IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-1454-2014**
v.	:	
	:	
JOSEPH MARTIN JENNINGS,	:	**CRIMINAL DIVISION**
Defendant	:	

OPINION AND ORDER

The Defendant filed an Omnibus Pre-trial Motion October 21, 2014. A hearing on the motion was held on December 4, 2014.

I. Background

A. Testimony during Preliminary Hearing

1. Agent Joshua Kriger's Testimony

Joshua Kriger (Kriger) is an agent for the Pennsylvania Board of Probation and Parole (PA Board). He was off duty at an ice cream parlor on July 27, 2014. While Kriger was in the parlor, he saw the Defendant drive a silver Jeep into parlor's parking lot. The Defendant exited the vehicle and entered the parlor. Kriger knew that the Defendant was being supervised by Agent Matthew Kieski (Kieski) of the PA Board. Because Kriger worked with Kieski, Kriger had seen the Defendant approximately six times. Kriger also knew that the Defendant did not have a valid driver's license. Kriger had seen the Defendant on July 14, 2014, when the Defendant, Kieski, and Kriger had joked about the Defendant not having a driver's license.

Kriger exited the parlor and positioned himself to photograph the Defendant getting back into the vehicle. He called the Lycoming County Communications Center. He told the dispatcher that he saw a parolee driving and the parolee did not have a driver's license. He also requested the assistance of a police officer. A police officer contacted Kriger and said he was five minutes from the parlor. Before the officer arrived, Kriger saw the Defendant exit the

parlor, get into the Jeep, and drive. Kriger then tried to get in touch with the Williamsport police, but he was unsuccessful.

2. Sergeant Joseph Hope's Testimony

Joseph Hope (Hope) is a sergeant for the Old Lycoming Township Police Department. Kriger told Hope that he had seen the Defendant driving and the Defendant did not have a license. On August 4, 2014, Hope received a photograph of the Defendant entering the Jeep. Hope ran a background check on the Defendant. The background check revealed that the Defendant was convicted of Indecent Assault in 2003. Hope sent an email to Lieutenant Harman (Harman) of the Pennsylvania State Police (PSP). Hope asked for information about the Defendant. In a reply email, Harman told Hope that the Defendant was a sexual offender who was required to register with the PSP. Harman also told Hope that the Defendant did not have any vehicles registered to his name.

On August 12, 2014, Hope reviewed the Megan's Law public report on the Defendant. The report indicated that the Defendant did not register any vehicles.

B. Testimony during Hearing on Omnibus Motion

1. Agent Matthew Kieski's Testimony

Kieski began supervising the Defendant in May of 2013. Kieski was at the Defendant's parole violation hearing on April 9, 2014. During the hearing, Agent Hamm of the PA Board told the Defendant that he could not operate a vehicle and was lucky police were not pressing charges.

2. Trooper Angela Bieber's Testimony

PSP Trooper Angela Bieber (Bieber) is a Megan's Law field liaison officer. Bieber was at the state police barracks on June 24, 2013, when the Defendant came to the barracks to verify his information contained in the registry. Bieber testified that the Defendant was given a document with the sex offender registration requirements. Bieber testified that when a sex offender comes to the barracks to verify information, he or she must sign a document stating that he or she understands the registration requirements. If the offender does not sign the document, his or her verification is not complete. Bieber testified that the Defendant last verified his information on July 2, 2014. However, Bieber was not present at the July 2 verification.

