

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. :  
 : No. 362 CR 2006  
 MARK FENIMORE, :  
 Defendant :

Jean A. Engler, Esquire Counsel for the Commonwealth  
Assistant District Attorney  
George T. Dydynsky, Esquire Counsel for the Defendant

MEMORANDUM OPINION

Webb, S.J. - December 7, 2010

Here before the Court is the Defendant, Mark Fenimore's (hereinafter "Defendant") Appeal of this Court's Order dated September 15, 2010, which denied Defendant's Post Sentence Motion. We file the following Memorandum Opinion pursuant to Pa. R.A.P. 1925 and further recommend that our Order of September 15, 2010 be affirmed for the reasons set forth in this Memorandum Opinion.

FACTUAL AND PROCEDURAL HISTORY

On September 9, 2009, Defendant<sup>1</sup>, an adult male, plead guilty to two (2) counts of Statutory Sexual Assault<sup>2</sup> (F2), and one (1) count of Indecent Assault<sup>3</sup> (F3), before the late Honorable David W. Addy. As stated by the Commonwealth at the September 9, 2009 Guilty Plea Hearing, and confirmed by Defendant, the Franklin Township Police Department received a complaint on April 20, 2006 from the victim's mother. (N.T.,

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<sup>1</sup> Defendant was born on February 7, 1963.

<sup>2</sup> 18 Pa. C.S.A. § 3122.1

<sup>3</sup> 18 Pa. C.S.A. § 3126(a) (7)

Guilty Plea Hr'g, 9/9/09, p. 21). The complaint alleged that Defendant was engaging in sexual contact with her 11 year-old son. (N.T., Guilty Plea Hr'g, 9/9/09, p. 21). During an interview with the victim, the victim told Chief Beltz of the Franklin Township Police Department that Defendant had touched him through his pants and on his penis. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22).

During a subsequent interview at the Children's Advocacy Center, the victim indicated that Defendant had placed his mouth on the victim's penis, and also asked the victim to do the same, but the victim refused. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22). The victim also indicated that the incidents started in the Fall of 2005 and continued until April 2006. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22). The victim then told his mother about what happened, and she contacted the police. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22).

Following the mother's complaint, an interview was conducted with Defendant on April 27, 2006. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22). A second interview occurred on May 12, 2006, and Defendant admitted to the Pennsylvania State Police that he had sexual contact with the victim in Defendant's mobile home. (N.T., Guilty Plea Hr'g, 9/9/09, pp. 22-23). Defendant stated that he grabbed the victim's penis while the victim had his pants on, and also admitted to giving the victim a "blow job or oral sex." (N.T., Guilty Plea Hr'g, 9/9/09, p. 23). When asked by the Court, Defendant confirmed that these facts were essentially correct. (N.T., Guilty Plea Hr'g, 9/9/09, p. 26). Defendant also specifically admitted to the alleged time frame for all three offenses, namely September 1, 2005 through April 2006. (N.T., Guilty Plea Hr'g, 9/9/09, pp. 27-29). Defendant further admitted that he engaged in sexual intercourse with the victim; that he caused the victim to come into contact with seminal fluid, urine, or feces for the purpose of arousing sexual desire; and that he engaged in indecent contact with the victim on at least two occasions. (N.T., Guilty Plea Hr'g,

9/9/09, pp. 27-30).

Following Defendant's guilty plea, in accordance with 42 Pa. C.S.A. § 9795.4, this Court issued an Order on September 9, 2009 directing that Defendant be assessed by the Pennsylvania Sexual Offenders Assessment Board (hereinafter "Board") in order to determine whether he should be classified as a sexually violent predator. On September 29, 2009, the parties filed a joint "Stipulation to Amend Criminal Information" to amend the time frames charged in the Criminal Information to begin on January 23, 2006 instead of September 1, 2005.<sup>4</sup> On September 20, 2009, this Court entered an Order amending the Criminal Information in this matter as outlined in the above-cited Stipulation.

On December 15, 2009, the Board filed its Report pursuant to the Court's September 9, 2009 Order. On March 16, 2010, a hearing to determine whether Defendant should be classified as a sexually violent predator was held before this Court. At this hearing, the Commonwealth presented evidence by Paula Brust (hereinafter "Ms. Brust"), a licensed professional counselor and a member of the Board, who testified that in her opinion Defendant meets the criteria set forth in the statute to be classified as a sexually violent predator. (N.T., Assessment Hr'g, 3/16/10, p. 25). The Defense presented testimony from Dr. Frank Dattilio, a clinical and forensic psychologist, who testified that it was his opinion that Defendant is not a sexually violent predator. (N.T., Assessment Hr'g, 3/16/10, p. 57). At the conclusion of the hearing, this Court took the matter under advisement.

