

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-1207-2016
 :
 DEVAUN SMITH, :
 :
 Defendant : Motion to Dismiss

OPINION AND ORDER

By Information filed on July 29, 2016, the defendant is charged with two counts of failure to comply with registration of sexual offender's requirements. The Commonwealth alleges that the defendant failed to report that he was terminated from his employment with American Customer Care on or about January 20, 2016.

Before the court is the defendant's motion to dismiss filed on August 22, 2017. The hearing and argument on said motion was held before the court on November 7, 2017.

The parties do not dispute the applicable facts.

On November 14, 2011, under Lycoming County Docket No. CR-1443-2011, the defendant pled guilty to Indecent Assault, a misdemeanor of the second degree, in violation of 18 Pa. C.S. § 3126 (a) (8). The offense occurred on October 23, 2010.

The defendant was sentenced on January 9, 2012. At the time of the defendant's sentencing, he was not required to register as a sexual offender under the law then applicable.

Subsequent to the defendant's conviction and sentencing, the Pennsylvania

legislature enacted the Sex Offender Registration and Notification Act (SORNA)¹, 42 Pa. C.S. §§ 9799.10 to 9799.41. As a result of the passage of SORNA, the Pennsylvania State Police (PSP) required the defendant to register in accordance with the applicable SORNA provisions.

The SORNA landscape, however, significantly changed on July 19, 2017 when the Pennsylvania Supreme Court issued its decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). “*Muniz* was a sea change in the longstanding law of this Commonwealth as it determined that the registration requirements under SORNA are not civil in nature but a criminal punishment.” *Commonwealth v. Butler*, 2017 PA Super 344 at *5 (October 31, 2017).

In *Muniz*, the Supreme Court was called upon to decide whether applying SORNA’s increased registration requirements to an individual convicted of sex offenses prior to SORNA’s effective date violated the federal and/or state ex post facto clauses. The court concluded that the registration requirements of SORNA constituted punishment for purposes of the federal and state constitutions and, accordingly, retroactive application of SORNA’s registration provisions violated the federal and state ex post facto clauses.

While acknowledging the *Muniz* decision, the Commonwealth argues that *Muniz* “has been stayed and therefore, it has no precedential value at this time.”

The Commonwealth’s contention that *Muniz* has been stayed begs logic. First, the Pennsylvania Supreme Court has not stayed or vacated its decision by any Order or

¹ SORNA was enacted on December 20, 2011, but did not become effective until December 20, 2012. Prior to the effective date of SORNA, indecent assault graded as a misdemeanor of the second degree was not an offense that required sexual

Opinion. To the contrary, the Supreme Court implicitly affirmed the *Muniz* decision in the matter of *Spann v. Pa. Board of Probation and Parole and Pa. State Police*, 71 MAP 2016 (August 16, 2017)(per curiam)(“That portion of the ruling granting the preliminary objections filed by the Pennsylvania State Police and denying the Motion for Summary Judgment filed by Appellant Leroy Spann is hereby REVERSED. *See Commonwealth v. Muniz*, 47 MAP 2016, - A.3d -, (Pa. July 19, 2017).”). Even Chief Justice Saylor and Justice Mundy, who disagreed with the result in *Muniz*, have described the decision and its conclusions as “prevailing precedent” and “the law of this Commonwealth” in their concurring statements to per curiam orders in other cases. *Spann*, supra; *Commonwealth v. Gilbert*, 168 A.3d 145 (Pa. Aug. 22, 2017); *Commonwealth v. Reed*, 168 A.3d 132 (Pa. Aug. 22, 2017)

Furthermore, the Pennsylvania Superior Court has found *Muniz* to be good law and precedential. *Butler*, supra. The Superior Court concluded that it was “constrained” by the Supreme Court’s decision in *Muniz*. *Butler* at *11-12.

Second, while it is true that Cumberland County, the county from which the *Muniz* decision originated, filed a petition for writ of certiorari to the United States Supreme Court, the United States Supreme Court has not granted the writ.

Lastly, the Commonwealth argues that Pennsylvania Rule of Appellate Procedure 2591 (a) supports an implicit, if not express, stay of the *Muniz* decision to other cases. Specifically, Rule 2591 of the Pennsylvania Rules of Appellate Procedure notes that

offender registration. Indecent assault in violation of 18 Pa. C.S. §3126(a)(8) is now a Tier II sexual offense for which an individual must register for 25 years.

on remand of the record, the court below shall proceed in accordance with the judgment or other order of the appellate court and, except as otherwise provided, Rule 1701(a) (effect of appeals generally) shall no longer be applicable to the matter.

