

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 201-2007, 202-2007  
 :  
 RICHARD E. BRITTAIN, III, :  
 :  
 Defendant : 1925(a) OPINION

Date: **March 17, 2008**

**OPINION IN SUPPORT OF THE ORDER OF JUNE 15, 2007 IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Richard E. Brittain, III, (hereafter “Brittain”), has appealed this court’s sentencing order of June 15, 2007, arguing that the court erred in imposing a lifetime registration requirement pursuant to 42 Pa. C. S. § 9795.1, and erred in its determination that lifetime registration was mandatory. Brittain’s appeal should be denied and the sentencing order affirmed.

**I. BACKGROUND**

On February 1, 2007, after a hearing, the court granted the Commonwealth’s motion to transfer charges filed under Juvenile case JV 248-2006 and JV 249-2006 to the adult criminal division to the Court of Common Pleas. At the hearing an agreement was reached by both parties stipulated to the transfer to adult court and the Court determined Brittain made a knowing, intelligent, and voluntary decision to waive any opposition to the Commonwealth’s motion. On March 12, 2007, an arraignment was held before this court and Brittain pleaded guilty to the following charges under case 201-2007: Count 1, Indecent Assault, 18 § 3126(a)(2). At the same hearing Brittain also pleaded guilty under case 202-2007 to Count 1, Indecent

Assault, 18 § 3126(a)(2). Both counts are graded misdemeanors of the first degree. Within the guilty plea findings and order, the court ordered a presentence investigation be completed by the Adult Probation Officer prior to sentencing. The court also ordered that Brittain submit to an evaluation by the Sexual Offender's Assessment Board as provided under Megan's Law II provisions with the completed result being furnished to the court at the earliest possible date.

On June 15, 2007, this court sentenced Brittain under Count 1 of case 201-2007 to a term of confinement at the Lycoming County Prison for a minimum term of thirty days and a maximum term of two years less one day and a fine of \$500.00. Under Count 1 of case 202-2007, the court sentenced him to a term of 5 years Probation under the supervision of the Adult Probation Office of Lycoming County and to pay a fine of \$1,000.00. These two sentences were ordered to run consecutively. The court further ordered Brittain to have no contact, directly, or indirectly, with either of the victims nor their families.

Furthermore, the court ordered as a sentencing condition to both incarceration and supervision, that the Lycoming County Prison officials and the Adult Probation Office cooperate in arranging for Brittain to undergo a complete sexual offender assessment, psychological, and, if deemed appropriate, psychiatric evaluation and that Brittain follow the recommendations of the evaluation. The court noted that the sexual offender evaluation which was completed prior to sentencing could serve as a guide to the evaluator, but could not supplant the need for a full assessment as ordered because Brittain did not actively participate in the earlier assessment nor was that assessment designed to provide the basis for treatment and/or rehabilitation.

Finally, the court advised Brittain during his sentencing on June 15, 2007 and noted in its subsequent order, that Brittain was subject to the lifetime registration provisions despite the protestations of counsel. Notes of Testimony, 6/15/2007, pg., 6, 25. The court included its

reasoning in its order for this requirement by stating that because there were two convictions of Indecent Assault, both misdemeanors of the first degree, under *Commonwealth v. Merolla*, 909 A.2d 338 (Pa. Super. 2006) and 42 Pa. C.S. § 9795.1(b)(1), Brittain is subject to the lifetime registration requirements under that Section.

On October 24, 2007, counsel for Brittain filed a Petition for Allowance to Appeal Nunc Pro Tunc alleging that Brittain's initial counsel was ineffective for failing to preserve his rights on appeal by neglecting to file an appeal within the thirty day deadline. A hearing was held on this matter on November 21, 2007. At the hearing the court granted, upon the consent of the Commonwealth, Brittain's petition to file an appeal nunc pro tunc. N.T., 11/21/2007, pg. 4.

On December 20, 2007, Brittain filed a Notice of Appeal to the Superior Court. On December 21, 2007 this court filed an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Brittain to file a Concise Statement of Matters Complained of on Appeal within fourteen days of the order. On January 3, 2008, Brittain filed by and through his attorney, James Protasio, a Concise Statement of Matters Complained of on Appeal.

In the Concise Statement of Matters, Brittain asserts the following issues on appeal:

- (1) The Court erred in imposing a lifetime registration requirement as part of the sentence where there were no previous convictions as enumerated under 41 Pa. C.S. § 9795.1.
- (2) The Court erred in determining that the imposition of the lifetime registration requirement was mandatory.

## **II. DISCUSSION**

Contrary to Brittain's assertions, the court did not err by imposing a mandatory lifetime registration with the Pennsylvania State Police under 42 Pa. C.S. § 9795.1(b)(1) because: (1) in *Commonwealth v. Merolla* the court established the now governing rule that guilty pleas entered

in two separate counts of indecent assault at the same hearing constitutes two separate convictions under Section § 9795.1(b)(1) of Megan’s Law II requiring the defendant be subject to lifetime registration requirements; and (2) the language of the statute through the unambiguous use of the word “shall” clearly mandates lifetime registration when the defendant has been convicted of two counts of indecent assault, misdemeanors of the first degree.

