PITTSBURGH LEGAL JOURNAL

OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

Criminal Appeal

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Petition for Continued Involuntary Commitment – SOAB Evaluation

It is well settled under 42. Pa. C.S.A § 6404, (hereinafter "Act 21"), that the Judge has discretion to determine whether a person requires additional inpatient treatment if the Judge finds by clear and convincing evidence that a person has serious difficulty controlling sexually violent behavior. Furthermore, the Judge considered all of the evidence presented during the hearing, including the SOAB evaluation. Lastly, the Judge considered the opinions of both experts, Dr. McCracken, and Mr. Allenbaugh, in rendering decision.

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PLJ

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Opinions

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COMMONWEALTH OF PENNSYLVANIA vs. DEANGELO ZIEGLAR

Criminal Appeal

Commonwealth filed a Concise Statement of Matters Complained Of On Appeal setting forth the following issues. The first issue was whether the trial court abused its discretion and/or committed an error of law by ignoring its duty under the Sentencing Code and the Rules of Criminal Procedure to seat a death qualified jury in a prosecution where the death penalty is sought, where the Judicial Code provides that "[a]fter a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment", 42 Pa. C.S.A. § 9711 (a) (1), and the Rules of Criminal Procedure require the court to provide a death qualified jury under these circumstances, see e.g. Pa. R.Crim.P. 802 (requiring Commonwealth to file notice of aggravators in capital cases); Pa. R.Crim.P. 810 (imposition of sentence); Pa. R.Crim.P. 631(F) (requiring the individual voir dire method to be used in capital cases unless the defendant waives this procedure)? The second issue was whether the trial court's refusal to permit the assembly of a death-qualified jury constitutes interference with the prosecutor's discretionary functions and violates the constitutional principle of separation of powers, which provides that no branch of government should exercise the functions exclusively committed to another branch? The court discusses both of these issues in its opinion.

Case No.: CP-02-CR-02096-2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Mariani, J.

OPINION

Factual/Procedural History

The defendant in this case, DeAngelo Zieglar (hereinafter, "Defendant"), is charged with multiple offenses, the principal offense being criminal homicide. Defendant is represented by the Public Defender of Allegheny County.[1] The Commonwealth of Pennsylvania (hereinafter, "the Commonwealth") is represented by the District Attorney of Allegheny County. The jury trial in this case is scheduled for September 6, 2023, having been postponed from July 5, 2023, by mutual request of both sides. Defendant was remanded to the Allegheny County Jail on January 21, 2022, to await trial, bail having been denied pursuant to provisions of the Pennsylvania Constitution.

The Commonwealth has filed pleadings which indicate that the Commonwealth believes that evidence in this case will prove that Defendant committed first-degree murder and that the circumstances surrounding this alleged first-degree murder and Defendant's alleged culpability for that crime warrant the imposition of the death penalty as an appropriate sentence.

In furtherance of the Commonwealth's view of the crime it intends to prove and the sentence it intends to request, on April 14, 2022, the Commonwealth timely filed a Notice of Intention To Seek Death Penalty And Notice Of Aggravating Circumstances Pursuant to Rule 802 And 42 PA. C.S. 9711 (hereinafter, "Notice"). The Notice set forth five separate aggravating circumstances/factors which, the Commonwealth contends, support the Commonwealth's seeking the death penalty should Defendant be convicted of first-degree murder.

Sometime after the Commonwealth filed the Notice, the Court indicated that an evidentiary hearing would be scheduled, the purpose of which was to require the Commonwealth to produce evidence which supports the Notice as to aggravating circumstances the Commonwealth contends warrant the imposition of the death penalty.

In response to the Court's indication of its intention to schedule the evidentiary hearing, on June 23, 2022, the Commonwealth filed Commonwealth's Motion to Reconsider Order to Prove Aggravators of Death Penalty Notice. In that motion, the Commonwealth objected to the Court's having an evidentiary hearing and argued that the decision of the Pennsylvania Supreme Court in the case of Commonwealth v. Buck 551 Pa. 184, 70 A. 2d 892 (1998) precludes a review by the Court unless the defendant files a challenge to the notice of aggravating circumstances and makes a showing that no evidence exists to support the aggravating factors alleged by the Commonwealth.

The Commonwealth's Motion To Reconsider correctly recites that this Court's purpose in initiating the scheduling of the evidentiary hearing was to ensure that members of the community of Allegheny County would not be subjected to the probing process of jury selection in a death penalty case and, if the jury returns a verdict of guilty of first-degree murder, the ensuing immeasurably onerous task of having to make the life or death decision of punishment of another member of the community if the entire event was to be an exercise, not of duty of citizenship, but of futility, due to the long-standing moratorium on carrying out the death penalty that had been put into effect by then- Governor Tom Wolf. The Commonwealth's Motion To Reconsider also noted that Governor Wolf's term would end on January 17, 2023.

The moratorium on carrying out the death penalty put into effect by former Governor Wolf was the subject of a legal action filed by the Philadelphia County District Attorney in Commonwealth v. Williams, 634 Pa. 290, 129 A.3d 1199 (2015). The Philadelphia District Attorney contended that then-Governor Wolf had exceeded his constitutional authority when he granted a reprieve on February 13, 2015, while awaiting receipt of "the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment." In responding to the challenge of the Philadelphia District Attorney, the Office of General Counsel, Governor Wolf's attorneys, argued that, "The Plain Text of the Constitution Expresses No Relevant Limits to the Governor's Power of Reprieve," describing the Governor's power as "unfettered prerogative" and likening the Governor's authority under the Pennsylvania Constitution to the English common law's, "ex mandato regis," meaning, "from the mere pleasure of the Crown." The Pennsylvania Supreme Court ruled that the issuance of a "temporary reprieve" by then–Governor Wolf to await the issuance of the report was an act within his constitutional authority despite the fact that no time limit was placed on the length of time the reprieve was to be in effect. The Pennsylvania Supreme Court emphasized that the holding in that case was based on the determination "that the reprieve issued is, in fact, a temporary suspension of sentence and not a commutation" (citation and footnote omitted).

On November 2, 2022, this Court issued an order directing Defendant's attorneys to file a written response to the Commonwealth's Motion to Reconsider. On November 6, 2022, the Public Defender's Office filed such a response, although apparently somewhat misunderstanding why an evidentiary hearing was to be held, essentially agreed with the Commonwealth's legal position:

Mr. Zieglar concedes that under current law it is improper for this Honorable Court to challenge the Commonwealth's exercise of discretion in seeking the death penalty.

