

COMMONWEALTH OF PENNSYLVANIA, Appellee, v. Allen..., 2010 WL 6546776...

2010 WL 6546776 (Pa.Super.) (Appellate Brief)
Superior Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA, Appellee,

v.

Allen STOSSEL, Appellant.

No. 787 WDA 2010.
September 22, 2010.

Appeal from the order of the Honorable David J. Tulowitzki, entered on April 23, 2010, denying Defendant's Post- Sentence Motion, in The Court of Common Pleas of Cambria County, Pennsylvania, at Nos. 188-2008 & 1556-2008

Brief for Appellant

Stanton D. Levenson, Esquire, PA ID. 00765, P.O.Box 81630, Pittsburgh, PA 15217, 412-889-7270, Attorney for Appellant.

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STATEMENT OF JURISDICTION

*4 This Court has jurisdiction pursuant to 42 Pa. C.S. 742, and Pennsylvania Rule of Appellate Procedure 341 (a).

ORDER APPEALED FROM

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*5 "AND NOW, this 23rd day of April, 2010, upon consideration of defendants Post-Sentence Motion, it is hereby **ORDERED** and **Directed** that said Motion is hereby **DENIED**.

***6 STATEMENT OF STANDARD OF REVIEW**

An allegation that the verdict is against the weight of the evidence should result in the grant of a new trial "when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Goodwine*, 692 A.2d 233, 236 (Pa. Super. 1997).

***7 STATEMENT OF THE QUESTION INVOLVED**

Were the verdicts against the weight of the evidence where Appellant presented compelling evidence of his innocence in the form of testimony from a forensic computer expert?

STATEMENT OF THE CASE

*8 On November 17, 2009, a jury sitting in Cambria County convicted Appellant of eighteen counts of Sexual Abuse of Children (18 Pa. CSA 6312), five counts of Unlawful Contact With A Minor (18 Pa. CSA 6318), and one count of Criminal Use Of A Communication Facility (18 Pa. CSA 7512).

On *March* 26, 2010, Appellant was sentenced to a total term of imprisonment of 11 1/2-23 months. In addition, his bail was revoked and he was committed forthwith to the Cambria County Jail. Motions to reinstate bail pending appeal were subsequently denied by both the court below and this court.

A Post-Sentence Motion was filed and was denied by the trial court on April 23, 2010. This timely Appeal followed.

The evidence may be fairly summarized as follows. Jessica Eger, a Special Agent in the Office Of The Attorney General¹ (RR.41). posing as "Awesome Ashley 1994," a thirteen year old female, turning fourteen in October, (RR.48-50) had four online computer chats with "holmsy20062000." (RR.51)

The online chats took place on October 18, 22, 23, and 30, 2007. (RR.51) During each of those chats "holmsy" sent "Awesome Ashley" a webcam purportedly of him masturbating. (RR. 69, 88, 96, 102)

*9 Agent Eger subsequently learned that the internet protocol address used by "holmsy" was subscribed to by Appellant. (RR.108-109) On December 19, 2007, agents went to Appellant's residence to arrest him and execute a Search Warrant. (RR.196) All of his computers were seized. (RR. 116, 117)

Following his arrest, Appellant admitted to Agent Robert Soop that he had previously used a webcam while masturbating. However, he added, he did that only while chatting with adult females. (RR. 199) He also admitted to using the screenname "holmsy20062000," but only in connection with Fantasy Football." (RR. 210)

Appellant told Agent Eger about a possible forced entry and attempted burglary at his residence. (RR.202) Also, he told Agent Soop that the year before, his computer had been hacked into and that he had reported it to Yahoo. (RR. 208, 209)

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Prior to Appellant's arrest and the search of his residence, Agent Eger learned that he had no prior criminal history, (RR. 131)

A subsequent forensic examination of Appellant's computers revealed the presence of images of child pornography. (RR. 148) As a result, Appellant was separately charged with twenty counts of Sexual Abuse Of Children. Ultimately, both Criminal Informations were consolidated for trial.

*10 Appellant did not dispute that the webcam images sent to Agent Eger were of him. However, he denied that he was the individual who had the chats with, and sent the webcam images to the agent.

Appellant did not testify at trial. However, he did present the testimony of Tami Loehrs, a computer forensics expert. Ms. Loehrs spent approximately twenty seven hours examining the seized computers, (RR. 224, 225) and concluded that none of the webcam images sent by "holmsy" to "AwesomeAshley" were sent from those computers. (RR. 235, 239, 240, 241, 242). She further explained various ways unwanted data can be created on a computer without the knowledge of the owner. (RR.245)

Consistent with the evidence presented. Appellant's counsel argued to the jury that someone illegally obtained the webcam images of Appellant masturbating, and sent them to Agent Eger while posing as "holmsy20062000." Counsel also argued that the Commonwealth failed to prove that Appellant was aware of the child porn on his computers.

*11 SUMMARY OF THE ARGUMENT

Appellant, an individual with no previous criminal history, was charged with numerous serious sex offenses committed with a computer. He was convicted by a jury and is currently serving a prison sentence.

At trial Appellant presented the testimony of a forensic computer expert who spent approximately twenty seven hours examining his computers. She explained to the jury why his computers could not have been used to commit these crimes. The Commonwealth's expert gave the opposite conclusion.

In addition. Appellant's expert explained to the jury the numerous ways in which unwanted data can unknowingly appear on a computer. This testimony supported Appellant's position that he was unaware of the child porn discovered on his computer.

The verdicts in this case are "so contrary to the weight of the evidence as to shock one's sense of justice," thus entitling Appellant to a new trial. *Commonwealth v. Goodwine*, 692 A.2d 233.236 (Pa. Super. 1997).

