

COMMONWEALTH OF PENNSYLVANIA
v. DOUGLAS PAUL WINGERT, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 1272 of 2003

"Sexually violent predator" status under 42 Pa.C.S.A. §9795.4

1. It is the court's responsibility to make the legal determination of whether a defendant is a sexually violent predator under the provisions of the statute.
2. In making this determination, the court considers the facts of the instant case, the defendant's entire criminal record, characteristics of the defendant, the assessment provided by the member of the Sexual Offenders Assessment Board, and any conflicting professional assessments provided by the defendant.
3. The instant defendant was found by clear and convincing evidence to be a sexually violent predator subject to lifetime registration under sections 9795.1 and 9798 of the Registration of Sexual Offenders Act.

Appearances:

Nancy H. Meyers, Esq., *Assistant District Attorney*

Justin McShane, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., March 8, 2005

Introduction

This case originated from a criminal complaint filed by the Pennsylvania State Police against Douglas Paul Wingert (Defendant) on June 11, 2003. The complaint charged Defendant with criminal attempt to commit rape, indecent assault, terroristic threats, unlawful restraint, and simple assault from events that occurred on May 22, 2003. Following a two-day jury trial, Defendant was found guilty on May 13, 2004 of all of the enumerated charges. Sentencing was deferred in this matter to allow Defendant to undergo an assessment by the Pennsylvania Sexual Offender Assessment Board, pursuant to 42 Pa.C.S.A. § 9795.4 to determine whether Defendant met the criteria of a sexually violent predator. Such a determination would require a lifetime registration on the part of Defendant with the Pennsylvania State Police pursuant to Pa.C.S.A. § 9795.1(b).

An assessment was completed and a summary report was prepared on July 21, 2004 by Robert M. Stein, Ph.D., a member of the Sexual Offender Assessment Board under the auspices of the Pennsylvania Board of Probation and Parole. Upon motion of the District Attorney's office filed August 16, 2004, a hearing was scheduled pursuant to Pa.C.S.A. § 9795.4(e) to determine whether the Commonwealth has proved by clear and convincing evidence that Defendant does meet the criteria of a sexually violent predator. Due to unavoidable conflicts, the hearing was continued until February 21, 2005. At the hearing, Dr. Stein testified to his sexual offender assessment summary and his conclusion that Defendant did meet the criteria necessary to be a sexually violent predator. Having reviewed Dr. Stein's report and having heard the evidence presented at the hearing, this matter is now ripe for disposition.

Background of the Case

At about 5:00 o'clock p.m. on May 22, 2003, Ms. Esther Horst, a 21-year-old teacher at Antrim Mennonite School, was alone working at her desk. She noticed from a classroom window a white box truck driving slowly on the road. The truck drove into the parking lot and then back out onto the road. Ms. Horst began to prepare to leave for the day. She began to load items into her car, which required several trips from the school building to her car. During one of these trips, Defendant entered the parking lot and exited the truck. Defendant indicated to Ms. Horst that he was lost and asked her if she knew how to get to the Keystone Ford dealership. She indicated that she could not help him but agreed to get the phone book so he could look up the number. When Ms. Horst went into the building to retrieve the phone book, Defendant remained outside. When she returned he told her that the batteries in his cell phone were dead and could he use the phone. Defendant then went into the building to use the phone, and Ms. Horst continued to load things into her car. When she came back into the building she asked Defendant if was able to get through to the dealership. At this point, Defendant sprang behind her putting his hand over her mouth and a knife to her throat. He then threatened to kill her if she resisted. Defendant then led her to a classroom and told her to place her hands on the wall. She did so without resisting. Defendant then began to fondle Ms. Horst's breasts and vaginal area above and below her clothing. Defendant instructed Ms. Horst to remove her jacket and as she did so her hands became free and she attempted to run away. Defendant caught up to her and tackled her to the floor. He straddled her hips and kept the knife to her throat. He instructed her to turn over onto her stomach so that he could bind her hands behind her with plastic ties. As he got up to allow her to turn over, she ran. This time she was able to exit the building and hide in an adjacent field. Defendant gave up the chase, returned to his truck and left. Ms. Horst obtained help by flagging down a passing car. The police were contacted and Ms. Horst was able to identify Defendant and his vehicle. After investigation, the police identified Defendant as a suspect. Ms. Horst identified him in a photographic line-up. Defendant was ultimately arrested, tried by jury and found guilty on all charges.

