

COMMONWEALTH OF PENNSYLVANIA
v. SHAWN PAUL LESHER, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 1700-2001

Mental Health; Sexually Violent Predator Classification; Evidence

1. After conviction but before sentencing of an individual convicted of a sexually violent offense, an assessment must be completed by a member of the Sexual Offenders Assessment Board to determine whether the convicted individual should be classified as a sexually violent predator. 42 Pa.C.S.A. §§ 9791-9799.
2. The convicted individual may request another expert assessment in addition to the Board Assessment.
3. At the hearing prior to sentencing, the Commonwealth has the burden of proving by clear and convincing evidence that the individual is a sexually violent predator.
4. Although assessments have been completed and professional opinions given by knowledgeable psychologists in their field of study, it is the duty of the Court to make the legal determination of Defendant as a sexually violent predator.
5. In making its determination of Defendant as a sexually violent predator, the Court considers (1) the facts of the current offense; (2) Defendant's entire offense record; (3) characteristics of the Defendant; and (4) the conflicting professional assessments and opinion of evaluators.
6. The correct statutory focus of the determination of whether Defendant is a sexually violent predator is whether Defendant is likely to re-offend.

Appearances:

John M. Lisko, Esq., *Assistant District Attorney*

Eric J. Weisbrod, Esq., *Counsel for Defendant*

OPINION

Van Horn, J., May 2, 2003

Introduction

A criminal complaint was filed in this case on August 29, 2001, charging Shawn Paul Leshner (hereinafter "Defendant") with Attempted Sexual Assault, Sexual Assault, and Aggravated Indecent Assault. On April 1,

2002, Defendant entered a negotiated plea of guilty to one (1) count of Aggravated Indecent Assault, a felony in the second degree, in Criminal Action Number 1700-2001. Defendant was twenty (20) years old at the time of the offense, and the victim was fifteen (15) years old.

As a result of his plea, Defendant was required to undergo an assessment by the Pennsylvania Sexual Offender Assessment Board, pursuant to 42 Pa.C.S.A. § 9791, et. seq., in order to determine whether he met the criteria necessary to be determined to be a sexually violent predator.

Pursuant to 42 Pa.C.S.A. § 9795.4(a), an assessment was completed and a summary of the assessment ("Overcash Report"), dated May 20, 2002, was prepared by Stephen J. Overcash, Ed.D., a member of the Sexual Offender Assessment Board under the auspices of the Pennsylvania Board of Probation and Parole. Pursuant to 42 Pa.C.S.A. § 9795.4(e), a hearing to determine whether Defendant is a sexually violent predator was scheduled for July 22, 2002, at which time Dr. Overcash testified to his sexual offender assessment summary and his conclusion that Defendant met the criteria necessary to be a sexually violent predator. See Overcash Report at 9.

At the hearing, Defendant requested and was granted a continuance for the purpose of obtaining another expert assessment as allowed by 42 Pa.C.S.A. § 9795.4(e)(2), to be completed by Lawrence Donner, Ph.D. Dr. Donner holds a Diplomate (the highest level of accomplishment in one's area of expertise) in Clinical Psychology, Marital and Sex Therapy, Professional Psychotherapy, Medical Psychotherapy, Sexology, and Family Therapy. Dr. Donner completed an assessment of Defendant and created a summary of his assessment contained in his Confidential Neuropsychological Report ("Donner Report").

After a series of continuances for the purpose of granting Dr. Donner more time to complete his evaluation of Defendant, a hearing was scheduled for April 7, 2003, for the purpose of determining whether Defendant is a sexually violent predator.

At the Determination Hearing on April 7, 2003, Dr. Donner testified to his assessment and Confidential Neuropsychological Report in which he determined that Defendant does not meet criteria necessary for a sexually violent predator. See Donner Report at 11. Dr. Donner further testified that he regularly evaluates sex offenders in Maryland, but this is his first time to testify in Pennsylvania at a determination hearing for sexually violent predator status pursuant to 42 Pa.C.S.A. § 9795.4.

