

PITTSBURGH LEGAL JOURNAL

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PLJ

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OPINIONS

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**Anthony Bucci v.
Bart Mele and Tad Abel v.
Paul Rothrauff, Theresa Rothrauff, and
Richard D. Malin & Associates, Inc.**

Indemnification Provisions—Invalidation of Contract Language—Unconscionability—Consumer Contracts

The indemnification clause in the agreement between a property owner and inspection company was invalidated due to unconscionability. The unconscionable indemnity clause required the homeowner to pay all legal and other fees of the company in the event the property owner pursued a claim against the company resulting from the inspection of the client's property. This language has no place in a consumer contract in Pennsylvania.

(Lynn E. MacBeth)

Elizabeth F. Collura for Plaintiff.

Robert A. Weinheimer for Bart Mele.

Charles P. Falk for Theresa Rothrauff.

Miles A. Kirshner for Richard D. Malin & Associates.

Tad Abel, *pro se*.

No. GD 09-8904. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER

Friedman, J., January 12, 2010—Original Defendant Bart Mele (“Mele”) has filed Preliminary Objections to the cross-claims of Additional Defendant Richard D. Malin & Associates, Inc. (“Malin”). The issue to be decided is whether or not an indemnification provision included in the consumer contract between those parties is unenforceable as a matter of law. It should be kept in mind that we are not dealing here with any aspect of Malin’s *defense* to Mele’s Complaint to Join. Before us now are only Malin’s cross-claims against Mele. The validity of the indemnification provision is central to those claims.

The contract between Mele and Malin contains the following language upon which Malin relies for its cross-claims:

In the event that the company offers to refund the cost of the inspection and the client pursues any claim against the Company resulting from the inspection of Client’s property, Client agrees to pay all expenses incurred by Company in defending any such claim, to include costs incurred, witness fees, expenses of hiring expert witnesses and legal fees.

Mele cites *Carll v. Terminix International Company*, 793 A.2d 921 (Pa.Super. 2002) for the law that applies to consumer contracts, such as the instant one, and argues that the *reasoning* in *Carll*, which involved the invalidation of an arbitration clause, would require the invalidation of the instant indemnification clause. We agree.

Malin cites to a case at the Common Pleas level, *Mannion v. Manor Care, Inc.*, 4 Pa. D&C 5th 321 (C.P. Lehigh 2006) and argues that it supports its view that its cross-claim is viable. However, a closer reading of *Mannion* reveals that it is more supportive of Mele’s objections. In *Mannion*, the Court allowed the dispute to go to arbitration per an arbitration clause that was *severable* from two other clauses it found unconscionable and unenforceable, limiting damages awardable in arbitration and discovery allowable. The *Mannion* trial judge distinguished *Carll* on the arbitration issue because of the *severability* of the clauses provided in the contract at issue. However, *Mannion* follows *Carll* on the issue of unconscionability.

The limitation of damages available to Mele under the contract is not now before us and any dispute in that regard is for another day. However, the instant indemnification clause, which is much like *in terrorem* clauses in wills¹ has no place in a consumer contract under the law of Pennsylvania as discussed in *Carll*. That clause, which patently attempts to prevent consumers from seeking to vindicate their rights under the law, will not be enforced by our courts, and as a consequence the cross-claim based upon it must be stricken, with prejudice.

Malin’s expenses in defending against Mele’s Complaint are solely the burden of Malin. See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: January 12, 2010

¹ *Black’s Law Dictionary* defines *in terrorem* clause as follows: “A provision in a document such as a lease or a will designed to frighten a beneficiary or lessee into doing or not doing something; e.g. clause in a will providing for revocation of a bequest or devise if the legatee or devisee contests the will. A condition ‘in terrorem’ is a provision in a will which threatens beneficiaries with forfeiture of their legacies and bequests should they contest validity or dispositions of the will. *Taylor v. Rapp*, 217 Ga. 654, 124 S.E. 2d 271, 272.” *Black’s Law Dictionary* 735 (5th ed. 1979).

ORDER OF COURT

AND NOW, to-wit, this 12th day of January 2010, for the reasons set forth in the accompanying Memorandum in Support of Order, the Preliminary Objections of original Defendant Bart Mele to the cross-claims of Additional Defendant Richard D. Malin & Associates, Inc. are hereby SUSTAINED, and the cross-claims of Malin against Mele are DISMISSED with prejudice; paragraphs 44-49 of Malin’s Answer, New Matter and Crossclaims Pursuant to Pa. R.C.P. 1031.1 are stricken; paragraphs 50 and 51 shall not apply to Mele.

BY THE COURT:
/s/Friedman, J.

**Sean Claar v. Erik Moore and Commonwealth of Pennsylvania,
Department of Transportation, and Duquesne Light Company**

Pa. R.A.P. 1925(b)—Failure to File Untimely Statement of Matter Complained of On Appeal—Power of Trial Judge to Excuse Untimely Filing

The trial court's ability to excuse untimely file in the wrong court of a party's Pa. R.A.P. 1925(b) Statement is limited according to *Tucker v. R.M. Tours*, ___ Pa. ___, 977 A.2d 1170 (2009).

(Lynn E. MacBeth)

Mark F. Bennett for Plaintiff.

Jonathan A. Orié for Duquesne Light.

Robert T. McDermott for Department of Transportation.

David Harouse for Erik Moore.

No. GD 01-21366. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., January 8, 2010—Plaintiff has appealed from this Court's Order Denying Reconsideration which was dated September 15, 2009. After receiving the Notice of Appeal, we issued an Order pursuant to Pa. R.A.P. 1925(b)(1), directing him to file a Statement of Matters Complained of on Appeal within 21 days of the date of the Order. The 1925(b) Order was dated October 29, 2009 and docketed October 30, 2009, so the Statement was due no later than November 20, 2009. As of December 2, 2009, no Statement has been filed in the Court of Common Pleas, although a copy of a Statement filed with the Superior Court was delivered to our chambers on November 18, 2009.

It is very possible that Plaintiff has waived all issues on appeal. The Pennsylvania Supreme Court recently re-visited the issue of the trial court's power to accept an untimely 1925(b) Statement in the case of *Tucker v. R.M. Tours*, ___ Pa. ___, 977 A.2d 1170 (2009). The Supreme Court reiterated the long-standing rule that a failure to file a timely Statement could not be excused by a trial judge. We therefore doubt that a trial judge can excuse a timely filing in the wrong court.¹

The issues on appeal seem to be whether the report of a professional engineer which was attached to Plaintiff's Motion to Reconsider was sufficient to require denial of Duquesne Light's Motion for Summary Judgment. We vacated the Order granting summary judgment so we could hear additional argument without causing the parties any worry about procedural pitfalls. After further argument, we reiterated the grant of summary judgment in favor of Duquesne Light.

As summarized in Plaintiff's Statement, he contends that the engineer's opinion was "that the failure to relocate, eliminate, or make breakaway, the struck pole prior to the crash was not in accordance with long-standing safety concepts, was not reasonable, and caused the severe outcome of the crash." He further contends that, based on his opinion, the issue of whether the location of the pole was dangerous should have been allowed to go to the jury.

Both sides agreed at the original argument that *Nelson v. Duquesne Light Co.*, 338 Pa. 37, 12 A.2d 299 (1940) controls this case. *Nelson* held that a utility company such as Duquesne Light is liable for the harm caused by the placement of a utility pole only when the placement causes a foreseeable and unreasonable risk of harm to users of the highway. The report Plaintiff's counsel attached to his Motion to Reconsider was written in 2001; a short affidavit dated June 16, 2009, was also supplied confirming authorship and that "the statements therein are true and correct."

The report was not supplied in a timely fashion in response to the Motion for Summary Judgment, although it is dated July 11, 2001 and related to the instant action. The gist of the report as it applies to Duquesne Light is that the pole was in a zone that should have been kept available by the "highway design engineer" for a "forgiving roadside" or "clear zone," and that Duquesne Light (along with the electrical utility industry) had been aware of the resultant hazard for some years, even decades.

We leave it to Commonwealth Court, which will hear this appeal, to decide whether or not Plaintiff's counsel's various procedural missteps should be ignored so that the merits of the existence or not of a jury question can be reached. We conclude that *Tucker* prohibits this court from doing so.

BY THE COURT:

/s/Friedman, J.

Dated: January 8, 2010

¹ Pa. R.A.P. 1925(b) specifies that the Statement is to be filed "of record in the trial court and served on the judge."

**Allen E. Miller and Dorothy Miller, his wife v.
Edward J. Cleis and Margaret A. Cleis, his wife**

Delay Damages—Delay Not Caused by Plaintiff—Pa. R.C.P. 238

Delay caused by death and illness of attorneys and a praecipe "languished" in the system does not constitute delay caused by the plaintiff for purposes of delay damages under Rule 238.

(Lynn E. MacBeth)

John S. Sherry for the Plaintiffs.

David Harouse for Defendants.