Discussion

After conviction but before sentencing of a defendant found guilty of a sexually violent offense as enumerated in Pa.C.S.A. § 9795.1, an assessment must be conducted to determine if the defendant should be classified as a sexually violent predator. A member of the Sexual Offenders Assessment Board (Board), which is composed of psychiatrists, psychologists, and criminal justice experts who are considered experts regarding the behavior and treatment of sexual offenders, conducts the assessment. Pursuant to Pa.C.S.A. § 9795.4(b), in addition to the standards established by the Board for evaluations and evaluators, an assessment shall include but not be limited to the following:

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 sexual 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 reoffense.

42 Pa.C.S.A. § 9795.4(b).

By statute, a sexually violent predator is defined 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. The term includes an individual determined to be a sexually violent predator where the determination occurred in another state, territory, Federal Court, the District of Columbia or by court martial.

42 Pa.C.S.A. § 9792.

By statute, predatory behavior is defined as:

An act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

42 Pa.C.S.A. § 9792.

After a Board member completes the assessment, a written report must be submitted to the District Attorney. 42 Pa.C.S.A. § 9795.4(d). A hearing must then be held to determine whether the individual is a sexually violent predator. 42 Pa.C.S.A. § 9795.4(e)(1). Notice of the hearing must be given to the District Attorney and the individual informing them of the right to call witnesses including experts and the right to cross-examine witnesses. Additionally, the individual shall have the right to counsel and to have counsel appointed if the individual cannot afford one. If the individual requests an additional expert assessment, he or she shall provide a copy of the assessment to the District Attorney prior to the hearing. 42 Pa.C.S.A. § 9795.4(e)(2). At the hearing, the court shall determine whether the Commonwealth proved by clear and convincing evidence that the individual is a sexually violent predator. 42 Pa.C.S.A. § 9795.4(e)(3).

A determination by the Court that Defendant meets the criteria as a sexually violent predator comes with necessary consequences. For instance, the State Police or local municipal police department must inform the victim when the sexually violent predator registers with the police or informs the police of any change in residency. 42 Pa.C.S.A. § 9797(a)(1). In addition to the victim, notice must be given to the sexually violent predator's neighbors, the director of the county children and youth service agency for the county within which the sexually violent predator lives, the superintendent of each school district and the equivalent person for private and parochial schools where the sexually violent predator lives, licensees of day care providers in the municipality in which the sexually violent predator lives, and the president of each college, university or community college within 1000 feet of the sexually violent predator's home. 42 Pa.C.S.A. § 9798(b)(1)-(5). The notice shall contain the name and address of the sexually violent predator, the offense for which he or she was convicted, a statement that he or she has been determined by a court to be a sexually violent predator, and, if available, a photograph. 42 Pa.C.S.A. § 9798(a)(1) (i)-(v). Persons found to be sexually violent predators are subject to lifetime registration. 42 Pa.C.S.A. § 9795.1(b)(3).

The Pennsylvania legislature explains the public policy considerations for drafting the Registration of Sexual Offenders Act as follows:

It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

42 Pa.C.S.A. § 9791(b).

It is the responsibility of the Court to make the legal determination of whether Defendant is a sexually violent predator. 42 Pa.C.S.A. § 9795.4(e)(3). In doing so, the Court considers: (1) the facts of the instant case; (2) Defendant's entire criminal record; (3) characteristics of Defendant; and (4) Dr. Stein's professional assessment and any conflicting professional assessments provided by Defendant. 42 Pa.C.S.A. § 9795.4(b)(1)-(4).

In this case, Dr. Stein, who was appointed to the Sexual Offenders Assessment Board, assessed Defendant and submitted his written report to the District Attorney's office. Dr. Stein is a psychologist licensed to practice in Pennsylvania. He received his Ph.D. in cognitive and neurological psychology from the City College of New York. From 1982 until 1988, Dr. Stein estimates that he treated about 700 persons at a sexual behavioral clinic in New York City. He has done consulting work at the Berks County prison and was a clinical director of a traumatic brain injury clinic. In 1996, he began his own practice. In 1998 he was approached by the State Sexual Offenders Assessment Board and served a four-year term. He is now serving in his second four-year term. During his tenure with the Board, he estimates that he has performed 300 assessments and has testified at hearings on about 100 occasions. Dr. Stein was recognized as an expert at the hearing on this matter, and he was the only witness to present evidence.[1]

1. Facts of the current case

The record is clear that this case involves only one victim, Ms. Horst, a twenty-one year old schoolteacher at the time of the offense. Dr. Stein's report indicates that the acts committed by Defendant did not exceed the means necessary to achieve the offense and that Defendant did not display unusual cruelty toward the victim. However, the Court is mindful that Defendant brandished a knife, put it to the victim's throat and threatened to kill her if she resisted. When Ms. Horst attempted to flee, Defendant pursued her and tackled her to the ground and attempted to bind her wrists. It was only through sheer determination and courage that Ms. Horst was finally able to escape from Defendant and summon help. Therefore, the Court considers Defendant's action to be particularly vicious in relation to this case.