At the conclusion of the hearing on April 7, 2003, the Court directed attorneys for the parties to submit Memoranda of Authority applying the facts of this case to the applicable law. Having received Memoranda from each party's counsel of their respective positions and applicable authority in support thereof, the matter of determining whether Defendant is a sexually violent predator is ripe for disposition.

Relevant Facts

On the evening of July 10, 2001, the fifteen-year-old victim agreed to stay overnight at the residence of a past family friend in order to baby-sit two (2) minor children. Numerous other persons were at the residence that night.

During the course of the evening, Defendant sat beside the victim while she was babysitting, and Defendant attempted to touch her breasts and to kiss her. She repelled his sexual advances and repeatedly told him to stop, and she would move to different areas of the house to get away from him or to be near others so that he would leave her alone. She reported Defendant's behavior to Defendant's relatives who were present in the home, one of whom spoke to Defendant and told him to "knock it off." Aff. of Probable Cause ¶ 4.

Later in the evening, the victim went to bed, sharing a bedroom with the six-year-old child, one of the children she was babysitting. In the early morning hours, the victim awoke when she heard Defendant in the bedroom telling the six-year-old to leave the room and go to her mother's room. As the victim remained in bed and pretended to be asleep, Defendant began to fondle her breasts and placed his hand inside her vaginal area. She told Defendant to stop and to leave her alone. At this point, Defendant left the room.

The victim went back to sleep but subsequently awoke with Defendant lying on top of her. Defendant attempted to have sexual intercourse with the victim as she slept and had penetrated her vaginal cavity with his penis when she awoke and pushed him off of her and ran from the room to tell an adult what had happened.

On July 17, 2001, the victim, accompanied by her father, went to the Chambersburg Police Department where she was interviewed concerning the July 10, 2001, incident.

On July 23, 2001, Defendant was interviewed at the Chambersburg Police Department and admitted to having sexual contact with the victim without her consent. Defendant stated that he "fondled her breasts,

and when she told him to stop, he didn't." Aff. of Probable Cause ¶ 5. Defendant further stated that after the victim fell asleep, he "laid on top of her placing his hand in her vaginal area." Id. Defendant stated that he tried to have sex with the victim, but she woke up and told him to get off of her. Id.

Discussion

After conviction but before sentencing of an individual convicted of a sexually violent offense, as defined in 42 Pa.C.S.A. § 9795.1, an assessment must be completed by a member of the Sexual Offenders Assessment Board to determine whether the convicted individual should be classified as a sexually violent predator. In addition to the Board-established standards for evaluations, § 9795.4(b) provides that 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 record.

(ii) Whether the individual completed any prior sentences.

(iii) Whether the individual participated in available programs for sexual offenders.

3. Characteristics of the individual, including:

(i) Age 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 filed as criteria reasonably related to the risk of reoffense.

42 Pa.C.S.A. § 9795.4(b).

A sexually violent predator is defined by statute 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. The term includes an individual determined to be a sexually violent predator where the determination occurred in another state, territory, Federal Court, the District of Columbia or by court martial.

42 Pa.C.S.A. § 9792.

Predatory behavior is defined by statute as follows:

"Predatory." An act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

42 Pa.C.S.A. § 9792.

Once the Board has submitted its written report containing its assessment to the district attorney, a hearing must be held to determine whether the individual is a sexually violent predator. The convicted individual may request another expert assessment in addition to the Board Assessment. At the hearing prior to sentencing, the Commonwealth has the burden of proving by clear and convincing evidence that the individual is a sexually violent predator.

In the instant case, the Court is presented with sexual offender assessments by two very accomplished men in the field of psychology and the behavior and treatment of sexual offenders: Dr. Overcash, who was appointed to the Sexual Offenders Assessment Board, and Dr. Donner, who has a long and distinguished list of credentials and experience in the state of Maryland, but has no experience with an assessment pursuant to the Pennsylvania Registration of Sexual Offenders Act ("the Registration Act").