C. Charges

Charges were filed on August 19, 2014. The Defendant was charged with Failure to Comply with Registration Requirements (Failure to Comply),[1] Habitual Offenders,[2] Driving without a License,[3] and Driving while Operating Privilege is Revoked – DUI Related.[4]

D. Arguments

The Defendant argues that 18 Pa. C.S. § 4915.1(a)(3) and the relevant sections of 42 Pa. C.S. § 9799.13 et seq. are void for vagueness because the words, "vehicle," "owned," and "operated" are not defined. He contends, "[T]he federal SORNA statute upon which the Pennsylvania model is based, defines the precise vehicle information and includes only those vehicles that are 'regularly' operated." He argues that a sex offender has to register only vehicles that he or she operates regularly because if the offender was required to register vehicles

[1] 18 Pa. C.S. § 4915.1(a)(3).
[2] 75 Pa. C.S. § 6503.1.
[3] 75 Pa. C.S. § 1501(a).
[4] 75 Pa.C.S. § 1543(b)(1).

that he or she does not operate regularly, the offender would be required to register a vehicle before using it in an emergency.

The Defendant argues that the evidence is insufficient to establish a prima facie case of Failure to Comply because the Commonwealth did not present evidence that the Defendant was not in compliance with the vehicle registration requirement on July 27, 2014. The Defendant contends that the Commonwealth did not provide evidence that Defendant drove the silver Jeep on a regular basis or evidence that the Defendant knowingly failed to provide vehicle information.

The Defendant argues that the prosecution should be dismissed because the alleged infraction was de minimis. He argues that the legislature did not intend the registration requirements to cover an isolated event that did not cause harm to anybody.

The Defendant argues that application of the Pennsylvania SORNA registration requirements violates the *Ex Post Facto* clauses of the constitutions of the United States and Pennsylvania because his convictions for sexual offenses occurred before SORNA's effective date.

The Defendant argues that the evidence is insufficient to establish a prima facie case of Habitual Offenders because the Commonwealth did not present evidence that the Defendant had the requisite number of convictions within the past five years.

The Defendant argues that the charges of Habitual Offenders and "Driving while Operating Privilege is Revoked – DUI Related" are multiplicitous and should be dismissed because they arose from a single incident.

The Defendant's omnibus motion contained other arguments, but during the hearing, Defense Counsel indicated that the issues were resolved or would likely be resolved by agreement.

The Commonwealth argues that the relevant statutes are not vague. It notes that the DUI statute does not define "operate," but the provisions of that statute are not vague. In addition, the Commonwealth argues that a person of reasonable intelligence would know that if he or she may not operate a vehicle, he or she may not drive.

The Commonwealth argues that the Defendant knowingly violated the registration requirements because he was told by Bieber and at his parole violation hearing that he could not drive.

The Commonwealth argues that the Defendant's certified driving history shows he is a habitual offender.

II. Discussion

A. The Relevant Statutory Provisions are not Vague.

18 Pa. C.S. § 4915.1(a)(3) provides, "An individual who is subject to registration under 42 Pa.C.S. § 9799.13 (relating to applicability) commits an offense if he knowingly fails to provide accurate information when registering under 42 Pa.C.S. § 9799.15, 9799.19 or 9799.25." Section 9799.15(g)(6) provides, "[A]n individual specified in section 9799.13 shall appear in person at an approved registration site within three business days to provide current information relating to [a]n addition, a change in and termination of a motor vehicle owned or operated, including watercraft or aircraft." 42 Pa. C.S. § 9799.15(g)(6).

"The constitutional validity of duly enacted legislation is presumed. The party seeking to overcome the presumption of validity must meet a formidable burden." Commonwealth v.

Haughwout, 837 A.2d 480, 487 (Pa. Super. 2003) (quoting Commonwealth v. Means, 773 A.2d 143, 147 (Pa. 2001)).

"A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution; all doubts are to be resolved in favor of a finding of constitutionality." Commonwealth v. Crawford, 24 A.3d 396, 400 (Pa. Super. 2011) (quoting Commonwealth v. Mayfield, 574 Pa. 460, 466, 832 A.2d 418, 421 (2003)).

"[I]f the language of a statute is clear and unambiguous, a court must read its provisions in accordance with their plain meaning and common usage." Commonwealth v. De Fusco, 549 A.2d 140, 141 (Pa. Super. 1988).

