusion that 7 of the 27 photographs introduced by the Commonwealth show children under 18, and his opinion was offered to a reasonable degree of medical certainty.

The defendant now argues, as he did at trial, that Dr. Greenwald's opinion was inadmissible because Dr. Tanner himself recently cautioned members of the medical community to refrain from using the Scale to offer expert testimony as to the age of children depicted in computer print-outs and pictures. We disagree that this rendered Dr. Greenwald's testimony inadmissible.

Dr. Greenwald testified that, in a letter to the Pediatric Journal, Dr. Tanner expressed a concern that expert medical witnesses might use the Scale to offer testimony about a child's **specific** age (for example, 11 vs. 14). Dr. Greenwald agreed that this would indeed be an improper use of the Scale, but credibly testified that it was legitimate for such a witness to use the Scale in order to state to a reasonable degree of medical certainty that a particular child either has or has not reached the age of 18, and this is precisely how Dr. Greenwald used the Scale to evaluate the photographs at issue. Dr. Greenwald also credibly testified that Dr. Tanner's rigid position has been wholly rejected by Dr. Tanner's own colleagues. In light of Dr. Greenwald's qualifications, including his own professional, clinical experience as a physician and one who has viewed 10,000-15,000 pornographic images of children over many years, his testimony was clearly admissible.

In addition to considering Dr. Greenwald's credible testimony, the court itself closely examined every photograph. We found that 11 of them, clearly and beyond a reasonable doubt, depicted children below the age of 18 engaging in a prohibited sexual act or in the simulation of such an act. In this context we

note that the Commonwealth need not have presented **any** expert testimony as to the age of the persons in the photographs. It is for the trier of fact to decide, based on all the evidence, whether the Commonwealth has proven beyond a reasonable doubt every element of the crime charged, including the minority status of the victims. Commonwealth v. Robertson-Dewar, 829 A.2d 1207 (Pa.Super. 2003), appeal denied, 839 A.2d 352 (Pa. 2003). This court as fact-finder was fully able to examine the physical appearances of the persons in the photographs and concluded that they were below age 18 using our own experience, powers of observation and common sense. Id.

Megan's Law

Appeal ground #9 is that the court erred in finding the defendant is a sexually violent predator. Megan's Law II defines a sexually violent predator as:

A person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

42 Pa.C.S.A. §9792. Sexually violent predator status does not automatically attach to all persons who commit sexual offenses against children. Commonwealth v. Krouse, 799 A.2d 835 (Pa.Super. 2002). Rather, the Commonwealth has the burden of proving through clear and convincing evidence the defendant meets this definition. Commonwealth v. Maldonado, 838 A.2d 710 (Pa. 2003); Commonwealth v. Dengler, 843 A.2d 1241 (Pa.Super. 2004). The statute contains certain factors for the assessor to consider in evaluating a perpetrator. § 9795.4(b).

The defendant contends: "In the absence of proof regarding the identity of the victims, sexually violent predator [status] should not attach. Moreover, there was no evidence offered at any time during [the defendant's] case that he acted in a violent manner in committing the crime in question." He cites Commonwealth v. Meals, 842 A.2d 448 (Pa.Super. 2004), and Krouse, *supra*. We have already addressed the matter of the identity of the children in connection with the Free Speech Coalition case, *supra*.

As for the lack of evidence of violence, the defendant's contention urges an unduly narrow approach to the section 9795.4 factors. According to Dr. Overcash's report and testimony, the defendant has a mental abnormality or personality disorder — pedophilia — shown by his recurring and intense sexual preference for prepubescent children and children 13 years of age or younger. He was convicted in 1992 for sexually assaulting his 7-year-old stepdaughter 3-4 times a week. The assaults included fellatio and attempted intercourse. The defendant was already a registered Megan's Law offender as a result of that prior conviction and was on parole for that crime when he committed the instant offense. In fact, he committed the instant offense shortly after being placed on parole.

As Dr. Overcash notes, a sexual preference for children is a strong indicator of a high risk of recidivism. The instant offense involved multiple victims, which is associated with greater risk-taking. The same is true for non-familial victims, which is the situation here. Although the defendant does, to some extent, understand how to avoid placing himself in situations which trigger his conduct, he continues to re-offend despite prior incarceration, sexual offender treatment programs, court Orders and intensive supervision.