On March 29, 2010, this Court issued an Order, which concluded that Defendant is a sexually violent predator within the meaning of Megan's Law. This Order was accompanied by a Determination of Court which included the following Findings of Fact and Conclusions of Law:

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<sup>4</sup> The Stipulation was to accommodate the effective date of the statutory section to which Defendant was pleading.

1. The Defendant has been convicted of two counts of Statutory Sexual Assault. The Defendant has also been convicted of Indecent Assault involving a person less than 13 years of age, which is graded as a Felony of the 3<sup>rd</sup> Degree pursuant to 18 Pa. C.S.A. § 3126(a)(7), a sexually violent offense as defined in 42 Pa. C.S.A. § 9792.
2. This case involves a single victim.
3. The Defendant exceeded the means necessary to achieve the offense, in that he extensively groomed the child victim by buying him gifts and offering him money in order to get the victim to trust him.
4. The Defendant was involved in fondling the penis of his victim and having the victim fondling the Defendant's penis. He masturbated in front of the victim to ejaculation. He showed the victim pornographic movies and performed oral sex on the victim and asked the victim to perform oral sex on him. These events took place on numerous occasions.
5. The Defendant was a neighbor to the victim.
6. The victim at the time these assaults began was 10 years of age.
7. The offenses did not include any display of cruelty or sadistic behavior.
8. There is no evidence to indicate that the victim has any mental incapacity.
9. The Defendant has no prior criminal record.
10. The Defendant was 42 years of age at the time the assaults began.
11. There is no evidence that the Defendant was involved in the use of illegal drugs.
12. There is no evidence to indicate that the Defendant has successfully participated in any

type of treatment to date, including sex offender treatment.

13. The following behavioral characteristics contributed to the Defendant's conduct in this matter: The Defendant has committed more than one sexual act in a single instance with a single victim. He has maintained a tolerant attitude toward sexual assaults by claiming that it was the victim who wanted to have sexual contact with him. He has demonstrated intimacy deficits and has shown a deviate sexual interest in minor males.
14. The following facts are supportive in the Sexual Offenders Assessment that has been filed as criteria reasonably related to the risks of re-offending: (a) The Defendant has displayed characteristics that meet the criteria for a diagnosis of pedophilia, in that over the course of at least 6 months the Defendant has recurrent intense sexual fantasy urges and behavior involving a pre-pubescent child less than 13 years of age. (b) The Defendant's conduct in this matter was predatory in nature and it showed careful planning and intent on his part. His over-riding interest was to satisfy his own sexual deviancies.
15. The Court finds as credible the testimony of Paula Brust, who testified on behalf of the Sexual Offender Assessment Board.
16. The Court rejects as not credible the testimony of Dr. Frank M. Dattilio, who testified as a witness for the Defendant.
17. The Defendant does suffer from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses.
18. The Defendant therefore is found to be a sexually violent predator within the meaning of Megan's Law.

On April 8, 2010, this Court sentenced Defendant to a  
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period of incarceration of not less than fourteen (14) months nor more than twenty-eight (28) months on the first count of Statutory Sexual Assault (F2); to a period of incarceration of not less than fourteen (14) months nor more than twenty-eight (28) months on the second count of Statutory Sexual Assault (F2), to run consecutive to the sentence imposed on the first count; and to a period of incarceration of not less than eight (8) months nor more than sixteen (16) months on the count of Indecent Assault (F3), followed by two (2) years of state probation, to run consecutive to the sentence imposed on the second count of Statutory Sexual Assault.

On April 19, 2010, Defendant filed a Post Sentence Motion which alleged, *inter alia*, that this Court erred in finding that Defendant was a sexually violent predator, because the Commonwealth did not prove its case by clear, concise, and convincing evidence; and that this Court erred in relying on Ms. Brust's report, since it took into account unproven conduct to which Defendant did not plead guilty. On September 15, 2010, after consideration of the briefs submitted by counsel, this Court issued an Order denying Defendant's Post Sentence Motion.