No. GD 00-001248. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly, J., November 25, 2009—This matter relates to Hamlet's lament in his famous soliloquy where one of the "slings and arrows of outrageous fortune" is the "law's delay."¹

Here, this motor vehicle accident involved a cross over by Defendant, “Cleis” whereby he collided with the vehicle of Plaintiff, “Miller,” causing bodily injury. The case was filed on January 24, 2000, and finally came to trial August 31, 2009. The jury rendered a verdict in favor of Miller in the amount of \$45,000, and \$4,000 for Miller’s wife, Dorothy. Cleis has not filed any Post Trial Motion, and the sole issue before me is the calculation of damages under Rule 238.

(a)(1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the court in a nonjury trial or in the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. § 7361, and shall become part of the verdict, decision or award.

(2) Damages for delay shall be awarded for the period of time from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.

(3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.

(b)(1) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,

(i) after the defendant made a written offer which complied with the requirements of subdivision (b)(2), provided that the plaintiff obtained a recovery which did not exceed the amount described in subdivision (b)(3), or

(ii) during which the plaintiff caused delay of the trial.

To the attorneys’ credit they have agreed upon most of what is due Miller. The amount to be decided by me is for a finite period from January 26, 2007 to September 2, 2009, which amounts to \$8,873.63.

The delay in the matter was occasioned by the untimely, and unfortunate death of the attorney who originally filed the suit. The administration of that attorney’s estate occasioned some delay. Substitute counsel was appointed, and he is still in the case. However, that attorney became ill, and needed protracted medical attention. In anticipation of that medical treatment, he asked that the matter be continued. That request was granted on July 9, 2004, and the matter taken off our trial list.

Said counsel recovered, and on January 25, 2007 filed a Praecipe to re-list the case. Herein arises that “sling and arrow.”

That Praecipe languished in our system from January 25, 2007 to August 31, 2009, when the case was finally called, and the above verdict entered.

As noted, the attorneys did an admirable job in achieving a partial settlement. The positions advanced by each have support in appellate caselaw. Miller relies on *Wirth v. Miller*, 580 A.2d 1154 (Pa.Super. 1990) for the proposition that Rule 238 does “not permit exclusion for calculation of delay damages for periods of delay for which *no party* is responsible due to extraneous administration concerns” at 1164. The Court there adds that plaintiff will be denied delay damages only when “...his or her conduct caused the delay of trial.”

In contrast, Cleis relies on *Tindall v. Friedman, D.O.*, 970 A.2d 1159 (Pa.Super. 2009) for the proposition that “...any period of time must be excluded during which the plaintiff caused delay of trial.” However, in reciting the facts in support of her denial of delay damages, Judge Bowes observed “...(T)his delay was not the result of any action by the defendant or the Court System.” She further states that “...the sole issue under Rule 238 is whether the “plaintiff” caused the delay. If proceedings are postponed by *any other mechanism*, delay damages are imposed.” (Emphasis Supplied).

Here the delay *caused* by Miller ended when it filed its Praecipe. That the case did not come on for trial until September, 2009 is not conclusive because the Prothonotary’s delay was the “other mechanism” that caused the delay. Hence, I will GRANT delay damages in the amount of \$8,873.63.

BY THE COURT:

/s/O’Reilly, J.

Date: November 25, 2009

¹ Shakespeare, *The Tragedy of Hamlet*, Act Third, Scene First, Line 65-80 (The Yale Shakespeare, Cross & Brooke, p. 995, 1993).

Commonwealth of Pennsylvania v. Keith Orville Wood

Change of Venue—Pretrial Publicity—Suppression of DNA Evidence—Forced DNA Sample—42 Pa. C.S.A. §2316 (a)

1. Defendant was convicted of various crimes including rape, indecent assault, and sexual assault and convicted to aggregate sentences of 80 to 160 years.

2. Defendant’s pretrial motion requesting that the term “East End Rapist” not be used to describe him during his trial was consented to by the Commonwealth. The remaining requests for change of venue and exclusion of DNA evidence were denied by the court.

3. The mere presence of pretrial publicity does not warrant a change of venue. Defendant must show that the publicity led to actual prejudice. In this case, the rapes had occurred more than seven years prior to jury selection. The arrest occurred over a year before jury selection. The jury pool had relatively little knowledge of the publicity, and the ones who recalled the case stated that they could set aside what they heard and render a fair and impartial verdict.

4. Defendant argued that DNA evidence should be suppressed because he was forced to give a sample as a condition of release

from incarceration on a parole violation resulting in his return to prison on a burglary conviction that took place in 1997. The statute requiring samples as a condition of release from prison, 42 Pa. C.S.A. §2316 (a), applied to offenses prior to its effective date of June 19, 2002 if prisoners remained incarcerated or returned to prison as parole or probation violators after that date. Therefore, Defendant's argument that burglary was not one of the offenses that triggered the requirement for a sample upon release was not supported by the express terms of the statute.

(Lynn E. MacBeth)

Michael W. Streily for the Commonwealth.

Brandon P. Ging for Defendant.

Nos. CC 200702862; 200712474; 200712475; 200415477. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION OF THE COURT

Manning, A.J., December 30, 2009—The defendant was charged in five separate Criminal Informations with the following:

At CC 200702862:

- a. One count of Burglary (F1), 18 Pa. C.S.A. § 3502(a);
- b. One count of Rape (F1), 18 Pa. C.S.A. § 3121(a)(1);
- c. One count of Sexual Assault (F2), 18 Pa. C.S.A. § 3124.1;
- d. One count of Indecent Assault (M2), 18 Pa. C.S.A. § 3126(a)(1); 18 Pa. C.S.A. § 3124.1;
- e. One count of Robbery (F1), 18 Pa. C.S.A. § 3701(a)(ii);
- f. One count of Terroristic Threats (M1), 18 Pa. C.S.A. § 2706(a)(1); and
- g. One count of Theft by Unlawful Taking (M3), 18 Pa. C.S.A. § 3921(a).

At CC 200712474:

- a. One count of Burglary (F1), 18 Pa. C.S.A. § 3502(a);
- b. One count of Rape (F1), 18 Pa. C.S.A. § 3121(a)(1);
- c. One count of Involuntary Deviate Sexual Intercourse (F1), 18 Pa. C.S.A. § 3123(a)(1);
- d. One count of Indecent Assault (M2), 18 Pa. C.S.A. § 3126(a)(1);
- e. One count of Terroristic Threats (M1), 18 Pa. C.S.A. 2706(a)(1);
- f. One count of Simple Assault (M2), 18 Pa. C.S.A. 2701(a)(1);
- g. One count of Robbert (F1), 18 Pa. C.S.A. § 3701(a)(1)(i); and
- h. One count of Theft by Unlawful Taking (M3), 18 Pa. C.S.A. §3921(a).

At CC 200712475:

- a. One count of Burglary (F1), 18 Pa. C.S.A. § 3502(a);
- b. One count of Rape (F1), 18 Pa. C.S.A. § 3121(a)(1);
- c. Three counts of Aggravated Indecent Assault (F2), 18 Pa. C.S.A. § 3125(a)(1); and
- d. One count of Indecent Exposure (M1), 18 Pa. C.S.A. § 3127(a).

At CC 200712476:

- a. One count of Burglary (F1), 18 Pa. C.S.A. § 3502(a);
- b. One count of Rape (F1), 18 Pa. C.S.A. § 3121(a)(1);
- c. One count of Sexual Assault (F2), 18 Pa. C.S.A. § 3124.1; and
- d. One count of Terroristic Threats (M1), 18 Pa. C.S.A. § 2706(a)(1).

And, at CC 20071247:

- a. One count of Burglary (F1), 18 Pa. C.S.A. § 3502(a);
- b. One count of Rape (F1), 18 Pa. C.S.A. § 3121(a)(1);
- c. Three counts of Involuntary Deviate Sexual Intercourse (F1), 18 Pa. C.S.A. 3123(a)(1);
- d. One count of Indecent Assault (M2), 18 Pa. C.S.A. § 3126(a)(1);
- e. One count of Aggravated Assault (F1), 18 Pa. C.S.A. § 2702(a)(1);
- f. One count of Terroristic Threats (M1), 18 Pa. C.S.A. § 2706(a)(1); and
- g. One count of Simple Assault (M2), 18 Pa. C.S.A. § 2701(a)(1).

The defendant filed pre-trial motions seeking a change of venue/venire; requesting that if the defendant testified, the

Commonwealth be required to refer to the defendant's prior convictions for burglary and theft only as "crimes involving dishonesty"; seeking to bar the Commonwealth from using the term "East End rapist"; and to bar the introduction of DNA evidence. After hearing and argument, the pre-trial motions were denied in their entirety, except for the request that the Commonwealth not use the term "East End rapist," which was consented to by the Commonwealth.