According to Dr. Overcash, the defendant's behavior is predatory because it was premeditated, it was aimed primarily at satisfying his own sexually deviant needs while using his child victims as mere tools to satisfy those needs, and he has been unable to control his behavior. All these factors place him at great risk for re-offending, according to Dr. Overcash, who gave his opinions to a reasonable degree of professional certainty.

After reviewing the entire record at our disposal, including Dr. Overcash's credible report and testimony, the court found that the Commonwealth met its burden of proving by clear and convincing evidence that the defendant is a sexually violent predator under section 9795.4. Neither the Krouse case nor the Meals case cited by the defendant undermine our conclusion. The Superior Court ruled that the trial courts in those cases lacked a sufficient basis to conclude those defendants were sexually violent predators under the clear-and-convincing standard of proof. In no respect do we take issue with those appellate rulings, but are confident that a review of the entire record contains more than sufficient grounds for this court's conclusion.

Sentencing: Merger

Appeal ground #1 is that the court erred in not merging the charges, either before or at the sentencing. Counsel submitted a sentencing memorandum on this issue, as did the Commonwealth. The court reviewed the memoranda and discussed this issue at length with counsel at the sentencing hearing.

The defendant argued that the 11 convictions should merge for sentencing purposes where §6312(d)(1) makes **possession** of child pornography the illegal act, and the evidence showed he possessed a single stack of photographs found in one location. The Commonwealth countered that merger was inappropriate because each photograph depicted a separate child victim and/or another victimization of the same child, and therefore each photograph constituted a separate criminal act. The court must discern the legislature's intent in order to resolve this question.

Merger may not be appropriate where a defendant's conduct harmed multiple victims, even where such conduct constituted a single criminal transaction. Commonwealth v. Burge, 562 A.2d 864 (Pa.Super. 1989); Commonwealth v. Gray, 489 A.2d 213 (Pa.Super. 1985). The same facts may support multiple convictions and separate sentences for each conviction. Commonwealth v. Anderson, 650 A.2d 20, 21 (Pa. 1994); Commonwealth v. Duffy, 832 A.2d 1132 (Pa.Super. 2003), appeal denied, 845 A.2d 816 (Pa. 2004).

The record shows that, in addition to 6 individual child victims, there were instances in which some of those children were victimized more than once, resulting in the court's 11 separate findings of guilt. Insofar as the purpose of the statute is to protect children from becoming victims of sexual abuse through pornography, we disagree with the defendant's assertion that "whether he possessed 1, 50 or 100" photographs is irrelevant in terms of whether merger is appropriate. (N.T. Proceedings of Sentencing, March 15, 2004, p. 47.).

Appeal ground #2 is that "the correct unit of prosecution should have been one charge, not 27. Moreover, the charges in question were all filed under one indictment, creating the strong suggestion of one criminal act/charge." The defendant argues that this procedure constitutes double jeopardy, and also shows the need to merge the offenses for sentencing purposes. He cites no Pennsylvania authority for the double jeopardy contention, and this is simply another permutation of the merger contention discussed above.

Sentencing Orders

Although not raised in his appeal statement, defense counsel wrote the court a letter dated April 16, 2004, pointing out alleged errors on the sentencing Orders. Counsel cites Commonwealth v. Moran, 823 A.2d 923 (Pa.Super. 2003) which allows the court *sua sponte* to correct certain defects in sentencing Orders even after the appeal has been filed without the need for a formal motion for modification. The defendant points to the following alleged defects: (1) several of the Orders do not state whether the sentences are concurrent or consecutive; (2) two of the Orders are not signed; (3) modifications to the Orders at the sentencing may have resulted in illegal sentences.

The court has reviewed the 11 sentencing Orders and notes that we did ultimately sign each one as required. Also, the court clearly indicated its intention to impose consecutive sentences, evident in the "COMPUTED FROM" language appearing in paragraph one of each Order. The only Order which does not utilize that language is the Order pertaining to Count 2. The court intended to have the sentence for Count 2 begin at the expiration of the sentence in Count 1, and we will clarify this in a separate Order.