On October 15, 2010, Defendant filed a Notice of Appeal of this Court's Order of September 15, 2010 to the Superior Court of Pennsylvania. On October 18, 2010, this Court issued an Order directing Defendant to file of record and serve upon the undersigned a Concise Statement of the matters complained of on appeal, pursuant to Pa. R.A.P. 1925(b), within twenty-one (21) days of the date of docketing of the Order. On November 9, 2010, Defendant filed and served his Concise Statement.

### ISSUES

In his Concise Statement, Defendant raises the following issues on appeal:

1. The lower court abused its discretion and committed errors of law and fact in finding that

the Defendant was a sexually violent predator because the Commonwealth did not prove by clear, concise and convincing evidence that the Defendant was a sexually violent predator.

2. The lower court failed to consider that the Defendant pled only to actions which took place between January 23, 2006, and April 2006.
3. The court improperly found that the Commonwealth's expert should be believed even though the Commonwealth's expert considered allegations against the Defendant which were not proven and to which the Defendant did not plead guilty; the Commonwealth expert admitted that pursuant to the amended information she did not have the requisite six month period necessary to determine if he is a pedophile; the Commonwealth expert admitted that Defendant suffered from no other mental disabilities; that the Defendant did not include any display of cruelty or sadistic behavior; that the Defendant had no prior criminal record and the Defendant was not involved with the use of illegal drugs and the victim was not under any mental incapacity; she had no reports that the Defendant had sexual fantasies as to sex with underage children, and the Commonwealth's expert never spoke to the Defendant.
4. The court erred when it considered the testimony of the Commonwealth's expert that the Defendant groomed the victim by buying him gifts and offering him money when there was little or no evidence to prove such allegations.
5. The Commonwealth expert did not take under consideration that the Defendant never admitted that he showed the victim pornographic movies or that he asked the victim to perform oral sex on him or that he masturbated in front of the victim till ejaculation and other unproven allegations. On the contrary, the Commonwealth never pursued these allegations.
6. The Court erred when it accepted the absurd conclusion by the Commonwealth expert that

because the Defendant warned the victim's mother that the victim was being sexually assaulted by members of the victim's family, this was an attempt to cloak the Defendant's actions.

7. The court erred when it dismissed the testimony of the defense expert, Dr. Frank Dattilio, as not credible. Dr. Dattilio examined the Defendant, administered batteries of psychological tests to him and fully documented the Defendant's life and psychology. He concluded that the Defendant did not meet the criteria of a sexually violent predator.
8. The court erred when it failed to discern the contradiction in the Commonwealth expert's testimony who indicated she could not find Defendant to be a pedophile unless she had evidence that the Defendant had sexual urges or sexual fantasies or behaviors involving sexual activity with children under the age of thirteen over a period of at least 6 months. The amended information alone makes such a finding impossible. The expert further agrees that she does not know if the Defendant fantasized about or had such fantasies except from what she had determined from unproven allegations.
9. When the charges to which Defendant pled and by inference the time line of the underlying allegations were amended to reflect the time period of January 23 to April 2006, the Commonwealth expert could not possibly find a diagnosis of pedophilia.
10. The court did not have jurisdiction over this matter because the sexual offender report was filed more than 90 days after September 9, 2009. It is the position of the Defendant this is jurisdictional in nature and therefore the court has absolutely no power to find him a sexually violent predator because the report did not comply with 42 Pa. C.S.A. § 9795.4(d) where the term "shall" is used in the rules.

However, notwithstanding the foregoing, this Court



concludes that Defendant's Concise Statement essentially raises the following issues for review, which we will address *seriatim* below:

1. Whether this Court has jurisdiction to designate a defendant a sexually violent predator when the Board files its report after the ninety (90) day period allocated under the statute has elapsed.
2. Whether an expert can properly rely on unproven conduct, alleged to have occurred outside of the time frame identified in the criminal information, in designating a defendant a sexually violent predator.
3. Whether this Court's determination that Defendant is a sexually violent predator is supported by clear and convincing evidence.

#### DISCUSSION

Pennsylvania's version of Megan's Law, 42 Pa. C.S.A. §§ 9791-9799.9, creates two levels of mandatory registration for those individuals convicted of certain specific offenses. For those individuals convicted of any of the criminal offenses set forth in Section 9795.1(a), a ten-year period of registration is required. 42 Pa. C.S.A. § 9795.1(a). These offenses are primarily sexual offenses involving minors. For repeat offenders of the offenses specified in Section 9795.1(a), individuals convicted of more serious violent sexual offenses, and individuals classified as sexually violent predators, lifetime registration is required. 42 Pa. C.S.A. § 9795.1(b). With the exception of those individuals classified as sexually violent predators, the defined period of registration arises solely by virtue of the conviction of the offense. Id.