See Defendant's Response to Commonwealth's Motion To Reconsider Order to Prove Aggravators of Death Penalty Notice, par.7. The response did raise a claim that the Commonwealth did not provide discovery materials in support of the Notice but no challenge to the Notice itself was or has been filed by the Public Defender's Office on behalf of Defendant.

After this Court reviewed the Commonwealth's Motion to Reconsider and Defendant's response thereto and reviewed the Pennsylvania Supreme Court's decision in Commonwealth v. Buck, this Court did not schedule the evidentiary hearing because this Court was persuaded that, absent a challenge put forth by Defendant's attorneys, this Court has no authority to order such an evidentiary hearing.

On February 16, 2023, Governor Josh Shapiro, the successor to Governor Tom Wolf, issued a public statement, proclaiming that, "when an execution warrant comes to my desk, I will sign a reprieve each and every time." Governor Shapiro also stated, "The Commonwealth shouldn't be in the business of putting people to death. Period. I believe that in my heart. This is a fundamental statement of morality." Governor Shapiro then called upon the General Assembly to work with him to abolish the death penalty in Pennsylvania. See https://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty/

On February 21, 2023, this Court issued an order directing counsel for the Commonwealth and counsel for Defendant to file all voir dire questions each party would seek to use in impaneling the jury. The Commonwealth filed 34 proposed questions, 16 of which specifically mention the death penalty. Defendant filed a proposed questionnaire containing 70 questions, along with a full page of instructions. Question 66 of Defendant's questionnaire specifically asks prospective jurors if they believe the death penalty may not be carried out even if the defendant is sentenced to death. The questionnaire submitted on behalf of Defendant requires that the prospective juror provide a "Signature Under Penalty of Perjury." Both filings clearly indicate that the case is a potential death penalty case.

On April 5, 2023, this Court issued an Opinion and Order of Court which denied all voir dire questions requested by the Commonwealth per the document filed by the Commonwealth on March 13, 2023.[2] The Order of Court also denied all voir dire questions requested by Defendant per the document filed by Defendant, also on March 13, 2023. The Order of Court further indicated that the jury impaneled in this case would not be permitted to deliberate regarding sentencing.

On April 13, 2023, the Commonwealth filed a Motion To Reconsider And Clarify. On April 18, 2023, Defendant filed a Response To Commonwealth's Motion To Reconsider And Clarify. In Defendant's Response To Commonwealth's Motion to Reconsider And Clarify, Defendant raised the protection of the Eighth Amendment to the United States Constitution as explained by the United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320 (1985). On April 21, 2023, Defendant filed a Supplement To Defendant's Response To Commonwealth's Motion To Reconsider And Clarify.

On April 24, 2023, this Court convened a hearing, during which various issues regarding the above- described Order of Court and subsequent filings were addressed. At the end of that hearing, this Court gave counsel for both sides 20 days to file any additional pleadings and/or documents. The Court advised the parties that the appealability of the Court's ruling should be among the issues addressed in their pleadings and/or documents.

On May 5, 2023, the Commonwealth filed a Notice of Appeal of this Court's April 5, 2023, Order of Court to the Superior Court of Pennsylvania.

On May 8, 2023, this Court convened a hearing to address the procedural posture of this case. At that hearing, the Commonwealth withdrew the Motion to Reconsider and Clarify. Accordingly on May 9, 2023, this Court issued a Pa. R. A.P. 1925(b) Order. On May 18, 2023, the Commonwealth filed an Amended Notice of Appeal. On May 26, 2023, the Commonwealth filed a Concise Statement of Matters Complained Of On Appeal setting forth the following issues:

a.) whether the trial court abused its discretion and/or committed an error of law by ignoring its duty under the Sentencing Code and the Riles of Criminal Procedure to seat a death qualified jury in a prosecution where the death penalty is sought, where the Judicial Code provides that "[a]fter a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment", 42 Pa. C.S.A. § 9711 (a) (1), and the Rules of Criminal Procedure require the court to provide a death qualified jury under these circumstances, see e.g. Pa. R.Crim.P. 802 (requiring Commonwealth to file notice of aggravators in capital cases); Pa. R.Crim.P. 810 (imposition of sentence); Pa. R.Crim.P. 631(F) (requiring the individual voir dire method to be used in capital cases unless the defendant waives this procedure)?

b.) Whether the trial court's refusal to permit the assembly of a death-qualified jury constitutes interference with the prosecutor's discretionary functions and violates the constitutional principle of separation of powers, which provides that no branch of government should exercise the functions exclusively committed to another branch?

Legal Discussion[3]

Because this Court believes the Commonwealth mis-perceives this Court's ruling in relation to the Commonwealth's decision to pursue the death penalty in this case, this Court addresses the Commonwealth's issues on appeal in reverse order. In this Court's view, the Commonwealth properly exercised its discretion and, believing this case was an appropriate death penalty case, filed the Notice. Contrary to the allegation made in the Commonwealth's 1925(b) statement, this Court's decision is not a rebuke of the Commonwealth's discretionary authority to file the Notice. Rather, this Court's decision rests squarely on the invocation of this Court's discretion in administering jury trials, as courts have authority and discretion in addressing capital case jury trials wholly independent of the prosecutor's discretion with regard to seeking the death penalty. See Commonwealth v. Brown, 649 Pa 293, 196 A. 3d 130 (2018) as more specifically discussed, infra. Accordingly, the Commonwealth's second claimed error is based on an erroneous interpretation of this Court's order and that claim of error is without merit.

