NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GADIEL AGOSTO-DIAZ Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3138 EDA 2014

Appeal from the Order October 1, 2014
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0001273-2013

BEFORE: MUNDY, J., OLSON, J., and MUSMANNO, J.

MEMORANDUM BY MUNDY, J.: **FILED AUGUST 03, 2015**

Appellant, Gadiel Agosto-Diaz, appeals from the October 1, 2014 order determining that Appellant is a sexually violent predator (SVP) pursuant to Pennsylvania's Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S.A. §§ 9799.10-9799.41.[1] Contemporaneously with this appeal,

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[1] SORNA became effective on December 20, 2012, replacing Megan's Law III. Pennsylvania enacted SORNA in response to the federal Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901-16962, which provided that ten percent of the allocated federal funding for state and local law enforcement would be withheld unless the states "substantially implemented" the Act. ***Commonwealth v. Nase***, 104 A.3d 528, 529 n.1 (Pa. Super. 2014); 42 U.S.C. § 16925. Title I of that Act is known as SORNA. ***Id.*** Herein, we refer to the statute as "SORNA." Pennsylvania courts have referred to it by other names, including "Megan's Law IV," "Act 111 of 2011," "Adam Walsh Child Protection and Safety Act," and "Adam Walsh Act." ***See Commonwealth v. Giannantonio***, 114 A.3d 429, 432 n.1 (Pa. Super. 2015).

Appellant's counsel has filed a petition to withdraw and an ***Anders*** brief, stating that the appeal is wholly frivolous.[2] After careful review, we affirm the order and grant counsel's petition to withdraw.

The trial court summarized the relevant facts and procedural history as follows.

> On November 18, 2013, [Appellant] entered a plea of guilty to one count of criminal use of a communication[s] facility[1] and one count of corruption of minors.[2] [That same day,] [p]ursuant to a plea agreement, [Appellant] was sentenced to 11 ½ to 23 months[']' imprisonment on the charge of criminal use of communications facility and 6 years[']' probation, consecutive to the above count, on the charge of corruption of minors. As part of the plea agreement, [Appellant] received credit for time served from April 3, 2013 to November 18, 2013, would not [be] eligible for [g]ood [t]ime and would not be eligible for parole until serving 23 months.
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> By [o]rder dated November 18, 2013, the State Board to Assess Sexual Offenders was to perform an assessment of [Appellant] as required by 42 Pa.C.S. § 9799.24 to determine whether [Appellant] meets the criteria to be classified as a sexually violent predator (SVP).[3] On or about January 29, 2014, the Sexual Offender Assessment Board [(SOAB)] provided the Commonwealth with an assessment stating that [Appellant] met the criteria of a[n] SVP. The Commonwealth sought a hearing under 42 Pa.C.S. § 9799.24(e) requesting that the

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[2] ***Anders v. California***, 386 U.S. 738 (1967).

[3] As part of the plea agreement, Appellant waived the statutory requirement that the SOAB perform an SVP assessment prior to sentencing. ***See*** N.T., 11/18/13, at 6-7; 42 Pa.C.S.A. § 9799.24(a); ***Commonwealth v. Whanger***, 30 A.3d 1212, 1214 (Pa. Super 2011).

> [trial] [c]ourt determine whether [Appellant] shall be classified as a[n] SVP.
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> Following a two-day hearing on September 30, 2014 and October 1, 2014, the [trial] [c]ourt determined that the Commonwealth proved by clear and convincing evidence that [Appellant] is a[n] SVP. [Appellant] timely filed a [n]otice of [a]ppeal on October 30, 2014.[4]

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[1] 18 Pa.C.S.A. § 7512(a).

[2] [***Id.***] § 6301(a)(1)(ii).

Trial Court Opinion, 12/22/14, at 1-2 (citations omitted).

In her ***Anders*** Brief, counsel has raised the following issue for our review.

> I. Whether the trial court erred regarding the sufficiency of evidence when it found that the Commonwealth presented sufficient evidence to prove by clear and convincing evidence that [] Appellant [] is a sexually violent predator?

