

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-640-2012  
 :  
 vs. :  
 :  
 BRANDON KLOPP, :  
 Defendant :

**OPINION AND ORDER**

This matter came before the court on Defendant's request that the court vacate the portion of its sentencing order dated January 31, 2013, which noted that Defendant is a lifetime registrant under Pennsylvania's Megan's Law/Adam Walsh Act, 42 Pa.C.S.A. §§9799.14 and 9799.15. The relevant facts follow.

In exchange for a recommended sentence of three (3) to six (6) years of incarceration in a state correctional institution, Defendant pled guilty to one hundred eighty-one (181) counts of sexual abuse of children (possessing child pornography), each of which was a violation of 18 Pa.C.S.A. §6312(d) graded as a felony of the third degree, and one count of criminal use of a communication facility, a violation of 18 Pa.C.S.A. §7512 also graded as a felony of the third degree. At sentencing, Defendant argued that all of the charges were contained in the same Information and arose from the same criminal episode; therefore he was only subject to a fifteen (15) year registration requirement under Megan's Law. The court found that Defendant was subject to lifetime registration but, without objection from the Commonwealth, it gave the defense sixty (60) days within which to file any motion to modify the Tier designation or the registration requirements.

On April 1, 2013, Defendant filed a memorandum in support of imposing a

fifteen (15) year registration requirement. After reviewing the statute and Defendant's memorandum as well as the case law cited therein, the court will deny Defendant's request.

Sexual offenses are classified in a three-tiered system composed of Tier I sexual offenses, Tier II sexual offenses and Tier III sexual offenses. 42 Pa.C.S.A. §9799.14(a). A conviction for sexual abuse of children in violation of 18 Pa.C.S.A. §6312(d) is a Tier I sexual offense. 42 Pa.C.S.A. §9799.14(b)(9). An individual convicted of a Tier I sexual offense must register for a period of 15 years. 42 Pa.C.S.A. §9799.15(a)(1). A Tier III sexual offense, however, includes "[t]wo or more convictions of offenses listed as Tier I or Tier II sexual offenses." 42 Pa.C.S.A. §9799.14(d)(16). An individual convicted of a Tier III sexual offense must register for the rest of their life. 42 Pa.C.S.A. §9799.15(a)(3).

While Defendant concedes that he has two or more convictions of sexual abuse of children in violation of 18 Pa.C.S.A. §6312(d), relying on Commonwealth v. Jarowecki, 604 Pa. 242, 264, 985 A.2d 955, 968-969 (2009), he argues that both section 6312(d)(2) and Megan's Law are indicative of a recidivist philosophy, which would require a prior conviction before the enhanced registration requirement could be imposed. Defendant also relies on the Opinion in Support of Reversal in Commonwealth v. Gehris, 54 A.3d 862 (Pa. 2012).

Regrettably, in Gehris the Pennsylvania Supreme Court was evenly divided, with the result that neither the Opinion in Support of Affirmance (OISA) nor the Opinion in Support of Reversal (OISR) constitutes binding precedent. This Court, however, is bound by

the Superior Court's decision in Commonwealth v. Merolla, 909 A.2d 337 (Pa. Super. 2006).

In Merolla, the Superior Court decided whether guilty pleas to two separate counts of indecent assault, entered at the same time, constituted two convictions under section 9795.1(b)(1) of Megan's Law, which also required lifetime registration for "two or more convictions." In finding that lifetime registration was appropriate, the Superior Court noted that registration is not an additional criminal penalty or punishment, the policy underlying registration was the promotion of public safety, and the sequence described in Commonwealth v. Shiffler, 583 Pa. 478, 879 A.2d 185 (2005) with respect to the Three Strikes statute - first offense, first conviction, first sentencing, second offense second conviction, second sentencing – did not apply based on a literal reading of the Megan's Law statute. 909 A.2d at 345-47.

Although Megan's Law was replaced effective December 20, 2012 by 42 Pa.C.S.A. §9799.1 et seq. so that Pennsylvania would be in substantial compliance with the Adam Walsh Child Protection and Safety Act, the operative phrase "two or more convictions" remained unchanged. Therefore, the Court believes it is bound by the Superior Court's interpretation of that phrase in Merolla.