The Registration Act is somewhat unique in that it subjects to lifetime registration with the Pennsylvania State Police any individual convicted of aggravated indecent assault or individuals who are determined to be sexually violent predators. The determination of an individual as a sexually violent predator attaches other consequences as well. Section 9797 provides that written notice of the determination of sexually violent predator be provided to the victim. Additionally, law enforcement personnel must provide written notice of the determination with the predator's name, address, offense for which he or she was charged, and a photograph of the sexually violent predator, if available, to the following persons: neighbors; the director of the county children and youth service agency where the sexually violent predator resides; the superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality, and/or within a one-half (1/2) mile radius, of where the sexually violent predator resides; licensed daycare and preschool program licensees in the municipality where the sexually violent predator resides; and the president of each college, university and community college located within 1,000 feet of a sexually violent predator's residence.

The Pennsylvania legislature has explained the public policy consideration that underpins their drafting of the Registration of Sexual Offenders Act as follows:

(b) Declaration of policy. – It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

42 Pa.C.S.A. § 9791(b).

Although assessments have been completed and professional opinions given by knowledgeable psychologists in their field of study, it is the duty of this Court to make the legal determination of Defendant as a sexually violent predator. In doing so, this Court considers (1) the facts of the current offense; (2) Defendant's entire offense record; (3) characteristics of Defendant; and (4) the conflicting professional assessments and opinions of Dr. Overcash and Dr. Donner. A determination of Defendant as a sexually violent predator will result only if the Commonwealth has proved by clear and convincing evidence that such a determination is justified.

Facts of the current offense:

The current offense did not involve multiple victims, as the record shows that Defendant's aggravated indecent assault charge and conviction pertained only to his actions toward the fifteen-year-old victim. And although Defendant apparently did not use excessive force to achieve the offense, this Court is mindful that his relentless pursuit of the victim throughout the evening rose to the level of harassment. Additionally, Defendant's sexual advances occurred over a period of hours, and sexual contact with the victim occurred only after her defenses were completely down as she had gone to bed for the evening in her six-year-old charge's bedroom. Defendant spent the entire evening attempting to establish a sexual relationship with the victim, and Defendant was rebuffed each time, with the victim going so far as to enlist the help of Defendant's cousin with whom Defendant resides, and a relative of Defendant's to intervene on her behalf. The relative then spoke to Defendant about his behavior toward the victim and told him to "knock it off." Why Defendant chose the victim to make sexual advances toward is not clear from the record, but it appears that it was opportunistic behavior on the part of the Defendant who spent his energies the rest of the evening trying to establish a romantic interest with her. Defendant reported to Dr. Overcash that Defendant had met the victim a couple of times when she previously baby sat for Defendant's cousin. Dr. Donner, in his report, notes that the victim was "one of several teenage girls who had gone to fire works with the Defendant in his car over the fourth of July," but he does not state how or

whether Defendant's previous contact with the victim factors in with Defendant's subsequent sexual assault on her. She did not report having a previous social contact with Defendant.

The victim was present at the residence in the capacity as an overnight babysitter for two (2) young children. As such, she did not share the same social standing that evening as the twenty-year-old Defendant or the others present in the house. As she had agreed to baby sit the children for the evening and throughout the night, she was not free to leave and, thereby, extricate herself from Defendant's presence since he resided in the house as well.

Defendant went into the bedroom where the victim was sleeping with the six-year-old child and told the little girl to leave her bedroom and go to her mother's room. The little girl apparently obeyed Defendant's command, and Defendant got in the bed with the victim who pretended to be asleep, whereupon Defendant fondled her breasts and placed his hand inside her vaginal area. When told to stop, Defendant left the room.

Sometime later in the night, however, Defendant returned to the victim while she was sleeping, and she subsequently awoke with Defendant lying on top of her with his penis having penetrated her vaginal cavity. She then pushed Defendant off of her and ran from the room to tell the adult what had happened.

In his report, Dr. Donner notes that Defendant stopped when the victim pushed Defendant off of her, but Dr. Donner does not equate Defendant's going back to her bedroom and penetrating her as a predatory action. This Court finds that Defendant's acts toward the victim, with whom Defendant promoted a relationship for the primary purpose of victimization, was predatory behavior as statutorily defined.