Anders Brief at 4.

"When presented with an ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Daniels***, 999 A.2d 590, 593 (Pa. Super. 2010) (citation omitted). Additionally, an ***Anders*** brief shall comply with the

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[4] Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

requirements set forth by our Supreme Court in ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

> [W]e hold that in the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that have led to the conclusion that the appeal is frivolous.

Id. at 361.

Pursuant to ***Commonwealth v. Millisock***, 873 A.2d 748 (Pa. Super. 2005), and its progeny, counsel seeking to withdraw on direct appeal must also meet the following obligations to his or her client.

> Counsel also must provide a copy of the ***Anders*** brief to his client. Attending the brief must be a letter that advises the client of his right to: (1) retain new counsel to pursue the appeal; (2) proceed *pro se* on appeal; or (3) raise any points that the appellant deems worthy of the court[']s attention in addition to the points raised by counsel in the ***Anders*** brief.

Commonwealth v. Orellana, 86 A.3d 877, 880 (Pa. Super. 2014) (internal quotation marks and citation omitted). "Once counsel has satisfied the above requirements, it is then this Court's duty to conduct its own review of the trial court's proceedings and render an independent judgment as to whether the appeal is, in fact, wholly frivolous." ***Commonwealth v.***

Goodwin, 928 A.2d 287, 291 (Pa. Super. 2007) (*en banc*), *quoting* ***Commonwealth v. Wright***, 846 A.2d 730, 736 (Pa. Super. 2004). Further, "this Court must conduct an independent review of the record to discern if there are any additional, non-frivolous issues overlooked by counsel." ***Commonwealth v. Flowers***, 113 A.3d 1246, 1250 (Pa. Super. 2015) (footnote and citation omitted).[5]

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[5] Speaking for myself only, I disagree with ***Flowers***' interpretation of case law to impose a duty on this Court, when reviewing an ***Anders*** brief, to comb the record for issues of arguable merit that counsel did not raise. ***See Commonwealth v. King***, 57 A.3d 607, 633 n.1 (Pa. 2012) (Saylor, J., concurring) (discussing the precedent for a special concurrence by the author of the majority opinion); ***Flowers***, ***supra***.

In introducing this Court's duty of independent review, the majority in ***Flowers*** acknowledged, "[n]either the Pennsylvania Supreme Court nor an en banc panel of this Court has explicitly discussed this issue." I agree with Judge Strassburger's dissent in ***Flowers***, explaining that our Supreme Court's decisions do not require this approach. ***Flowers***, ***supra*** at 1251-1252 (Strassburger, J., dissenting). Further, this approach causes disparate treatment of criminal defendants, with this Court acting as appellate counsel when counsel seeks to withdraw, but not when counsel does not seek to withdraw. ***Id.*** at 1252 (Strassburger, J., dissenting); ***see also Commonwealth v. Koehler***, 914 A.2d 427, 438 (Pa. Super. 2006) (explaining "it is not this Court's duty to become an advocate for an appellant and comb through the record to assure the absence of trial court error[]"), *appeal denied*, 961 A.2d 858 (Pa. 2008). Moreover, a review by this Court for all potential issues renders the requirement of counsel to identify issues arguably supporting an appeal and the opportunity afforded to the appellant to raise issues *pro se* mere superfluities. ***See Commonwealth v. Thomas***, 511 A.2d 200, 204 (Pa. Super. 1986). For these reasons, I disagree with ***Flowers***. However, we are constrained to apply it. ***See Commonwealth v. Pepe***, 897 A.2d 463, 465 (Pa. Super. 2006) (noting that a panel of this Court cannot overrule a prior decision of this Court), *appeal denied*, 946 A.2d 686 (Pa. 2008), *cert. denied*, 555 U.S. 881 (2008).