The defendant was tried by a jury, between June 10 and June 16, 2008. The jury found him guilty of all counts at CC 200702862, 200712474, 200712475 and 200712477. The jury could not agree upon verdicts as to the charges at CC 200712476, which involved the victim M.H.¹ A mistrial was declared at that case and, at sentencing, the Commonwealth *nolle prossed* those charges. At the remaining cases, the defendant received the following sentences. At CC 200712475: 60 to 120 months at count 1; 120 to 240 months at count 2, consecutive to the sentence at count 1; 60 to 120 months at count 3, consecutive to the sentences at counts 1 and 2; and no further penalty at the remaining counts. At CC 200702862: 60 to 120 months at count 1; 120 to 240 months at count 2, consecutive to the sentence at count 1; and 60 to 120 months at count 5, consecutive to the sentences at counts 1 and 2; and no further penalty at the remaining counts. At CC 200712477: 60 to 120 months at count 1; 120 to 240 months at count 2, consecutive to the sentence at count 1; 60 to 120 months at count 3, consecutive to the sentences at counts 1 and 2 and no further penalty at the remaining counts. At CC 200712474: 60 to 120 months at count 1; 120 to 240 months at count 2, consecutive to the sentence at count 1; 60 to 120 months at count 7, consecutive to the sentences at counts 1 and 2; and no further penalty at the remaining counts. The aggregate sentence imposed was 80 to 160 years.

In his Concise Statement of Matters Complained of on Appeal, the defendant identified the following claims:

- I. The Trial Court erred in denying the pre-trial motion for change of venue/venire;
- II. The Trial Court erred in denying the pre-trial motion to exclude DNA evidence;
- III. The evidence was not sufficient beyond a reasonable doubt to convict Mr. Wood on the various charges, particularly the sex offenses, when the DNA evidence was not admissible, no other physical evidence linked Mr. Wood to any of the crimes, and no victim was able to identify Mr. Wood as her assailant;
- IV. The verdicts were against the weight of the evidence where the Commonwealth's evidence was speculative, tenuous, and inconsistent at best, particularly as to the collection and testing of DNA evidence;
- V. The Trial Court abused its discretion in sentencing Mr. Wood by considering improper factors and/or not considering proper facts; and
- VI. Mr. Wood's sentence of not less than 80 years, not more than 160 years, which amounts to a *de facto* life sentence, is manifestly excessive and unreasonable.

As the defendant has challenged the weight and sufficiency of the evidence, a review of that evidence is necessary. The Commonwealth's evidence established that the first assault took place the morning of June 26, 2000 when 59 year old M.H. woke feeling as if someone were in her bedroom. She noticed a man standing at the foot of her bed, with what she later determined was her housecoat covering his face. He climbed on top of her, threatened to strike her and kill her when she tried to resist and then raped her. When he got off of her, he ordered her to lie on the floor and then left. M.H. called her daughter and was taken to Magee Hospital.

The next attack occurred the very next day, in the early morning hours of June 27, 2000, when T.S., a 22 year old law student awoke in the middle of the night to find a man standing over her. He had one of her hats on his head and had his face concealed by a cloth of some sort. He held a butcher knife in his hand. She could see enough of his features, however, to determine that he was African-American, about 5' 7" to 5' 9" tall and in his late thirties or early forties. He told her that he had been watching her for some time, which she considered odd as she had just moved to Pittsburgh a few weeks previously. He raped her while holding a knife at her throat. When he left, he took approximately \$40 from her purse. He told her to not call the police or he would be back with other "guys" and would "cut her." (N.T. 6/10/08, Pp. 79-85).

At approximately 4:30 a.m. on July 9, 2000, A.U. was awoken suddenly by the presence of another person in her bedroom. She first thought that it was her boyfriend. When she realized it was not her boyfriend, she began to scream. The man jumped on top of her and subdued her by threatening to kill her. He then raped her. Although she was unable to identify the assailant, she believed that he was a black man in his thirties. Before leaving, he told her to lie on her stomach and face the wall. She laid there for several minutes, not moving until she heard her boyfriend's voice. Although he arrived minutes after the defendant left and went outside to look for him, he was not able to locate anyone. The victim was taken to the hospital. She later discovered that \$15.00 was missing from her wallet. (N.T. 6/10/08 Pp. 124-128).

On August 8, 2000, A.O., a physician serving her residency in Pittsburgh, was awakened in the middle of the night by the sensation of someone touching her right shoulder. After becoming more awake, she realized it was a man. She could not see his face, but could tell he was a black man in his thirties. When this individual began to remove her clothes, she fought him; kicking, trying to gouge his eyes and screaming for him to get off of her. The assailant was able to finally subdue her by choking her to the point that she lost consciousness. When she regained consciousness, she was being straddled by the man who then proceeded to rape her. During the rape, he struck her numerous times on the head because she refused to comply with his demands and continued to struggle with him. The assailant, in an attempt to remove biological evidence, wiped his semen from the victim with a scarf and then poured bleach on her. He told her that if she called the police, he would come back and kill her. During her interview with the police, the victim recounted that the man attempted to fake an accent. (N.T. 6/11/08 Pages 148-163).

The final assault occurred on May 11, 2001, at the residence of M.T. She awoke at approximately 1:30 a.m., alerted by the presence of another person in the room. The man, in a heavily accented voice, told her to wake up. She noticed the man's face was covered up with a piece of her clothing. He proceeded to rape her while holding a screwdriver to her eye. After the rape, the assailant attempted to clean the victim. Before leaving, he told her to face away from him and to not call the police or he would kill her. (N.T. 6/11/08 Pages 198-208).

In four of the assaults biological material was left at the scene by the assailant. It was tested by the law enforcement and it was determined that the same man had been responsible for those assaults. Police were not, however, able to match the assailant's profile to any they had on file until 2007, when a DNA sample taken from the defendant after he had been incarcerated as a parole violator was determined to match. At trial, a serologist presented by the Commonwealth testified that there was only a 1 in 56 quin-

tillion chance of someone having that particular DNA pattern matching that of the defendant. (N.T. 6/12/08, P. 323).

The Court will now address the defendant's claims. First, he contends that the Court erred in denying the pre-trial motion for change of venue/venire. A change of venue is necessary 'if a fair and impartial jury cannot be selected in the county in which the crime occurred,' a determination that the trial court is best suited to make. *Commonwealth v. Karenbauer*, 715 A.2d 1086, 1092 (1998), *cert. denied*, 526 U.S. 1021, 119 S.Ct. 1258, 143 L.Ed.2d 354 (1999). Thus, in reviewing a denial of a motion for a change of venue, an appellate court will only disturb the trial court's decision if it represents an abuse of discretion. *Id.* at 1092. The mere occurrence of pre-trial publicity does not warrant a change of venue. In general, a defendant must show that the publicity led to actual prejudice. *Id.* at 1092.

The instant case was reported quite extensively during the period when the rapes occurred; however, that was more than seven years prior to the selection of the jury. Moreover, the arrest of the defendant, which also received media interest, was over a year before selection of the jury. The passage of time certainly meant that there was little chance that the jurors were going to recall the media coverage from the time of the rapes. This was borne out when the Court inquired of the jury pool as to their knowledge of the case. Out of the entire venire, only 29 even recalled the case. Of these, all stated that they could set aside what they had heard and render a fair and impartial verdict. Moreover, the jury selection process resulted in the elimination of potential jurors who were not capable of serving impartially. The defendant had not claimed that any of the jurors actually chosen to serve were affected by the trial publicity. In the absence of prejudice, the defendant is not entitled to relief.

Next, the defendant claims that the Court erred in denying the pre-trial motion to exclude the DNA evidence. The defendant sought suppression of the DNA evidence, contending that it had been seized unlawfully. The Deputy District Attorney explained the circumstances surrounding the seizure from the defendant:

MS. NECESSARY: Your Honor, the facts listed in paragraph 4 of the defendant's motion are correct. He was arrested — he was arrested on June 18, 2002, and was then detained around June 27, 2002, by the Pennsylvania Department of Probation and Parole. This was for a violation of a burglary conviction which occurred back in 1997. He was — however, in the year 2002, the law was changed to require that any person who served any term of incarceration on the effective date who was convicted of burglary shall not be released until that person had submitted a DNA sample. And so, as of the date the defendant entered the prison in 2002, he was required to submit a DNA sample prior to his release.

(N.T., 6/9/08, p. 11). The defendant contends that because his burglary conviction took place in 1997 and, at that time, burglary was not among the offenses which resulted in the seizure of a DNA sample, he should not have been subject to the seizure of that sample upon his return to prison in 2002 as a parole violator.

The statute provides:

(a) General rule.—A person who is convicted or adjudicated delinquent for a felony sex offense or other specified offense *or who is or remains incarcerated for a felony sex offense or other specified offense on or after the effective date of this chapter* shall have a DNA sample drawn...

42 Pa. C.S.A. § 2316 (a) (emphasis added). It further states:

(b) Condition of release, probation or parole.—

(1) A person who has been convicted or adjudicated delinquent for a felony sex offense or other specified offense and *who serves a term of confinement in connection therewith after June 18, 2002*, shall not be released in any manner unless and until a DNA sample has been withdrawn.