A. Fairness to prospective jurors

As to the Commonwealth's first issue on appeal, this Court has properly exercised its discretion to ensure fairness to all persons participating in the trial process. The Pennsylvania Supreme Court, through Rule 632 of the Pennsylvania Rules of Criminal Procedure, requires that all prospective jurors in all cases complete a confidential questionnaire prior to the beginning of the jury selection process. Personal information about the prospective juror and the prospective juror's family is requested in the first part of the questionnaire. The prospective juror is also required to answer sixteen specific questions and then sign the questionnaire directly below a pre-printed statement that indicates that the prospective juror certifies that the answers given are true and correct and also acknowledges that providing false answers subjects the prospective juror to penalties under 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.[4]

After each prospective juror completes the Rule 632 questionnaire, the voir dire questions tendered by the Commonwealth and Defendant could be asked of each prospective juror individually, in the presence of the judge, counsel for each side, Defendant and a court reporter. Many of the questions proposed by the Commonwealth and Defendant ask for personal beliefs about the death penalty. Others ask about how the prospective juror's spouse or partner feels about the death penalty. Questions

are directed to the prospective juror's area of study, areas of interest, what television shows the perspective juror watches, what organizations the prospective juror and anyone close to the prospective juror supports or sponsors. Other questions focus on the criminal history and/or victimization of the prospective juror and of family members. Each answer to these individual questions subjects the prospective juror to follow-up questions; each answer to a follow-up question subjects the prospective juror to additional questions from one side or the other, or, most likely, both sides. The process of asking questions during voir dire in death penalty cases has been referred to as "death-qualifying" a jury. See Commonwealth v. Woodard, 634 Pa 162,129 A. 3d 480 (2015).

Jurors are not volunteers. Jurors are compelled by Court Order to appear for jury service. Prospective jurors who fail to appear may be cited for contempt of court and face fines and/or imprisonment as sanctions. See 45 Pa.C.S.A. §4584. They are required to put their own personal lives on hold while performing their civic duty. The process of "death-qualifying" a jury generally takes weeks, not a day or two. Death penalty trials also are elongated, not only as to the guilt phase, but also as to sentencing phase, due to the potential penalty should a first-degree murder verdict be returned.[5] It would not be out of the ordinary for this case to require that the jurors who are eventually seated in this case give up at least six weeks of their personal lives.

"[T]rial judges of this Commonwealth exercise broad powers while presiding at the trial of cases assigned to them." Commonwealth v. Pittman, 320 Pa.Super. 166, 466 A.2d 1370, 1373 (1983). With respect to voir dire, "the process of selecting a jury is committed to the sound discretion of the trial judge." Id. In a legal and factual context unrelated to the matter at issue here, our Supreme Court has affirmed a trial court's acting "in the interests of justice" and it has explained that:

[it] is the trial judge's review of the conditions and activity surrounding the trial which leaves him or her in the best position to make determinations regarding the fairness of the process and its outcome.

Commonwealth v. Powell, 527 Pa. 288, 590A.2d 1240 (1991).

The Pennsylvania Supreme Court has held that the public statement of a district attorney of one of Pennsylvania's sixty-seven counties, who declared that he was speaking "as the sovereign Commonwealth of Pennsylvania," and who declared publicly that he would not prosecute a certain individual, did legally bind the Commonwealth to that representation. That public statement was sufficient to bar all other prosecutors in the Commonwealth from pursuing criminal charges against the defendant in that case. See Commonwealth v. Cosby, 252 A.3d 1092, 1114 (Pa. 2021). The Pennsylvania High Court observed that the non-prosecution agreement was made by the district attorney "whose public announcement of that decision was fully within his authority and was objectively worthy of reasonable reliance." Id. at 1114.

Similarly, Governor Shapiro, whose authority to grant death penalty reprieves derives directly from the Pennsylvania Constitution, surely issued his proclamation with the intent that the citizens of Pennsylvania believe it and, hence, rely on it. This Court, on behalf of those citizens of Allegheny County, Pennsylvania, who may be called for jury duty in this case, acts in reliance on Governor Shapiro's proclamation. Because there is no possibility that the death penalty will be carried out in any Pennsylvania case for years to come, no matter what the Pennsylvania Legislature has passed as the law of Pennsylvania, and no matter what a jury, following that law, might determine in a given case, this Court concludes that it is patently unjust to compel members of the community of Allegheny County to endure the grueling and intrusive process and the unreasonable invasion of privacy which occurs in "death-qualifying" any jury. It is also fundamentally unfair to those same citizens to require them to sit through additional days of presentation of evidence in which one side presents evidence as to why Defendant should lose his life while the other side presents evidence as to why Defendant should be sentenced to life in prison with no parole, then be required to listen to hours of arguments directed to those same issues, and then be required to deliberate whether Defendant should live or die, when it has already been decided by Governor Shapiro that Defendant will not be given the death penalty under any circumstances.

This Court finds further support for this Court's exercise of discretion with regard to jury selection in this case in the Pennsylvania Supreme Court's discussion of a capital case jury's sentencing determination in Commonwealth v. Brown, 649 Pa 293, 196 A.3d 130 (2018). In that case, the defendant (hereinafter, "Brown") was sentenced to death for first-degree murder in the Court of Common Pleas of Philadelphia County. After his direct appeal was unsuccessful, Brown filed a petition pursuant to the Post Conviction Relief Act (hereinafter, "PCRA") in which he alleged numerous inter-mixed claims of ineffective assistance of counsel and due process violations. Brown's PCRA petition was denied in the Court of Common Pleas of Philadelphia County.

Brown filed a direct appeal of that denial to the Pennsylvania Supreme Court alleging thirteen claims of error. On September 19, 2017, the Commonwealth, represented by the District Attorney of Philadelphia County, filed a brief in which the Commonwealth opposed all claims of relief advanced by Brown. Brown filed a reply brief in November of 2017.

On April 9, 2018, before the Pennsylvania Supreme Court issued a ruling, Brown and the Commonwealth filed a joint motion in which the Commonwealth agreed (stipulated) to Brown's claim of ineffective assistance of counsel as alleged in his sixth claim of error. The Commonwealth and Brown jointly asked the Pennsylvania Supreme Court to vacate Brown's death sentence and remand the case to the Court of Common Pleas of Philadelphia County for the purpose of sentencing Brown to life without parole.[6]

The Pennsylvania Supreme Court ordered supplemental briefs and also invited the Attorney General of Pennsylvania to file an amicus curiae brief.[7] Brown and the Philadelphia District Attorney argued that the Pennsylvania Supreme Court was required to defer to the District Attorney's prosecutorial discretion and that only district attorneys have the "power to decide whether to seek or continue to seek the death penalty…" See Brown, 649 Pa at 315. The Philadelphia District Attorney also argued that the Pennsylvania Supreme Court could not "second-guess" the District Attorney of Philadelphia County with regard to his decision to stipulate away the death penalty in Brown's case. Id.[8] The Pennsylvania Attorney General argued that while courts should give substantial consideration to district attorneys' positions on such matters, if the Pennsylvania Supreme Court (or any other court) were required to defer to the District Attorney as argued by Brown and the Philadelphia District Attorney, "they would not be acting as judges but rather as mere rubber stamps." Brown, 649 Pa at 316.