The Superior Court of Pennsylvania has set forth the following standard for evaluating whether a statute is void:

> A statute is vague if it fails to give people of ordinary intelligence fair notice as to what conduct is forbidden, or if they cannot gauge their future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. A vague law is one whose terms necessarily require people to guess at its meaning. If a law is deficient—vague—in any of these ways, then it violates due process and is constitutionally void.
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> By contrast, to be valid, a penal statute must set forth a crime with sufficient definiteness that an ordinary person can understand and predict what conduct is prohibited. The law must provide reasonable standards which people can use to gauge the legality of their contemplated, future behavior.
>
> At the same time, however, the void for vagueness doctrine does not mean that statutes must detail criminal conduct with utter precision. Condemned to the use of words, we can never expect mathematical certainty from our language. Indeed, due process and the void for vagueness doctrine are not intended to elevate the practical difficulties of drafting legislation into a constitutional dilemma. Rather, these doctrines are rooted in a rough idea of fairness. As such, statutes may be general enough to embrace a range of human conduct as long as they speak fair warning about what behavior is unlawful. Such statutes do not run afoul of due process of law.

Crawford, 24 A.3d at 400 (quoting Commonwealth v. Habay, 934 A.2d 732, 737 (Pa. Super. 2007)).

Here, 18 Pa. C.S. § 4915.1(a)(3) and 42 Pa. C.S. § 9799.15(g)(6) are not vague because they gave the Defendant notice as to what conduct was forbidden and allowed him to gauge his conduct. When a registrant operates a vehicle that he or she has not previously operated, the registrant adds to the motor vehicles that he or she has operated. If a registrant adds to the motor vehicles that he or she has operated, the registrant has three business days from the addition to appear at a registration site and provide information about the vehicle. 42 Pa. C.S. § 9799.15(g)(6) gave the Defendant fair notice of this requirement. If he operated a vehicle that he had not previously operated, he had three business days from the operation to provide the PSP with the vehicle information. 18 Pa. C.S. § 4915.1(a)(3) gave the Defendant fair notice that if he did not provide vehicle information in three days, he would commit a crime.

The Commonwealth points out that the provisions of the DUI statute contain the terms "operate" and "vehicle," and although these terms are not defined by the statute, the provisions are not vague. *See* Commonwealth v. McCoy, 895 A.2d 18, 32 (Pa. Super. 2005) (holding that appellant did not meet his burden of proving that 75 Pa. C.S. § 3802 is vague). The Court agrees with the Commonwealth that a person of ordinary intelligence knows that when he or she drives a motor vehicle, he or she operates a motor vehicle. A person of ordinary intelligence also knows that a Jeep is a motor vehicle.

The Court disagrees with the Defendant's argument that the Defendant had to register a vehicle only if he regularly operates it. 42 Pa. C.S. § 9799.15(g)(6) is clear. If a registrant adds to the motor vehicles that he or she has operated, the registrant has three days from the addition to provide information about the vehicle. The Court may not insert "regularly" into an unambiguous provision. Arbitrary and discriminatory enforcement would actually be encouraged if registrants had to register only vehicles regularly operated. This Court believes it

is usually more difficult to determine when a vehicle becomes regularly operated than to determine when a vehicle is operated.

The Defendant is correct in saying that the Pennsylvania statute is based on the federal SORNA. *See* 42 Pa. C.S. § 9799.11(b)(1) (stating that it was the General Assembly's intention to substantially comply with the Adam Walsh Child Protection and Safety Act of 2006 (SORNA)). However, he is incorrect in saying that the federal SORNA statute requires registration only of vehicles regularly operated. The federal SORNA provides, "The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry: [t]he license plate number and a description of any vehicle owned or operated by the sex offender." 42 U.S.C.S. § 16914. The Attorney General's national guidelines for sex offender registration and notification provides that vehicles owned or operated by the sex offender "include[], in addition to vehicles registered to the sex offender, any vehicle that the sex offender regularly drives, either for personal use or in the course of employment." 73 Fed. Reg. 38057 (2008). The guideline does not impose a requirement that the vehicle be regularly operated. It simply says that vehicles owned or operated *include* a vehicle that the sex offender regularly drives.