(2) *This chapter shall apply to incarcerated persons convicted or adjudicated delinquent for a felony sex offense prior to June 19, 2002.*

(3) *This chapter shall apply to incarcerated persons and persons on probation or parole who were convicted or adjudicated delinquent for other specified offenses prior to the effective date of this paragraph.*

42 Pa. C.S.A. § 2316 (b). (emphasis supplied) The highlighted language clearly contemplates that person convicted of predicate offenses prior to the effective date of this section, June 19, 2002, would have to supply DNA samples if they remained incarcerated after June 19, 2002 or if they were returned to prison as parole or probation violators after that date. The defendant was incarcerated for his burglary after June 19, 2002 when he was returned to prison as a parole violator. By its express terms, this statute required that he supply a DNA sample. Moreover, the Superior Court has rejected a challenge to the provisions that allow for the taking of DNA samples based on convictions that predate the effective date of those provisions in *Commonwealth v. Derk*, 895 A.2d 622, 627-628 (Pa.Super. 2006). The defendant in *Derk*, who had been convicted of a predicate offense committed prior the enactment of the relevant provisions of 42 Pa. C.S.A. § 2316, challenged the requirement that she submit DNA samples. Although her conviction came after the amendment, she complained that this violated the *ex post facto* provisions of the Federal and State constitutions. The Court rejected this argument, finding that the requirement that a person convicted of certain offenses supply a DNA sample was not punitive, but, rather, procedural in nature and, therefore, did not constitute an *ex post facto* law. Since Section 2316, on its face, required the defendant to provide the DNA sample and the Section was constitutional, the defendant's Motion to bar the admission of that DNA evidence was properly denied.

Next, the defendant claims that the evidence was not sufficient to establish his guilt beyond a reasonable doubt. This contention, however, rests on his claim that the DNA evidence was improperly admitted. Without the DNA evidence, he contends that the remaining evidence was not sufficient to establish his guilt. He is right. Without the DNA, the Commonwealth could not possibly have carried its burden. The DNA evidence was, however, admissible. That evidence, coupled with the other circumstantial evidence, such as the defendant generally fitting the description given by the victims, was clearly sufficient to establish his guilt. The serologist testified that the chance that another person had the same DNA as the defendant was one in 56 quintillion.² Clearly, that evidence was sufficient to establish that the defendant was the person who deposited that DNA material on or near the four victims as he raped them.

The defendant also claims that the verdicts rendered by the jury were against the weight of the evidence. "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. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the

jury's verdict if it is so contrary to the evidence as to shock one's sense of justice." *Commonwealth v. Begley*, 780 A.2d 605, 619 (2001). As with his challenge to the sufficiency of the evidence, this claim is also predicated on the earlier claim that the DNA evidence was improperly admitted. Since that claim was clearly without merit and the DNA evidence properly admitted, this claim must likewise fail.

The defendant's final two claims challenge the propriety of the sentences imposed. He claims that the Court abused its discretion in sentencing Mr. Wood by considering improper factors; and/or not considering proper factors and that the length of the sentence was excessive in that it amounted to a *de facto* life sentence. "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." *Commonwealth v. Fullin*, 892 A.2d 843, 847 (Pa.Super. 2006).

The defendant did not, in either his Post-Sentence Motion or his Concise Statement, explain what improper factors the Court considered or what proper factors the Court failed to consider. It is, accordingly, impossible to respond to those claims. The record of the sentencing will reflect, however, that the Court considered all of the factors identified in the Sentencing Code before imposing sentence.³ The defendant was given the opportunity to present evidence and give allocution. The Court also had the benefit of a pre-sentence report. The defendant did not have any additions or corrections to the report and offered no evidence. In exercising his right to allocution, although he said that he was "sorry" for the victims, he insisted that he was innocent of the charges, claiming, incredibly, that there was no DNA evidence secured from the victims when they were treated at the hospital following the assault. He offered nothing about himself or his history in an attempt to affect the sentence imposed. The Court considered all that the defendant offered at sentencing. The Court also considered the evidence offered by the Commonwealth, which consisted of live testimony from two of the victims as well as written statements from relatives and friends of the victims recounting the terrible impact the defendant's actions had on the victim's lives. The Court observed two things about the victim's, both those who appeared at sentencing and those who just appeared at trial: the horrible impact that the defendant's actions had on their lives and the lives of those who care for them and the tremendous courage they demonstrated in overcoming that impact in their lives and in confronting the defendant in person at trial and at sentencing. This Court commented before imposing sentence, explaining to the defendant why it was going to impose the sentences that would follow:

THE COURT: The Court has the benefit of a presentence report, victim impact statements and the arguments of counsel.

Taking into consideration the sentencing guidelines and all those things, I'll remark as I do to the jurors that St. Thomas Aquinas defined justice as an ancient concept which is to give to each that which is due him.

It is apparent from the evidence presented and everything that has been presented here today, as well as the evidence in the case, that what is due you, Mr. Wood, is a severe, harsh sentence without mercy, commensurate with what you have done.

To impose a sentence less than what I will impose here will only diminish the horrendous nature of your conduct, but would also be rewarding you for the multiple, vicious brutal attacks on the innocent women that you perpetrated.

(N.T. 9/3/08, p. 33). The Court considered all proper factors in arriving at the sentence imposed.

The defendant also contends that the sentence was unduly harsh because, in running the sentences consecutively, the Court assured that the defendant would serve the remainder of his life in prison. The Court imposed the lengthy sentence it did for two reasons: First, because the defendant committed multiple horrific crimes, each of which deserved a separate sentence. Second, because this Court firmly believes that if the defendant were ever permitted to live among society again, he would pose a profound threat to offend again. He committed two of these vicious rapes within one twenty-four hour period. He obviously had no ability to control his impulses. Keeping him in prison, far away from other potential victims, was the only way to protect society from his predatory nature.

"[I]t is well established that a claim of excessiveness of sentence does not raise a substantial question so as to permit appellate review where the sentence is within the statutory limits." *Commonwealth v. Cruz-Centeno*, 668 A.2d 536, 545 (Pa.Super. 1995). The statutory limit for the crimes of rape and burglary is 240 months. For the second degree felonies the defendant was convicted of, the statutory maximum is 10 years. Each of the sentences imposed were within the statutory maximums. The actual sentences imposed were also within standard ranges for the crimes of burglary, robbery, IDSA and aggravated indecent assault. Only the sentences for rape were outside the standard range, and they were in the aggravated range. The Court certainly set forth sufficient reasons for imposing aggravated range sentences for the four rapes committed by the defendant. In addition to the horrendous nature of his offense and the impact they had on the innocent victims, the defendant showed absolutely no remorse for his conduct, denying his guilt in the face of irrefutable evidence to the contrary. The sentences imposed were lawful, proper and warranted by the facts of the case and the character of the defendant.

For the reasons stated above the sentence should be affirmed.

BY THE COURT:
/s/Manning, A.J.

Date: December 30, 2009

¹ To protect the confidentiality of the victims, they will only be identified by their initials.

² That would be the number fifty-six, followed by eighteen zeros.

³ 42 Pa. C.S.A. s 9721 (b) provides those factors: **General standards.**—In selecting from the alternatives set forth in subsection (a), the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing and taking effect under *section 2155* (relating to publication of guidelines for sentencing, resentencing and parole and recommitment ranges following revocation).

**Commonwealth of Pennsylvania v.
Luis Miguel Guzman-Tirado**

Suppression of Evidence—Probable Cause for Arrest—Searches and Seizures—18 Pa. C.S. §§5701, et seq.

1. Bureau of Narcotics and Investigating Drug Control obtained a pen register and a trap and trace device on the telephone of Victor Allen for investigation of a cocaine distribution ring in Monroeville, Pennsylvania.

2. As a result of the interception of the phone calls, police suspected the transfer of drugs at a Sharpsburg residence. Allen was arrested and his cell phone seized. Incoming messages on his phone led police to search for a green van with Ohio license plates in the Monroeville area. Defendant spoke briefly to the person in the green van; otherwise there was no evidence of any suspicious activity on behalf of Defendant.

3. There was no probable cause to arrest Defendant. The presence or proximity of Defendant to a drug transaction does not constitute probable cause for arrest.

(Lynn E. MacBeth)

Maureen Sheehan-Balchon, Sr. for the Commonwealth.

William E. Brennan for Defendant.

No. CC20080001356. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Todd, J., January 11, 2010—This is an appeal by the Commonwealth of Pennsylvania from an Order of April 6, 2009 granting the Motion to Suppress Evidence filed on behalf of the Defendant, Luis Miguel Guzman-Tirado. Defendant was arrested on September 17, 2007 and charged with Corrupt Organizations, 18 Pa. C.S.A. §911(b)(3) and (4); Conspiracy, Possession with Intent to Deliver and Delivery of Cocaine, 18 Pa. C.S.A. §903(a)(1) and (2); and Possession with Intent to Deliver Cocaine, 35 P.S. §780-113(a)(30). Defendant filed a Motion to Suppress Evidence obtained arising out of his arrest on the basis that there was no probable cause to arrest him and, therefore, any evidence obtained incident to the arrest should be suppressed. After a Hearing on February 17, 2009 the Order was entered granting Defendant's motion and suppressing all evidence obtained incident to the arrest.

The Commonwealth filed a timely Notice of Appeal to the Superior Court on May 5, 2009. On May 20, 2009, the Commonwealth was ordered to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) within twenty-one (21) days. On June 4, 2009, the Commonwealth filed their Concise Statement that raised the following issues:

- “1. The Trial Court erred when it concluded that the Commonwealth's arrest of the Defendant was not supported by probable cause. Under the totality of the circumstances of the case as known at the time of arrest, police had sufficient basis or reasonably believe that the defendant had committed or was committing a crime.
2. The Trial Court erred when it concluded that the arrest was illegal and that the evidence seized from the defendant was fruit of the poisonous tree.
3. The Trial Court erred when it granted the defendant's motion to suppress evidence.”