Dr. Stein determined the nature of Defendant's offense to be Paraphilia, Not Otherwise Specified (NOS). The diagnostic criteria for Paraphilia, NOS as specified in the Diagnostic and Statistical Manual-IV-TR (DSM-IV) requires recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving: 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other non-consenting persons. These urges, behaviors or fantasies must occur over a period of at least six months. The urges, behaviors or fantasies cause clinically significant distress or impairment in social, occupational, or other areas of functioning. Dr. Stein looked to the fact that Defendant chose as a victim in this case Ms. Horst who was non-consenting and a complete stranger to Defendant. Dr. Stein compared past victims of Defendant and found that in three prior sexual assaults Defendant only vaguely knew the victims because they lived in the same town, but they were otherwise complete strangers.

Dr. Stein emphasized in his report that predatory behavior is indicated when the attack is against a complete stranger or against someone with whom a relationship has been established for the primary purpose of victimization.[2] In this case, Defendant approached a complete stranger in the person of Ms. Horst and attempted to establish a rapport with her under the guise of needing directions. Defendant did this with the sole intent to victimize Ms. Horst for the purpose of Defendant's sexual gratification. Based on these facts, the Court finds that Defendant's actions in the instant case were predatory as statutorily defined.

2. Prior offense history

Defendant has a long and violent criminal history. At 16 years of age, Defendant was arrested for auto theft and received a warning. At 17 years, he was arrested for theft and received probation. Later, at 17 years, he was arrested for simple assault and theft, was adjudicated delinquent and committed to the Youth Development Center. Upon reaching 18 years, Defendant was again arrested for theft and served 12 months probation. He was later arrested for burglary and received 23 months probation.

At 20 years of age, Defendant's crimes became sexual in nature. In his first offense, he approached a 17-year-old girl as she was walking down the street. He asked her for a "bowl" and then a "light." She responded that she did not have these items. He continued to follow her ultimately brandishing a knife, putting his arm around her and stating, "You're coming with me." The girl raised her arm in defense and Defendant slashed her arm. She was able to escape by running away. Defendant was arrested and sentenced to 5-10 years in state prison.

At 21 years, Defendant was arrested for the rape of a 14-year-old girl and was sentenced to 7-15 years in state prison. Defendant approached the girl and asked to walk her home. He began walking with

her and suggested they proceed through the woods. The victim refused and Defendant grabbed her and placed a knife to her throat. He began to fondle her and instructed her to remove her clothes when two strangers interrupted them. Defendant spoke to the strangers, and they went away. The girl had tried to run away at this time, but Defendant was able to chase her down. He took her inside an apartment complex where he forced her to perform oral sex. He then forced vaginal intercourse. He took her back to the woods and forced her to again perform oral sex. The victim was then able to escape and run home where her mother contacted the police.

When in prison on the rape charge, Defendant attacked a prison employee while doing janitorial duties in the prison chapel. He approached the woman and asked her if she could let him into the storage room so he could clean it. As she opened the door, Defendant grabbed her and pushed her into the back of the closet. He grabbed her right breast while thrusting his lower torso against her body. The victim was able to escape and Defendant was given two additional years. Defendant wound up serving a total of 17 years and was released in 2002.

Shortly after being released, Defendant met a 16-year-old girl at a Harrisburg mall. He drove her to Hershey Park where she worked. After spending some time at the park, they left in the same vehicle. At some point, he stopped the car and began making advances at the girl eventually touching her breast. The victim continued to resist, and Defendant brandished a knife. The victim pushed the knife back at Defendant and received a cut. Defendant eventually apologized and drove the victim home. He pled guilty to simple assault and indecent assault and was sentenced to 18 months to 3 years in state prison.

