

2014 PA Super 32

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SAMUEL BARTON SLOCUM,	:	
	:	
Appellant	:	No. 470 WDA 2012

Appeal from the Judgment of Sentence February 28, 2012,
Court of Common Pleas, McKean County,
Criminal Division at No. CP-42-CR-0000275-2011

BEFORE: DONOHUE, MUNDY and PLATT*, JJ.

CONCURRING OPINION BY DONOHUE, J.: FILED: FEBRUARY 21, 2014

I join the Majority’s determination with regard to Slocum’s conviction of concealing the whereabouts of a child. While I concur in the decision to affirm Slocum’s conviction of corruption of the minors, I must distance myself from the Majority’s reasoning with regard to this determination. In my view, the evidence was sufficient to support Slocum’s conviction of corruption of minors only because he was convicted of the separate crime of concealing the whereabouts of that minor. As will be discussed, consistent with decades of precedent from our Supreme Court and this Court, I conclude that a corruption of minors conviction must be tied to a predicate act by the defendant that would satisfy the definition of a crime if proven beyond a reasonable doubt.¹

¹ As a preliminary matter, I note that the Majority begins its discussion regarding this conviction by stating that Slocum “argues that he never

*Retired Senior Judge assigned to the Superior Court.

In 1980, the Pennsylvania Supreme Court decided ***Commonwealth v. Mumma***, 489 Pa. 547, 414 A.2d 1026 (1980). At that time, the corruption of minors statute provided, in its entirety, as follows:

Whoever, being the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, is guilty of a misdemeanor of the first degree.

CRIMES AND OFFENSES, 1996 Pa. Legis. Serv. Act 1996-98 (S.B. 1254).²

The appellant in ***Mumma*** was convicted of indecent assault and corruption of minors. ***Mumma***, 489 Pa. at 555, 414 A.2d at 1027. Mumma's convictions were based upon findings that he touched a 12-year-old male's

abetted or encouraged the victim to commit a delinquent act and that a child's disobedience of his parents is not the kind of violation that the statute was intended to prevent." Maj. Op. at 8. This is incorrect. In his brief, Slocum states, "the only issues before this Court are whether the evidence met the Commonwealth's burden of proof and whether the child's disobedience is a type of violation that Corruption of Minors was intended to prevent." Appellant's Brief at 27. Slocum makes no argument regarding abetting or encouraging a delinquent act. The Majority's discussion thereof is not on point with the issue presented in this appeal. I believe that the Majority's recitation of Slocum's argument on this point supports this conclusion. **See** Maj. Op. at 13 n.9.

² The current statute retains this language in subsection (a)(i) and creates more specific categories for sex crimes committed by the defendant (18 Pa.C.S.A. § 6301(a)(1)(ii)) and truancy (18 Pa.C.S.A. § 6301(a)(2)). The grading of the sex crimes offense in subsection (a)(1)(ii) is increased to a third-degree felony. 18 Pa.C.S.A. § 6301(a)(1)(ii). Conversely, the grading of the truancy offense in subsection (a)(2) is lowered to a third-degree misdemeanor. 18 Pa.C.S.A. § 6301(a)(2). As discussed in footnote 3 ***infra***, the statute was amended to include subsections (a)(1)(ii) and (a)(2) in 2010 and 1996, respectively.

genitals after convincing him to undress for a physical examination, which the appellant required for admission to his “club.” *Id.* at 550, 414 A.2d at 1027. The Supreme Court granted allowance of appeal in ***Mumma*** and primarily addressed whether the evidence was sufficient to support the defendant’s indecent assault conviction. Perhaps as a result of this focus, the discussion regarding the corruption of minors conviction is brief. Nevertheless, of relevance here, the defendant argued that the evidence was insufficient to support his corruption of minors conviction because the Commonwealth failed to prove that the minor’s morals were actually corrupted. Our Supreme Court rejected his claim, stating as follows:

The Commonwealth need not prove that the minor’s morals were actually corrupted. Rather, a conviction for corrupting morals will be upheld where the conduct of the defendant ‘tends to corrupt’ the minor’s morals. The statute speaks to conduct ‘toward a child in an unlimited variety of ways which tends to produce or to encourage or to continue ***conduct of the child which would amount to delinquent conduct.***’

Id. (citations omitted) (emphasis added).