Prior offense history:

When he was seventeen (17) years old, Defendant was charged with Rape and Involuntary Deviate Sexual Intercourse for allegedly raping his five-year-old brother on July 16, 1998. As a result of these charges, Defendant was adjudicated a delinquent child on September 10, 1998, on one (1) count of indecent assault in which he had anal intercourse with his five-year-old brother.

Defendant was committed to Paradise School for Boys in Abbottstown, Pennsylvania, and was released at age eighteen (18) from the school on December 3, 1999, whereupon Defendant moved into an apartment in Greencastle, Pennsylvania, because his family did not wish for him to return to their home. After release from Paradise School for Boys, Defendant was on a very extensive aftercare treatment plan including probation. Defendant violated the probation supervision on numerous occasions and was subsequently placed in Cornell Abraxas Detention Center in South Mountain, Pennsylvania, where he attended the Cornell Abraxas Sex Offender Treatment Program. Thereafter, Defendant was released from Abraxas and committed to Project Self, a fifty-six (56) day program at the Youth Forestry Camp in James Creek, Pennsylvania. Importantly, neither Dr. Overcash nor Dr. Donner indicated that Defendant significantly benefited from the Sex Offender Treatment Program that Defendant attended while at Cornell Abraxas, nor does this Court see any evidence of any such benefit manifested in self-control by Defendant.

Characteristics of the individual:

In conjunction with the Sex Offender Treatment Program that Defendant participated in while he was at Cornell Abraxas, he was given the Juvenile Sex Offender Assessment Protocol (JSOAP), the results from which Dr. Donner quotes extensively in his report. Donner states that while the JSOAP does not enable one to predict the probability that someone will re-offend, the test results did indicate that Defendant scored "very high on the sexual drive and preoccupation factor [60%], as well as the intervention factor [40%], indicating a continued need for strong structure to prevent recidivism." The quoted portion of the results also indicates that Defendant scored 37% on the Impulsive-Antisocial Personality Factor, but did "not present as a typically anti-social personality." Without a full explanation of the scores of the JSOAP by Cornell Abraxas evaluators, this Court accepts at face value the quoted excerpt contained in Dr. Donner's report, but does not give great weight to the excerpt in that it is not Dr. Donner's finding, but rather that of the Clinical Director of Cornell Abraxas who did not testify to her June 20, 2000, JSOAP report at hearing in the instant matter.

After acknowledging Defendant's arrest for the sexual abuse of his five-year-old brother when Defendant was seventeen (17) years old, Dr. Donner notes that the present conviction of aggravated indecent assault is Defendant's "only adult adjudication." This Court notes that Defendant was only twenty (20) years old at the time of the incident that forms the basis of this present matter and had been an adult for only two (2) years at the time of his "only adult adjudication." As such, Defendant had had precious little time to accumulate adult adjudications.

Defendant admitted to both Dr. Overcash and Dr. Donner that he was under the influence of drugs and/or alcohol at the time of the offense in this matter. However, Defendant did not raise this as a defense at the

Chambersburg Police Station when he gave a handwritten statement of his version of the facts of the July 10, 2002, incident at the residence involving the fifteen-year-old victim, nor did he use it as a defense at his arraignment. It is very important to again note that Defendant pled guilty to penetrating the genitals of the victim with a part of his body without her consent. This Court is puzzled by Dr. Donner's testimony that he refused to accept the facts as set forth in the probable cause affidavit and the police report as an accurate description of the crime despite the fact that defendant pled guilty to aggravated indecent assault. A synopsis of Dr. Donner's reasoning for not accepting the facts in the affidavit and report as garnered from testimony and his report follows:

- a. Defendant was under the influence of drugs and/or alcohol at the time of the offense and he could not have remembered the events of July 10, 2001, when he made his statement to the police six (6) weeks later on August 23, 2001.
- b. The fifteen-year-old victim did not report the offense for three (3) days and was accompanied by her father when she provided a statement to the police.
- c. If only the victim had told Defendant to stop, he would not have committed this offense.
- d. The police did not obtain a tape recording of Defendant's statements.