Candidly, the court is perplexed. This case is not yet on appeal. Therefore, the Pennsylvania Rules of Appellate Procedure cited by the Commonwealth have no bearing on this case. Rule 2591 and Rule 1701(a) only have an effect on the Cumberland County trial court in the *Muniz* case.

The Commonwealth argues that other defendants should not get relief when Mr. Muniz cannot. The Commonwealth is forgetting that Mr. Muniz's judgment of sentence is not final at this point. By application of the Rules of Appellate Procedure that the Commonwealth is attempting to invoke in this case, Mr. Muniz's obligation to register for life was stayed by the various appeals in his case. The direct appeal in the *Muniz* case won't be completed until either the denial of the Commonwealth's petition for certiorari or a decision on the merits by the United States Supreme Court.

Even if Mr. Muniz's obligation to register was not stayed by his appeals or the Pennsylvania Supreme Court's decision in his favor, Mr. Muniz could get relief pursuant to other subsections of Rule 2591 or Rule 1701. "At any time, upon its own motion or upon application, an appellate court may issue any appropriate order requiring obedience to or otherwise enforcing its judgment or other order." Pa. R. App. P. 2591(b). Additionally, the trial court may take any action directed or authorized on application by the appellate court. Pa. R. App. P. 1701(b)(5). If, despite the ongoing direct appeal, the Commonwealth or its

agencies attempted to enforce the trial court's order requiring Mr. Muniz to register for life, Mr. Muniz could obtain relief upon application to the Pennsylvania Supreme Court. Certainly the Commonwealth is not seriously suggesting that the Pennsylvania Supreme Court would rule in Mr. Muniz's favor and find SORNA's retroactive application to him unconstitutional and then turn around and deny an application to enforce its judgment, thereby requiring Mr. Muniz to comply with those unconstitutional requirements during the pendency of the proceedings before the United States Supreme Court.

Accordingly, given the decision in *Muniz* and the subsequent decision in *Butler*, the court grants the defendant's motion to dismiss.

The court is well aware that this order does not become final for thirty days. The Commonwealth has indicated that it intends to appeal this order. Defendant's bail is presently set at \$10,000.00 unsecured. The Commonwealth argues that said bail should be increased pending the appeal of this Order. First, the Commonwealth argues that defendant's SORNA offense involves sexual conduct with an individual who is less than 16 and defendant was four or more years older. However, at the time defendant committed the offense, he had no registration requirements whatsoever. As well, this information was provided to and considered by the court when defendant's initial bail was set. Finally, there is no indication whatsoever that the defendant has committed any similar offenses subsequent to his conviction in 2011.

Second, the Commonwealth argues that at the time the present offenses were charged, the defendant was required to provide updated information pursuant to SORNA.

The suggestion is that the defendant is dangerous because he failed to comply with SORNA. The defendant has not been convicted of any SORNA offense; the charges are dismissed. The defendant is presumed innocent.

Third, the Commonwealth argues that the defendant is not abiding by his conditions of probation or bail. The Commonwealth claims that the defendant pled guilty to simple assault, a misdemeanor of the second degree, and criminal mischief, a summary offense. Further, the defendant is now charged with possession with intent to deliver a controlled substance, an ungraded felony, and related charges. Bail in that matter is unsecured. The preliminary hearing is scheduled for December 13, 2017.

Contrary to what the Commonwealth claims, the defendant has not violated his probation. He was not on probation when he committed the criminal mischief and simple assault offenses. While he violated his conditions of bail, the Commonwealth did not seek to revoke or modify such following his conviction on January 26, 2017. The court is hard pressed to place any weight on the Commonwealth's position since it remained silent on the matter for ten months. Regarding the defendant's new charges, bail has been set. The court may assume that the issuing authority considered all of the relevant factors in setting bail.

Fourth, the Commonwealth argues that the defendant twice failed to appear for his Pre-Sentence Investigation (PSI) with the Adult Probation office. Defendant pled guilty on January 26, 2017. The Adult Probation office was directed to prepare a PSI report. The defendant was not, nor could he be, ordered to participate. Further, the defendant timely filed a motion to withdraw his guilty plea which was ultimately granted following a hearing.

The defendant's failure to appear for a pre-sentence investigation under the circumstance is of no relevance whatsoever.

In this court's final analysis, there is no meritorious reason at this point to increase defendant's bail. The defendant has appeared when directed. The defendant has not fled or demonstrated that he is an increased danger to the community. Moreover, and perhaps determinatively, the strength of the case against the defendant is miniscule. The charges have been dismissed. Bail is not meant as a punishment nor is it meant as a security blanket for the Commonwealth when decisions do not go in favor of the Commonwealth.

ORDER

AND NOW, this ____ day of November 2017, following a hearing and argument, the defendant's motion to dismiss is **GRANTED**. The defendant shall remain released on his present bail.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Kirsten Gardner, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file