

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-2173-2015  
Appellant :  
vs. : CRIMINAL DIVISION  
:   
GREGORY PERSON, :   
Appellee : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's Order dated September 27, 2017 and entered on the docket on September 29, 2017. The relevant facts follow.

On November 7, 1994, Gregory Person (hereinafter “Person”) pled guilty to involuntary deviate sexual intercourse (IDSI) and related offenses, and he was sentenced to 5 to 10 years’ incarceration. See CP-41-CR-0000566-1994. At that time, Pennsylvania did not have any sexual offender registration requirements.

Megan’s Law II became effective prior to Person’s release from prison and required Person to register as a sexual offender for his lifetime.

Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA) became effective on December 20, 2012. SORNA requires lifetime registrants to appear in person quarterly to provide or verify their employment information and to appear in person within three business days to provide information relating to any commencement, change or termination of employment, see 42 Pa. C.S. §9799.15(e), (g).

On September 15, 2014, Person became employed with Staimans.

On September 25, 2015, the Pennsylvania State Police (PSP) charged Person with six counts of failure to comply with sexual offender registration requirements in

violation of 18 Pa. C.S. §4915.1. The criminal complaint alleged that Person failed to report his employment with Staimans within three business days of September 15, 2014, and that he failed to disclose his employment when he appeared for his quarterly verifications and when he appeared to update other information on five occasions between December 15, 2014 and September 5, 2015.

Despite the fact that Person was represented by counsel, on October 20, 2016, Person filed a pro se habeas corpus petition in which he asserted various constitutional challenges to his obligations to register under SORNA based on a violation his rights to due process, privacy and reputation. The court denied the motion because it was not filed by Person's attorney and it was untimely.

Following a jury trial, Person was convicted of all six counts. On May 6, 2017, the court sentenced Person to 5 to 20 years' incarceration.

On May 12, 2017, Person, through counsel, filed post sentence motions which, among other claims, included challenges to the constitutionality of SORNA based on violations of his rights to substantive and procedural due process and reputation. On July 27, 2017, Person, through counsel, filed a motion to vacate his conviction and sentence and release him from custody based on the Pennsylvania Supreme Court decision in *Commonwealth v. Muniz*, 164 A.3d 1189, 2017 Pa. LEXIS 1682 (July 19, 2017).

The Commonwealth opposed Person's motion on the basis that the *Muniz* decision was stayed because the time period for filing a petition for writ of certiorari from the United States Supreme Court had not expired.

On September 27, 2017, the court granted Person's motion to vacate his conviction and sentence. In accordance with *Muniz*, the court found that SORNA violated

the ex post facto clauses of the United States Constitution and the Pennsylvania Constitution.

The court reinstated Person's bail.

The Commonwealth appealed. The sole issue asserted by the Commonwealth is:

The trial court erred in granting Defendant's Motion to Vacate Conviction and Sentence by finding that Commonwealth v. Muniz, 47 MAP 2016 (PA July 19 2017) was applicable in holding that SORNA was found unconstitutional as constituting punishment and therefore the application of SORNA was an ex post facto law.

The Commonwealth contended that the court could not apply the *Muniz* decision because the time period for appealing that decision to the United States Supreme Court had not yet expired; therefore *Muniz* was stayed and did not constitute binding precedent.

The court disagreed with the Commonwealth. The court noted that the Pennsylvania Supreme Court implicitly affirmed the *Muniz* decision in the matter of *Spann v. Pa. Bd. of Prob. & Parole*, 71 MAP 2016 (August 16, 2017). Since that time, the Pennsylvania appellate courts have been reversing and remanding decisions of lower courts based on *Muniz*, even though the Cumberland County District Attorney filed a petition for writ of certiorari with the United States Supreme Court on October 17, 2017. See *Commonwealth v. Bricker*, 2018 Pa. LEXIS 86 (Jan. 3, 2018)(per curiam); *Commonwealth v. Brooks*, 2018 Pa. LEXIS 88 (Jan. 3, 2018)(per curiam); *Commonwealth v. Rivera-Figueroa*, 2017 PA Super 359, 2017 Pa. Super. LEXIS 919 (Nov. 14, 2017); *Commonwealth v. Hart*, 2017 PA Super 355, 2017 Pa. Super. LEXIS 911 (November 13, 2017); *Commonwealth v. McCullough*, 2017 PA Super 352, 2017 Pa. Super. LEXIS 899 (November 9, 2017); *Commonwealth v. Butler*, 2017 PA Super 344, 2017 Pa. Super. LEXIS

873 (Oct. 31, 2017).

In fact, Person filed a motion to enforce a negotiated plea contract in his underlying IDSI case (CP-41-CR-0000566-1994) challenging the constitutionality of his obligation to register under SORNA. The lower court denied that motion on the basis that registration requirements could not have been a part of Person's plea because no registration requirements existed at that time. On November 20, 2017, however, the Pennsylvania Superior Court vacated that decision and remanded in light of the Pennsylvania Supreme Court's decision in *Muniz*. 1367 MDA 2016. On remand, an order was issued on January 10, 2018, finding that Person is not required to register under SORNA.

Regardless whether *Muniz* was binding precedent at the time the court entered its order, it is binding precedent now. On January 22, 2018, the United States Supreme Court denied the petition for writ of certiorari filed by the Cumberland County District Attorney.