Dr. Donner not only misses the point of the assessment (whether Defendant is likely to re-offend), but also misses the mark by making excuses for Defendant's sexual assault and by couching Defendant's actions as not being violent. The statute (42 Pa.C.S.A. § 9795.4) does not require that force be used in order for an individual to be classified as a sexually violent predator. Indeed, the offense of aggravated indecent assault, which Defendant pled guilty to, is classified by the Pennsylvania legislature as a sexually violent offense. Notwithstanding the aforesaid, this Court notes that when Defendant sodomized his five-year-old brother, force was used. And in the instant case, against her will, Defendant penetrated the fifteen-year-old victim's vaginal cavity with his penis, an act that is in and of itself a violent act, regardless of the amount of force used to perpetuate the act. If Dr. Donner does not believe that Defendant actually committed the crime to which Defendant pled guilty, this Court is left wondering if Dr. Donner's testimony and report represents an unbiased professional assessment of Defendant.

In the instant case, both Dr. Overcash and Dr. Donner conclude from their assessments that Defendant has a personality disorder. Dr. Donner states that Defendant "tends to be defensive and unwilling to acknowledge psychological problems and distress. There are undercurrents of chronic dysphoria [an emotional state characterized by anxiety, depression, or unease] that he does not recognize. His self-understanding and insight are limited. There is no indication of an effort to intentionally distort results, but rather a tendency to avoid looking at negative or unpleasant aspects of himself." Likewise, Dr. Overcash finds that "Defendant's behavioral characteristics are consistent with an Antisocial Personality Disorder, as well as having narcissistic personality traits, ... that correlate positively to a risk for predatory behavior and recidivism."

Dr. Overcash defines Antisocial Personality Disorder as "a pervasive pattern of disregard for and violation of the rights of others occurring since the age of 15 and the individual being at least 18 years of age." Dr. Overcash stated that "upon reviewing the criteria listed in the DSM IV for Antisocial Personality Disorder, it is apparent that [Defendant] meets all of the criteria." Dr. Overcash enumerated the criteria and Defendant's behaviors that meet the criteria as follows:

1. Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.
2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for safety of self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

The assessment reports and the record are replete with the troubling details of Defendant's experience as

a victim of sexual abuse at the hands of his biological parents until he was four (4) years old (when he was removed from his parents' home and placed in foster care) and by his brother, who sodomized Defendant when Defendant was thirteen (13) years old. Then at the age of seventeen (17), Defendant sodomized his five-year-old brother. Dr. Donner notes that Defendant "was not provided specific counseling regarding issues of interpersonal, physical and sexual boundaries with others or that sexual contact between siblings was not simply inappropriate but illegal." This Court notes that Dr. Donner does not draw conclusions from Defendant's lack of counseling in regard to Defendant's likelihood of re-offending. Therefore, this Court concludes, based on the facts of this case, Dr. Overcash's report, and Dr. Donner's report, that Defendant's lack of counseling combined with his "limited self-understanding and insight" and his "tendency to avoid looking at negative or unpleasant aspects of himself" constitute behavioral characteristics that put him at great risk of re-offending.

Factors that are supported in a sexual offender assessment filed as criteria reasonably related to the risk of reoffense:

Dr. Donner's assessment report enumerates twenty-nine (29) items in support of his professional opinion that Defendant does not meet criteria for sexually violent predator as follows:

1. As an adult the defendant has plead [sic] guilty to a single count of aggravated indecent assault.
2. There was a single victim.
3. The victim was a 15-year-old white female, who was sleeping over at the home the defendant resided at.
4. The victim had been one of several teenage girls who had gone to fire works [sic] with the defendant in his car over the fourth of July.
5. The defendant who was 20 years old at the time believed the victim to be 17 years old.
6. The defendant acknowledged using alcohol and drugs the night of the instant offense.
7. The victim sought no medical attention and claimed no physical injury after the offense.
8. There is no report of any physical force being used in the incident.
9. There is no evidence that the defendant "exceeded the means necessary to achieve the offense."
10. The victim sought neither medical nor psychological treatment or help following the incident.
11. No weapon or verbal threat was involved according to the victim.
12. There was no display of unusual cruelty by the defendant.
13. The defendant denies any other sexual assault as an adult.
14. There are no other adjudications involving sexual assault or misbehavior by the defendant as an adult.
15. The defendant was a victim of extensive sexual abuse and physical abuse by his biological parents until the age of 4.
16. Although he was removed from his biological parents [sic] home and his father was incarcerated for the sexual abuse the defendant never received any psychological treatment for his childhood abuse and trauma.
17. He was placed in the Leshner's home, which was an extremely different environment from that of the general population in that it was unusually restrictive with respect to: exposure to the media (e.g. books, radio, television, movies, etc.), alcohol, cigarettes, cultural opportunities, school interactions, socialization and peer community.
18. At the age of 13 he was again the victim of sexual abuse at the hands of his older brother.
19. Again he received no treatment for this sexual abuse.
20. At sixteen he sexually abused his five-year-old stepbrother and was removed from his foster home.
21. He was adjudicated a delinquent child and sent to a series of Juvenile facilities and institutions where he was finally given counseling regarding his sexual offense against young children.

22. Although it was alleged on the basis of the instant offense [that] this counseling was not successful, in actuality it was, in that he has not offended against young children since undergoing this counseling.

23. Although his own prior victimization and his juvenile adjudication involved male partners, his history as an adult indicates only older female partners with the exception of the instant victim.

24. From the time he was four years old and went to live in his adopted parents' home, through the period of time he was placed in youth facilities, he was always in a highly structured and restricted environment. When he was ultimately discharged from these facilities notwithstanding the recommendations of these facilities and his parents he was released into the community without effective supervision, therapy, support or any form of structure. He did not take his medication and it is not surprising [that] he quickly ended up in trouble.

25. Neither the instant offense nor the defendants [sic] past history indicate him to be a violent sexual predator, i.e., his history is absent of any use of violence, threats or weapons, and as an adult the defendant has had only one offense, the instant offense. Since 16 years of age there is [sic] no charges nor pattern of sexually molestation of children, nor any adjudication or pattern of sexual violence or rape against anyone.

26. He has repeatedly expressed remorse and guilt [sic] for his molestation of his stepbrother and according to Detective Sergeant Kelso supplemental report regarding the instant case "he stated he felt bad for what he had done."

27. Given that this is the defendant's first adult sexual offense and incarceration, although having [had] sexual counseling, he has not actually been involved in an intensive treatment program for sexual offenders in which medication such as Depo-Provera is utilized along with counter-conditioning and sensitization techniques.

28. In addition to intensive sexual offender treatment he needs treatment for his substance abuse problem, which impairs both his judgment and impulse control and a definite factor in the instant case.

29. Although it is impossible to predict with any accuracy recidivism in general, receiving effective psychological, psychiatric and sexual offender treatment not only during Shawn Leshner's incarceration but when he is on probation would certainly lower the likelihood of his re-offending.

Perhaps because Dr. Donner has never before completed an assessment pursuant to 42 Pa.C.S.A. § 9795.4, and he was unfamiliar with the statutory language and usage, Dr. Donner's final analysis mistakenly focuses on whether Defendant used force or the threat of force to perpetuate his sexually violent offense against the victim in this case. Dr. Donner, thereby, erroneously justifies finding Defendant NOT a sexually violent predator because Defendant did not use a weapon and the victim was not injured. Since the correct statutory focus of the determination of whether Defendant is a sexually violent predator is whether Defendant is likely to re-offend, this Court finds Dr. Donner's opinion to be lacking in credibility. Consequently, this Court finds Dr. Overcash's professional opinion to be of more value in making a determination in this case.

Dr. Overcash reported that Defendant "meets most of the criteria generally associated with a higher risk for recidivism in some sex offenders," and in Dr. Overcash's review of the criteria of § 9795.4, he determined that "the following issues are of psychosexual importance in this case:"

1. Defendant's age;
2. Defendant's previous sexual offenses;
3. More than one victim;
4. The age of one of his victims, i.e., being under the age of 13;
5. Previous treatment for sexual offenses; and
6. A childhood history of behavioral problems and sexual abuse.

