IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY,
PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. : CP-14-CR-2421-2011
CP-14-CR-2422-2011

GERALD A. SANDUSKY :

FILED FOR RECORD
2012 JUN 21 A 9:02
DEBRA C. IMMEL
PROTHONOTARY
CENTRE COUNTY, PA

MEMORANDUM ORDER

John M. Cleland, S.J.

June 21, 2012

The Commonwealth has filed a Motion to Amend Information requesting leave to amend counts 16 and 19 at CP-14-CR-2422-2011 to allege acts of attempted involuntary deviate sexual intercourse.

The issue has arisen because at the charging conference with counsel after the close of the case held on the afternoon of June 20, 2012, and after all parties had rested, I sua sponte made counsel aware that the witness identified as alleged victim #4 did not testify that anal penetration, either penile or digital, had occurred during any alleged assault on victim #4 by the Defendant. I provided a transcript of the witness' testimony to all counsel and noted where the witness specifically testified that the defendant "attempted" to insert his penis and finger into the witness' anus.

It was apparent, and I believe undisputed, that neither counsel for the Commonwealth or the defense had noted this omission until I brought it to their attention. Although I had not been able to find any Pennsylvania case law that established that the facts the witness testified to constituted "penetration," I did cite counsel to a decision of the Supreme Court of Ohio that definitively held, on

identical facts and applying a similarly worded statute, that "penetration" had not been proven.[1]

The Commonwealth relies principally on Pa.R.Crim.P. 564 and the cases applying it. While I do not question the continued viability of the rule and the cited cases, it appears to me that the relevant rule is not Rule 564, but Rule 720.

The practical reality is that if the jury were to have found the Defendant guilty on counts 16 and 19, I would have been required to set the convictions on those counts aside on a post-sentence motion for judgment of acquittal because the verdict was not supported by the evidence.

Before I raised the issue with counsel at the charging conference, I considered whether it was appropriate for me to do so sua sponte, or whether it would be better practice to simply wait and address the issue in a post-sentence proceeding. Once I was satisfied that the failure of proof would not be either caught or corrected by counsel, I determined that it was not fair to the jury to require them to deliberate on two charges on which a verdict of guilt could not be sustained in any event – particularly when the jury was already facing the Herculean task of considering nearly 50 counts involving 10 alleged victims.

Accordingly, it is ordered as follows:

1. That the Commonwealth's Motion to Amend Counts 16 and 19 at CP-14-CR-2422-2011 is denied.
2. That Count 16 and Count 19 at CP-14-CR-2422-2011 are dismissed with prejudice.

By the Court:

John M. Cleland, S.J.
Specially Presiding

[1] Ohio v. Wells, 740 N.E. 2d 1097 (Supreme Court of Ohio 2001)