Although the Supreme Court defined conduct that corrupts or tends to corrupt a minor’s morals as conduct that encourages delinquency, the Supreme Court did not discuss how, in ***Mumma***, this requirement was met. Instead, in ***Mumma*** and the cases from this Court that have come since, we have presumed corruption of the minor by virtue of the commission of a crime in which the minor was the victim or, in far fewer incidences, the

commission of a crime in the presence of the minor. The vast majority of the published cases after **Mumma** applying the “any act that corrupts or tends to corrupt” language of Section 6301(a)(1) involve sexual assault committed against a minor victim, *see, e.g., Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006) (corruption of minors conviction based on sexual abuse of five-year-old daughter that constituted indecent assault); **Commonwealth v. Charlton**, 902 A.2d 554 (Pa. Super. 2006) (corruption of minors conviction based on rape, involuntary deviate sexual intercourse an indecent assault of minor daughter); **Commonwealth v. Judd**, 897 A.2d 1224 (Pa. Super. 2006) (corruption of minors based upon rape and indecent assault of minor); **Commonwealth v. Snyder**, 870 A.2d 336 (Pa. Super. 2005) (rape, indecent assault, involuntary deviate sexual intercourse and statutory sexual assault underlie corruption of minors conviction); **Commonwealth v. Smith**, 863 A.2d 1172 (Pa. Super. 2004) (sexual assault and indecent assault of minor victims sufficient to support corruption of minors conviction); **Commonwealth v. Bishop**, 742 A.2d 178 (Pa. Super. 1999) (evidence was sufficient to support conviction of corruption of minors where defendant sexually abused his five-year-old step-granddaughter and was convicted of involuntary deviate sexual intercourse, aggravated indecent assault and indecent exposure); **Commonwealth v. Halye**, 719 A.2d 763 (Pa. Super. 1998) (*en banc*) (sex crimes of defendant toward child sufficient to support conviction of corruption of minors);

Commonwealth v. Bricker, 580 A.2d 388 (Pa. Super. 1990) (sexual assault of 11-year-old); **Commonwealth v. Pankraz**, 554 A.2d 974, 976 (Pa. Super 1989) (corruption of minors conviction upheld where defendant's conduct was repeatedly inserting object into minor daughter's vagina); **Commonwealth v. Todd**, 502 A.2d 631 (Pa. Super. 1985) (indecent exposure supporting corruption of minors convictions). The remaining outlier cases involve other criminal activity by the adult defendant in the presence of a minor. *See, e.g., Commonwealth v. Barnette*, 760 A.2d 1166, 1173 (Pa. Super. 2000) (corruption of minors conviction upheld where defendant deceived minor into accepting delivery of package containing contraband); **Commonwealth v. Williams**, 428 A.2d 165 (Pa. Super. 1981) (corruption of minors charge based upon exposing minor to illegal narcotic drug use). Like the Supreme Court in **Mumma**, this Court did not discuss how the underlying acts of the defendant tended to corrupt, or corrupted, the minor's morals in any of these cases. I can discern only the presumption that the criminal nature of the act committed against or in the presence of the minor corrupted, or had the tendency to corrupt, the minor's morals.³

³ I have found only one case in which the conduct underlying the corruption of minors charge was not defined as a crime by the legislature. That case is **Commonwealth v. Decker**, 698 A.2d 99 (Pa. Super. 1997) (Opinion by Tamilia, J., Cercone, P.J.E. joins, Hudock, J. concurs in result). In **Decker**, a 37-year-old man had sexual intercourse with a 15-year-old girl. At the time of the event, this was not a criminal act because the age of consent was 14.

It is important to note that this presumption requires criminal conduct by the actor, not a criminal conviction. Indeed, this is in line with the definition of corruption of minors, which provides that one is guilty by the commission of “**any** act [that] corrupts or tends to corrupt the morals of any minor[.]” 18 Pa.C.S.A. § 6301(a)(1)(i) (emphasis added). While the majority of cases involve a corruption of minors conviction **and** a conviction for the criminal conduct that formed the basis of the corruption of minors charge, I have found two instances in which the defendant was charged in this manner but convicted of corruption of minors alone. **See Bricker**, 580 A.2d 388 (acquitted of indecent assault and involuntary deviate sexual intercourse but convicted of corruption of minors); **Commonwealth v. Anderson**, 550 A.2d 807 (Pa. Super. 1988) (acquitted of indecent assault but convicted of corruption of minors). In both of these cases, the defendants argued that their corruption of minors convictions could not