BACKGROUND

Defendant, in his Motion to Suppress Evidence, alleged that on September 17, 2007 he was arrested by the Pennsylvania State Police in Monroeville, Pennsylvania and that as a result of the search of Defendant and his vehicle incidental to his arrest incriminating evidence was obtained. Defendant further alleged that his arrest was in violation of his constitutional rights on the following basis: the arresting officers did not have a valid warrant to arrest or search the Defendant; any warrant failed to contain sufficient facts to support probable cause to arrest and search the Defendant; the arresting officers did not have probable cause to arrest and search the Defendant; the arresting officers failed to properly execute any warrant they had; and, the arresting officers lacked any legal justification for the detention, arrest and search of the Defendant.

At a Hearing held on February 17, 2009, the Commonwealth presented the testimony of Agents Timothy Yesho and Harold Johnson of the Pennsylvania Office of Attorney General Bureau of Narcotics and Investigating Drug Control. Agent Yesho testified that an investigation began in 2007 into a cocaine distribution ring in Monroeville, Pennsylvania. (T. p. 7) The investigation centered on the distribution of cocaine and other controlled substances by Victor Allen. As a result of preliminary information obtained during the investigation an Order of Court was obtained authorizing a pen register and a trap and trace device to be placed on Allen's phone. An analysis of the information from the pen register and trap and trace device established that Allen made and received numerous calls from the Columbus, Ohio area which were likely related to the major source of the drugs which Allen distributed and sold in Pennsylvania. (T. p. 8)

In addition to monitoring the phone calls, surveillance of Allen was also carried out during which numerous apparent drug transactions between Allen and other individuals were observed. (T. p. 9) One of the transactions occurred on July 23, 2007 when Allen was observed on Route 22 in the Monroeville area at which time he met with an individual in a red truck with Ohio registration. The red truck was found to be registered to a Jose Marcos Lopez of 818 Riggsby Road, Columbus, Ohio. (T. p. 10) As a result of this information, surveillance was instituted at the Riggsby Road address during which a white SUV also registered to Lopez was seen in the driveway.

As a result of the extensive information obtained from the pen register and trap and trace devices, as well as the surveillance, the Commonwealth obtained an Order on August 24, 2007 from Judge Bender of the Pennsylvania Superior Court authorizing non-consensual interception of Allen's phone conversations pursuant to 18 Pa. C.S. §5701, *et seq.* The interception of Allen's phone calls began on August 24, 2007. (T. p. 11) The intercepts ended on September 17, 2007. (T. p. 14)

As a result of the interception of the phone calls, the investigating officers were able to determine that many of the calls to and from Ohio were from Hispanic males discussing the purchase and sale of kilo quantities of cocaine, including the timing of deliveries and the price for the purchase of the cocaine by Allen. (T. p. 15) The interception of the phone calls and additional surveillance further established that the transfer of drugs was taking place at a residence located in Sharpsburg, Pennsylvania that had an attached garage that allowed vehicles under surveillance to enter the garage and transfer the drugs without being observed. (T. pp. 17-18)

As a result of continued surveillance at the house in Sharpsburg, a dark blue Volvo was observed on September 6, 2007 entering and then leaving the house. After leaving the house, the vehicle was stopped as it headed toward Ohio and as a result of a search of the vehicle \$20,980.00 was found in a hidden compartment in the vehicle. The driver of the vehicle, Juventino Parra, who was alone in the vehicle, was later released. (T. p. 19) On September 12, 2007, a blue Chevy Trail Blazer was stopped after leaving the Sharpsburg residence and was found to have \$90,000.00 in the driver's side wheel well. The vehicle was also being operated by Juventino Parra, who was accompanied by Juan Mora. (T. pp. 21-22)

On September 16, 2007, at approximately 5:48 p.m. a phone call was intercepted between a Hispanic male and Allen. As a result of the phone call the agents believed that Allen was attempting to meet the Hispanic male who was driving a green van. It appeared that Allen and the Hispanic male were attempting to locate each other in the Monroeville/Wilkinsburg area in order to possibly complete a drug transaction. Based on the previous surveillance the green van was believed to be the same green van which had been previously observed at the residence in Sharpsburg making a delivery of drugs. (T. p. 24) This vehicle, bearing Ohio Registration DYR 1702, was known to be registered to Clara Diaz of Columbus, Ohio.

As a result of the continued interception of phone calls on September 16, including one at approximately 6:22 p.m., the agents believed that the drug transaction had been completed and that Allen had a substantial amount of cocaine in his vehicle. The decision was therefore made to initiate a traffic stop of Allen and recover the cocaine in his vehicle. (T. p. 26) Allen's vehicle was located and a traffic stop was attempted, however, Allen fled. After a short vehicle chase, Allen abandoned his vehicle and fled on foot, however, his van was found to contain approximately ten kilos of cocaine. (T. p. 26) Allen was found several hours later and he was arrested. (T. p. 26) Allen's phone was recovered at the time of his arrest. After his arrest and continuing into September 17, Allen continued to receive at least 40 incoming phone messages from the same number that had been intercepted the previous day. (T. p. 27) These phone messages referenced the green van and the drug transaction the day before. In these phone messages, the Hispanic male repeatedly indicated that he was waiting for Allen to call back. The agents believed the caller was trying to arrange a meeting in order for Allen to pay for the cocaine that was delivered the day before. (T. p. 28) Based on this information the agents believed that the Hispanic male involved in the transfer of the drugs to Allen was still in the Monroeville area. (T. p. 28) As a result, the investigating officer instructed the surveillance supervisor that a green van with Ohio plates might be in the Monroeville area attempting to meet with Allen. (T. p. 29)

Agent Harold Johnson initiated surveillance in the Monroeville area on the morning of September 17, 2007. (T. p. 52) At approximately 9:00 a.m., Agent Johnson observed the green van in the parking lot at the Days Inn Motel on Route 48 in Monroeville. Agent Johnson observed a Hispanic male and Hispanic female leave the motel, load some items into the van, enter the van and drive to the front of the motel. (T. p. 52) At the front of the motel Agent Johnson also observed a maroon Ford pick up truck which was being driven by Defendant, who also had a Hispanic female passenger in the vehicle. (T. p. 53) Defendant and the driver of the green van spoke briefly and then Defendant proceeded out of the parking lot in the maroon truck with the green van following. Defendant then drove into a pharmacy parking lot, followed by the van, at which time the driver of the van and Defendant were arrested. (T. p. 55) There was no evidence of any suspicious activity involving the transfer of money or drugs between Defendant and the operator of the green van on the morning of September 17. In fact, there was no specific evidence that a transfer of drugs took place between the operator of the green van and Allen on September 17 as any transfer was never actually observed.

DISCUSSION

Defendant contends that his warrantless arrest was in violation of his rights under the United States and Pennsylvania Constitutions because the arrest was without probable cause. It is axiomatic that in order for a warrantless arrest to be constitutionally valid, it must be supported by probable cause. *Commonwealth v. Evans*, 685 A.2d 535 (1996) In determining whether probable cause exists for a warrantless arrest, the totality of the circumstances must be considered. *Commonwealth v. Banks*, 658 A.2d 752 (1995)

Regarding the standard applicable for a finding of probable cause, it has been stated that:

“Probable cause for a warrantless arrest exists if the totality of the circumstances known to the officer is sufficient to justify a person of reasonable caution in believing the suspect has committed a crime. *Commonwealth v. Burnside*, 425, 625 A.2d 678, 681 (1993). Probable cause does not require a certainty that a crime has occurred. *Id.* Rather, it exists where criminality is a reasonable inference based on the factual and practical considerations of reasonable and prudent persons. *Id.*” *Commonwealth v. Pitner*, 928 A.2d 1104, 1110 (Pa.Super. 2007)

In the present case, an examination of the facts presented in order to support a finding of probable cause establish only that Defendant is Hispanic, he was observed in proximity to the green van which was suspected of being involved in the delivery of drugs and he was conversing with the operator of the van. This presence or proximity, considering the totality of the circumstances, does not constitute probable cause in this case. Given the fact that there was no other evidence that suggested that Defendant was involved any of the drug transactions, there were insufficient facts to support a finding of probable cause.

In *Commonwealth v. Goslee*, 234 A.2d 849 (1967), the Pennsylvania Supreme Court addressed the issue of whether presence at the scene of a crime is sufficient probable cause for a warrantless arrest. In *Goslee* the evidence showed that a house was burglarized between 2:30 p.m. October 16, 1965 and 2:30 p.m. October 18. One of the investigating officers remembered that on the night of the 17th he had seen Goslee standing on the corner one-half block away from the scene of the offense conversing with another unrecognized individual. Based on this information and the fact that Goslee had a prior burglary conviction, a search warrant was obtained for Goslee's apartment at which time Goslee was arrested. The search of the apartment found some of the stolen items. *Commonwealth v. Goslee*, 234 A.2d at 850. Subsequent to his conviction, Goslee appealed contending there was no probable cause for the search warrant or his arrest.