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." 42 Pa. C.S.A. § 9792. Mental abnormality is defined as "[a] congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." Id. Predatory is defined as "[a]n act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization." Id.

Individuals convicted of an offense requiring registration are subject to assessment as a sexually violent predator.<sup>5</sup> After conviction of a qualifying offense, the court must order that the individual be assessed by the Board. 42 Pa. C.S.A. § 9795.4(a). This assessment is to include, but not be limited to, an examination of the following statutory factors:

1. Facts of the current offense, including:
  - a. Whether the offense involved multiple victims.
  - b. Whether the individual exceeded the means necessary to achieve the offense.
  - c. The nature of the sexual contact with the victim.
  - d. Relationship of the individual to the victim.
  - e. Age of the victim.
  - f. Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
  - g. The mental capacity of the victim.
2. Prior offense history, including:
  - a. The individual's prior criminal record.
  - b. Whether the individual completed any prior sentences.

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<sup>5</sup> In addition to registration requirements, a person found to be a sexually violent predator is subject to requirements of lifetime counseling and community notification. 42 Pa. C.S.A. § 9798 and § 9799.4.

- c. Whether the individual participated in available programs for sexual offenders.
3. Characteristics of the individual, including:
    - a. Age of the individual.
    - b. Use of illegal drugs by the individual.
    - c. Any mental illness, mental disability or mental abnormality.
    - d. Behavioral characteristics that contribute to the individual's conduct.
  4. Factors that are supported in a sexual offender assessment field as reasonably related to the risk of reoffense.

42 Pa. C.S.A. § 9795.4(b). Under the statute, the Board is given ninety (90) days from the date of conviction to submit a written report containing its assessment to the district attorney. 42 Pa. C.S.A. § 9795.4(d). Upon the praecipe of the district attorney, the court must hold a hearing to determine whether the individual is a sexually violent predator. 42 Pa. C.S.A. § 9795.4(e)(1). At this hearing the individual is afforded the right to counsel, the right to call and cross-examine lay and expert witnesses, and the right to be heard. 42 Pa. C.S.A. § 9795.4(e)(2).

At an assessment hearing, the Commonwealth is required to prove by clear and convincing evidence that the offender is a sexually violent predator. 42 Pa. C.S.A. § 9795.4(e)(3). This standard "requires evidence that is 'so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.'" Commonwealth v. Meals, 912 A.2d 213, 219 (Pa. 2006). "[T]he 'salient inquiry' for the trial court is the 'identification of the impetus behind the commission of the crime,' coupled with the 'extent to which the offender is likely to reoffend.'" Commonwealth v. Dixon, 907 A.2d 533, 536 (Pa. Super. 2006), quoting Commonwealth v. Bey, 841 A.2d 562, 566 (Pa. Super. 2004).

1. JURISDICTION OF THE COURT TO CLASSIFY DEFENDANT AS A  
SEXUALLY VIOLENT PREDATOR

Defendant alleges that this Court does not have jurisdiction to classify him as a sexually violent predator, because the Board filed its report seven (7) days late, on December 15, 2009. While it is true that Section 9795.4(d) required the Board to submit its report within ninety (90) days of September 9, 2009, the date of Defendant's conviction, that section does not prescribe any remedy for a late filing. Additionally, in his Brief, Defendant does not provide any authority in support of his contention that this Court lacks jurisdiction due to the Board's untimely filing. "When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof." Commonwealth v. Sanford, 445 A.2d 149, 150 (Pa. Super. 1982). Thus, in this regard, Defendant's appeal merely represents "the act of a disappointed litigant raising sails on the ship of a defeated cause, hoping that some vagrant or wanton wind might bear the craft into a happier port. [We] believe that the [Defendant] [is] aboard a ship [devoid of] a cargo of legal and justified complaint." Thomas v. Mills, 130 A.2d 489, 493 (Pa. 1957).