In addition to these factors, Dr. Overcash reported that Defendant "admits to alcohol and drug use the night of the offense. He currently denies the offense and shows little remorse or empathy. There is evidence of impulsive character traits and repressed hostility and anger. He has little insight into his sexual offending behavior despite his previous sexual offender treatment. He does appear to have adequate social skills. However, his social judgement [sic] is below average." Dr. Overcash noted that "the only criteria generally associated with a lower risk for recidivism in some sex offenders and relevant in

[Defendant's] case are no evidence of cruelty and no randomness." Finally, Dr. Overcash concludes that Defendant's "current offense appears to have been opportunistic with access to the victim" and "his antisocial personality disorder correlates positively to a risk for predatory behavior and recidivism." This Court concurs with Dr. Overcash's conclusions and expert opinion that the sexual offender assessment indicates that Defendant is likely to re-offend.

Dr. Donner determined that Defendant suffers from a Mixed Personality Disorder with antisocial, paranoid, and dependent features. As such, if Defendant receives treatment, takes his medication, and is in a structured environment, Dr. Donner opines that Defendant would not necessarily be a sexually violent predator. The "ifs" in this case are just the problem. Defendant chose not to follow the therapy recommendations; he quit taking his medications; he was provided treatment (Cornell Abraxas Sex Offender Program) as a result of his juvenile adjudication; and Defendant still re-offended. Both psychologists who evaluated Defendant in this case concluded that Defendant currently denies the offense he pled guilty to and is unwilling to acknowledge his psychological problems and distress, which paints a bleak picture for Defendant's overcoming his sexual impulsivity. Dr. Donner's report advocates treatment, and certainly Defendant could benefit from treatment, but that is not the function of this Court at this time. This Court is charged with looking at Defendant's exhibited behavior and making a determination of whether he is a sexually violent predator under the Pennsylvania statute.

Conclusion

Considering the facts of the current offense, Defendant's prior offense history, characteristics of the Defendant, and factors that are supported in the sexual offender assessment filed as criteria reasonably related to the risk of re-offense as discussed above, this Court determines, pursuant to 42 Pa.C.S.A. § 9795.4, that Defendant is a sexually violent predator and is, therefore, subject to lifetime registration pursuant to 42 Pa.C.S.A. §§ 9795.1(b) and 9798.

ORDER OF COURT

And now this 2nd day of May, 2003, the Court concludes that the Commonwealth has met its burden of proving by clear and convincing evidence that the Defendant is a sexually violent predator. The Defendant shall be subject to all registration and notification procedures required by 42 Pa.C.S.A. §9751.1 et. seq.

18 Pa.C.S.A § 3125.

42 Pa.C.S.A. § 9799.3(a) provides that the Board "shall be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders."

42 Pa.C.S.A. § 9795.4(a).

42 Pa.C.S.A. § 9795.4(d).

42 Pa.C.S.A. § 9795.4(e)(1).

42 Pa.C.S.A. § 9795.4(e)(2).

42 Pa.C.S.A. § 9795.4(e)(3).

Pa.C.S.A. § 9795.1(b)(2).

Pa.C.S.A. § 9795.1(b)(3).

Pa.C.S.A. § 9797(a).

Pa.C.S.A. § 9798(a)(1).

Pa.C.S.A. § 9798(b).

42 Pa.C.S.A. § 9795.4(e)(3).

42 Pa.C.S.A. § 9795.4(b).

42 Pa.C.S.A. § 9795.4(e)(3).

See Donner Report at 8.

Id.

Id.

Id. at 6.

See Commonwealth's Information

See Donner Report at 11-13.

Pa.C.S.A. § 9795.1(b)(2).

See Overcash Report at 7 and Donner Report at 10.

Donner Report at 10.

Overcash Report at 7.

Id.

Id.

Id. at 7-8.

Donner Report at footnote 9.

See Donner Report at 10.

Id.

Id. at 11-13.

Overcash Report at 6.

Overcash Report at 6.

Id.

Id.