On appeal, the Commonwealth conceded that the search warrant was invalid, but contended that the incriminating evidence was properly admitted as being incidental to a lawful arrest. The Court rejected the proposition that Goslee's presence near the scene of the crime and his past conviction was sufficient probable cause for his arrest. The Court stated:

“We think it clear that the arresting officer, relying only on appellant Goslee's presence near the scene of the crime within a two-day period and his past conviction, was acting upon mere suspicion. Nothing appears of record to indicate that Goslee's actions, as opposed to his presence, alone, were 'suspicious.' To sustain this conviction we would be forced to countenance a proposition that presence plus a prior conviction is sufficient for arrest—a proposition we cannot accept.” *Commonwealth v. Goslee*, 234 A.2d at 851.

Therefore, it is clear that mere presence at or near the scene of a crime is not a sufficient basis to find probable cause for an arrest.

In *Commonwealth v. Reece*, 263 A.2d 463 (1970), the Supreme Court again found that presence at or near the scene of a potential crime is not a sufficient basis for probable cause. In *Reece*, the police, acting on information that a “pot party” would take place in a certain apartment in the township, secured a search warrant. Pursuant to the warrant, the officers entered the apartment and found a small amount of amphetamine powder. During the time period that the officers were in the apartment, approximately 15 people arrived at the apartment, all of whom were searched. *Reece*, 263 A.2d at 464. At approximately 12:30 a.m. Defendant Reece knocked on the door of the apartment, which was slightly ajar and entered. He was confronted by one of the police who mirandized him and conducted a search of his coat which resulted in the seizure of a small amount of marijuana. *Reece*, 263 A.2d at 465. Citing *Commonwealth v. Goslee*, the Supreme Court found that the arresting officer lacked the required probable cause to arrest Reece and, therefore, the incidental search of his clothing was likewise unlawful. The Court found that the arresting officer had no information whatsoever about Reece before he entered the apartment and there was nothing in his demeanor or conduct that in any way suggested that he was on drugs or that he had drugs in his possession. The Court noted: “In reality, the only possible basis for the arrest was his appearance on the scene where a ‘pot party’ was expected to occur.” *Reece*, 263 A.2d at 466. It is clear that mere presence at the scene of a crime, without more, is insufficient to establish probable cause for arrest.

In the present case, the non-consensual phone interceptions established that Allen was communicating with Hispanic males, however, prior to his arrest none of the intercepted information or intercepted phone calls established or identified Defendant specifically. In addition, Defendant was not identified during any of the surveillance in which drug transactions were observed in the Monroeville area or during any delivery of drugs to the residence in Sharpsburg. Defendant was not found in nor linked in any way to any of the vehicles that were observed during the surveillance. Finally, Defendant was not found in nor linked in any way to any of the vehicles which were stopped and in which money related to drug transactions with Allen were found.

As it pertained to the events of September 16 and September 17, Defendant was not identified prior to his arrest in any of the phone calls made to Allen regarding the impending sale and transfer of cocaine nor was he observed in the green van that was believed to be involved in the transfer of the cocaine to Allen. During Agent Johnson’s surveillance which occurred on the morning of September 17, which located and observed the green van at the motel in Monroeville, Defendant was not observed in or operating the green van. Defendant’s only connection to the van was that he was observed talking to the operator of the van and upon leaving the motel parking lot the two vehicles appeared, for a short distance, to be traveling together. There was no evidence that Defendant emerged from the same room of the motel as the operator of the green van nor was there a description of any type of suspicious activity which would tend to indicate that Defendant was involved in transferring drugs or money from the green van to his person or the vehicle which he was operating. The record did establish that during previous surveillance in July of 2007, a red pickup truck was observed, however, there was no evidence that the maroon pickup truck that Agent Johnson observed Defendant operating on September 17 was the same pickup truck. In fact, the evidence established that it was a different truck and there was no attempt to verify on September 17 whether the truck had the same registration.

It is clear from an examination of the record and considering the totality of the circumstances, that the only basis for the arrest of Defendant was that he was an Hispanic male seen speaking to the driver of the green van which was suspected of being involved in the drug transaction with Allen the previous day and that he was seen driving a separate vehicle, with Ohio registration, which appeared to be traveling with the green van. Using these facts as a basis to establish probable cause, any Hispanic male seen conversing or even near the green van on September 17 could have been arrested. However, these facts do not establish probable cause. Therefore, Defendant’s Motion to Suppress was appropriately granted.

BY THE COURT:

/s/Todd, J.

Commonwealth of Pennsylvania v. Richard Montgomery

Indecent Exposure—Megan’s Law—42 Pa. C.S.A. §9791—Timing of Sexually Violent Predator Hearing—Guilty Plea

1. Defendant asserted that the court erred in conducting the Sexually Violent Predator (SVP) hearing 3 and 1/2 years after he was convicted and sentenced where the applicable statute stated that the determination must be made before sentencing, rendering the court without jurisdiction to conduct the hearing or issue the resulting order.

2. Defendant pled guilty and was informed at the time of his plea and sentencing that he would be subject to a 10 year registration pursuant to Megan’s Law and possibly lifetime reporting requirements. Defendant reviewed and signed an explanation of Megan’s Law rights form and expressly waived the requirement for the evaluation to be completed prior to sentencing and acknowledged that a separate hearing would be conducted.

3. There is nothing in the Act that precludes Defendant from waiving the time period for the assessment. At the time of the SVP hearing no objection was made as to timeliness. Therefore, it was not error to conduct the SVP hearing after sentencing.

(Lynn E. MacBeth)

Michael L. Streily for the Commonwealth.

Carrie L. Allman for Defendant.

No. CC200507434. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION

Todd, J., January 19, 2010—This is an appeal from an Order entered on March 24, 2009 finding that Defendant, Richard Montgomery, was a Sexually Violent Predator pursuant to 42 Pa. C.S.A. §9795.4. On April 21, 2009, Defendant filed a Notice of Appeal. On April 23, 2009, an Order was entered pursuant to Pa. R.A.P. 1925(b) directing Defendant to file a Concise Statement of

Matters Complained of on Appeal within twenty-one (21) days of receipt of all transcripts. On July 10, 2009, the Transcript of the Defendant's Guilty Plea and Sentencing Hearing of October 27, 2005 was filed. On October 1, 2009, Defendant's Petition to Accept Statement of Matters Complained of on Appeal *Nunc Pro Tunc* was granted as a result of a delay in counsel's receipt of the transcript of the March 19, 2009 Sexually Violent Predator (hereinafter "SVP") Hearing transcript.

In his Concise Statement of Matters Complained of on Appeal, Defendant raised the following issues:

"a. The Court committed an error of law in conducting the SVP Hearing 3 and 1/2 years after Mr. Montgomery was convicted and sentenced where the applicable statute explicitly state that the determination must be made before sentencing. As such, the Court was without jurisdiction to conduct the hearing or issue the Order determining Mr. Montgomery to be a Sexually Violent Predator.

b. Mr. Montgomery was denied due process where the Court informed him at the time of his plea and sentencing proceedings that he would be subject to a 10 year registration pursuant to Meghan's Law and then, more that 3 years later, conducted an SVP Hearing and determined that Mr. Montgomery was a SVP subject to lifetime reporting and registration.

c. The Court erred in determining that Mr. Montgomery was a SVP where there was no evidence that he was violent or that his acts had ever involved any physical attacks, additionally the Court relied on unfounded factors to make its determination that Mr. Montgomery should be classified as an SVP. There was no Clear and Convincing Evidence by which to label Mr. Montgomery a sexually violent predator."

BACKGROUND

This matter arises out of the arrest of Defendant after he exposed himself to an 11-year-old girl outside a school in the Shadyside area of Pittsburgh on April 11, 2005. Defendant was charged with one Count of Indecent Exposure in violation of 18 Pa.C.S. §3127; one Count of Corruption of Minors in violation of 18 Pa.C.S. §6301; and one Count of Unlawful Contact with a Minor in violation of 18 Pa.C.S. §6318. On October 27, 2005, Defendant pled guilty to all the Counts as alleged. The summary of the evidence presented by the Commonwealth at the time of the guilty plea established that on April 18, 2005 Defendant was sitting in a vehicle outside of a school and exposed himself to an 11-year-old female who was walking to school. The minor had seen Defendant for the previous several days sitting in a car outside the school. The day prior to the incident Defendant said "hello" to the minor, but did not have any further contact. However, on April 18, Defendant said "hello" to the minor and asked her to approach the vehicle. As she approached the vehicle, she saw Defendant was not wearing any pants. He was wearing only boxer shorts, had his penis exposed and was rubbing his penis. As the girl approached his vehicle he stated, "I like it when you see me." (T., pp. 6-7) The girl then ran to school and told her teacher and principal. The following day the minor's mother drove her to school and they saw the Defendant's vehicle in the same spot as the previous day. After obtaining the vehicle's license plate number and reporting it to the police, the minor was able to pick Defendant's photograph out of a photo array. Defendant was arrested and on April 25, 2005, in a tape-recorded statement, he admitted that he exposed himself to the minor in this case and also admitted that he had a problem exposing himself to girls and masturbating. The police did verify that Defendant had prior offenses of this nature. (T., pp. 6-7)

The Commonwealth's attorney indicated that a plea agreement was proposed which called for a period of 18 to 36 months incarceration and a concurrent period of 7 years probation. (T., p. 2) The Assistant District Attorney also indicated that Defendant "has executed a Megan's Law Document, Explanation of Megan's Laws Rights, and I believe that is the extent of our agreement. He has a 10 year reporting requirement that he is aware of." (T., p. 2) A guilty plea colloquy was conducted in which Defendant acknowledged that he was aware of the nature of the charges against him and the potential penalties. Defendant further acknowledged that he was entering a guilty plea as a result of his being guilty of the charges as filed. (T., p. 8) Defendant acknowledged that he had completed a Guilty Plea and Explanation of Defendant's Rights form. (T., p. 8) Defendant also was advised of the right to have his sentencing delayed for up to 90 days, which Defendant waived. In addition, Defendant specifically acknowledged that he had completed the "Explanation of Defendant's Megan's Law Rights." (T., p. 12) Defendant acknowledged that he read and understood each of the questions on the Megan's Law Rights Explanation form and consulted with his counsel regarding the regulations.