Moreover, Defendant has not alleged that he has suffered any prejudice as a result of the Board's late filing. Prejudice "includes any substantial diminution of defendant's ability to present factual information in the event of trial which has been brought about by plaintiff's delay." American Bank & Trust Co. v. Ritter, Todd & Haayen, 418 A.2d 408, 410 (Pa. Super. 1980). Trial courts have broad discretionary power in considering procedural issues. Allison v. Merris, 493 A.2d 738, 740 (Pa. Super. 1985). "[P]rocedural rules are not ends in [and of] themselves, and . . . the rigid application of our rules does not always serve the interests of fairness and justice." Womer v. Hilliker, 908 A.2d 269, 276 (Pa. 2006). Thus, "[i]t has been

our policy to overlook . . . . procedural errors when a party has substantially complied with the requirements of the rule and no prejudice would result . . . ." Commonwealth v. Laskaris, 561 A.2d 16, 20 (Pa. Super. 1989), quoting Feingold v. Southeastern Pennsylvania Transp. Auth., 517 A.2d 1270, 1272 (Pa. 1986).

In this case, Defendant's ability to present his case has not been affected by the Board's delay in filing its report. At the assessment hearing, Defendant's counsel cross-examined the Commonwealth's expert and also presented the testimony of his own expert. Thus, Defendant has enjoyed the full benefit of the procedural protections afforded to him, despite the late filing of the report. Accordingly, Defendant has not suffered any prejudice, and therefore the late filing of the report is a harmless error that does not affect this Court's jurisdiction to classify Defendant as a sexually violent predator.

2. RELIANCE ON UNPROVEN CONDUCT BY THE COMMONWEALTH'S EXPERT  
IN CONCLUDING THAT DEFENDANT IS A SEXUALLY VIOLENT PREDATOR

Defendant alleges that this Court erred in accepting the opinion of the Commonwealth's expert, Ms. Brust, because in forming that opinion, Ms. Brust relied upon allegations which were not proven; to which Defendant did not plead guilty; and which occurred outside the time frame contained in the Criminal Information. Pa. R. Evid. 703 provides that:

"[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

At the assessment hearing, when asked how she became involved in this case, Ms. Brust outlined the procedure that is undertaken by the Board when an assessment is ordered. She testified that a board member and an investigator are assigned to the case. (N.T., Assessment Hr'g, 3/16/10, p. 9). The investigator then compiles all of the information available on the defendant, and offers to interview the defendant, who may choose to participate or not to participate. (N.T., Assessment Hr'g, 3/16/10, p. 9). The assigned board member then prepares a report indicating whether that board member believes the defendant meets the statutory criteria to be classified a sexually violent predator. (N.T., Assessment Hr'g, 3/16/10, p. 9).

In this case, Ms. Brust conducted an assessment of Defendant based on the information compiled for her by the investigator. (N.T., Assessment Hr'g, 3/16/10, p. 10). She testified that the documents she reviewed include, *inter alia*, the investigator's report; the Criminal Information; the Criminal Complaint; the Affidavit of Probable Cause; the interview of Defendant; the interview of the victim; the preliminary hearing transcript; and statements from the victim, his mother and other parties.<sup>6</sup> (N.T., Assessment Hr'g, 3/16/10, p. 12). Accordingly, given Ms. Brust's testimony that that the investigator compiles the information relied upon in making assessments, this Court concludes that this information is reasonably relied upon by experts in determining whether an individual should be classified as a sexually violent predator.

Thus, in forming her opinion that Defendant is a sexually violent predator, it was proper for Ms. Brust to rely upon the information she reviewed, whether or not it was "proven" to Defendant's satisfaction. As a result, it is irrelevant that the documents relied upon by Ms. Brust may contain allegations of conduct beyond that to which Defendant pled guilty, or that occurred outside of the time frame contained within the Criminal

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<sup>6</sup> The list of documents relied upon by Ms. Brust is also reflected in her report. See Commonwealth's Ex. 2

Information.

**3. EVIDENTIARY SUPPORT FOR THIS COURT'S DETERMINATION THAT  
DEFENDANT IS A SEXUALLY VIOLENT PREDATOR**

Finally, Defendant alleges that this Court erred in finding that Defendant is a sexually violent predator, because the Commonwealth did not present clear and convincing evidence to support such a finding. However, the record in this matter clearly supports this Court's conclusion that Defendant is a sexually violent predator, as well as the other Findings of Fact and Conclusions of Law set forth in the March 29, 2010 Determination of Court.