The defendant also claims that the court modified the Orders at sentencing and this may have resulted in illegal sentences. The court explained that counts 3 and 4 were modified at the time sentence was imposed. The modifications to the minimum sentence which appear on the Orders were clarified on the record at the hearing. (N.T. Proceeding of Sentencing, March 15, 2004, p. 68.) In making this change, the court failed to adjust the maximum sentences accordingly. The maximum sentence for counts 3 and 4 of Criminal Action #115 of 2001 should be 42 months, and the court will enter a corrective Order in accordance with Commonwealth v. Moran, *supra*.

In appeal ground #10, the defendant asserts that it was improper for three different judges to preside over his case at different times. Judge Walker ruled on the motion to suppress, the undersigned presided over the bench trial and sentencing, and the Honorable Carol L. Van Horn issued the Order directing the defendant to be assessed as to the Megan's Law II criteria. The defendant cites no authority for this allegation, nor does he explain how this prejudiced him in any way. We note that Judge Van Horn's Order was a routine Order carrying out a statutorily-required evaluation.

The defendant also raises the following alleged defect in procedure: Judge Van Horn issued an Order on October 14, 2003 directing the Sexual Offenders Assessment Board to evaluate the defendant. Judge Van Horn issued this Order 12 days rather than 10 days after the undersigned found the defendant guilty on October 2, 2003. Presumably, the defendant relies on §9794(a) found in the previous version of Megan's Law, which required that "the order for an assessment shall be sent to the administrative officers of the board within ten days of the date of conviction." Aside from §9794(a) having been deleted from the current version of the statute, the court fails to see how this 2-day delay prejudiced the defendant and indeed he cites no authority for the proposition that such a delay is justification for allowing him to avoid being assessed by the board.

We submit that, aside from the non-substantive irregularities in the sentencing Orders for count 2 which we have addressed in a separate Order, this court committed no errors in any aspect of this case, and we respectfully request that the conviction and sentence be affirmed.

ORDER OF COURT

Now, this 19th day of May, 2004, pursuant to Pennsylvania Rules of Appellate Procedure 1931(c), it is hereby ordered that the Clerk of Courts of Fulton County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion Sur Pa.R.A.P. 1925(a).

The two crimes were attempted statutory sexual assault (19 Pa.C.S.A. §3122.1) and unlawful contact or communication with a minor (18 Pa.C.S.A. §6318).

(1) Facts of the current offense , including: (i) whether the offense involved multiple victims; (ii) whether the individual exceeded the means necessary to achieve the offense; (iii) the nature of the sexual contact with the victim; (iv) relationship of the individual to the victim; (v) age of the victim; (vi) whether the offense included a display of unusual cruelty by the individual during the commission of the crime; (vii) the mental capacity of the victim. **(2) Prior offense history**, including: (i) the individual's prior criminal record; (ii) whether the individual completed any prior sentences; (iii) whether the individual participated in available programs for sex offenders. **(3) Characteristics of the individual**, including: (i) age of the individual; (ii) use of illegal drugs by the individual; (iii) any mental illness, mental disability or mental abnormality; (iv) behavioral characteristics that contribute to the individual's conduct. **(4) Factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of re-offense**. [Bold supplied].

We must point out that the defendant relies heavily on Commonwealth v. Gatling, 807 A.2d 890 (Pa. 2002) to support his position. Perhaps unfortunately for him, Gatling was issued by only a plurality of the court and is therefore not a precedential holding.

The defendant also offers Girard v. State of Alabama, a December 30, 2003 decision issued by the Alabama Supreme Court, as persuasive authority on the subject of merger in a child pornography possession case. This court declines to consider the Alabama case, not only because it lacks precedential value in Pennsylvania, but also because, insofar as the caption references only a Westlaw citation, it is not clear whether that case is or will be a reported case even in Alabama.

As to Judge Walker's involvement in pretrial matters, it is usually desirable, although not required, for pretrial matters to be handled by a judge other than the trial judge.