The court's decision is also supported by the Superior Court's decision in *McCullough*, supra, which as a published decision that has not been appealed, is binding on this court. McCullough was convicted in 1994 of indecent assault and sentenced to five years of probation. At that time, McCullough was not subject to any registration requirements. In 1997, McCullough violated his probation and was sentenced to a period of incarceration, followed by an additional three years of probation. In 1999, McCullough again violated his probation, and he was sentenced to eleven and a half to twenty-three months' incarceration, followed by another three years of probation. While McCullough was incarcerated for his second probation violation, Megan's Law II was enacted, which required defendants convicted of indecent assault to register for a period of ten years. McCullough's

ten-year period of registration commenced on April 7, 2004. SORNA was enacted on December 20, 2011 and became effective on December 20, 2012. The provisions of SORNA increased McCullough's registration period from ten years to twenty-five years. At some point McCullough was prosecuted for his failure to register under SORNA. The trial court ordered McCullough removed from the sexual offender registry based on the Superior Court's decision in *Commonwealth v. Rivera*,<sup>1</sup> in which a panel of the Superior Court interpreted the registration provisions of Megan's Law II that applied to "individuals incarcerated or convicted on or after the date of this act" to exclude offenders incarcerated due to a revocation of their probation. The Commonwealth appealed.

Although the case came before the Superior Court to resolve conflicting applications of *Rivera*, the Superior Court found that McCullough was not required to register under SORNA based on the holding of *Muniz* and affirmed the trial court's order removing McCullough from the sexual offender registry.

Like McCullough, Person was convicted of a sexual offense in 1994, before Pennsylvania had any sexual offender registration requirements. Based on *Muniz* and *McCullough*, retroactive application of SORNA's registration requirements violates the *ex post facto* clauses of the United States and Pennsylvania Constitutions. Therefore, Person cannot be required to register under SORNA.

Even if Person was required to register under the provisions of Megan's Law II (former 42 Pa. C.S. § 9795.1), Person cannot be convicted of failing to register in violation of 18 Pa. C.S. §4915.1, as that section only applies to individuals who are required to register under SORNA.

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<sup>1</sup> 10 A.3d 1276 (Pa. Super. 2010).

SORNA is codified at 42 Pa. C.S. §9799.10 et seq. Person was charged with violating 18 Pa. C.S. §4915(a)(1) and (3), which provide:

Any individual who is subject to registration under 42 Pa. C.S. §9799.13 commits an offense if he knowingly fails to:

- (1) register with the Pennsylvania State Police as required under 42 Pa.C.S. §9799.15 (relating to period of registration), 9799.19 (relating to initial registration) or 9799.25 (relating to verification by sexual offenders and Pennsylvania State Police);
- ...; or
- (3) provide accurate information when registering under 42 Pa.C.S. §9799.15, 9799.19 or 9799.25.

Unlike former section 4915, section 4915.1 does not contain any provisions for individuals who were subject to registration under former 42 Pa. C.S. §9795.1.

Moreover, Person cannot be convicted of failing to register under prior versions of Megan's Law, because the registration requirements<sup>2</sup> and penalty provisions<sup>3</sup> of Megan's Law II expired on December 20, 2012, see 42 Pa. C.S. §9799.41; the provisions of former 18 Pa. C.S. §4915 (relating to failing to register under Megan's Law III) expired on December 20, 2012;<sup>4</sup> and Megan's Law III was found unconstitutional in *Commonwealth v. Neiman*, 624 Pa. 53, 84 A.3d 603 (2013).

These conclusions are supported by the Pennsylvania Supreme Court's decision in *Commonwealth v. Derhammer*, 173 A.2d 723, 2017 Pa. LEXIS 3190 (Nov. 22, 2017). In *Derhammer*, the appellant was convicted at a bench trial of failing to timely register his new address under section 4915, but was granted a new trial due to the trial court's failure to conduct a jury-waiver colloquy. In the interim, section 4915 expired and was replaced with Section 4915.1, and the Pennsylvania Supreme Court found the entirety of

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<sup>2</sup> 42 Pa. C.S. §9795.1.

<sup>3</sup> 42 Pa. C.S. §9795.2(D).

<sup>4</sup> 18 Pa. C.S. §4915(g).

Megan’s Law III unconstitutional in *Neiman*. The *Neiman* decision was stayed for 90 days to allow for legislative action. Although the legislature enacted Act 2014-19 shortly before the stay expired, it did not re-enact Megan’s Law III’s penalty provision (Section 4915) or amend its SORNA replacement (Section 4915.1). In light of these developments, the appellant filed a motion to dismiss. On appeal, he argued that, since the crime of which he was found guilty was defined by an unconstitutional statute, his conviction was null and void. The Commonwealth responded by arguing, in part, that the appellant was required to register pursuant to Megan’s Law II and was subject to being charged under Section 4915.1. The Pennsylvania Supreme Court rejected this argument and specifically noted that Section 4915.1 “did not exist under Megan’s Law II, and moreover, under SORNA the prior version of Megan’s Law expired. Therefore, it is difficult to see how Appellant can be charged, pursuant to Megan’s Law II, with violating Section 4915.1(a)(3).”

Based on *Muniz*, *Derhammer*, and *McCullough*, Person’s conviction cannot stand. Therefore, the court submits it did not err when it granted Person’s motion to vacate his conviction and sentence and released Person from incarceration on bail as previously set for the duration of the Commonwealth’s appeal.

DATE: \_\_\_\_\_

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)  
William Miele, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)