

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 232-2010
	:	
Michael Degilio,	:	
Defendant	:	
James Lavelle, Esquire		Counsel for the Commonwealth
John Waldron, Esquire		Counsel for the Defendant

MEMORANDUM OPINION

Nanovic, P.J. - June 14, 2011

Defendant, a licensed psychologist, has been charged with sexually assaulting a patient who came to him for counseling after discharge from a hospital stay due to mental health issues. The Defendant does not dispute that the sexual encounter occurred but asserts that the conduct was consensual. Defendant has filed an omnibus pre-trial motion asking that the charges against him be quashed for insufficient evidence presented at the preliminary hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Michael Degilio, was arraigned on or about January 25, 2010, and charged with three counts: involuntary

deviate sexual intercourse (forcible compulsion)<sup>1</sup>, indecent assault (forcible compulsion)<sup>2</sup>, and indecent exposure<sup>3</sup>. A preliminary hearing was held on April 9, 2010, before District Justice Lewis and all charges were bound over. Defendant filed an Omnibus Pre-trial Motion on May 28, 2010, through counsel, Attorney Waldron. Defendant asks that a motion to quash be granted as to all three charges, arguing that the evidence presented by the Commonwealth through Assistant District Attorney Lavelle at the preliminary hearing was insufficient as a matter of law for each count.<sup>4</sup>

The charges stem from events which occurred in February of 2009. The alleged victim was to receive out-patient psychological counseling from the Defendant following hospitalization for depression and a nervous breakdown. The victim initially sought treatment from another provider who was unavailable. The victim then made an appointment with the Defendant.

Upon arriving at the Defendant's office on February 20, 2009, the office was empty. The victim filled out applicable paper work and paid a twenty dollar co-pay. She was then escorted to an inner office by the Defendant where they

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<sup>1</sup> 18 Pa.C.S.A. §3123(a)(1)

<sup>2</sup> 18 Pa.C.S.A. § 3126 (a)(2)

<sup>3</sup> 19 Pa.C.S.A. § 3127(a)

<sup>4</sup> The Omnibus Pre-trial Motion also contained a request for a bill of particulars. However, this claim was dismissed by Order of the Court dated September 30, 2010, due to agreement by the Commonwealth to provide the requested information to the Defendant.

were alone. Once in the office, the Defendant expressed an interest in the victim and dimmed the lights after asking the victim if this was alright with her. The Defendant asked the victim questions of a sexual nature, whether she ever cheated on her husband, and asked what would happen if the two had a sexual encounter. The Defendant allegedly informed the victim that if anything happened it needed to be a secret since such conduct would be unprofessional. The victim asked the Defendant if he would be able to help her with her mental illness and the Defendant responded affirmatively to this. The victim then made a follow up appointment with the doctor.

The victim's second appointment was four days later. The Defendant again met the victim alone in the office. The Defendant continued to make conversation that was sexual in nature. After some advances, the Defendant kissed the victim who allegedly returned the kiss. Following the kiss the Defendant fondled the victim's breast. Then the Defendant took off his pants and guided the victim to perform oral sex on him.<sup>5</sup>

After this incident the victim left. She told a friend what had happened. The victim was later again admitted to the hospital due to another bout with depression and at this time she reported the incident to hospital staff and the police.

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<sup>5</sup> The Defendant used his hand to bring the victim's hand and head toward him for the encounter.

The Defendant was arrested and charged with the offenses previously listed.

The Defendant has filed an Omnibus Pre-trial Motion seeking to quash the charges against him due to the sufficiency of the evidence presented at the Preliminary Hearing. The Defendant does not dispute that the sexual encounter occurred. Rather the Defendant asserts that the victim was a willing participant in the sex act. The Defendant alleges that no force or threat of force was used to coerce this encounter and that, in his view, the victim accepted and enjoyed the encounter. The issue to be decided is whether there was sufficient evidence presented at the preliminary hearing to make out a *prima facie* case against the Defendant on each of the three offenses charged.

#### DISCUSSION

Defendant seeks to have the charges against him dismissed for lack of sufficient evidence presented at the preliminary hearing.

The principle function of a preliminary hearing is to protect the individual against unlawful detention. The prosecution, therefore, has the burden of establishing "at least *prima facie* that a crime has been committed [a]nd the accused is the one who committed it.... The prosecution must establish "sufficient probable cause" that the accused has committed the offense.

Commonwealth v. Prado, 393 A.2d 8, 10 (Pa. 1978) (citations omitted). Further,

[t]he Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. [T]he Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged. Moreover, the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense. Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.

Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa.Super. 2001) (citations and quotation marks omitted).