The Court disagrees with the Defendant's argument that the relevant provisions are vague because they would require a sex offender to register a vehicle before using it in an emergency. This is an irrelevant argument since driving is not a First Amendment freedom, and "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." Commonwealth v. Mayfield, 832 A.2d 418, 422 (Pa. 2003) (quoting Commonwealth v. Heinbaugh, 354 A.2d 244, 245 (Pa. 1976)). Even though ice cream is delicious and can be the subject of cravings, the Defendant's alleged trip to the parlor is

not an emergency. In an emergency, a defendant may have the defense of justification[5] although 42 Pa. C.S. § 9799.25(e) provides, "The occurrence of a natural disaster or other event requiring evacuation of residences shall not relieve the sexual offender of the duty to register or any other duty imposed by this subchapter."

B. The Commonwealth Presented Sufficient Evidence to Establish a Prima Facie Case of Failure to Comply.

"A prima facie case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. Notably, the Commonwealth does not have to prove the defendant's guilt beyond a reasonable doubt. Further, the evidence must be considered in the light most favorable to the Commonwealth so that inferences that would support a guilty verdict are given effect." Commonwealth v. Santos, 876 A.2d 360, 363 (Pa. 2005).

The Commonwealth presented sufficient evidence to establish a prima facie case of Failure to Comply. Kriger testified that he saw the Defendant driving a silver Jeep to and from an ice cream parlor on July 27, 2014.[6] He took photographs of the Defendant entering the Jeep. Kriger also told Hope that the Defendant was driving and did not have a license. On August 4, 2014, Hope received Kriger's photographs. Hope contacted Harman who said that the Defendant was a registrant and did not have a vehicle registered to his name. Hope also checked the public report on August 12, 2014, and the Defendant did not have any vehicles listed on the report. Charges were not filed until August 19, 2014, so there is evidence that the Defendant had more than three business days to register the silver Jeep.

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[5] 18 Pa. C.S. § 502.

[6] The Court has already determined that the "vehicle operated" requirement is not limited to vehicles that a registrant regularly operates.

The Court disagrees with the Defendant's argument that the Commonwealth did not present evidence that the Defendant knowingly failed to provide vehicle information. Trooper Bieber gave the registration requirements to the Defendant, who was required to sign a document stating that he understood them. Because the Commonwealth presented evidence that the Defendant knew about the registration requirements but did not register an additional vehicle within three business days of operating it, the Commonwealth established a prima facie case of Failure to Comply.

The Court agrees with the Defendant that the Commonwealth did not present sufficient evidence that the Defendant was non-compliant with the vehicle registration requirement on July 27, 2014. 18 Pa. C.S. § 4915.1(a)(3) does not make it a crime for a registrant to operate an unregistered vehicle. Section 4915.1(a)(3) makes it a crime for a registrant to knowingly fail to provide accurate information. While a Defendant is required to provide accurate vehicle information at periodic verifications,[7] the Commonwealth did not present sufficient evidence that the Defendant knowingly failed to do this. The Commonwealth presented evidence that the Defendant's last verification was on July 2, 2014 and the Defendant was driving an unregistered silver Jeep on July 27, 2014. "Evidentiary inferences, like criminal presumptions, are constitutionally infirm unless the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'" Commonwealth v. Wojdak, 466 A.2d 991, 996 (Pa 1983) (quoting Turner v. United States, 396 U.S. 398, 404-05 (1970)). "This 'more-likely-than-not' test, which must be applied to inferences already enjoying judicial or legislative sanction, must

