

COUNTY COURT
COUNTY OF ONONDAGA STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff.

v

Indictment #2007-1185-1
Index #07-1381

JAPHETH S. IRWIN,

Defendant.

APPEARANCES:

WILLIAM J. FITZPATRICK, ESQ.
Onondaga County District Attorney
MELINDA H. MCGUNNIGLE, ESQ., of Counsel

ANTHONY J. DiMARTINO, JR., ESQ.
Canal Commons
193 West First Street, Suite 16
Oswego, NY 13126

FAHEY, J.

DECISION / ORDER

On October 16, 2007, the Defendant, Japheth Irwin, entered a plea of guilty to a Superior Court Information charging him with two counts of Attempted Criminal Sexual Act in the First Degree, in violation of Sections 110.00 and 130.50 of the Penal Law. Both the People and the Defendant agreed that the Court would impose a determinate sentence of six years in the New York State Department of Correctional Services, to be followed by five years post-release supervision. On that date, the Court ordered a Pre-Sentence Report as required by Section 390.20(1) of the Criminal Procedure Law.

On December 30, 2007, defense counsel moved this Court for an order pursuant to

Section 400.10 of the Criminal Procedure Law, requesting a conference be held to resolve alleged discrepancies in the Pre-Sentence Report. In particular, defense counsel objected to the history set forth in the portion of the Report entitled “Circumstances of the Present Offense”, concerning the number of victims and the total of separate offenses engaged in with the victims in this county and an adjacent county. Defense counsel further objected to the probation officer’s observation and opinion, located under “Commentary” in the Report, that,

“The defendant has little insight into his sexual behavior.”¹

and

“The defendant appears unable to resist the impulse to offend against children.”²

Defense counsel proposed that the former observation be amended to read,

“The defendant had little insight into his sexual behavior.”

He also urged that the latter observation be deleted in its entirety.

The People oppose these amendments and deletions.

On February 22, 2008, the Court conducted a hearing pursuant to Section 400.10 of the Criminal Procedure Law to resolve these discrepancies. In support of its position that no amendments or deletions be made to the report, the People called Probation Officer James Hernandez as a witness.

Mr. Hernandez testified that he interviewed the Defendant on two dates, October 22 and October 29, 2007, at the Justice Center in Syracuse, New York. The witness testified that during the course of the interview, the Defendant admitted to the sexual conduct involving two victims

¹ Pre-Sentence Report dated 10/29/07, page 5.

² Pre-Sentence Report dated 10/29/07, page 6.

and explained it by stating that "he was overtired and could not resist the urges."³ Mr. Hernandez characterized this as a "degree of victim blaming", and "...not accepting responsibility by virtue of fatigue."⁴ Turning to the statement in the "Commentary" portion of the Report concerning the statement that, "The defendant has little insight into his sexual behavior," the witness explained that he formed this opinion because,

"The defendant did not provide me with any information in terms of motivation, whether he had been exposed, victimized. He could not explain to me how he came to abuse victims. He did not seem to have a grasp of at least the offense cycle so I can't ascertain that he had done any substantive work with any counselor on this issue so, therefore, I don't think he has the insight into the dynamics, such as grooming behavior that would have occurred to have children go along with the sexual behaviors, such as his own role in perpetrating those sexual behaviors on those children."⁵

The witness was further questioned about the sentence in the "Commentary" portion of the report in which he commented, "the defendant appears unable to resist the impulse to offend against children." He testified this was based on two factors,

"One is the defendant's statement saying he was overtired and was himself unable to resist that impulse. The second part of the assessment is based on the defendant's multiple involvements with sexual behavior over a course of time with three different individuals."⁶

On cross-examination, the witness testified that all of the statements attributed to the Defendant in the portion of the Report entitled "Defendant's Statements" were made by the Defendant during their two interviews, including the disputed statement that, "He states that he

³ H -12.

⁴ H - 14.

⁵ H - 15.