The Megan's Law Explanation and Rights form contained the following statements, all of which were reviewed, accepted and signed by Defendant:

- | | | | |
|--|---|-----|-----|
| "6. Do you understand that you have the right to be sentenced within 90 days? | X | Yes | No |
| 7. Do you understand that Megan's Law dictates, as a result of your plea today, that you must be evaluated to determine whether you are a 'sexually violent predator'? | X | Yes | No |
| 8. Do you understand that your evaluation to determine whether you are a 'sexually violent predator' must be completed within 90 days, and that the Megan's Law statute states that the evaluation must be completed prior to sentencing? | X | Yes | No |
| 9. Are you willing to waive the requirement that your evaluation be completed prior to sentencing, and be sentenced today? | X | Yes | No |
| 10. If the evaluation results in a recommendation that you be labeled a 'sexually violent predator,' a separate hearing will be conducted at which time a Judge from the Court of Common Pleas, in the Criminal Division will hear testimony and weigh evidence presented by the Commonwealth and possibly your attorney to reach the final determination as to whether you will be labeled a 'sexually violent predator.' Do you understand this? | X | Yes | No |
| 11. Do you understand if you are labeled a 'sexually violent predator,' that you will have a lifetime reporting requirement? | X | Yes | No |
| 12. Have you answered all the above questions with the assistance of your attorney, and of your own free will? | X | Yes | No" |

Guilty Plea Explanation of Defendant's Rights, Explanation of Megan's Law Rights

On January 23, 2006, the Commonwealth filed a Praeceptum for Hearing to determine whether Defendant should be determined a Sexually Violent Predator pursuant to the provisions of Megan's Law. Attached to the Praeceptum for Hearing was a copy of the

report generated by the Sexual Offender's Assessment Board.

The record does not reflect any further activity related to the proceeding until a hearing on March 19, 2009. At that time the Commonwealth offered the report of Dr. Alan Pass of the Sexual Offender's Assessment Board. Dr. Pass' evaluation was performed in January 2006 and included a face-to-face assessment with Defendant. (T., p. 17) The Commonwealth offered the report of Dr. Pass, with the consent of counsel for Defendant, which set forth in detail his evaluation which led to his opinion that Defendant's criminal behavior met the criteria of a Sexually Violent Predator as set forth in 42 Pa. C.S.A. §9795.4(b). (T., p. 3) The report of Dr. Pass and his testimony on cross-examination established that Defendant was convicted of indecent exposure in 1973, 1978, 1986, 1992 and 1993. (T., p. 4) His conviction in 1993 also involved convictions for Harassment, Luring a Child into a Motor Vehicle, Indecent Assault and Corruption of Minors. (T., pp. 4-5) At that time, he was sentenced to 1 and 1/2 to 5 years in prison with 5 years probation. Dr. Pass also noted the current offense for which he pled guilty on October 27, 2005 also involved Indecent Exposure, Corruption of the Morals of a Minor and Unlawful Contact with a Minor. (T., p. 5)

Dr. Pass found that it was relevant that the current offense involved the victimization of an 11-year-old female with no pre-existing relationship with Defendant. Dr. Pass considered the facts and circumstances concerning the offenses of April 18, 2005 as set forth in the summary of facts given by the Assistant District Attorney at the time of the guilty plea. In addition, Dr. Pass interviewed Defendant and obtained more details related to the facts and circumstances of the offense of April 18, 2005, including the fact that Defendant admitted that he drove to the Sacred Heart School in Shadyside two to three times a week for a month and observed the victim walking to school and that he masturbated while doing so. (T., p. 7) Defendant also admitted that he watched the victim for approximately a week until he built up enough courage to speak to her and to get her to approach his car so that he could expose himself. Defendant admitted to Dr. Pass that, "I was convinced that she liked what I was doing." (T., p. 8) Defendant also admitted to Dr. Pass receiving and reviewing on an ongoing basis child pornography and that his viewing of child pornography encouraged him to commit the instant offense. (T., p. 8) Dr. Pass also testified that Defendant reported that he had been indecently exposing himself throughout the majority of his lifetime and had only been apprehended by authorities on a few occasions. (T., p. 9) Dr. Pass also reported that Defendant stated that he knew he needed professional treatment in order to adequately treat his compulsively driven deviate sexual behavior involving his behavior with children. Dr. Pass also testified that:

"He admitted his sexual deviancy as it related to his attraction to children in his words **is out of control** and that **his behavior was in fact escalating** over time as driven by what he described as his fevered cycle of sexual arousal. **He also admitted that if he had not been caught in the instant offense, he may have abducted a child for sexual purposes.**" (T., pp. 8-9)(Emphasis added)

Dr. Pass also noted previous reports prepared by the Pennsylvania Board of Probation and Parole from November 4, 1994 in which Defendant admitted to committing over 100 acts of indecent exposure in the past, beginning with his discharge from the service in 1971 and that he had been involved in therapy for a period of approximately 7 years with no positive impact noted. (T., p. 9) In addition, Dr. Pass noted a mental health assessment completed on Defendant in May of 1997 noting that it was recommended at that time that, "Defendant have no unsupervised contact with any minor aged children." (T., p. 10) In addition, a psychiatric evaluation was completed in response to a consideration for parole on a prior imposed sentence, which indicated that Defendant had a 20 year history of indecent exposure in which he would drive around in his car, randomly pick out females and expose himself. (T., p. 10) The treating psychiatrist at that time arrived at a diagnostic impression of exhibitionism under Section 302.4 of the DSM Manual and indicated that if paroled, Defendant would need continued treatment because of his history of recidivistic criminal behavior. (T., p. 10)

On cross-examination, Dr. Pass discussed in consideration of the factors enumerated in §9795.4(b), that is, that there were multiple victims; Defendant never exceeded the means necessary to achieve the offense; there was no physical contact of any victim in any situation; the relationship with the victim was always a stranger; the ages of the victims range from school age girls to grown women; there was no cruelty in the commission of the exposure; the mental capacity of the victims was never in dispute; he had a very long history of repeated criminal convictions. (T., pp. 11-12) Dr. Pass acknowledged, however, that Defendant's age of 57 years at the time of his evaluation might affect his recidivism in that older offenders, according to some scientific literature, may be less likely to re-offend, however, this assessment would require biochemical measures of his testosterone during serology tests. (T., p. 13) Dr. Pass concluded that his classification as a Sexually Violent Predator was based on his repetitive nature of the criminal offense, the long history of his repeated criminal offenses, as well as disclosure of a long history of offenses which did not result in prosecution and his participation in the most recent offense. (T., p. 14) Further, Dr. Pass, in reaching his opinion, also took into account Defendant's disclosure of his preoccupation with child pornography, his utilization of child pornography for self-stimulator purposes, his diagnosis of personality disorder and mental abnormality and the predatory aspect of his behavior. (T., p. 15) Dr. Pass noted with concern Defendant's premeditated observation of the victim in the instant offense over a prolonged period of time which escalated to contact with the victim. (T., p. 16) Dr. Pass acknowledged Defendant's openness about his history of repeated offenses and his expressed desire to seek treatment, but also noted that despite not only treatment and incarceration for his offenses, he had a long history of repeated offenses.

After consideration of the testimony of Dr. Pass and the evaluation of his report and a review of the evidence related to the instant offense, an Order was entered on March 24, 2009 finding that Defendant was a Sexually Violent Predator as defined by 42 Pa. C.S.A. §9791 requiring lifetime reporting requirements under the Act. Defendant then filed this timely appeal.

DISCUSSION

42 Pa. C.S.A. §9791, *et seq.*, known as "Megan's Law," provides for various registration and reporting requirements for persons convicted of certain crimes. There is a general 10-year reporting requirement if a defendant is convicted of a crime as listed in §9795.1(a). If, however, a defendant is convicted of other crimes as listed in §9795.1(b)(2) or is found after a hearing to be a Sexually Violent Predator as defined by the Act, then the person is subject to the lifetime reporting requirements of the Act.