[7] "*Periodic in-person appearance required*. . . an individual specified in section 9799.13 shall appear in person at an approved registration site to provide or verify the information set forth in section 9799.16(b)(relating to registry) . . . as follows: [a]n individual convicted of a Tier III sexual offense shall appear quarterly." 42 Pa. C.S. § 9799.15(e). "*Periodic verification*. . . sexual offenders shall verify the information provided in section 9799.16(b) (relating to registry) . . . as follows: [a]n individual convicted of a Tier III sexual offense shall appear in person at an approved registration site quarterly." 42 Pa. C.S. § 9799.25(a)(3).

be viewed as a minimum standard in assessing the reasonableness of inferences relied upon in establishing a prima facie case of criminal culpability." Id. Without evidence of more than one instance when the Defendant was driving the silver Jeep, the Court cannot say that the Defendant was more likely than not driving the silver Jeep before his July 2, 2014 verification. The Commonwealth presented evidence that the Defendant drove a vehicle before April 9, 2014 but did not present evidence that the vehicle was the same silver Jeep. The specific vehicle is important because the complaint alleges that the Defendant's operation of a silver Jeep caused him to be non-compliant. In addition, the information alleges that the offense occurred on or about July 27, 2014, not July 2, 2014.

Although the Commonwealth did not present sufficient evidence that the Defendant committed Failure to Comply specifically on July 27, 2014, it has still established a prima facie case.

C. The Alleged Infraction is not De Minimis, so the Prosecution will not be Dismissed.

The alleged infraction is not de minimis because the legislature decided that in order to protect the public, a registrant must register an additional vehicle within three business days. *See* 42 Pa. C.S. § 9799.11(b)(2) (providing that the legislature requires sex offender registration to assure public protection). "[T]he legislature's stated intent was to provide a system of registration and notification so that relevant information would be available to state and local law enforcement officials in order to protect the safety and general welfare of the public." Commonwealth v. Williams, 832 A.2d 962, 972 (Pa. 2003) (quoting Commonwealth v. Gaffney, 733 A.2d 616, 619 (Pa. 1999)). Since the Defendant allegedly failed to provide information that the legislature has determined is required for public protection, the prosecution will not be dismissed.

D. Application of the Registration Requirements to the Defendant does not Violate the Federal or State *Ex Post Facto* Clauses.

"[T]he new registration regime pursuant to SORNA is constitutional under the Federal and State *Ex Post Facto* Clauses." Commonwealth v. Perez, 97 A.3d 747, 760 (Pa. Super. 2014). Therefore, application of the registration requirements to the Defendant does not violate the Federal or State *Ex Post Facto* Clauses.

E. The Commonwealth has Presented Sufficient Evidence to Establish a Prima Facie Case of Habitual Offenders.

The Commonwealth has presented sufficient evidence to establish a prima facie case of Habitual Offender because the Commonwealth presented evidence that the Defendant was a habitual offender and was driving while his license was revoked. "A habitual offender under section 1542 (relating to revocation of habitual offender's license) who drives a motor vehicle on any highway or trafficway of this Commonwealth while the habitual offender's operating privilege is suspended, revoked or canceled commits a misdemeanor of the second degree." 75 Pa. C.S. § 6503.1. "A 'habitual offender' shall be any person whose driving record, as maintained in the department, shows that such person has accumulated the requisite number of convictions for the separate and distinct offenses described and enumerated in subsection (b) committed after the effective date of this title and within any period of five years thereafter." 75 Pa. C.S. § 1542(a). "A conviction for habitual offenders requires the Commonwealth to demonstrate that a person has accumulated three separate convictions for serious traffic offenses within a five-year period." Commonwealth v. Raven, 97 A.3d 1244, 1252 (Pa. Super. 2014).

