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

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. CR-236-2016
	:	
JOSEPH F. CURRAN,	:	
	:	
Defendant	:	

Seth E. Miller, Esquire — Counsel for the Commonwealth
Assistant District Attorney
Brian J. Collins, Esquire — Counsel for the Defendant

MEMORANDUM OPINION

Serfass, J. – October 10, 2017

Joseph F. Curran, (hereinafter "Defendant"), has taken this appeal from our Order of Sentence entered in this matter on November 14, 2016, and made final when his timely post-sentence motion was denied on July 13, 2017. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that the aforesaid order and denial be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

On June 16, 2016, Defendant entered a plea of guilty to one (1) count of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1). Following this plea, a hearing was scheduled on October 27, 2016, to determine whether Defendant met the criteria to be classified as a sexually violent predator (hereinafter "SVP") pursuant to 42 Pa. C.S.A. § 9799.24(e). Following that hearing during which

testimony was presented by experts for both the Commonwealth and Defendant, this Court found that Defendant met the criteria to be classified as an SVP. On November 14, 2016, "Defendant's Post-Sentence Motions" were filed and oral argument was held on February 13, 2017. At the conclusion of oral argument, we directed counsel for the parties to submit briefs in support of their respective positions on the post-sentence motion. Defendant's brief was filed on February 16, 2017, and the Commonwealth's brief was filed on February 28, 2017.

On April 10, 2017, Defendant filed a "Praecipe to Enter Order Pursuant to Pa.R.Crim.P. Rule 720 (B)(3)(c)" requesting that an order be entered in accordance with Pa. R.Crim.P. 720(B)(3)(c) denying Defendant's post-sentence motion by operation of law as more than one-hundred twenty (120) days had passed since the filing of the post-sentence motion and this Court had yet to enter its decision. On July 13, 2017, the Carbon County Clerk of Courts entered an Order denying Defendant's post-sentence motion by operation of law.

On August 8, 2017, Defendant filed a Notice of Appeal to the Pennsylvania Superior Court in the Office of the Carbon County Clerk of Courts. However, no such notice was served on the trial court. Defendant's Notice of Appeal was not docketed in the Superior Court until September 20, 2017, and this Court was unaware that an appeal had been filed until September 25, 2017, when a

copy of the Superior Court's appeal docket sheet and cover letter directed to President Judge Roger N. Nanovic was received in chambers of the undersigned. As a result, this Court did not receive actual notice of the appeal filed in this matter until September 25, 2017, which left insufficient time for this Court to enter an order directing Defendant to file of record a concise statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). However, without an order from this Court, Defendant filed a "Concise Statement of Matters Complained of on Appeal" on September 29, 2017, raising the following issues for appellate review:

1. Whether the application of Pennsylvania's Sex Offender Registration and Notification Act (hereinafter "SORNA") to Defendant is an illegal *ex post facto* punishment;
2. Whether the retroactive application of SORNA to Defendant violates the Pennsylvania Constitution's Due Process Clause by creating an irrebuttable presumption of dangerousness and denying Defendant the fundamental right to reputation;
3. Whether our determination that Defendant was a SVP should be reversed considering the procedure employed to make that determination involved a finding of fact that increased the penalty without having been submitted to a jury and proved beyond a reasonable doubt in violation of Defendant's Due

Process rights under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 113 S.Ct. 2151 (2013);

4. Whether our determination that Defendant was an SVP was based upon insufficient evidence; and
5. Whether our determination that Defendant was an SVP was contrary to the weight of the evidence so as to shock one's sense of justice.

DISCUSSION

Defendant's issues raised on appeal can be divided into four (4) categories: 1. *Ex post facto* claims relative to SORNA, which Defendant failed to raise in his post-sentence motion; 2. a due process claim which Defendant failed to raise in his post-sentence motion; 3. a challenge to the sufficiency of the evidence supporting our finding that Defendant is an SVP; and 4. a challenge to our determination that Defendant is an SVP as being against the weight of the evidence. We will now address each issue in turn.