42 Pa. C.S.A. §9795.4 provides as follows:

"Order for assessment – After conviction, but before sentencing, a court shall order an individual convicted of an offense specified in §9795.1 (relating to registration), to be assessed by the Board. The order for an assessment shall be sent to the administrative officer of the Board within 10 days of the date of conviction."

Further, §9795.4(d) provides that the Board shall have 90 days from the date of conviction of the individual to submit a written report concerning its assessment to the District Attorney. If the District Attorney then elects to proceed to a determination of whether or not defendant is a Sexually Violent Predator, the District Attorney may praecipe for a hearing on the issue pursuant to 42 Pa. C.S.A. §9795.4(e).

In addition, it is clear that pursuant to §9795.4(e)(3), a hearing prior to the sentencing shall determine whether or not the Commonwealth has proved by clear and convincing evidence that the individual is a Sexually Violent Predator.

Defendant, in his concise statement, argues that it was error to conduct the SVP Hearing 3 and 1/2 years after he was sentenced when the statute requires the evaluation prior to sentencing. Defendant contends the Court was without jurisdiction to issue the Order determining Defendant to be a Sexually Violent Predator. Defendant further argues that he was denied due process when the Court informed him at the time of his plea and sentencing that he would be subject to 10 year registration pursuant to Megan's Law and that the subsequent hearing determined that he was a Sexually Violent Predator and subject to lifetime reporting and registration under the Act.

There is no question that the Act directs that an assessment and hearing be conducted prior to sentencing. There is, however, nothing in the Act that precludes Defendant from waiving the time period for the assessment. The record clearly demonstrates that Defendant reviewed and signed the Explanation of the Megan's Law Rights form and specifically acknowledged that he "must be evaluated to determine whether you are a 'Sexually Violent Predator.'" (*Explanation of the Megan's Law Rights form*, ¶ 7) Defendant further acknowledged that under Megan's Law the evaluation regarding his status as a Sexually Violent Predator must be completed within 90 days and prior to sentencing. Defendant, however, expressly waived the requirement for the evaluation to be completed prior to sentencing and further acknowledged that if the evaluation recommended that he be labeled as a Sexually Violent Predator a separate hearing would be conducted at which such a determination would be made. Further, Defendant acknowledged that if a subsequent determination was made, he would be subject to lifetime reporting requirements.

Defendant acknowledged his understanding of his waiver of these rights and stated that he did so of his own free will. (T, p. 12) Although an indication was made that at the time of the sentencing he would be subject to the 10 year reporting requirements as set forth in §9795.1, Defendant further acknowledged that a subsequent determination of his status as a Sexually Violent Predator would be made which might require lifetime reporting.

An evaluation of the language set forth in the Explanation of Megan's Law Rights form is unambiguous and clear. The form clearly stated that Defendant "*must be evaluated*" to determine whether or not he was a Sexually Violent Predator. The form further advised Defendant that if an evaluation results in a recommendation that determines he is a Sexually Violent Predator "*a separate hearing will be conducted.*" Finally, the form advised Defendant that if designated a Sexually Violent Predator "*you will have a lifetime reporting requirement.*" Defendant cannot therefore claim that there was any ambiguity regarding the requirements which he was submitting to including a determination that he may be subject to an SVP Hearing.

It is also important to note that at the time that the SVP Hearing was held on March 19, 2009, no objection was made whatsoever to the proceeding as being untimely or in violation of the Act. Finally, Defendant fails to allege any prejudice whatsoever arising from the timing of his sentencing, his SVP evaluation, the SVP hearing or the Order finding that he is a Sexually Violent Predator.

Therefore, Defendant's contention that it was error to conduct the SVP Hearing subsequent to the sentencing in this case is without merit.

Defendant further alleges that it was error to determine that Defendant was a Sexually Violent Predator when there was no evidence that he was violent or that his acts had ever involved any physical attacks. In addition, it is alleged that the Court relied on unfounded factors to make its determination that Defendant should be classified as a Sexually Violent Predator. Finally, Defendant argues that there was no clear and convincing evidence by which to label Defendant a Sexually Violent Predator.

Megan's Law defines a Sexually Violent Predator as follows:

"Sexually violent predator.' 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(3)

In addition, a sexually violent offense is defined by the Act as any offense specified in §9795.1, which includes Unlawful Contact With a Minor as set forth in 18 Pa. C.S. §6318, which Defendant plead guilty to.

The Act, in §9795.4, sets forth the various factors that can be taken into consideration in making an assessment regarding Sexually Violent Predator status in pertinent part as follows:

"(b) Assessment. – Upon receipt from the court of an order for an assessment, a member of the board as designated by the administrative officer of the board shall conduct an assessment of the individual to determine if the individual should be classified as a sexually violent predator. The board shall establish standards for evaluations and for evaluators conducting the assessments. An assessment shall include, but not be limited to, an examination of the following:

- (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 records.
 - (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 of the individual
 - (ii) Use of illegal drugs by the individual.
 - (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 re-offense." 42 Pa. C.S.A. §9795.4(b)

In *Commonwealth v. Geiter, III*, 929 A.2d 648 (Pa.Super. 2007), the Superior Court discussed the evidence and findings that must be made by clear and convincing evidence in order to make a determination that an individual is a Sexually Violent Predator. The Court stated:

"The precise line of inquiry for the Board's expert, as well as any other expert who testifies at an SVP hearing, is 'whether the defendant satisfied the definition of a sexually violent predator set out in the statute, that is, whether he or she suffers from 'a mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexually violent offenses.' 42 Pa.C.S.A. §9792.' *Dixon*, 907 A.2d at 536. The salient inquiry to be made by the trial court is the identification of the *impetus* behind the commission of the crime and the extent to which the offender is likely to re-offend. *Commonwealth v. Price*, 876 A.2d 988, 995 (Pa.Super. 2005), *appeal denied*, 587 Pa. 706, 897 A.2d 1184 (2006), *cert. denied*, 549 U.S. 902, 127 S. Ct. 224, 166 L.Ed. 2d 179, 75 USLW 3171 (2006)." *Commonwealth v. Geiter, III*, 929 A.2d 648, 651 (Pa.Super. 2007)

A review of the evidence and the testimony in this case clearly indicates that the issue to be addressed is the identification of the impetus behind the commission of the crime and the extent to which Defendant is likely to re-offend. Defendant appears to contend that the issue is whether or not he was violent or whether his acts ever involved physical attack. While certainly those questions or factors can be relevant in the consideration of whether or not Defendant is a Sexually Violent Predator, it is clear that the determination also focuses on the existence of a mental abnormality or personality disorder that makes Defendant likely to engage in sexually violent offenses or to re-offend. Clearly, Unlawful Contact With a Minor falls within the definition of a sexually violent offense as set forth in the Act. The testimony of Dr. Pass taken as a whole unequivocally indicates that Defendant has a mental abnormality or personality disorder which was specifically identified as exhibitionism. Further, there is no dispute that Dr. Pass, as well as previous psychiatric evaluations and assessments, determined that Defendant has a mental abnormality that is likely to cause him to re-offend. Dr. Pass specifically testified as follows:

"He then also reported that he is in need of professional treatment in order to adequately treat his compulsively driven deviate sexual behavior involving his behavior with children. He admitted his sexual deviancy as it relates to his attraction to children in his words is **out of control and that his behavior was in fact escalating over time** as driven by what he described as his fevered cycle of sexual arousal. **He also admitted that if he had not been caught in the instant offense he may have abducted a child for sexual purposes.**" (T., pp. 8-9) (Emphasis added)

This testimony reflects not only a recognition by Dr. Pass of Defendant's mental abnormality and his likelihood to re-offend, but the Defendant's own admission of his mental illness and his likelihood to re-offend. In addition, this evidence establishes the likelihood that his conduct might actually escalate to include the abduction of a child for sexual purposes. Defendant contends that this was an unfounded factor because there was no evidence that he had ever actually abducted a child for sexual purposes. While this may be true, Defendant's admission is nonetheless alarming. In addition, the fact that he has never abducted a child or had physical contact with a child does nothing to erase the fact that the record establishes, and he admits, that he has had over a 20 year history of repeated conduct all of which would appear to fall within the definition of a sexually violent offense as defined by the Act. Neither is it encouraging that Defendant admits that he has only been arrested and prosecuted on what appears to be a very small percentage of his acts. Clearly, despite the fact that Defendant was convicted in 1973, 1978, 1986, 1992 and 1993, the last offense occurring while he was on probation, he nonetheless continued to re-offend and continued in his pattern of sexual criminal conduct. The record establishes more than sufficient evidence to reach the conclusion that Defendant suffers from a mental abnormality or personality disorder that is the basis for his criminal conduct and that he is likely to re-offend. Dr Pass properly considered the factors set forth in §9795.4(b) as well as all of the other relevant information regarding Defendant and, therefore, Defendant's contention that there was no clear and convincing evidence by which to label Defendant a Sexually Violent Predator is without merit.

BY THE COURT:
/s/Todd, J.