However, this conduct was criminalized four months after Decker was charged, as the age of consent was raised from 14 to 16 years of age. **See id.** at 102 n.5. Thus, by the time the defendant was tried, his conduct had been criminalized, a fact referenced twice by the **Decker** majority. **Id.** at 102. Contrary to the Majority’s reference, **Decker** does not cite to a long line of controlling authority that no underlying criminal act was required. Maj. Op. at 12 n.8. Further, the well-versed Majority cites no other case in which a defendant was convicted of corruption of minors without the commission of an accompanying criminal act against or in the presence of the minor. I must conclude that my research is not faulty and, indeed, **Decker** is the only case that allowed for a conviction of corruption of minors without the attendant criminal conduct. To me, **Decker** is appropriately viewed as an anomaly. In my view, if it is more than the anomaly I believe it to be, then **Decker** should be considered by the Superior Court *en banc*.

stand because they were acquitted of the crimes charged as the basis for the corruption of minors charges. In both cases, this Court rejected the defendants' positions based on the well-established principles that there is no requirement for consistent verdicts in criminal cases and that an acquittal cannot be viewed as a specific finding with regard to any particular portion of the evidence. **Anderson**, 550 A.2d at 809-10; **Bricker**, 580 A.2d at 389.

I concur in the result reached by the Majority because in this case, there is no question that Slocum's acts were criminal. Slocum was convicted of concealing the whereabouts of a child, and the victim of that crime – the child who was wrongfully concealed – was J.H. Thus, in accordance with **Mumma** and the subsequent case law from this Court, I conclude that there is a presumption that Slocum's commission of this crime against J.H. constitutes an act that corrupted or tended to corrupt J.H.'s morals, and therefore, that the evidence is sufficient to support Slocum's corruption of a minor conviction.

Finally, I note my unease with the standard endorsed by the Majority, not only because it departs from precedent, but because of the danger of its unpredictable application across the Commonwealth. Presently, the entire definition of corruption of minors is as follows:

(a) Offense defined.—

(1) (i) Except as provided in subparagraph (ii), whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of

any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

(ii) Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.

(2) Any person who knowingly aids, abets, entices or encourages a minor younger than 18 years of age to commit truancy commits a summary offense. Any person who violates this paragraph within one year of the date of a first conviction under this section commits a misdemeanor of the third degree. A conviction under this paragraph shall not, however, constitute a prohibition under section 6105 (relating to persons not to possess, use, manufacture, control, sell or transfer firearms).

18 Pa.C.S.A. § 6301(a).

The provision under which Slocum was charged, Section 6301(1)(i), addresses three types of conduct: acts that corrupt or tend to corrupt the morals of a minor; aiding, abetting, enticing or encouraging a minor to commit a crime; and assisting or encouraging a minor to violate parole or an order of court. Without question, the language used to define the first category of conduct is highly subjective. We know only that it excludes sexual conduct, as that is addressed in Section 6301(1)(ii), and truancy, as

that is addressed in Section 6301(2).⁴ My analysis of this Court's precedent leads me to the conclusion that we have consistently given definition to the otherwise highly subjective "by any act" language by requiring the coupling of a conviction of corruption of minors with a predicate act by the defendant that would satisfy the definition of a crime if proven beyond a reasonable doubt. **See** survey of cases *infra* at 4-6.

The Majority endorses the application of a definition of acts that "corrupt or tend to corrupt the morals of a minor" that is, in my view, constitutionally questionable⁵: *ad hoc* determinations that actions "offend

⁴ Section 6301 was amended to include sub-section 6301(a)(1)(ii), addressing sex crimes, in October 2010 with an effective date of December 6, 2010. Therefore, this provision was in effect in 2011, when Slocum was charged in connection with this case. Section 6301(a)(2) (relating to truancy) was added to this statute by amendment in 1996. I note that Slocum was charged and convicted under the truancy provision, and he does not challenge that conviction on appeal.

⁵ The constitutionality of this language has not been challenged in 56 years, since this Court's decision in ***Commonwealth v. Randall***, 133 A.2d 276 (Pa. Super. 1957). In my view, this is because our Court has confined the definition of an act that corrupts or tends to corrupt the morals of a minor to acts that amount to criminal conduct. No court, before this Majority, has applied the statute to behavior remotely similar to the conduct here with or without a predicate criminal act.