In this case, Defendant admitted to sexually assaulting the victim between the September 1, 2005 and April 2006. (N.T., Guilty Plea Hr'g, 9/9/09, pp. 22, 27-29)<sup>7</sup>. Defendant performed oral sex on the victim and touched his penis. (N.T., Guilty Plea Hr'g, 9/9/09, pp. 22-23). Defendant also admitted to the police that he fondled the victim's penis. (N.T., Assessment Hr'g, 3/16/10, p. 17). Additionally, he asked the victim to perform oral sex on him, but the victim refused. (N.T., Guilty Plea Hr'g, 9/9/09, p. 22). Defendant further admitted to causing the victim to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire, and to engaging in indecent contact with the victim on at least two occasions. (N.T., Guilty Plea Hr'g, 9/9/09, pp. 27-30).

The testimony of Ms. Brust, which this Court found credible, supports the conclusion that Defendant suffers from a "mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses." 42 Pa. C.S.A. § 9792. At the assessment hearing, Ms. Brust testified

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<sup>7</sup> See Commonwealth v. Morrison, 878 A.2d 102 (Pa. Super. 2005) (holding that the defendant admits the details of the crimes contained in the factual basis by pleading guilty), and Commonwealth v. Mullins, 76 Pa. D. & C.4<sup>th</sup> 129 (C.P. Bucks 2005) (relying on the facts admitted by the defendant at the guilty plea hearing in finding that he is a sexually violent predator).

that, based on her assessment, it was her opinion that Defendant has met the Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition (hereinafter "DSM-IV") criteria for pedophilia.<sup>8</sup> (N.T., Assessment Hr'g, 3/16/10, p. 22). According to Ms. Brust, the essential features of pedophilia are: 1) recurrent, intense sexual arousing fantasies, sexual urges or behaviors involving sexual activity with a child under the age of 13 over a period of six (6) months; 2) action on these sexual urges or the existence of more distress due to these urges and fantasies; and 3) the offender is at least sixteen (16) years old and at least five (5) years older than the victim. (N.T., Assessment Hr'g, 3/16/10, p. 23).

Ms. Brust concluded that Defendant suffers from pedophilia because he acted on his sexual urges for a period of eight (8) months, and demonstrated his arousal to the victim by ejaculating and masturbating in his presence<sup>9</sup>. (N.T., Assessment Hr'g, 3/16/10, p. 23). She also concluded that Defendant's diagnosis of pedophilia motivated him in this case. (N.T., Assessment Hr'g, 3/16/10, p. 23). She also concluded that Defendant's diagnosis "predisposes him towards committing certain sex offenses and will cause him to have an internal drive towards repeating sexual crimes in the future." (N.T., Assessment Hr'g, 3/16/10, p. 23). Additionally, she stated that "having a male victim increases the likelihood of recidivism." (N.T., Assessment Hr'g, 3/16/10, p. 22).

Ms. Brust concluded that Defendant's behavior was predatory in nature because "[h]is offenses showed planning and intent."

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<sup>8</sup> We note that this Court is not bound by the criteria for pedophilia set forth in the DSM-IV. See Commonwealth v. Dengler, 890 A.2d 372, 383 (Pa. 2005) (holding that "[t]he statute does not require proof of a standard of diagnosis that is commonly found and/or accepted in a mental health diagnostic paradigm.")

<sup>9</sup> While Defendant argues that Ms. Brust cannot diagnose Defendant with pedophilia because the Criminal Information reflects only a three-month time frame, we have already determined that it was proper for Ms. Brust to rely on information outside of the time frame reflected in the Criminal Information. In any event, since Defendant admitted that the assaults occurred over an eight (8) month period when he plead guilty, this Court properly considered that fact when considering whether Defendant suffers from pedophilia.



(N.T., Assessment Hr'g, 3/16/10, p. 24). She notes that he groomed the victim extensively "for purposes of sexual victimization." (N.T., Assessment Hr'g, 3/16/10, pp. 24-25). Defendant would buy the victim items such as fishing gear and a pellet gun, give him money and gifts, show him pornographic videos, and allow him to use his computer. (N.T., Assessment Hr'g, 3/16/10, pp. 15-16, 19, 24). Defendant told the victim not to tell anyone about what he was doing to him, and he would also place a cane against the door, which would fall if the door was opened, so he would know if someone entered the home while he was assaulting the victim. (N.T., Assessment Hr'g, 3/16/10, pp. 16-17). In her report, Ms. Brust also notes her opinion that Defendant would have continued sexually assaulting the victim if he had not been caught. (Commonwealth's Ex. 2).