In our consideration of whether the charges should be dismissed we look only to see whether the Commonwealth was able to establish a *prima facie* case against the Defendant. In making this decision, all evidence must be viewed in favor of the Commonwealth. Evidence must be presented establishing every element of each of the charges. The charges and their elements are as follows:

Count 1: 18 Pa.C.S.A. § 3123(a)(1) (Involuntary deviate sexual intercourse) (F1)  
(a) Offense defined.--A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:  
(1) by forcible compulsion....

Count 2: 18 Pa.C.S.A. § 3126(a)(2) (Indecent assault) (M1)  
(a) Offense defined.--A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and:

\* \* \*

(2) the person does so by forcible compulsion....

Count 3: 18 Pa.C.S.A. § 3127(a) (Indecent exposure) (M2)  
(a) Offense defined.--A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

In order to allow the case to proceed to trial, the Commonwealth is required to show probable cause that Defendant's alleged conduct meets each element of each of the above crimes charged. At this stage of the proceedings, in determining the sufficiency of the evidence, the Commonwealth's evidence is accepted as true. See Commonwealth v. Back, 389 A.2d 141, 142 (Pa.Super. 1978).

'[F]orcible compulsion' . . . includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will. It is neither desirable nor appropriate to attempt to delineate all of the possible circumstances that might tend to demonstrate that sexual intercourse was engaged in by forcible compulsion . . . That delineation will evolve in the best tradition of the common law - by development of a body of case law applying section 3121 (as it has been here construed) and the principles of construction set

forth in the Crimes Code. . . . When forcible compulsion . . . consists of 'moral, psychological [sic] or intellectual force,' the force may be less tangible but is not less susceptible of proof, and the critical circumstances and evidence here will be those which tend to prove or disprove compulsion or lack of consent, i.e. that such force was 'used to compel a person to engage in sexual intercourse against that person's will.'

Commonwealth v. Smolko, 666 A.2d 672, 675 (Pa.Super. 1995) (quoting Commonwealth v. Rhodes, 510 A.2d 1217, 1226-27 (Pa. 1986)); see also 18 Pa.C.S.A. § 3101 (Definition of "Forcible Compulsion"). "[Wh]ere there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement . . . is not met." Id. at 676.

Counts one and two require forcible compulsion. The other elements of the charges have been met. Deviate sexual intercourse is defined to include oral sex which occurred in the instant case. See 18 Pa.C.S.A. § 3101 (Definition of "Deviate Sexual Intercourse"). It is not disputed that this act occurred between the victim and the Defendant. The sexual encounter would also qualify as indecent contact for purposes of the second count. See 18 Pa.C.S.A. § 3101 (Definition of "Indecent Contact"). The sole issue is whether the encounter was coerced.

No evidence was offered to show any physical force or threat of physical force occurred between the Defendant and the

victim. What remains is whether the Defendant in his position as a counselor to a patient exercised psychological coercion over the victim who had come to him for help. While the defense argues that the encounter was consensual and that Defendant had not treated the victim long enough to have developed a relationship of authority over her, at this time we accept the evidence in the light most favorable to the Commonwealth. We accept the testimony of the victim that she was mentally coerced into the sexual encounter due to the Defendant's position of authority over her and assurances that he could help her with her mental condition. With this determination, the elements of the first two charges have been met and neither charge will be quashed.

The third charge is that of indecent exposure. Indecent exposure involves the showing of one's genitals in a public place or in a place where it will cause offense, affront, or alarm. It is undisputed that Defendant did not expose his genitals in a public place as the sexual encounter occurred in Defendant's closed office. However, if the exposure occurred under circumstances likely to offend, or cause affront or alarm, even if in a non-public location, then the elements of indecent exposure have been met. The victim testified that she was in Defendant's office for counseling in her recovery from depression, following a nervous breakdown; that she was an



unwilling participant; and that she was offended by Defendant's conduct. These circumstances, when looked upon most favorably to the Commonwealth, satisfy the elements of indecent exposure.

#### CONCLUSION

Having found that the Commonwealth has presented sufficient evidence in support of each element of each of the charges against Defendant, Defendant's motion to quash for insufficient evidence will be denied.

BY THE COURT

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P.J.

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ORDER

AND NOW, this \_\_\_\_\_ day of June, 2011, upon consideration of the Defendant's, Michael Degilio, Omnibus Pretrial Motion, and in consideration of the parties' submissions thereto and the argument thereon, it is hereby

ORDERED and DECREED that Defendant's Omnibus Pretrial Motion in the nature of a Motion for Writ of Habeus Corpus is DISMISSED and DENIED.

BY THE COURT:

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P.J.