In this appeal, we conclude that counsel's ***Anders*** brief complies with the requirements of ***Santiago***. First, counsel has provided a procedural and factual summary of the case with references to the record. Second, counsel advances relevant portions of the record that arguably support Appellant's claims on appeal. Third, counsel concluded, "this appeal is frivolous[.]" ***Anders*** Brief at 10. Lastly, counsel has complied with the requirements set forth in ***Millisock***. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous.

The sole issue counsel raises on Appellant's behalf is the sufficiency of the evidence to support the trial court's finding that he was an SVP under SORNA.[6] ***Anders*** Brief at 9. "Because evidentiary sufficiency presents a question of law, our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Johnson***, 107 A.3d 52, 66 (Pa. 2014) (italics added). As in all sufficiency reviews, we consider the evidence in the light most favorable to the Commonwealth as the prevailing party at trial. ***Id.***

After a conviction for one or more of the sexually violent offenses listed in Section 9799.14, the trial court must order the SOAB to perform an SVP assessment of the offender. 42 Pa.C.S.A. § 9799.24(a). A member of the SOAB then must evaluate the offender to determine whether he is an SVP by considering, among others, the following statutory factors.

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[6] Appellant did not respond to counsel's petition to withdraw or raise any additional issues for our review.

(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.

(ii) Use of illegal drugs.

(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 field as criteria reasonably related to the risk of reoffense.

Id. § 9799.24(b). The SOAB then provides its assessment to the Commonwealth, which may file a praecipe to schedule a hearing, prior to sentencing, to determine whether the offender is an SVP. ***Id.*** § 9799.24(d), (e)(1).

SORNA defines a "sexually violent predator" as "an individual convicted of an offense specified in [section 9799.14] who [] is determined to be a sexually violent predator under section 9799.24 [] due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. § 9799.12. A "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.*** Further, the statute defines "predatory" 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.***

At the SVP hearing before the trial court, the Commonwealth must prove by clear and convincing evidence that the defendant is an SVP. ***Id.*** § 9799.24(e)(3). "The clear and convincing 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) (brackets in original, citation omitted, internal quotation marks omitted). Accordingly, in reviewing the trial court's SVP classification, "[w]e will reverse a trial court's determination of SVP status only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied." ***Commonwealth v. Leddington***, 908 A.2d 328, 335 (Pa. Super. 2006), *appeal denied*, 940 A.2d 363 (Pa. 2007) (citation omitted).

In this case, Appellant pled guilty to one count of corruption of minors, where the victim was 14 years old, which is a triggering offense for an SVP assessment under SORNA. ***See*** 42. Pa.C.S.A. § 9799.14(b)(8) (listing 18 Pa.C.S.A. § 6301(a)(1)(ii) as a Tier I sexual offense). At the SVP hearing, the Commonwealth presented the testimony of Dr. Bruce E. Mapes, Ph.D., a member of the SOAB. Appellant did not challenge Dr. Mapes' qualification as an expert. N.T., 9/30/14, at 8. Upon our review of the record, we conclude that Dr. Mapes' testimony was clear and convincing evidence supporting Appellant's classification as an SVP. The trial court summarized Dr. Mapes' testimony as follows.

> Based upon his interview with [Appellant], his review of [Appellant]'s past criminal history, the current criminal complaint and affidavit of probable cause, list of charges, police investigative records, [SOAB]