⁶ H - 18.

was overtired and could not resist the sexual urge.”⁷ Mr. Hernandez further testified that all of the opinions expressed in the “Commentary” portion of the Report were opinions he formed based upon his review of the case reports and the statements made by the Defendant in the two interviews.⁸

The Defendant called Michael Hungerford, Esq. as a witness. Mr. Hungerford testified that he was employed as a supervising attorney for the Mental Hygiene Legal Services in the Appellate Division, Fourth Department, for the Fifth Judicial District.⁹ He further testified that fifty applications for civil commitment pursuant to Article 10 of the Mental Hygiene Law entitled, “Sex Offender Management and Treatment Act” (SOMTA)¹⁰, have been filed. The witness informed the Court that in every case his office had reviewed, the Pre-Sentence Report is a document that is reviewed by the multi-disciplinary staff charged with making a recommendation to the case review team concerning the institution of civil commitment proceedings.¹¹ Asked what significance the Pre-Sentence Report has in this process, the witness testified,

“It certainly seems to be something that the case review team and their expert rely upon very heavily in reaching their diagnosis, analysis and conclusion about whether or not they believe the individual has what’s called a statutorily defined permanent mental abnormality and whether or not the person therefore should be subject to some form of civil management under the statute. So they

⁷ Pre-Sentence Report, dated 10/29/07, page 3.

⁸ H - 51.

⁹ H - 33.

¹⁰ H - 34-35.

¹¹ H - 35-36.

do look at it carefully. They rely upon it heavily. And it's our experience so far that what's there they take as absolute truth."¹²

On cross-examination, Mr. Hungerford amplified this answer to include "prison disciplinary records" in the materials the various review teams consider.¹³

The Defendant also called Kostas Katsavdakakis, Ph.D., a psychologist licensed by the State of New York as an expert on the civil commitment process pursuant to Article 10 of the Mental Hygiene Law (SOMTA).¹⁴ Following his testimony concerning his extensive experience in the evaluation and treatment of sex offenders, the witness testified that he had reviewed all of the documents in the instant case.¹⁵ He provided the Court with a definition of volitional impairment and the criteria essential for a reliable assessment. He specifically ruled out "self-reporting" by a Defendant as a reliable factor.¹⁶ He further testified that other assessment instruments were commonly used by the Office of Mental Health for civil commitment screening.¹⁷ The doctor opined that based upon the Pre-Sentence Report and Probation Officer Hernandez's testimony, there was not sufficient information to render an opinion or make a conclusion concerning the Defendant's level of insight into the offense or impulse to offend.¹⁸

¹² H - 37.

¹³ H - 41.

¹⁴ H - 61-71.

¹⁵ H - 71. The witness had also been allowed to observe and hear the testimony of Probation Officer Hernandez.

¹⁶ H - 77.

¹⁷ H - 79-80.

¹⁸ H - 84-85.

The doctor also testified that the Pre-Sentence Report is not the only document which the case review teams must consider in their determinations about whether a respondent is a sex offender requiring civil commitment pursuant to the Act, but is the document “that is cited and most frequently used.”¹⁹

Criminal Procedure Law Section 390.30(1) provides,

“The Pre-Sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant’s history of delinquency or criminality, and the defendant’s social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.”²⁰

The law is clear that the purpose of a Pre-Sentence Report is to provide the Court with the fullest picture of a defendant’s background in order that an appropriate sentence may be imposed. (See, *People v Halaby*, [3rd Dept., 1980] 77 A.D.2d 717, and *People v Wright*, [S.Ct., NY Co., 1980] 104 Misc.2d 911). While Section 390.30(1) enumerates the subjects to be investigated and reported on, the section does not require that the reporting agency make a sentencing recommendation. Indeed, courts have found that the absence of a recommendation does not invalidate the defendant’s sentencing. (See, *People v Morton*, [3rd Dept., 1988] 142 A.D.2d 763).

In support of his application to have certain information deleted from the Pre-Sentence Report, the Defendant relies upon *People v Rampersaud*, [S.Ct., Bronx Co., 1989] 144 Misc.2d 126 and *People v Boice*, [County Court, Cemung Co., 2004] 6 Misc.3d 1014. In *Rampersaud*,

¹⁹ H - 75.

²⁰ (McKinney’s 2005).

the court ordered a paragraph deleted from a Pre-Sentence Report which opined that it was questionable “whether the defendant could refrain from extreme violence in the future whenever she feels that she is sufficiently provoked,” because the court found such a conclusion was unjustified and contrary to all the other information about the offense in question. In *Boice*, the court ordered the probation department to strike an opinion that “the defendant is a sociopath pure and simple, whose sense of entitlement has rendered him incapable of respecting others’ rights or belongings.” In doing so, Judge Buckley observed,

“The conclusion by Probation Officer Calderon-Clark that the defendant is a sociopath, pure and simple, is improper. There is no showing that the probation officer is qualified to make such a determination or that the conclusion was based upon the report of a qualified individual.” (*supra*).