Ms. Brust's credible testimony also supports the conclusion that Defendant's conduct exceeded the means necessary to achieve the offenses he committed. She determined that Defendant exceeded the necessary means by extensively grooming the victim, and abusing the trust that he developed with the victim, "in order to satisfy his sexual deviancies." (N.T., Assessment Hr'g, 3/16/10, p. 19).

Ms. Brust also presented testimony regarding the factors outlined in Section 9795.4. As to the nature of the sexual contact, she testified that sexual contact occurred between Defendant and the victim on multiple occasions. (N.T., Assessment Hr'g, 3/16/10, p. 20). This sexual contact included Defendant fondling of the victim's penis; Defendant having the victim fondle Defendant's penis; Defendant performing oral sex on the victim; Defendant masturbating to ejaculation in front of the victim; Defendant asking the victim to perform oral sex on him; and Defendant showing the victim pornography<sup>10</sup>. (N.T., Assessment Hr'g, 3/16/10, p. 20). As to the relationship between Defendant and the victim, Ms. Brust stated that they were

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<sup>10</sup> As previously noted, during the Guilty Plea Hearing on September 9, 2009, Defendant admitted that he engaged in much of this conduct.

neighbors. (N.T., Assessment Hr'g, 3/16/10, p. 20).

As to special characteristics of Defendant, she testified that he sexually assaulted a male, unrelated minor victim over a period of eight (8) months, and maintains a tolerant attitude toward sexual assault by portraying the victim as the initiator of the sexual activity. (N.T., Assessment Hr'g, 3/16/10, p. 21). Based on the above, Ms. Brust opined that Defendant has a "sexually deviant pathway to offending." (N.T., Assessment Hr'g, 3/16/10, p. 22). She also testified that she found no unusual cruelty in this case, that Defendant has no prior criminal record, and that it was unknown whether the victim had any mental or physical disabilities, whether Defendant used illegal drugs, or whether Defendant successfully participated in any sort of treatment, including sex offender treatment. (N.T., Assessment Hr'g, 3/16/10, pp. 20-21; Commonwealth's Ex. 2).

While Defendant's Concise Statement focuses on the factors that weigh against finding that he is a sexually violent predator, there is simply no requirement that any particular number of the statutory factors "be present or absent in order to support an SVP designation. The factors are not a check list with each one weighing in some necessary fashion for or against SVP designation." Commonwealth v. Brooks, --- A.3d ---, 2010 Pa. Super. 185 (2010), citing Commonwealth v. Feucht, 955 A.2d 377, 381 (Pa. Super. 2008). The fact that Ms. Brust did not interview Defendant does not affect the ultimate issue of whether Defendant is a sexually violent predator, because she had ample information available to her in conducting her assessment<sup>11</sup>. See Commonwealth v. Woods, 909 A.2d 372, 381 (Pa. Super. 2006) (holding that an expert who reviewed the defendant's criminal history records, treatment records, and mental health assessments had ample information upon which to base an

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<sup>11</sup> We also note that this argument is somewhat disingenuous, because Defendant did not participate in the Board's assessment, despite his ability to do so. (N.T., Assessment Hr'g, 3/16/10, pp. 9, 36). See also Woods, 909 A.2d at 375 n.7.

assessment.)

While Defendant also claims that this Court erred in not accepting the testimony of Dr. Dattilio, "questions of credibility and the weight to be accorded to witness testimony are issues within the sound discretion of the trial court." Commonwealth v. Bennett, 827 A.2d 469, 475 (Pa. Super. 2003). Thus, as "it is for the [trial court] to make credibility determinations, [] the [trial court] may believe all, part, or none of a witness's testimony." Commonwealth v. Lee, 956 A.2d 1024, 1029 (Pa. Super. 2008) (citation omitted). Since this Court did not find Dr. Dattilio's testimony credible, his opinion that Defendant is not a sexually violent predator is irrelevant. Therefore, based on the evidence of record, this Court concludes that the Commonwealth presented clear and convincing evidence that Defendant is a sexually violent predator because he suffers from "a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." 42 Pa. C.S.A. § 9792.

#### CONCLUSION

For the foregoing reasons, this Court recommends that our Order of September 15, 2010 denying Defendant's Post Trial Motion be affirmed.

BY THE COURT:

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Richard W. Webb, S.J.