> Investigator Shaw Stiver's investigative memo, as well as a protection from abuse (PFA) order and a Domestic Relations order, Dr. Mapes concluded, within a reasonable degree of psychological certainty, that [Appellant] meets the criteria to be classified as a[n] SVP. Although Dr. Mapes has performed hundreds of SVP assessments, he has only found approximately 15% of those individuals to be classified as sexually violent predators.
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> Dr. Mapes addressed each of the factors enumerated in 42 Pa.C.S.A. §[ ]9799.24(b). Specifically, Dr. Mapes noted there was no evidence of substance abuse, unusual cruelty or excessive force during the commission of the crime and there was only one victim involved. However, he did note that the victim was a stranger, the victim was under the age of 14 and this was the second time [Appellant] was convicted of a crime of a sexual nature involving a minor within the last five years. These factors, as well as [Appellant]'s prior criminal record, played a key role in Dr. Mapes' decision.
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> Dr. Mapes noted in his report and testified during the hearing that this was not the first time [Appellant] had been involved in a sexual manner with a minor. Approximately 5 years ago [Appellant] was arrested on charges of involuntary deviate sexual intercourse, statutory sexual assault, aggravated indecent assault, corruption of minors, and indecent assault involving a 14 year old stranger. He pled guilty to statutory sexual assault and corruption of minors on January 19, 2010. [Appellant] was sentenced to 11 ½ months to 23 months in prison for statutory sexual assault followed by 5 years[']' probation for corruption of minors. [Appellant] was to have no unsupervised contact with minors, except his own children.
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> In the instant case, the victim was also a 14 year old stranger. [Appellant] claimed he had inadvertently misdialed the 14 year old's phone number and started a conversation with her. [Appellant] knew the victim's age and told her that

he was 33 years old when he was actually over the age of 40. However, he continued to call and text the victim, exchanging approximately 166 texts and 7 phone calls with the victim. Dr. Mapes testified that the victim was easily influenced and [Appellant] took advantage of this circumstance. [Appellant] told the victim he liked her voice, she sounded older and he wanted to marry her. The totality of these statements led Dr. Mapes to conclude that [Appellant] was grooming his victim; manipulating a minor he knew was 14 years old for his own pleasure. [Appellant] continued to engage in sexually explicit texts with this 14 year old girl while he was married with four children under the age of 12[]. [Appellant] also has three children from previous relationships and has engaged in 20 to 30 "one-night stands" while he was involved in intimate relationships with other women.

[Appellant]'s first arrest for statutory sexual assault was not his first encounter with the criminal justice system. As noted by Dr. Mapes, [Appellant]'s prior criminal history reaches back to 1989 when he was a juvenile. As a juvenile, [Appellant] was charged with the sale of marijuana in New York in 1989, and received 50 days conditional release. [Appellant] was charged with criminal attempt, theft by unlawful taking, loitering and prowling and criminal conspiracy, in Pennsylvania in 1990. These charges were disposed of through an informal adjustment.

As an adult, [Appellant] was charged with various theft offenses including shoplifting (1991); theft by unlawful taking, receipt of stolen property, theft from a motor vehicle (2004); and access device fraud, theft by deception and retail theft (2011). [Appellant] received fines and probation on most of the theft[-]related charges; however, he received a sentence of 23 months['] intermediate punishment on the charge of theft from a motor vehicle. In 2004, [Appellant] was arrested in Delaware for assaulting his former paramour in front of their one-year old child. In 2006, [Appellant] was charged

with two counts of simple assault and one count of harassment. [Appellant] pled guilty to one count of simple assault and was given time served to 23 months; the remaining charges were withdrawn. [Appellant] was charged with two counts of simple assault in 2009 and sentenced to two years[′] probation on one count of simple assault. [Appellant] was charged with statutory sexual assault and corruption of minors in 2010. [Appellant] was sentenced to 11 ½ to 23 months[′] imprisonment for statutory sexual assault and 5 years[′] probation for corruption of minors; the remaining charges were withdrawn. On February 11, 2011, [Appellant] pled guilty to contempt of a Protection from Abuse (PFA) order and received 11 days to 23 month[s′] imprisonment.

[Appellant] pled guilty to retail theft on August 17, 2011 and paid fines and costs; charges of access device fraud and theft by deception were withdrawn. Dr. Mapes testified that [Appellant]'s arrests for a myriad of crimes shows a continued pattern of violating rules and laws.

Dr. Mapes testified that following his imprisonment on sexual assault charges, [Appellant] attended a sex offender treatment program. Dr. Mapes testified that most participants complete the sexual offender program in 1 to 1 ½ years. [Appellant] attended the program for close to three years and was still in the program when he was arrested on the instant charges. [Appellant] informed his expert, Dr. Elliot Atkins, that he raised the issue of this sexual relationship with a 14 year old with his counselor and others in his treatment group on February 14, 2014, after he spoke with an investigator regarding the instant matter. [Appellant]'s counselor and group members advised him to discontinue these communications. Dr. Mapes testified that [Appellant] did not inform him of this conduct and that this conduct constituted a violation of probation that should have been reported to his counselor and his probation officer.