I. Defendant's *ex post facto* claims are waived as they were not raised in his post-sentence motion

Our Order of Sentence in this matter was entered in accordance with the settled law of this Commonwealth on November 14, 2016. Defendant filed his post-sentence motion on that same date challenging our determination that he is a sexually violent

predator.[1] In the motion, Defendant seeks reconsideration of his sentence claiming that our SVP determination was contrary to the weight of the evidence and that the Commonwealth had failed to meet its burden of clear and convincing evidence in demonstrating that Defendant was likely to re-offend, that Defendant's conduct was predatory, and that Defendant acted due to a mental abnormality or personality disorder that made him likely to engage in predatory sexually violent offenses.

Neither in his post-sentence motion nor at any time prior thereto did Defendant ever raise the issue that application of SORNA in this case constituted an "illegal *ex post facto* punishment." This issue was first raised in Defendant's concise statement of matters complained of on appeal. Moreover, it is to be noted that at the time of his sentencing hearing on November 14, 2016, Defendant executed a post-sentencing colloquy form wherein he acknowledged his appellate rights after sentencing. Pursuant to this form, Defendant was advised, *inter alia*, that in any post-sentence motion filed on his behalf, all requests for relief must be stated with specificity and particularity, and consolidated in the motion. Both Defendant and his counsel signed

[1] We note that Defendant was sentenced to undergo imprisonment in the Carbon County Correctional Facility for a period of not less than three (3) months nor more than twenty-four (24) months less one (1) day. He did not challenge the incarceration aspect of his sentence.

the appellate rights form on November 14, 2016, and that form was filed and incorporated into the sentencing hearing record.

We acknowledge the Pennsylvania Supreme Court's recent decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017), which was issued on July 19, 2017, and held that retroactive application of SORNA's registration provisions to the defendant violated the *ex post facto* clauses of both the federal and state constitutions. While we recognize that there may be merit to Defendant's *ex post facto* claims in light of Muniz, as previously observed, Defendant failed to raise this issue in his post-sentence motion or at any time beforehand. We note that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). *See* Commonwealth v. Askew, 907 A.2d 624, 626-27 (Pa.Super. 2006) (holding defendant who was found to be an SVP pursuant to Megan's Law II failed to preserve for appeal his claims challenging the constitutionality of Megan's Law II by not raising the claims of unconstitutionality in a post-sentence motion); *see also* Cherry v. Willer, 463 A.2d 1082 (Pa.Super. 1983) ("[I]n civil as well as criminal cases, only issues specifically raised in post-verdict motions can be considered and will be preserved for appeal"). Accordingly, Defendant's newly raised *ex post facto* claim relative to the application of SORNA in his sentence must be dismissed.

II. Because Defendant failed to raise due process claims in his post-sentence motion, such claims are waived and cannot be raised on appeal

Like his *ex post facto* claims, Defendant first raised a due process claim under Apprendi, 530 U.S. 446, and Alleyne, 133 S.Ct. 2151, in his concise statement of matters complained of on appeal. For the reasons discussed hereinabove, Defendant has failed to preserve this issue for appellate review because he did not include it in his post-sentence motion. Therefore, his due process claims must be dismissed.

III. This Court's finding that Defendant is a Sexually Violent Predator is supported by clear and convincing evidence

Defendant claims that the Commonwealth failed to prove by clear and convincing evidence that Defendant acted due to mental abnormality or personality disorder which made him likely to engage in predatory offenses, that Defendant was likely to reoffend, and that Defendant was "predatory" as defined in 42 Pa. C.S.A. § 9799.12.

The standard of proof governing the determination of SVP status is clear and convincing evidence, which is an intermediate test, falling above the preponderance of the evidence standard but below the highest standard, proof beyond a reasonable doubt. Commonwealth v. Morgan, 16 A.3d 1165, 1168 (Pa.Super. 2011). In claims involving sufficiency of the evidence, all of the evidence

and reasonable inferences drawn therefrom are viewed in the light most favorable to the Commonwealth. *Id.* The Superior Court will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence that each element of the statute has been satisfied. *Id.* In order to carry its burden of proving that a sex offender is an SVP, the Commonwealth is only obliged to provide the opinion of a qualifying criminal justice expert. Commonwealth v. Conklin, 897 A.2d 1168, 1178 (Pa. 2006).