I further note that the Pennsylvania Supreme Court discussed indefinite language similar to the corruption of minors statute in addressing the statute prohibiting endangering the welfare of a child ("EWOC"), which, at the time, provided as follows: "A parent, guardian or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support." ***Commonwealth v. Mack***, 467 Pa. 613, 615, 359 A.2d 770, 771 (1976) (quoting 18 Pa.C.S.A. § 4304). The Supreme Court noted the purpose of such statutes is to protect juveniles and therefore they are to be

broadly construed. It also reiterated the language relied upon here by the Majority, that such juvenile statutes should be defined by “[t]he common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain” in order to “individuate what particular conduct is rendered criminal by it.” *Id.* at 618, 359 A.2d at 772. The actual holding, rejecting the vagueness challenge to the EWOC statute, is based on the notion of a shared common sense of when a particular action would endanger a juvenile:

Thus, statutes such as the one at issue here are to be given meaning by reference to the ‘common sense of the community’ and the broad protective purposes for which they are enacted. ... Phrases such as ‘endangers the welfare of the child’ and ‘duty of care, protection or support’ are not esoteric. Rather, they are easily understood and given content by the community at large. An individual who contemplates a particular course of conduct will have little difficulty deciding whether his intended act ‘endangers the welfare of the child’ by his violation of a ‘duty of care, protection or support.’

Id. There can be little disagreement as to whether a particular conduct will endanger a child as this statute punishes threats to a child’s physical or psychological welfare, and not his or her moral fiber. **See Commonwealth v. Bryant**, 57 A.3d 191, 197 (Pa. Super. 2012) (stating the aim of the EWOC statute to be protection of children’s physical and psychological welfare). I cannot agree that there is a commonly shared sense of what conduct tends to corrupt a minor’s morals such that would allow us to reliably believe that a uniform standard would be applied by judges and juries across the Commonwealth. Nor do I believe that a defendant is put on notice that a particular course of conduct will violate the corruption of minors statute as interpreted by the Majority.

Further, in rejecting the vagueness challenge in **Mack**, the Supreme Court emphasized the duty component of the EWOC statute, stating that “[p]hrases such as ... ‘duty of care, protection or support’ are not esoteric. ... An individual who contemplates a particular course of conduct will have little difficulty deciding whether his intended act ‘endangers the welfare of the child’ by his violation of a ‘duty of care, protection or support.’” **Mack**, 467 Pa. at 618, 359 A.2d at 772. The non-esoteric notion of physical harm and the requirement of a duty provide ascertainable parameters for the EWOC

the common sense of the community and the sense of decency, propriety and morality which most people entertain.” Maj. Op. at 10-11 (quoting **Commonwealth v. DeWalt**, 752 A.2d 915, 918 (Pa. Super. 2000)).⁶ Without the factual predicate of some defined criminal conduct, the Majority’s ruling allows judges and juries to randomly criminalize perceived acts of impropriety. Because the approach sanctioned by the Majority departs from our precedent and allows for the conviction of a citizen of crime based on conduct our legislature has not specifically criminalized, I cannot endorse it.

As discussed at the outset of this Concurring Opinion, our case law has given definition to the language of the corruption of the morals of a minor statute which criminalizes “any act” that corrupts or tends to corrupt the morals of a minor. Our precedent requires that a corruption of minors conviction must be tied to a predicate act by the defendant that would satisfy the definition of a crime if proven beyond a reasonable doubt. I

statute’s implementation which do not exist in the corruption of minors statute.

⁶ **DeWalt** was convicted of corruption of minors and indecent exposure. **DeWalt**, 752 A.2d at 916. Thus while the general definition recited by the Majority appears in **DeWalt**, an underlying criminal act supported the conviction for corruption of morals of a minor. In fact, the language from **DeWalt** quoted by the Majority appears in many of the cases summarized *infra* at 4-6, to illustrate the requirement of predicate criminal conduct. **See Snyder**, 870 A.2d at 351; **Smith**, 863 A.2d at 1177; **Pankraz**, 554 A.2d at 977; **Todd**, 502 A.2d at 635 n.2; **Barnette**, 760 A.2d at 1173. Thus, although the general definition is often repeated, it has not been outcome determinative.

cannot agree with the Majority's failure to recognize this precedent and its application of a vastly indeterminate standard in its place.

For the foregoing reasons, I join in the Majority's decision to affirm the judgment of sentence on the conviction of concealing the whereabouts of a child and concur only in the result in affirming the conviction of corruption of minors.