

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-2106-2008
v.	:	CR-1697-2016
	:	
MATTHEW KOCH,	:	POST SENTENCE MOTION
Defendant	:	PRETRIAL MOTION

OPINION AND ORDER

Matthew Koch filed a *pro se* Motion for Relief *Nunc Pro Tunc* and is scheduled to plead guilty in Docket Number CP-41-CR-0001697-2016 on May 19, 2017. The Court ordered briefs on the *pro se* motion from the Commonwealth and Public Defender. Though the *pro se* motion and the parties briefs are docketed to the 2016 docket number, Defendant, in essence, is appealing from the Judgement of Sentence rendered on April 16, 2009 (President Judge Kenneth Brown then presiding), which SORNA has retroactively obligated him to be a lifetime registrant as a sexual offender.

Background

Court proceedings were initiated against Defendant on January 23, 2009, via criminal information charging Defendant with Attempted Indecent Assault (10 year old male)¹, Indecent Exposure², and Corruption of Minors³. Ultimately, Defendant pled *nolo contendere* on April 16, 2009, and was sentenced to a minimum of 12 months less one (1) day with a maximum of 24 months less one (1) day. The Court ordered a consecutive term of probation to the maximum incarceration term. Order of Sentence, 7/10/2009.

Defendant was made aware at the time of his guilty plea that he would be

¹ 18 Pa. C.S. § 901(a) inchoate to 18 Pa.C.S. § 3126(a)(7).

² 18 Pa.C.S. § 3127(a).

³ 18 Pa.C.S. 6301(a)(1).

subjected to a 10 year registration requirement under Megan's Law as it existed at the time. 42 Pa.C.S. §§ 9791-9799.9 (expired) and Guilty Plea Transcript, 4/16/2009, at 5.

Defendant allegedly failed to comply with the registration requirements and was charged on September 29, 2016, with two counts of Failure to Comply with Registration of Sexual Offenders Requirements⁴. In the time between the initial charges and the 2016 charges for failure to register, the State Offender Registration and Notification Act (SORNA) was passed and became law on December 12, 2012.⁵

SORNA does apply to Defendant as he is an individual who between January 23, 2005, and December 19, 2012, was convicted of a sexually violent offense and none of the exceptions under (3.1) apply to the facts underlying the conviction. 42 Pa.C.S. § 9799.13 (3.1) (applicability). SORNA classifies offenders who have been found guilty (or in this case plead *nolo contendere*) under 18 Pa.C.S. § 3126(a)(7) as lifetime registrants. See Definition of Tier III.⁶ See 9799.14(a)(14). An individual convicted of a Tier III offense shall register for the life of the individual. 42 Pa.C.S. § 9799.15 (period of registration). A "Sexually violent offense" is an offense specified in 9799.14 as a Tier I, Tier II, or Tier III sexual offense. 42 Pa.C.S. § 9799.12 (definitions).

Procedural History

On January 30, 2017, Defendant filed *pro se* a Motion for Relief *Nunc Pro Tunc* and the guilty plea date was continued to March 17, 2017. Both the Commonwealth and the Public Defender submitted briefs on the issues.

⁴ 18 Pa.C.S. § 4915.1(a)(1) and 18 Pa.C.S. § 4915.1(a)(2).

⁵ 42 Pa.C.S. §§ 9799.10 – 9799.41.

⁶ 42 Pa.C.S. § 9799.14(d)(14) Tier III Sexual Offenses. An attempt, conspiracy or solicitation to commit an offense listed in paragraph...(8) [(8) 18 Pa.C.S. § 3126(a)(7).]

Discussion

Whether application of SORNA's lifetime registration upon him is unconstitutional.