The Pennsylvania Supreme Court rejected the Philadelphia District Attorney's (and Brown's) position completely. The Pennsylvania Supreme Court began its analysis by making the following declaration:

During the penalty phase of Brown's trial, a jury of Philadelphia citizens was called upon to make the enormously difficult decision of whether to impose the death sentence, after hearing the evidence and instructions on the law. A representative cross section of the community must, of necessity, bear the responsibility to "express the conscience of the community on the ultimate question of life or death" in particular cases. Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The jury in this case having done so, neither the parties, by agreement, nor this Court, absent a finding of legal error, have the power or ability to order that the jury's verdict be commuted to a life sentence without parole (emphasis added).

The Pennsylvania Supreme Court went further:

A representative cross section of the community has issued its decision, and the prosecutor, having sought and obtained the death sentence, may not thereafter unilaterally alter that decision. The community now has an interest in the verdict, which may thereafter be disrupted only if a court finds legal error.

* * *

Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review.

Id. at 320-321.

In Brown, the Pennsylvania Supreme Court acknowledged the magnitude of the sentencing jury's role in a death penalty case and emphatically respected the result reached by that jury. In this Court's view, the same acknowledgement of the jury's "enormously difficult" task and the same respect for the jury's role should be shown to prospective jurors who are being impaneled in a potential death penalty case by not requiring the impaneled jury to endure the intrusive, grueling process of death qualification and "enormously difficult" sentencing deliberations when the result has already been determined by the Governor.

The use of a court order (jury summons) to conscript citizens to this meaningless impaneling by ordeal and completely purposeless sentencing deliberation is an abuse of process and, if this Court were to enforce such an order, an abuse of discretion.[9]

B. Constitutional Issues

Defendant raised a second basis for this Court's exercise of discretion in this case. In Caldwell v. Mississippi, 472 U.S 320, 105 S. Ct 2633 (1985), the United States Supreme Court ruled that the Eighth Amendment of the United States Constitution is violated when a death sentence has been issued by a sentencer who has been led to believe that responsibility for determining the appropriateness of a defendant's death sentence rests elsewhere. In Caldwell, the prosecutor's closing argument as to sentence included the following statements:

"ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it, Yet they…

"COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT: Alright, go on and make the full expression so the Jury will not be confused, I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

"ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." (emphasis in original).

Caldwell, 472 U.S. at 325-326..

In vacating the death sentence and reversing the judgment of the Mississippi Supreme Court, the United States Supreme Court explained:

In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct.2978, 49 L.Ed.2d 944 (1976). Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

The problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision that has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.

Caldwell, 472 U.S. at 333.

The Pennsylvania Supreme Court has relied on the reasoning in Caldwell to vacate death penalty sentences. In Commonwealth v. Baker, 511 Pa 1, 511 A.2d 777 (1986), the Pennsylvania Supreme Court affirmed the defendant's conviction of first-degree murder but set aside the defendant's death sentence due to the following:

The Assistant District Attorney began his argument to the jury by attempting to minimize their expectations that a verdict of death would ever be actually carried out, and hence minimized their sense of responsibility for a verdict of death-suggesting that ultimate responsibility rested with this Court. He stated: "You get an appeal after appeal after appeal after appeal, if you think the Supreme Court is going to let anybody get executed until they're absolutely sure that that man has a fair trial, make no mistake about that."

Baker, 511 A.2d at 782.

The Pennsylvania Supreme Court further reasoned:

We conclude that the inherent bias and prejudice to Appellant engendered by the Assistant District Attorney's remarks necessitates reversal of the death sentence in the instant case, and that under the circumstances said remarks also violated Appellant's rights under the Eighth Amendment of the United States Constitution as set forth in Caldwell v. Missouri, supra, as well as violating Appellant's rights under Article I, § 13, of the Constitution of the Commonwealth of Pennsylvania.

Baker, 511 A.2d at 790.

In Commonwealth v. Jasper, 558 Pa. 281, 737A. 2d 196 (1999), the trial court gave the following instruction to the jury: Now, with regard to death penalty, you know what that implies. Somewhere down the line, if you do impose the death penalty, the case will be reviewed thoroughly. And after thorough review the death penalty may be carried out. I won't go into all the various reviews that we have. That shouldn't concern you at this point.

Jasper, 737 A.2d at 196.

The Pennsylvania Supreme Court ruled that, despite the fact that the trial court also advised the jury three separate times that its determination was not merely a recommendation, but the actual sentence, the jury's death sentence had to be vacated:

We disagree that these instructions cured the remark set out above, for the plain import of the court's remarks is that although the jury may impose the death penalty, it may not be carried out, thus removing from the jury responsibility for imposing the death penalty.

Jasper, 737 A.2d at 197.

In Commonwealth v. Montalvo, 651 Pa. 359, 205 A.3d 274 (2019), the Pennsylvania Supreme Court affirmed the granting of a new penalty hearing to a defendant sentenced to death by the PCRA court. In that case, the prosecutor referred to the jury's penalty decision as a recommendation six different times. The trial court endorsed that characterization during defense counsel's closing argument in the following exchange:

DEFENSE COUNSEL: But again, that is why I chose you folks because I thought you would all try to be fair. So don't look at him and say I hate that guy, he's got to get the death sentence. That is not what this is all about. And [the prosecutor] certainly gave an impassioned plea. But you don't have to kill anybody. You don't have to kill anybody.

PROSECUTOR: I object to that argument. They are not doing it. They are recommending the sentence.

THE COURT: Objection sustained. That is an improper statement, ladies and gentlemen. I am the sentencing person. Your decision is a recommendation to the court.

Montalvo, 205 A.3d at 295.

In its final charge to the jury, the trial court instructed: "Remember that your verdict is not merely a recommendation. It actually fixes the punishment of life or death." Montalvo, 205 A.3d at 295.. The trial court made no reference to its previous statement to the jury.