*12 ARGUMENT

THE VERDICTS WERE AGAINST THE WEIGHT OF THE EVIDENCE WHERE APPELLANT PRESENTED COMPELLING EVIDENCE OF OF HIS INNOCENCE IN THE FORM OF TESTIMONY FROM A FORENSIC COMPUTER EXPERT.

The law on this issue is well settled: "A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner." *Commonwealth v. Widmer*, 744 A.2d 745.751 (Pa. 2000) "A new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Goodwine*, 692 A.2d 233.236 (Pa. Suoer. 1997)

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*13 Finally, and of significance here is the following: "The question the trial court should have been answering, in the sound exercise of its discretion, was whether 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" (cit. om) *Commonwealth v. Sullivan*, 620 A.2d 795, 806 (Pa. Super. 2003)

It was the Commonwealth's position that Appellant committed the crimes of Unlawful Contact With A Minor (5 counts), and Unlawful Use Of A Communication Facility (1 count) through the use of his computers. This was clearly the testimony of the Commonwealth's forensic computer expert Brian Coleman.

On cross examination Coleman conceded that if it was Appellant who sent the webcam transmissions in question to Agent Eger he would have needed a computer equipped with a webcam, or to which a webcam could have been connected. (RR.156)

Coleman further testified that only four of the computers seized from Appellant's residence contained anything of significance to these charges. (RR. 157) Neither The Dell Latitude 810 computer nor the Dell Optiplex 260 came equipped with a webcam. (RR. 158, 159, 161, 162) One of the computers did have software which would have permitted the use of a webcam, but Coleman could not remember which computer it was. (RR. 162)

*14 Finally, Coleman acknowledged that no webcams were found at Appellant's residence during the search. (RR.157)

Appellant's forensic computer expert, Tami Loehrs, testified that she spent approximately twenty seven hours examining the seized computers. (RR.225) For the past ten years she has owned Loehrs and Associates, a computer forensics company located in Tucson, Arizona. (RR.219) She has been retained as an expert hundreds of times and has been qualified to testify as a computer forensics expert approximately thirty times in state and federal courts all over the United States, (RR.222)

Specifically, Ms. Loehrs was looking for evidence of any webcam transmissions and chats during the time period in question, October, 2007. (RR. 226) She found none. (RR. 229, 230) In fact, during an examination which consumed approximately a day and a half, she confirmed that none of the images transmitted from "holmsy" to "AwesomeAshley" existed on any of Appellant's computers. (RR.234)

With regard to the Dell Latitude 810 computer, Ms. Loehrs testified that it could not have been used to transmit the images to Agent Eger because it did not have a webcam installed, and there was no evidence that a webcam had ever been connected to it. (RR. 235, 236) Moreover, the software needed to run a webcam had never been installed, (RR. 236, 237) and there was evidence that the Commonwealth had forensically mishandled the computer. (RR. 238, 239) She also found no *15 chats between "holmsy" and "AwesomeAshley." and no pictures. (RR.237)

The Dell Optiplex GX 260 also could not have been used to transmit the images because there was no evidence that this computer came with a webcam or was ever connected to a webcam. (RR. 240) In addition, there were only six hits on the harddrive for the LP. address used during the communications in question. This short period of time would not have supported the five separate conversations in question. (RR. 240, 241)

Likewise, the Dell Optiplex GX 370 could not have been used to transmit the images because there were no hits on the LP. address, indicating this computer did not communicate online during the time period in question. (RR.241) In addition, Ms. Loehrs found no images or chats, and no evidence of any online activity between "holmsy" and "AwesomeAshley 1994." (RR.241) She did find several hits on "AwesomeAshley" but not "AwesomeAshley 1994" the screen name used by Agent Eger. (RR.241)

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Lastly, the custom built computer also could not have been used to transmit the images because it was last used three years before these incidents. (RR.242)

Thus, Ms. Loehrs presented conclusive evidence that Appellant's computers were not used to transmit the images to Agent Eger, directly contrary to the Commonwealth's theory of the case.

*16 Ms. Loehrs did find evidence on Appellant's computers of a relationship he had with an adult female named Jill. (RR.244.245) She found pictures of them from 2004 and 2005. (RR.245) She also found a video recorded prior to July 15, 2005, identical to the video sent to Agent Eger in October of 2007. (RR.245)

Finally, Ms. Loehrs found images of child pornography on three of Appellant's computers. (RR.245) However, she found no evidence that he created, sought out, opened, viewed, copied, moved, sent, or otherwise accessed any of it (RR.249-253) Further, she explained how data can be created on a computer without the owners knowledge. (RR.245)

Ms. Loehrs testified that she has participated as an expert witness in over one hundred cases involving child pornography. (RR.253) Significantly, she found nothing on Appellant's computers which indicated that he had an interest in child porn. (RR.254) For instance, there was no evidence that he accessed any child porn websites, there were no child porn search terms, and there were no open files related to child porn. (RR. 254, 255)

Ms. Loehrs' testimony demolished the Commonwealth's theory that it was Appellant who engaged in the online chats with Agent Eger and sent her the webcam transmissions in question. Undoubtedly someone did, but it wasn't Appellant.

*17 In addition, Ms. Loehrs offered a plausible explanation for the child porn discovered on Appellant's computers. In that regard, the only evidence offered by the Commonwealth was the mere presence of the child porn on the computers.

Appellant is entitled to a new trial because the verdict's are so contrary to the weight of the evidence "as to shock one's sense of justice." Notwithstanding all of the facts, the facts presented by Appellant "are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Commonwealth v. Widmer. id.* at 752.

*18 CONCLUSION

Because the verdicts are against the weight of the evidence. Appellant must be granted a new trial.

Footnotes

1 "RR." Refers to Appellant's Reproduced Record.

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