> Dr. Mapes testified that this assessment is not a mental health evaluation or a risk assessment inquiry. There are no reliable tests for diagnosing paraphilia or personality disorder. Dr. Mapes testified that diagnosis of these disorders depends more on observable behavior and the facts of the offense itself, rather than on psychological testing. Dr. Mapes testified that [Appellant] has had multiple one-night stands with other women while he was involved in long[-]term intimate relationships. Dr. Mapes testified that [Appellant] has a history of failing to follow laws and rules, has been arrested numerous times for different crimes, was imprisoned, placed on probation and ordered to pay fines. However, Dr. Mapes testified that [Appellant] failed to learn from those experiences, continuing to break the laws and rules set forth by society.
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> Based upon the above highlighted evidence and other factors enumerated in his report, Dr. Mapes opined that [Appellant] met the criteria for diagnosis of Paraphilia Not Otherwise Specified (NOS) and the criteria for diagnosis of Personality Disorder NOS with marked antisocial features. Dr. Mapes testified that [Appellant]'s chronic history of breaking rules in conjunction with his "one-night stands" is "characteristic of antisocially oriented individuals who establish sexually exploitative relationships really for their own gratification."
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> Dr. Mapes opined that these disorders are considered lifetime disorders with no cure. Both disorders are considered congenital or acquired conditions, pursuant to the statute. Dr. Mapes concluded both disorders overrode [Appellant]'s emotional and volitional controls, making him likely to re-offend. Finally, Dr. Mapes testified that the totality of his findings makes [Appellant] more likely to engage in predatory behavior. Both Dr. Mapes' report and his testimony at the hearing presented sufficient clear and convincing evidence that [Appellant] has a mental abnormality or disorder making him likely to engage in predatory sexually violent offenses.

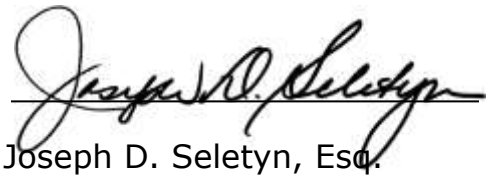
Trial Court Opinion, 12/22/14, at 4-9 (citations omitted). Our review of the record reveals no error in the trial court's description of the evidence. We note that at the SVP hearing, Appellant also presented an expert, Dr. Elliot L. Atkins, Ed.D, who concluded that Appellant did not meet the criteria of an SVP. N.T., 9/30/14, at 65. Specifically, Dr. Atkins opined that Appellant did not have a deviant sexual interest in teenagers; instead, his depression and avoidant personality disorder caused him to seek to connect with people, including those who were underage. ***Id.*** at 73-81. Dr. Atkins noted Appellant's mental health issues, as he diagnosed them, could be treated and were not, therefore, permanent mental abnormalities as contemplated by the SVP criteria, and, for similar reasons, Appellant's behavior was not predatory. ***Id.*** at 81-82. The trial court, however, was free to credit the conclusions of the Commonwealth's expert and discount the contrary findings presented by Appellant's expert, and we will not reweigh the evidence. ***See Meals***, ***supra*** at 223-224. Therefore, we conclude that the evidence was sufficient to enable the trial court to determine that the Commonwealth established, by clear and convincing evidence, that Appellant qualifies as an SVP. ***See Leddington***, ***supra***.

Based on the foregoing, we conclude Appellant is not entitled to relief, as his issue is wholly frivolous. Further, after conducting an independent review of the record, we conclude there are no additional, non-frivolous

issues overlooked by counsel. ***Flowers***, ***supra*** at 1250. Accordingly, we affirm the October 1, 2014 order and grant counsel's petition to withdraw.

Order affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/3/2015