

Starcher, J., dissenting:

In the instant case, the record shows that the defendant is a troubled young man who had a neglectful and abusive childhood. He performed an impulsive criminal act that was deeply wrong. But the record also indicates that he had never committed a similar offense -- in fact, it appears that he had never been in trouble with the law before.

Despite his troubled raising, the defendant had achieved some real success in overcoming his background. He had completed his educational goals -- and at age 17 he had fulfilled his dream of enlisting in the United States Army. He had just completed his basic training at the time of the instant offense.

I note -- and I am disappointed -- that the majority opinion does not mention key evidence and facts that are in the record of the instant case.

The majority opinion, for example, does not disclose that at the defendant's initial sentencing hearing, the pre-sentence evaluating psychologist, Harold Slaughter, Jr., M.S., recommended placement at the Anthony Center.

The majority also does not disclose that the court probation officer stated, with respect to the defendant's initial sentencing, that the probation office "does not believe that the defendant is a threat to the community, and the instant offense is viewed more as an isolated incident rather than a pattern of behavior exhibited by the defendant."

Moreover, citing the appellant's youthful age and "lack of any prior criminal record," the probation office recommended that the defendant be sent to our penal system's diagnostic unit for "a complete psychological evaluation" and "if no substantial problems are uncovered . . . that the subject be committed to the Anthony Correctional Center for not less than six months nor more than two years," followed with probation.

Additionally, at the defendant's sentencing reconsideration hearing, this professional consensus was joined by a second psychologist, Dr. Allan S. Muller. Dr. Muller worked for 8 years in the Virginia penal system. He has extensive experience with sexual offenders. Dr. Muller has recommended penitentiary incarceration for sex offenders many times -- and on many occasions, for first offenders. (The prosecutor presented no witnesses or evidence at this reconsideration hearing.)

Dr. Muller, based on nearly 8 hours of interviews with the defendant, and the results of 17 psychological tests, established the following:¹

¹Validity scales were employed in all 17 tests and the appellant was "forthright, open and honest" on all 17 tests, with the possible exception of the self-esteem measures which operate on "a kind of conscious level of belief." Dr. Muller stated that the defendant's consistent honesty throughout his tests belied any thought that he was manipulating the tests to "create a good impression (as somebody would do) so that somebody can get let out of jail." Among other facts, Dr. Muller's report documents that the appellant was raised by physically and sexually abusive alcoholic parents, as well as in several foster homes.

(a) the defendant suffers from borderline personality disorder (BPD) due to the learned violent behavior of his youth; a borderline personality disorder is “a protective way of interacting in the world;”

(b) although he has sexual fantasies and masturbates, the defendant does not have the fixed justifications and appetites of a pedophile. He is definitely not a pedophile and he is highly unlikely to harm another child;²

(c) the defendant is not an anti-social personality;

(d) the defendant is unlikely to commit a violent crime in the future if given the proper counseling and rehabilitative setting since he lacks a history of antisocial and violent behaviors; further, though “[t]he potential is always there for further impulsive actions . . . [I]t’s not likely . . . that this would occur again -- given his presentation he doesn’t prefer young children and that’s quite clear. There’s no long history of that;”

(e) the defendant exhibits an exceptionally high empathy for the victim and this is “something that characteristically prevents somebody from reoffending;”

(f) the defendant is an exceptionally good candidate for incarceration at a youthful offender facility, with therapeutic counseling to address his problems, followed by supervised release if appropriate.

²Dr. Muller pointed out that he had a child of his own, and that he evaluated the likelihood of an offender’s further sexual misconduct from the perspective of a protective parent.

The circuit judge's decision in the sentence reconsideration proceeding was premised on the defendant's not having admitted any wrongdoing or shown any remorse. However, at the time of the reconsideration hearing, the defendant had in fact admitted his acts and was beginning to show remorse and shame.

Was the defendant admitting his offense to try to avoid a minimum of 15 years in prison? I expect so. But it was nevertheless a genuine admission, which is a helpful beginning to rehabilitation. And there was substantial expert evidence that the defendant's shame, remorse and awareness of the harm he had caused the victim was also genuine, even though it was expressed for the first time after the defendant was convicted.

Yes, the defendant had vociferously denied the facts of his crime at his trial and at his initial sentencing -- although the defendant had initially confessed to a police officer.

The defendant claimed at trial that he had been frightened into confessing by the police officer. This claim was absurd, as the prosecution ably argued to the jury. Why would the defendant confess to something that would cause him to lose his military career, the one thing he cared about most?

Dr. Muller explained that the defendant's denial of his offense was not only an attempt by the defendant to avoid accountability for his crime,³ but also a part of the

³Dr. Muller also noted that the defendant had reported already being beaten in jail for being a "baby-raper."

shell of bravado and positive self-image that the defendant had created over the years -- to mask a bitter personal core of confusion, insecurity, low self-esteem, and pain -- arising out of the defendant's troubled childhood.

Thus, I believe that the defendant's denial of responsibility at his trial and initial sentencing substantially contributed to the sentence imposed in this case.

I believe that the circuit judge did seek to use his best discretion in his sentencing decisions in the instant case. But I think that the circuit judge may have let the defendant's stupid bravado and denial obscure and preclude a full consideration of the evidence and recommendations that the probation officer and two psychologists put before the court.

Additionally, I must note that the majority opinion's suggestion that Anthony Center is not an appropriate placement for this young man, to me, seems to be based on misinformation. I have sent dozens of youthful offenders to Anthony Center, including people with the same problems as this defendant. Most have done very well there.

Moreover, contrary to what the majority opinion suggests, Anthony Center is in fact strictly limited to youthful adult offenders -- no juveniles are housed there. This is based on a written departmental policy that is part of the record in the instant case.

That record also shows that Anthony Center definitely provides offense-specific group and individual therapy for sex offenders. Thus, two key factual postulates of the majority opinion are simply wrong.

It appears to me that based on the record, one appropriate sentencing approach for this defendant would be as follows: (1) a 60-day stint at an adult diagnostic and classification penal facility, then return to jail for final sentencing; (2) imposition of a sentence of penitentiary imprisonment for a term of 15-35 years; (3) if the diagnosis does not show serious problems not already disclosed about the defendant, suspension of the execution of the penitentiary sentence and commitment to Anthony Center, with required sexual offender counseling, for a 6-month to 2-year period, followed by a return to the circuit court; and (4) if the term at the Anthony Center is not successfully completed, execution of the penitentiary sentence -- or, if the Anthony Center term is completed successfully, then placement of the defendant on strict probation for the maximum of 5 years. Probation conditions should include: no drugs or alcohol; obtain and maintain employment; continued sexual offender counseling and treatment; restitution to the victim and victim's family; community service; and weekends in jail for a substantial period.

Based on the undisputed consensus of professional opinion in the record, and in light of the record as a whole, there is good reason to believe that this defendant, subject to conditions like the foregoing, can live as a productive citizen without reoffending. That is a pre-eminent goal of our justice system, when we have the conditions where it can be accomplished. In this case, it appears that we do. It's worth a try.

Finally, I completely understand and respect the feelings of the family of the child victim. I have children, too. At the appellant's sentencing, the child's mother wanted the strongest possible penalty. I understand and respect that feeling. The circuit court could send the defendant to Anthony Center; and then bring him back with a full record of his progress or lack thereof -- and then see what the victim's family has to say. Hard feelings often moderate somewhat over time.

For the foregoing reasons, I respectfully dissent.