Dr. Stein noted in his report and in his testimony the powerful significance that Defendant's criminal history had on his determination to classify Defendant as a sexually violent predator. Dr. Stein emphasizes that Defendant has had many victims over the years. All the victims have been strangers to Defendant and all were non-consenting. Defendant attempts to lure the victims into a false sense of security through non-threatening means for the sole purpose of sexual gratification and then uses or threatens force to get them to comply with his demands. Defendant has a long history of recidivism even spanning a 17-year period of incarceration. Defendant went so far as to attack a prison staff person during one period of incarceration. Defendant has continued to offend even after receiving sex offender treatment. Dr. Stein concludes and the Court agrees that Defendant's repeated acts of violence against non-consenting strangers and his inability to respond to treatment make him an especially high risk to re-offend.

3. Characteristics of the offender

Defendant's parents indicated in a 1985 evaluation that Defendant had behavioral difficulties since he was 14 years old. Dr. Stein notes that Defendant was only 21 years of age at the time of his first rape conviction. Dr. Stein informs the Court that persons who begin sexual offending before age 35 are more likely to re-offend. Dr. Stein enumerates Defendant's behavior problems as including: adjudication as a delinquent, criminal versatility, deception to authorities, repeated violent acts, recidivism following treatment, polysubstance abuse beginning at 12 years of age, multiple arrests and convictions, unstable work history, and violent impulsive behavior. Dr. Stein states that these behavior patterns are consistent with a diagnosis of Antisocial Personality Disorder, which in conjunction with Paraphilia NOS describes an individual who is an extremely high risk to the community for nonsexual and sexual criminal behavior.

The criteria for Antisocial Personality Disorder is indicated in the DSM-IV as:

A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

1. Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.
2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for the safety of self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

B. The individual is at least age 18 years.

C. There is evidence of Conduct Disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.

Upon comparing this definition with Dr. Stein's enumeration of Defendant's personal and behavioral characteristics, the Court agrees that Defendant suffers from a mental abnormality or personality disorder that makes Defendant more likely to engage in sexually violent offenses as indicated in the statutory definition of sexually violent predator.

4. Factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of re-offense

Dr. Stein's report mentions several factors related to the personal characteristics of Defendant, the nature of his crimes and the characteristics of his victims that Dr. Stein indicates relate directly to Defendant's likelihood to re-offend. These factors include:

1. Defendant was only 21 years old when he was first convicted of rape. Research indicates that offenders who begin perpetrating sexual offenses at such an early age are more likely to re-offend.
2. Defendant engaged in repeated acts of violence against strangers.
3. Defendant has continued a pattern of violent behavior despite a 17-year period of incarceration.
4. Defendant engaged in a repeated pattern of forced sexual behavior against non-consenting victims over a period of 18 years.
5. Defendant engaged in a repeated pattern of forced sexual behavior against non-consenting victims despite having received sexual offender treatment.
6. Defendant has a long history of polysubstance abuse and admits to being under the influence of controlled substances on the day of the instant attack. Such abuses only aggravate his Paraphilia NOS and Antisocial Personality Disorder.

The Court is satisfied from Dr. Stein's report that Defendant poses a likelihood of recidivism. The Court pays particular attention to Defendant's long history of repeated violent sexual offenses despite incarceration and treatment in concluding that Defendant not only poses a threat of recidivism, but, in fact, is a proven multiple recidivist. In making this conclusion, the Court finds that Defendant is the very type of person from which the public is to be protected under the lifetime registration requirement of the Registration of Sexual Offenders Act.

Conclusion

Considering the facts of the instant case, Defendant's prior offense history, characteristics of Defendant, and factors that are supported in the sexual offender assessment filed as criteria reasonably related to the risk of re-offense, the Court makes the legal determination, pursuant to 42 Pa.C.S.A. § 9795.4, that Defendant is a sexually violent predator subject to lifetime registration pursuant to 42 Pa.C.S.A. §§ 9795.1(b) and 9798.

ORDER OF COURT

And now this 8th day of March, 2005, the Court concludes that the Commonwealth has met its burden of proving by clear and convincing evidence that Defendant is a Sexually Violent Predator. Defendant shall be subject to all registration requirements and notification procedures required pursuant to 42 Pa.C.S.A. § 9795.1(b) and 42 Pa.C.S.A. § 9798.

[1] Defendant did not exercise his right to have an additional expert assessment prepared in this case.

Additionally, Defendant opted not to participate in Dr. Stein's assessment. Dr. Stein indicated in his report and in testimony at the hearing that the absence of an interview with Defendant does not preclude the ability to make a determination as to whether Defendant is a sexually violent predator. The reason for this is because the assessment is primarily derived from an examination of Defendant's behavior throughout his history and this information is readily available from Police reports, court documents, Sexual Offenders Assessment Board investigator's report, and other relevant records.

[2] 42 Pa.C.S.A. § 9792.