In affirming the grant of the new penalty phase (sentencing) hearing, the Pennsylvania Supreme Court provided the following analysis:

We agree with Appellant's characterization of this case as demonstrating a "textbook example of Caldwell error." As discussed at length supra, the prosecutor told the jury six times, without objection or correction, that the jury's sentencing verdict was a mere recommendation, leading the jury to believe that it was not responsible for determining Appellant's final sentence. The last of these misleading comments came during defense counsel's closing argument, where defense counsel was attempting to appeal to the jury's proper sentencing role when the prosecutor interrupted with an objection and a reminder that the jury's "decision is a recommendation to the court." N.T., 1/21/2000, at 136. To compound the impact of these erroneous assertions upon the jury's deliberations, the trial court sustained the prosecutor's objection, and expressly conveyed to the jury, "I am the sentencing person. Your decision is a recommendation to the court."

These statements reflect the precise sentiments that the High Court in Caldwell condemned as "constitutionally impermissible" because it "rest[s] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29, 105 S.Ct. 2633. The instant case is arguably more egregious than Caldwell because the improper comments made herein were more pervasive and did not merely reference the appellate court's role in the sentencing process, but specifically directed the jurors that the trial court, and not the jury, would determine whether Appellant would receive a sentence of life imprisonment or death.

We reject the Commonwealth's contention that the trial court's final jury charge cured any error that arose from the improper comments of the prosecutor and the trial court during the penalty phase closing arguments. While the final charge correctly stated that the jury's "verdict is not merely a recommendation" and that it "actually fixes the punishment," N.T., 1/21/2000, at 168, the trial court did not acknowledge that it had given an entirely inconsistent directive to the jury only a few hours earlier. Significantly, nothing in the trial court's final charge made clear to the jury that one of the contradictory instructions was erroneous. See Francis v. Franklin, 471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (holding that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"); Commonwealth v. Cain, 484 Pa. 240, 398 A.2d 1359, 1363 (1979) (stating that "[w]here a court gives two instructions, one erroneous and prejudicial and the other correct, reversible error occurs"). (footnote omitted).

Montalvo, 205 A.2d at 299.

Through Question 66, Defendant has already raised an issue concerning whether the Governor's proclamation will have an effect on jury sentencing deliberations. Though the question itself may contain a general inquiry as to whether a potential juror may believe that the death penalty won't be enforced even if the jury returns with a death sentence, a follow-up question could certainly be presented with regard to the Governor's proclamation. Alternatively, Defendant may well, perhaps, should, request that each prospective juror be questioned concerning the Governor's proclamation so as to ensure that a seated juror doesn't become informed about it for the first time by another juror during sentencing deliberations.

In this Court's view, the prospective jury in this case, if it were permitted to deliberate as to sentence, will have been informed by Governor Shapiro's proclamation that the responsibility for any determination as to whether Defendant will actually receive the death penalty has already been made by a respected Pennsylvania legal authority who, the juror(s) may perceive, has a greater right to make that determination. Deliberating jurors who might be reluctant to vote for a death sentence could nevertheless give in, knowing that Governor Shapiro has already made the ultimate decision. The possibility that the jury or any particular member of the jury might rely on Governor Shapiro's authority without openly acknowledging that the Governor's proclamation had an effect on the juror's decision, thereby causing a bias toward returning a death sentence, is simply too great. To borrow from the Jasper Court:

[T]he plain import of the [Governor's proclamation] is that although the jury may impose the death penalty, it [will] not be carried out, thus removing from the jury responsibility for imposing the death penalty.

The argument that a new governor with a different view of the death penalty may be elected in four or eight years is of no avail. The risk presented currently is that a capital case jury deliberating as to sentence while Governor Shapiro is in office, particularly at the beginning of his first term, may be influenced by Governor Shapiro's proclamation. The exact result forbidden

by Caldwell, Jasper, Baker, and Montalvo could occur if the jury, having been improperly affected by the Governor's proclamation, returns a death sentence, the case proceeds through the appeal process over a period of years during which a new governor is elected and then the new governor signs the execution warrant based on the tainted death sentence.

This Court understands that this Opinion relies on a degree of speculation as to how Governor Shapiro's proclamation might affect a capital case jury's sentencing deliberations. That same degree of speculation, in this Court's view, was the foundation for the holdings in Caldwell, Jasper, Baker, and Montalvo. In all of those cases, the Supreme Court of the United States and the Supreme Court of Pennsylvania invalidated capital case jury death sentences without proof that improper argument made by a prosecutor and/or improper and/or inconsistent instructions given by a trial judge actually affected the jury's decision. All of the decisions in these cases were premised on the presumption that the jury did not adequately appreciate or understand the importance of its role in sentencing because the defective comments and/or instructions could have caused a minimization, in the mind of at least one juror, of the jury's sentencing function.[10] This Court believes the risk of minimization of the jury's sentencing function in this case is even greater since the Governor's proclamation did not announce the continuation of a moratorium (temporary halt) but, instead, announced a total cessation of the carrying out of the death penalty.

Even were the jury to be instructed by the court to not let the Governor's proclamation affect their deliberations, a death sentence verdict would still be subject to question. As has been observed by the United States Supreme Court, and endorsed by the Pennsylvania Supreme Court:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

See Commonwealth v. Rainey, 593 Pa 67, 86, 928 A.2d 215, 227 (2007), quoting, Bruton v. United States, 391 U.S. 123, 135-136, 88 S.CA. 1620 (1968. This Court is of the view that no pre-sentencing deliberation instruction given by this Court can assure that the Governor's proclamation will not cause a result otherwise not reached by a capital case sentencing jury.

Conclusion

This ruling is not based on any particular view as to whether the death penalty should be available as a sentence for any offense. Nor is it based on any particular view of the morality or legality of the death penalty. Whether Governor Shapiro's proclamation may be regarded as "temporary" while he tries to convince the Legislature to abolish capital punishment in Pennsylvania or whether the Governor's proclamation violates Article 1, Section 12 of the Pennsylvania Constitution is a matter arguably central to but not presented in this case. The fact that the Governor has announced that he will grant preemptive reprieves in all cases, without any consideration as to legal merit, directs the action taken by this Court.

Requiring citizens to undergo the intensive and intrusive process of death qualification and sentencing deliberations, when the outcome has already been determined, is patently unreasonable and fundamentally unfair. All juries should be shown the same respect for their critically important role in all parts of a trial, from impanelment through verdict. Instructing jurors to ignore the public pronouncement of the highest-ranking executive officer in the Commonwealth, who has the ultimate authority to carry out the death penalty, is unrealistic, if not outright disingenuous.[11]

Death is different.[12] All death sentences otherwise issued in compliance with all legal requirements must be free from doubt that even one member of the jury deferred to the authority of the Governor in arriving at the decision to sentence another person to death. Governor Shapiro's proclamation, as it stands currently, makes any death penalty sentence issued after the date of the Governor's proclamation suspect under the Eighth Amendment of the United States Constitution and under Article 1, §13 of the Constitution of the Commonwealth of Pennsylvania.