Even if the Court were not bound by Merolla, it would be inclined to deny Defendant's request.

As noted by the OISA in Gehris, the best means of ascertaining the legislature's intent is through an examination of the statute's plain language. 54 A.3d at 864. "Further, in interpreting a particular statute, we must remain always mindful of the principle

that, ‘although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say.’ Accordingly, ‘it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.’” Id. at 864-65.

Defendant’s reliance on the language of section 6312(d) is misplaced because it is substantially different from the provisions of Megan’s Law/Adam Walsh Act. Section 6312(d)(2) states: “A first offense under this subsection is a felony of the third degree, and a second or subsequent offense under this subsection is a felony of the second degree.” 18 Pa.C.S.A. §6312(d)(2). The use of the terms “first offense” and “second or subsequent offense” requires that for the increased grading to apply the first offense and conviction must occur prior to the second offense and conviction.

If the legislature had intended a recidivist philosophy for Megan’s Law as argued by the Defendant, it simply could have said: The following offenses shall be classified as Tier III sexual offenses: ... (16) A second or subsequent conviction of an offense listed as Tier I or Tier II sexual offenses. The legislature, however, did not use the phrase “second or subsequent” that suggests a temporal or sequential element before the enhanced provisions would apply. Instead, the legislature chose the phrase “two or more convictions,” which suggests only a numerical element. Defendant readily admits that he pleaded guilty to one hundred and eighty-one counts of possession of child pornography. Since the legislature decided not to include language implicating the timing of the convictions, the court cannot superimpose such a requirement. Therefore, the lifetime

registration requirement would apply.

Furthermore, the Court agrees with the OISA in Gehris that the statute need not be strictly construed in favor of a defendant and that a “recidivist philosophy” does not apply because the Pennsylvania appellate courts have consistently held that sex offender registration is not intended to be penal in nature; rather its purpose is to effectuate the non-punitive goal of public safety. 54 A.3d at 865-66.

Defendant also argues that the offenses at issue “were non-violent” and “did not result in direct harm to any actual victims” due to any conduct by Defendant. The courts, however, are not interpreting the phrase “two or more convictions” only for individuals who download child pornography from the internet. This phrase must be consistently applied to any individual who is convicted of multiple Tier I or Tier II sexual offenses. Tier I and Tier II offenses include, but are not limited to: unlawfully restraining a minor; falsely imprisoning a minor; luring a child into a vehicle or structure; promoting prostitution of a minor; sex trafficking of children by force, fraud or coercion; and selling or buying of children so that they can be visually depicted engaging in sexually explicit conduct. Those offenses could be violent and likely would involve direct harm- either physical or psychological-to the child victims.

Finally, the Court notes that there is nothing in the record to support Defendant’s contention that the convictions all arose out of the same criminal transaction or episode. The Court does not know whether Defendant downloaded all the images with a single mouse-click or depression of the enter button on his computer keyboard or whether

there were multiple downloads separated by periods of law abiding conduct. Furthermore, each image of child pornography constitutes a separate offense, see Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198 (2007).

The Court understands that given the facts and circumstances of this case and Defendant's status as a youthful offender<sup>1</sup> that Defendant may feel a lifetime registration requirement is unduly harsh. Unfortunately, the statute neither gives the Court the discretion to set the period of registration based on the personal characteristics of a particular defendant or the factual circumstances of his case, nor provides a mechanism for termination of the period of registration similar to that provided for juvenile offenders in section 9799.17.

**ORDER**

**AND NOW**, this \_\_\_ day of June 2013, the Court DENIES Defendant's request to vacate the portion of his sentencing order, which noted that Defendant was subject to lifetime registration.

By The Court,

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Marc F. Lovecchio, Judge

cc: Melissa Kalas, Esquire (ADA)  
Robert Donaldson, Esquire  
508 Allegheny St., PO Box 508, Hollidaysburg PA 16648  
Work file

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<sup>1</sup> Defendant was nineteen (19) years old when he committed these offenses.

Gary Weber, Esquire (Lycoming Reporter)