Moreover, Judge Buckley went on to comment upon the importance of the information contained in a Pre-Sentence Report being accurate, observing,

“The report is prepared as an aid to the court, to the Department of Corrections and to the Division of Parole. It travels with the commitment to prison. In that sense, it becomes part and parcel of the Court’s sentence, and it should be relevant and factual. It should not be based upon conjecture, speculation, unsubstantiated opinion or gossip.” (*id.*)

In the instant case, Probation Officer Hernandez conducted two interviews with the Defendant and provided the Court with a very comprehensive Pre-Sentence Report. The Report contained all of the information required under Section 390.30(1) of the Criminal Procedure Law. The Probation Officer testified that the Defendant made the statements that, “... he was overtired and could not resist the sexual urge”. These statements, which are objected to, are set forth in that portion of the Report entitled “Defendant’s Statement”. In the Court’s opinion, the Probation Officer testified truthfully and forthrightly, and the statements are germane to that

portion of the Report.²¹ Accordingly, those statements should remain in the Report under the section entitled “Defendant’s Statement”.

Turning to the “Commentary” portion of the Pre-Sentence Report, some of the conclusions contained therein are more problematical. It is clear from the Defendant’s position during the hearing before the Court, and based upon the evidence and testimony that he proffered, that the Defendant’s paramount concern is that the opinions concerning his “lack of insight and inability to resist the impulse to offend against children,” will become the predicate for civil commitment pursuant to Article 10 of the Mental Hygiene Law (SOMTA) at the conclusion of his sentence. While the Court is mindful of the testimony of Mr. Hungerford and Dr. Katsavdakis of the importance of the Pre-Sentence Report in the determinations of the reviewing committees, the Court is also aware that great reliance will be placed upon the Defendant’s successful completion of sex offender treatment while in the custody of the Department of Corrections. Nonetheless, the Court views Article 10 to be one of the most imperfectly drafted enactments, and as such, there is no way of predicting whether it will be imperfectly administered in its implementation. As Judge Buckley noted, the Pre-Sentence Report “travels with the commitment to prison,” and will be central to any programming decisions made about the Defendant and could be a factor in his ultimate release or civil commitment. While Probation Officer Hernandez is an honest, conscientious public servant performing a vital function for the Court, he does not possess the qualifications of Dr. Katsavdakis to make the kind of clinical conclusions contained in the “Commentary” portion

²¹ The law is also clear that a defendant has no obligation to speak to the investigating probation officer. See, *People v Sanchez*, [2nd Dept., 1980] 175 A.D.2d 817.

of the Report.

Accordingly, it is hereby

ORDERED, that all of the "Commentary" portion of the Pre-Sentence Report be removed except the first and the last two paragraphs.

Both the People and the Defendant agree that certain descriptions of the offenses described in the Pre-Sentence Report could be more accurately conveyed.²² To accomplish that, is it hereby

ORDERED, that the portion of the Pre-Sentence Report entitled "Circumstances of the Present Offense" be amended to remove the tenth paragraph in its entirety, and it is further

ORDERED, that the portion of the Pre-Sentence Report entitled "Criminal History" be amended to state,

"The Defendant has two arrests in which he was charged with an aggregate of five violent felonies and two misdemeanors. They resulted in two criminal convictions, the present offense and a conviction for Sexual Abuse in the First Degree involving the same two victims and the sentences will run concurrently. These convictions are all sexual offenses against children."

and it is further,

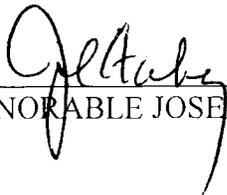
ORDERED, that the portion of the Pre-Sentence Report entitled "Pending Charges" be deleted, and it is further,

ORDERED, that the original Pre-Sentence Report be and hereby is sealed and may not be disclosed to any individual or agency except by order of this Court.

²² H - 103-104.

The foregoing constitutes the Decision and Order of the Court.

DATED: April 1, 2008
Syracuse, NY


HONORABLE JOSEPH E. FAHEY, J.C.C.