BY THE COURT:
/s/The Hon. Anthony M. Mariani

[1] Four different Assistant Public Defenders have entered their appearances in this case, two of whom are designated as "Capital Counsel." The Court has also been advised that a "Mitigation Specialist" employed by the Public Defender's Office is assigned to this case to assist with sentencing issues.

[2] A substantial portion of the April 5, 2023, Opinion forms part of this Opinion.

[3] This Court considers the Commonwealth's issues without addressing whether a pretrial ruling regarding voir dire questions and sentencing procedures is appealable under current appellate standards.

[4] A violation of 18 Pa.C.S §4904 subjects the prospective juror to criminal prosecution and a possible penalty of up to two years in state prison.

[5] Recently, in Pittsburgh, a federal capital case jury empanelment required seventeen days to qualify a sufficient number of jurors to be available before another day set for the parties to exercise peremptory strikes. The guilt phase of that trial was estimated to last three weeks. The sentencing phase is expected to take approximately six weeks. See https://triblive.com/local/jury-set-for-pittsburgh-synagogue-shooting-trial/ "Ward, Paula, May 17, 2023, "Jury Set for Pittsburgh Synagogue Shooting Trial"

[6] The November, 2017, election resulted in the installation of a new District Attorney of Philadelphia County whose term started in January of 2018.

[7] The Attorney General of Pennsylvania at that time was now- Governor Josh Shapiro.

[8] The Commonwealth also suggested that the Pennsylvania Supreme Court could, alternatively, remand the case to the PCRA court to allow that court to address the matters set forth in the joint motion.

[9] This Court recognizes that no Pennsylvania appellate court decision specifically endorses a trial court's use of discretion in this manner with regard to the jury selection process. Likewise, however, no Pennsylvania appellate court has ruled that a trial court may not exercise discretion in this manner. Most likely the issue has never arisen since no previous governor has determined that all death penalty sentences will be granted reprieves before the jury is sworn to hear the case.

[10] The jury's having heard the improper comments/instructions was enough to cause the High Courts to overturn the death sentences in those cases. Whether by design or otherwise, Governor Shapiro's proclamation was delivered in a way to ensure that

citizens of Pennsylvania, the pool from which jurors are chosen, were made aware of his intentions as to how he will exercise his ultimate authority in death penalty cases.

[11] In effect we are asking jurors to respect an instruction that tells them to disregard the fact that Governor Shapiro will not respect their decision if it doesn't align with his personal sense of morality, regardless of its legality.

[12] Because "execution is the most irremediable and unfathomable of penalties... death is different." Ford v. Wainwright, 477U.S. 399, 411, 106 S.Ct. 2595 (1986).

IN THE INTEREST OF: J.B.

Petition for Continued Involuntary Commitment – SOAB Evaluation

It is well settled under 42. Pa. C.S.A § 6404, (hereinafter "Act 21"), that the Judge has discretion to determine whether a person requires additional inpatient treatment if the Judge finds by clear and convincing evidence that a person has serious difficulty controlling sexually violent behavior. Furthermore, the Judge considered all of the evidence presented during the hearing, including the SOAB evaluation. Lastly, the Judge considered the opinions of both experts, Dr. McCracken, and Mr. Allenbaugh, in rendering decision.

Case No.: CP-02-MH-0000490-2000. Superior Court No. 604 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division – Juvenile Section. Clark, P.J. July 25, 2023.

OPINION

This is an appeal from an order entered on May 1, 2023. On April 25, 2023, the parties appeared for a hearing on the Petition for Continued Involuntary Commitment pursuant to 42 Pa. C.S. Ch. 64. Max Walko, Esquire represented the County and James Robertson represented the Appellant, J.B.

After consideration of the testimony of Dr. Cole McCracken, Clinical Director of the Pennsylvania Sexual Responsibility and Treatment Program, and Mr. William Allenbaugh clinical psychologist for the Sexual Offenders Assessment Board, the Exhibits admitted into the hearing[1], and the arguments of counsel, I granted the Application for Involuntary Mental Health Treatment and ordered for J.B. to be re-committed to the Pennsylvania Sexual Responsibility and Treatment Program (hereinafter "SRTP") at Torrance State Hospital pursuant to 42 Pa. C.S.A § 6404 of the Mental Health Procedures Act for a period of one (1) year. I also ordered that the Office of Behavioral Health continue to search for potential discharge resources for J.B.

On May 23, 2023, Appellant timely filed a Notice of Appeal of the order entered on May 1, 2023. On May 25, 2023, I entered an order directing Appellant to file a concise statement of errors complained of on appeal within twenty-one days. Appellant timely filed his statement of errors complained of on appeal on June 9, 2023.

MATTERS COMPLAINED OF ON APPEAL

Appellant raises three matters on appeal. First, Appellant avers that I erred in finding that he has serious difficulty controlling sexually violent behavior where the evaluation from the Sexual Offenders Assessment Board (hereinafter "SOAB") did not support this conclusion.

Next, Appellant argues that I erred by ignoring the SOAB evaluation, thereby undermining the legislative intent of the statute which requires an independent evaluation by the SOAB.

Finally, Appellant contends that I erred by denying him a fair hearing because I ignored independent expert testimony that Appellant no longer met the criteria for involuntary commitment under section 6404 of the Mental Health Procedures Act.

DISCUSSION

Appellant avers that I erred in finding that he has serious difficulty controlling sexually violent behavior where the evaluation from the SOAB did not support this conclusion. I disagree. It is well settled under 42. Pa. C.S.A § 6404, (hereinafter "Act 21"), that I have discretion to determine whether a person requires additional inpatient treatment if I find by clear and convincing evidence that a person has serious difficulty controlling sexually violent behavior.