At the outset, the Commonwealth and Public Defender agree that Commonwealth v. Perez, 97 A.3d 747 (Pa. Super 2014) stands for the proposition that the retroactive application of SORNA does not violate the *Ex Post Facto* Clause of the Federal Constitution. The Superior Court did not reach the issue of a violation of the *Ex Post Facto* clause of the Pennsylvania Constitution as the appellant in Perez failed to provide the analysis required in order for the court to consider the issue. The Superior Court denied rehearing on September 15, 2015, and Appellant did not petition the Supreme Court of Pennsylvania for allowance of appeal. But on April 22, 2016, the Pennsylvania Supreme Court granted appeal in three cases that it has set together for hearing in argument to decide *inter alia*:⁷

- 1) Are the recent SORNA statutes (42 Pa.C.S. § 9799.10, 9799.13 and 9700.14 and related provisions) punitive in nature and do they violate the *ex post facto* provisions of the Pennsylvania Constitution?
- 2) Do the SORNA statutes violate fundamental due process under the Fourteenth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution?
- 3) ...
- 4) Was lifetime Megan's Law Registration not part of petitioners original guilty plea, and therefore, should petitioner's original plea, and therefore, should petitioner's original plea, which only called for a ten year Megan's Law requirement be enforced?⁸

⁷ This Court has selected the appeal issues relevant to the instant motion for relief.

⁸ The Supreme Court of Pennsylvania did enforce the 10 year only registration requirement on Appellees in Commonwealth v. Martinez, 147 A.3d 517 (Pa. 2016), who like Defendant pled to crimes that only required a 10 year registration using a contract theory of the case (Justice Saylor in his concurring opinion did say the issue should be decided using substantive due process grounds). After review of Defendant's guilty plea colloquy, the Court finds that he did not plead in exchange for

Commonwealth v. Reed, 135 A.3d 177 (Pa. 2016) (petition for allowance of appeal granted).

- 1) Does applying 42 Pa.C.S. § 9799.14 retroactively violate the Federal Constitution?
- 2) Does applying 42 Pa.C.S. § 9799.14 retroactively violate the Pennsylvania Constitution?

Commonwealth v. Muniz, 135 A.3d 178 (Pa. 2016) (petition for allowance of appeal granted).

- 1) ...
- 2) Does SORNA violate the *Ex Post Facto* Clause of the Federal Constitution when SORNA's purpose or effect is so punitive that it constitutes a retroactive increase in punishment when applied?
- 3) Does SORNA violate the *Ex Post Facto* Clause of the Constitution of the Commonwealth of Pennsylvania when SORNA's purpose or effect is so punitive that it constitutes a retroactive increase in punishment when applied?

Commonwealth v. Gilbert, 135 A.3d 178 (Pa. 2016) (petition for allowance of appeal granted).

As such, the Court will defer decision on the constitutional issues raised by Defendant until the time after the Supreme Court of Pennsylvania renders a decision in the above captioned cases.

a 10 year registration requirement only and thus Martinez would not provide him with relief, even if he had raised a contract theory of the case rather than a constitutional claim.

ORDER

AND NOW, this 11th day of May, 2017, after consideration of Defendant's Motion for Relief *Nunc Pro Tunc*, the following is ORDERED and DIRECTED:

1. To the extent Defendant requests relief on Docket Number CP-41-CR-0001697-2016, the requested relief is DENIED.

The Court finds that on the date the criminal complaint was filed, September 1, 2016, Defendant was still required to register under the original 10 year period from his original guilty plea and sentence and no later enactment of SORNA disrupts this requirement and his alleged failure to meet it.

2. Defendant's Post Sentence Motion for Relief *Nunc Pro Tunc* in Docket Number CR-41-CP-0002106-2008 is DENIED without prejudice to refile when the Supreme Court of Pennsylvania issues a decision in the Commonwealth v. Reed, 135 A.3d 177 (Pa. 2016), Commonwealth v. Muniz, 135 A.3d 178 (Pa. 2016), and Commonwealth v. Gilbert, 135 A.3d 178 (Pa. 2016).

BY THE COURT,

Nancy L. Butts, P.J.

cc: Ravi Marfatia, Esq. Defense Counsel
Anthony Ciuca, Esq. ADA
Gary Weber Esq. Lycoming Law Reporter
S. Roinick, work file