

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-1207-2016
Appellant	:	
vs.	:	CRIMINAL DIVISION
	:	
	:	
DEVAUN SMITH,	:	
	:	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 entered on November 13, 2017. The relevant facts follow.

Under information 1443-2011, the defendant was charged with statutory sexual assault, aggravated indecent assault, and indecent assault. On November 14, 2011, as part of a negotiated plea agreement, the defendant pled guilty to indecent assault, a violation of 18 Pa. C.S. §3126(a)(8) graded as a misdemeanor of the second degree, in exchange for a six month minimum county sentence. On January 19, 2012, in accordance with the plea agreement, the defendant was sentenced to 6 to 23 months' incarceration in the Lycoming County Prison, and the remaining charges were dismissed. At that time, there were no sexual offender registration requirements under Pennsylvania's Megan's Law for indecent assault graded as a misdemeanor of the second degree.

On December 20, 2011, Pennsylvania's Sexual Offender Registration and Notification Act (SORNA) was enacted, but it did not become effective until December 20, 2012. Pursuant to SORNA, individuals who were convicted of indecent assault in violation

of 18 Pa. C.S. §3126(a)(8) but were still serving a sentence of incarceration, parole, probation or intermediate punishment on or after December 20, 2012, were required to register with the Pennsylvania State Police (PSP) for a period of 25 years. 42 Pa. C.S. §§ 9799.13(2), 9799.14(c)(1.3), 9799.15(a)(2). These registration requirements included, but were not limited to, notifying the PSP within three business days of any change in residence and termination of employment. 42 Pa. C.S. §9799.15(g)(2)(3).

On July 29, 2016, under information 1207-2016, the defendant was charged with two counts of failure to comply with sexual offender registration requirements. The complaint alleged that the defendant failed to notify the Pennsylvania State Police (PSP) that he was terminated from his employment on January 20, 2016 and that he changed his residential address on approximately May 30, 2016.

On July 19, 2017, the Pennsylvania Supreme Court issued its decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). In *Muniz*, the Court held that SORNA's registration requirements constituted punishment, and retroactive application of those registration requirements violated the *ex post facto* clauses of the United States and Pennsylvania Constitutions.

On August 22, 2017, the defendant filed a motion to dismiss the charges based on *Muniz*. On November 7, 2017, the court held a hearing and argument on the defendant's motion. While acknowledging the *Muniz* decision, the Commonwealth argued that *Muniz* had "been stayed and therefore, it has no precedential value at this time." On November 13, 2017, the court issued an Opinion and Order granting the defendant's motion.

The Commonwealth filed a timely notice of appeal. The sole issue asserted by the Commonwealth is that the trial court erred in granting the defendant's motion to

dismiss “by finding that Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 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 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). Even Chief Justice Saylor and Justice Mundy, who disagreed with the result in *Muniz*, 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. *Commonwealth v. Gilbert*, 168 A.3d 145 (Pa. Aug. 22, 2017); *Commonwealth v. Reed*, 168 A.3d 132 (Pa. Aug. 22, 2017).

Since that time, the Pennsylvania appellate courts have been reversing and remanding decisions of lower courts based on *Muniz*. 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).

Moreover, 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.

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

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)/Martin Wade, Esquire (ADA)  
Kirsten Gardner, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)