If the court determines by clear and convincing evidence that the person continues to have serious difficulty controlling sexually violent behavior while committed for inpatient treatment due to a mental abnormality or personality disorder that makes the person likely to engage in an act of sexual violence, the court shall order an additional period of involuntary inpatient treatment of one year; otherwise, the court shall order the department, in consultation with the board, to develop an outpatient treatment plan for the person. The order shall be in writing and shall be consistent with the protection of the public safety and appropriate control, care, and treatment of the person. 42. Pa. C.S.A § 6404

In determining whether there is clear and convincing evidence that Appellant has serious difficulty controlling sexually violent behavior, thus requiring an additional period of involuntary inpatient treatment, I may consider "all, part, or none of the evidence" presented at the recommitment hearing. See In re J.M., 5 A.3d 323, 331 (Pa. Super. 2010) holding "the trier of fact while passing upon the credibility of the witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence" See also Com. v. Troy, 832 A.2d 1089, 1092 (Pa. Super. 2003) holding the entire record must be evaluated and all evidence actually received must be considered...the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence."

While I do agree that under, 42 Pa.C.S.A. § 6352(a)(2), a child/person who has been adjudicated delinquent for certain acts of sexual violence is subject to assessment and reassessment by the SOAB, there is no case or statutory law which limits the court's evaluation of the evidence in a recommitment hearing to the confines of the SOAB assessment.

There is also no legal precedent requiring that I only consider and give weight to the conclusions of the SOAB evaluator during an Act 21 recommitment hearing. There is, however, case law precedent from this Appellate Court, which upheld a trial court's decision to order involuntary inpatient treatment where the opinions and evidence presented by the psychologist from the SRTP were more persuasive than those from the psychologist for the SOAB. See In re J.M., 5 A.3d 323, 331 (Pa. Super. 2010), where the Superior Court determined that although the SOAB assessor did not find that Appellant met the criteria for involuntary commitment under Act 21, the testimony from a licensed psychologist that Appellant had serious difficulty controlling his sexually violent behaviors, was persuasive enough for the trial court to order involuntary commitment.

As such, I find it permissible to not only consider the SOAB assessment of Appellant, but also any other evidence that may be helpful in determining whether he be recommitted for his safety and the safety of others. After considering all the evidence presented before me at the recommitment hearing, I entered the findings of fact set forth below. See Findings of Fact filed on May 2, 2023.

1. Both Dr. McCracken and Mr. Allenbaugh are respected experts in the field of sexual offending. Dr. McCracken opines that although J.B. has made progress over the past year, he is not even close to being ready for discharge in the community. (H.T. 30-32)[2] Mr. Allenbaugh opines that Mr. B. does not meet the criteria for continued civil commitment based upon one factor—that Mr. B. has not displayed sexually dangerous behavior in the controlled environment. (H.T. 52, 73-75)

2. I accept the opinion of Dr McCracken and. I find that J.B. continues to meet the criteria for continued civil commitment to the SRTP.

3. While I should and have considered the fact that Mr. B. has not engaged in an overt act of sexual violence or sexually dangerous behavior while in the confines of a secure treatment facility, I have also considered the other factors as testified to and reported by Dr. McCracken upon which I place greater weight.

4. Specifically, I considered the following factors:

a. Between April of 2022 and November of 2022, J.B. was on Level 2-1, which for all intents and purposes is the lowest level. There is one lower level, which is the level reserved for those first entering treatment. (H.T.13)

b. Mr. B. has been on Level 2-2 since November of 2022 and will move to level 2-3 if he continues to make progress. (H.T.13)

c. Mr. B., [sic.] is now 38 years old. He was initially committed to the SRTP on June 13, 2005, and has made minimal progress.

d. In order to receive supervised on grounds outing/activities, Mr. B. would need to reach Level 2.4. Then to receive supervised off-grounds outings, he would need to be on Level 3-1. The recommended Level for discharge to outpatient is the end of Level 4 or the beginning of Level 5. (H.T. 24-26)

e. Although it would be difficult for Mr. B. to engage in an overt act of sexually dangerous behavior in the secure confines of the SRTP, he continues to dwell daily on fantasies of assaulting staff, raping them, and visiting a multitude of nonsexual forms of violence on them. He actually reported an increased frequency of violent sexual fantasies once he began working on these matters. (H.T. 12-15)

f. Of great concern to this court is the acknowledgment by Mr. B. that he secreted letters to each of his two sisters, who were also victims, into a letter to his mother. Mr. B. was originally adjudicated delinquent of sexually assaulting two of his sisters while forcing another sister to watch the sexual assaults. Prior attempts at reunification work have been denied because the sisters had requested to have no contact with Mr. B. This state of affairs has been in place for quite some time, with an open invitation for the sisters to contact the facility should they reconsider and wish to explore reunification. Mr. B. rationalized his decision to ask his mother to pass along these letters by expressing that he wanted to have a relationship with his sisters, which he saw as sufficient cause to override their existing boundary. Mr. B. has recently expressed a desire to reside with his Mother upon discharge. (H.T. 13-16)

g. Mr. B. has made little progress in the eighteen years since his original commitment. I strongly agree with Dr. McCracken that release at this time, without more progress and without a transition plan or step-down program, places him in a position to engage in an act of sexual violence and places the community at significant risk as well. Attempts were made, last year, to identify a forensic Long-Term Structured Residence (LTSR) that could transition Mr. B. from the secure confines of the SRTP at Torrance State Hospital into the community. No LTSR would accept Mr. B.

h. Mr. B. was provided a full battery of cognitive, personality, and psychosexual testing. One of these tests is the Therapist Rating Scale-2 (TRS-2), which assesses progress during the review period. He did not score above a 2 on any of the categories.[3] (H.T. 24-26)

i. While I recognize both Dr. McCracken and Mr. Allenbaugh as experts in the field of sexual offending and sexual offender treatment, I place greater weight on the opinions of Dr. McCracken who has had the opportunity to observe and assess Mr. B. over a period of time and the opportunity to speak with Mr. B.'s treatment team on a regular basis as opposed to Mr. Allenbaugh who reviewed the records and had one telephone interview with Mr. B.

5. 42 Pa. C.S.A. § 6404 (b) (2) does not require that the respondent has engaged in an overt act of sexually dangerous behavior during the review period before the court can re-commit the respondent, the statue only requires that the court find by clear and convincing evidence that the respondent has a mental abnormality or personality disorder (which is not in dispute here) which results in serious difficulty in controlling sexually violent behavior that makes him likely to engage in an act of sexual violence.

6. Based upon the aforementioned factors, I find that the County has established by clear and convincing evidence that J.B. has a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes him likely to engage in an act of sexual violence.