Sentencing is a matter vested in the discretion of the trial court and it will not be disturbed absent an abuse of that discretion. *Commonwealth v. Miller*, 2003 PA Super 395, 835 A.2d 377, 380 (Pa. Super. 2003). An abuse of discretion is not merely an error in judgment, but occurs when the record discloses that the sentencing court misapplies or overrides the law, exhibits partiality, bias or ill will, or reaches a conclusion that is manifestly unreasonable. *Commonwealth v. Smith*, 543 Pa. 566, 673 A.2d 893 (1996). “[A] sentencing court must state on the record its reasons for imposing sentence.” *Id.*; 42 Pa.C.S.A. § 9721(b). “Nevertheless, a lengthy discourse on the trial court’s sentencing philosophy is not required.” *Commonwealth v. McAfee*, 2004 PA Super 143, 849 A.2d 270, 275 (Pa. Super. 2004). Rather, the record as a whole must reflect the court’s reasons and its meaningful consideration of the facts of the crime and the character of the offender. *Commonwealth v. Anderson*, 2003 PA Super 290, 830 A.2d 1013, 1018, 1019 (Pa. Super. 2003).

The precedent set by *Commonwealth v. Merolla* controls the case at hand and mandates that Brittain be subject to lifetime registration under Megan’s Law II. In that case, the court found the defendant was subject to lifetime registration under Megan’s Law II, Section § 9795.1(b)(1) even though he pleaded *nolo contendere* to two separate counts of indecent assault, at the same plea hearing. *Merolla*, 909 A.2d at 345. The court concluded that this plea constituted two convictions of that offense for purposes of Section 9795.1. *Id.* After a

discussion of the statute's legislative history and its comparison to other like statutes such as the Three Strikes Statute, the court concluded that because Megan's Law II is based on concern for public safety and not heightened punishment for criminals it was "irrelevant that Merolla had not been sentenced for his first offense before the commission of his second crime." *Id.* at 347. The court reasoned that "the intent of the legislature is better served by subjecting Merolla to heightened registration requirements because the public would continue to be notified of his whereabouts after the initial ten year registration period...this heightened registration is not an additional punishment." *Id.* See *Commonwealth v. Williams II*, 574 Pa. 487, 832 A.2d 962, 973 (Pa. 2003) (Neither the registration nor notification component of Megan's Law II is considered additional punishment).

Like the defendant in *Commonwealth v. Merolla*, Brittain pleaded guilty to two counts of indecent assault at the same hearing. Under the rule in *Merolla*, it is irrelevant that Brittain had not previously been convicted of indecent assault upon his sentencing date, two convictions plead at the same hearing are considered as two separate convictions for the purposes of the Megan Law II's lifetime registration requirement. Therefore pursuant to the rule in *Merolla*, Brittain is subject to the lifetime registration requirement as his two convictions satisfy the requirements set forth in Section § 9795.1(b)(1).

The language of 42 Pa.C.S. § 9795.1(b)(1) clearly mandates the lifetime registration requirement for Brittain. The applicable language states:

(b) "LIFETIME REGISTRATION.—The following individuals *shall* be subject to lifetime registration:

(1) An individual with two or more convictions of any of the offenses set forth in subsection (a).

(Emphasis added). Brittain is convicted to two counts of Indecent Assault under 18 Pa.C.S. § 3126, both graded a misdemeanor of the first degree. These convictions are listed in subsection (a) of this section and as such bring Brittain within the above Lifetime Registration requirement.

The word “shall” within this subsection, indicates that the lifetime registration requirement is mandatory upon the defendant being convicted of two or more offenses in subsection (a). The word “shall” by definition is mandatory, and it is generally applied as such. *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148, 150 (Pa. 1997). “Although some contexts may leave the precise meaning of the word ‘shall’ in doubt ... this Court has repeatedly recognized the unambiguous meaning of the word in most contexts.” *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 577 Pa. 231, 843 A.2d 1223, 1231-32. The courts “recognized that the term ‘shall’ is mandatory for purposes of statutory construction when a statute is unambiguous.” *Koken v. Reliance Insurance Company*, 586 Pa. 269, 893 A.2d 70, 81 (Pa. 2006) (citations omitted).”

The Lifetime Registration requirement cited above in Section 9795.1(b) is not ambiguous, nor has Brittain advanced an argument that it is ambiguous. Therefore, under the proper interpretation of the statute, the word “shall” in this context must be read as imposing a mandatory obligation of lifetime registration upon Brittain as a defendant who has been convicted of two or more offense listed in subsection (a).

Finally, it is important to note that even though lifetime registration for a defendant convicted of two or more counts of indecent assault is mandatory under Megan’s Law II, the court recognized that it was also within the interest of public safety to impose upon Brittain such a sentencing provision. The court noted at the sentencing hearing, that Brittain showed a lack of remorse and his behavior indicated he would continue to pursue the same type of sexual attitude

and conduct that lead him to his current troubled state. N.T., 6/15/2007, pg. 19. The court also recognized the tremendous impact and ongoing effects Brittain's conduct had upon the victims and their families. *Id.* at 20. The court felt that given Brittain's young age and statistical findings on such offenses, he was at a high risk to become a repeat offender. *Id.* at 21.

In imposing the lifetime registration requirement, the court stated on the record that it considered Brittain's guilty plea to the indecent assaults under cases 201-2007 and 202-2007 to constitute two separate convictions and therefore subject Brittain to lifetime reporting pursuant to the rule set forth in *Commonwealth v. Merolla*, 909 A.2d 337 (Pa. Super. 2006). N.T., 6/15/2007, pg. 25.

For the foregoing reasons, the court's sentencing order of June 15, 2007 should be affirmed and Brittain's appeal dismissed.

BY THE COURT,

William S. Kieser, Judge

cc: James Protasio  
DA  
Judges  
Rebecca Penn, Esquire (Law Clerk)  
Gary L. Weber, Esquire-Lycoming Reporter