In this matter, Dr. Mary Muscari of the Sexual Offenders Assessment Board testified, after evaluating Defendant's case, that Defendant had acted due to unspecified paraphilic disorder, which can override his emotional and/or volitional control and predisposes him towards committing sexual offenses. Taken as a whole, Dr. Muscari's analysis of the factors set forth at 42 Pa. C.S.A. § 9979.24(b) is comprehensive and her findings support a diagnosis of unspecified paraphilic disorder. Dr. Muscari testified that Defendant's paraphilic disorder may wax and wane, but it is a lifetime disorder that can be managed through treatment and supervision. Simply because Defendant has not re-offended in the past decade does not mean that he will not or that he does not pose a risk to re-offend in the future. Thus, the Commonwealth has presented clear and convincing evidence that Defendant acted due

to unspecified paraphilic disorder and that Defendant is likely to re-offend.

Defendant's acts were also "predatory," as defined in the statute,[2] because he maintained his relationship as the victim's uncle, at least in part, to facilitate victimization. This finding was supported by Dr. Muscari's report, which indicated that the assaults occurred at Defendant's residence when the victim's aunt would leave Defendant alone to supervise the victim. Defendant maintained this supervisory role to facilitate his assaults of the victim. Therefore, the Commonwealth has presented clear and convincing evidence that Defendant's conduct was predatory. When viewed in the light most favorable to the Commonwealth, the evidence in this case is sufficient to support the finding that Defendant is a sexually violent predator.

IV. This Court's finding that Defendant is a Sexually Violent Predator is not against the weight of the evidence

Finally, Defendant claims that this Court's determination that he is an SVP was based solely upon the assumption that he suffers from unspecified paraphilic disorder and that such finding is against the weight of the evidence.

[2] "An 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." 42 Pa. C.S.A. § 9799.12.

In an SVP status determination, the weight of the evidence is exclusively for the finder of fact, who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. Commonwealth v. Barker, 4 Pa. D. & C.5th 340, 352 (Pa. Com. Pl. 2006), aff'd, 929 A.2d 233 (Pa.Super. 2007) (citing Commonwealth v. McCloskey, 835 A.2d 801, 809 (Pa.Super. 2003)). In reviewing a claim that a verdict is against the weight of the evidence, the court should grant relief only if it finds that the verdict is so contrary to the weight of the evidence that it shocks one's sense of justice. *Id.* (citing Commonwealth v. Schwartz, 615 A.2d 350 (Pa.Super. 1992)).

Here, in his post-sentence motion, Defendant argued that Dr. Muscari did not interview Defendant and lacked Dr. Gill's 2006 report on Defendant, which were both relevant to the SVP determination. However, Dr. Muscari repeatedly testified that she was not at a disadvantage in evaluating Defendant under the statute without an interview. Moreover, Dr. Muscari's report notes that the absence of an interview does not preclude an SOAB member from assessing a Defendant's behavior for characteristics that are similar or dissimilar to the criteria set forth in the statute defining sexually violent predators. Dr. Muscari also dismissed as unnecessary reviewing Dr. Gill's 2006 report for the SVP determination because Dr. Gill was not aware of the offense to

which Defendant pleaded guilty in this case and that fact would have affected those prior tests.

Defendant also argues in his post-sentence motion that Dr. Robert Gordon's evaluations of Defendant for mental illness come to a contrary conclusion to that of Dr. Muscari. As stated above, this Court, as finder of fact, is free to believe all, part, or none of the evidence, and we were not persuaded by Dr. Gordon's testimony or his report.

Finally, Defendant argues that this Court's SVP determination was premised solely on the assumption that Defendant suffers from unspecified paraphilic disorder. However, this Court performed a complete evaluation of the statutory factors in making our determination that Defendant is a sexually violent predator as reflected in our Determination of Court dated November 3, 2016. We have attached a copy of that Determination of Court for the convenience of the Honorable Superior Court and incorporate the same herein.

Therefore, this Court's determination that Defendant is a sexually violent predator is fully supported by the evidence of record and Defendant's claims to the contrary are without merit.

CONCLUSION

For the reasons set forth hereinabove and in our Determination of Court dated November 3, 2016, we respectfully recommend that

the instant appeal be denied and that our Order of Sentence dated November 14, 2016 be affirmed accordingly.

BY THE COURT:

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Steven R. Serfass, J.