Although Appellant argues that the evaluation from Mr. Allenbaugh does not support finding that he has serious difficulty controlling sexually violent behavior, after considering all the evidence, I found otherwise. I am not obliged to rule in accordance with the SOAB assessor; I am only tasked with the responsibility of finding by clear and convincing evidence that Appellant has serious difficulty controlling sexually violent behavior. As such, I did not act outside of my discretion when I considered the evidence presented by both experts but found Dr. McCracken's evaluation to be more persuasive. Thus, I disagree with Appellant's argument that I erred in finding that he has serious difficulty controlling sexually violent behavior where the evaluation from the SOAB did not support this conclusion.

In his second matter raised on appeal, Appellant argues that I erred by ignoring the SOAB evaluation, thereby undermining the legislative intent of the statute which requires an independent evaluation by the SOAB. I disagree.

To ignore means to refuse to take notice of or fail to consider. In this case, I did neither. It is clear from the findings of fact, mentioned above, that I considered all of the evidence presented during the hearing, including the SOAB evaluation, in deciding whether Appellant had serious difficulty controlling sexually violent behavior under Act 21. Specifically, I considered the SOAB's evaluation when I acknowledged Mr. Allenbaugh's argument that J.N.B did not engage in any overt act of sexual violence or dangerous behavior while in the confines of a secure treatment center over the past year. However, I also considered other factors as testified to and reported by Dr. McCracken upon which I placed greater weight. Although I found Dr. McCracken's evidence to be more persuasive than Mr. Allenbaugh's, that does not mean I ignored his evaluation. Instead, it means I did not find the SOAB evaluator persuasive enough to order that Appellant be released to the public. Accordingly, Appellant's assertion that I failed to consider Mr. Allenbaugh's testimony is without merit.

I also disagree with Appellant's assertion that I attempted to undermine the legislative intent of Act 21. Appellant argues that the legislative intent of the statute requires an independent evaluation by the SOAB. I believe Appellant misunderstood the role of the SOAB evaluation under Act 21. The SOAB evaluation is a means of enforcing the true legislative intent of the statute which is rooted in public safety and to provide treatment for sexually violent delinquent children. In In re J.M., 5 A.3d 323, 330 (Pa. Super. 2010), the Pennsylvania Superior Court opined that Act 21 was promulgated to provide treatment for people who are likely to commit another sexually violent crime at some point in their future. See also In re S.A., 925 A.2d 838, 843 (Pa. Super. 2007) holding the General Assembly's intent in promulgating Act 21 was not to punish sexually violent delinquent children, but rather, to establish civil commitment procedures designed to provide necessary treatment to such children and to protect the public from

danger. To achieve the legislative intent of Act 21, the State SOAB has authority to assess a delinquent child which includes determining whether the child needs to remain committed.

I do recognize the function and importance of the SOAB as enumerated under 42 Pa.C.S. §6358. However, the SOAB is primarily charged with providing an assessment of delinquent children who have committed sexual acts of violence and reassessment of those for whom the court has determined are sexually violent delinquent children in furtherance of the legislative intent of Act 21. As mentioned above, the legislature is concerned with ensuring the delinquent child receives the correct treatment while ensuring the public is protected from harm. Therefore, even though the SOAB provides an independent assessment of a formerly delinquent child, the court is free to consider other relevant information to determine if the person should be re-committed. "The court shall consider the assessment, treatment information and any other relevant information regarding the delinquent child at the dispositional review hearing pursuant to section 6353 (relating to limitation on and change in place of commitment) ..." See, 42 Pa.C.S. §6358(e).

In this context, I find that the SOAB evaluation is not controlling but merely serves as guidance for the court to determine whether the person continues to meet the criteria for commitment to the SRTP, while protecting the public from danger.

In this case it is patently clear that I do not ignore the testimony and opinion of the SOAB or the legislative intent on Act 21. In this case, I considered the SOAB's evaluation in addition to other evidence and ultimately, concluded that Appellant continues to have a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes him likely to engage in an act of sexual violence. In keeping with the legislative intent, and after considering the evidence, I determined it would not be in the best interest of Appellant or the public if he were to be released.

Lastly, Appellant contends that I erred by denying him a fair hearing because I ignored independent expert testimony that Appellant no longer met the criteria for involuntary commitment under Act 21. I disagree.

As discussed in significant detail above, I considered the opinions of both experts, Dr. McCracken, and Mr. Allenbaugh, in rendering my decision. After considering the testimony of both experts, I accepted the opinion of Dr McCracken and found that Appellant continues to meet the criteria for continued civil commitment to the SRTP. I accepted Mr. Allenbaugh's testimony that over the past year, Appellant made more progress in treatment than in prior years and that Appellant had not displayed sexually dangerous behavior in the controlled environment of the SRTP. (H.T. 50-52) However, based upon the totality of evidence presented I did not believe that Appellant was ready to be reintegrated into the public because he still struggles with the belief that his urges, desires, and wants, supersede the rights, boundaries, and physical well-being of others. (H.T.16) Accordingly, I find that Appellant had a fair trial.

CONCLUSION

Based on the foregoing, no reversible error occurred, and my findings and rulings should be left undisturbed.

BY THE COURT:
/s/The Hon. Kim Berkeley Clark

[1] Three exhibits presented by the County were admitted: the court order entered after the May 2, 2022, Act 21 hearing; the ten-month comprehensive review report from the Sexual Responsibility and Treatment Program; and the report from the assessment of the Sexual offenders Assessment Board.

[2] The letters H.T. followed by numbers, refer to the pages of the transcript of the testimony from the Act 21 Review Hearing on April 25, 2023.

[3] The dynamic risk variables included in the TRS-2 are taken from the research in the field and have been empirically established to be the most strongly predictive of sexual recidivism. Each treatment target is evaluated twice: first based on the resident's intellectual understanding of the concept or target, and second, based on his emotional acceptance and formal demonstration of the target. The targets are evaluated based on the resident's presentation within the treatment group itself and on his demonstrated ability to generalize the group principles to his life overall. Ratings are based on estimates of what would be considered "normal" functioning among the general population. There are four levels of possible ratings for each target: Level 4: Optimal Functioning (Significantly better than average, Level 3: Normative (Average functioning, mostly achieves this target), Level 2: Approaching Normative (Approaching average functioning), Level 1: Unsatisfactory (Needs to redo treatment component). See County Exhibit 2, which also contains Appellant's specific scores.