The Commonwealth submitted the Defendant's certified driver history. The history shows that the Defendant entered ARD for a DUI offense[8] committed on March, 12 1988. On February 2, 1990, the Defendant was convicted of "Accidents Involving Damage to Attended Vehicle or Property,"[9] which he committed on November 8, 1989. On April 16, 1990, the Defendant was convicted of "Driving while Operating Privilege is Either Suspended or Revoked,"[10] which he committed on March 5, 1990. This is labeled as a major violation on the certified driver history, and after the conviction the Defendant was designated as a habitual offender. It should be noted that Legislative Act 143[11] "eliminated certain driving offenses, including those noted in Section 1543, from the Section 1532 habitual offender 'counters.'" Heath-Hazlett v. DOT, Bureau of Driver Licensing, 805 A.2d 686, 689 (Pa. Cmwlth. 2002). However, "Act 143 does not automatically remove [a person] from habitual offender status. Instead, the Act gives persons who desire to be removed the ability to petition the Bureau [of Driver Licensing] for their change of status, and allows the Bureau to remove them from habitual offender status." Id. at 690.

The Defendant's driver history also shows that his driving privilege was revoked for two years effective June 19, 2014. The Defendant was driving on July 27, 2014. Because the Commonwealth presented evidence that the Defendant was designated as a habitual offender and was driving while his license was revoked, the Commonwealth has established a prima facie case of Habitual Offenders.

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[8] DUI is an offense enumerated in 75 Pa. C.S. § 1542(b). "Acceptance of Accelerative Rehabilitative Disposition for any offense enumerated in subsection (b) shall be considered an offense for the purposes of this section." 75 Pa. C.S. § 1542(c).

[9] "Accidents Involving Damage to Attended Vehicle or Property" is an offense enumerated in 75 Pa. C.S. § 1542(b).

[10] The driver history indicates only that it was a violation of Section 1543.

[11] Act of December 12, 1994, P.L. 1048 (Act 143).

The Court does not agree with the Defendant's contention that for him to be a habitual offender the offenses had to occur within the five years preceding July 27, 2014. The Commonwealth must show that the Defendant has accumulated three convictions for offenses committed within "any period of five years." *See* 75 Pa. C.S. § 1542(a).

F. The Charges of Habitual Offenders and "Driving While Operating Privilege is Revoked" are not Multiplicitous.

In Raven, a driver pled guilty to Habitual Offenders, Driving While Operating Privilege is Suspended or Revoked – DUI Related,[12] and other offenses. 97 A.3d at 1247. The trial court imposed consecutive sentences for Habitual Offenders, Driving While Operating Privilege is Suspended or Revoked, and the other offenses. Id. at 1247-48. The Superior Court found that the sentences did not merge. Id. at 1251-52.

"Even a single, indivisible act may support more than one punishment under separate statutory provisions if each provision requires proof of a fact that the other does not." Commonwealth v. Williams, 496 A.2d 31, 36 (Pa. Super. 1985). The conduct punished in Habitual Offenders is not the same conduct punished in "Driving While Operating Privilege is Revoked." If a person, whose only conviction is a DUI, drives with a license that was suspended as a result of the conviction, that person is not committing Habitual Offenders as long as the person does not commit another offense when driving. However, that person is committing "Driving While Operating Privilege is Suspended or Revoked – DUI Related" regardless of whether the person commits another offense when driving. If a person whose only convictions are three convictions in five years for "Accidents Involving Damage to Attended Vehicle or Property," that person is not committing "Driving While Operating Privilege is Suspended or

[12] This is the same offense with which the Defendant has been charged.

Revoked – DUI Related" when driving with a suspended license. However, that person is committing Habitual Offenders when driving with a suspended license. Although the Defendant may have violated both provisions with one act, the charges of Habitual Offenders and "Driving While Operating Privilege is Revoked" are not multiplicitous.

III. Conclusion

The relevant statutory provisions are not vague. The Commonwealth established a prima facie case of Failure to Comply. The alleged infraction is not de minimis. Application of the Pennsylvania SORNA to the Defendant does not violate the Federal or State *Ex Post Facto* Clauses. The Commonwealth has established a prima facie case of Habitual Offenders. The charges of Habitual Offenders and "Driving While Operating Privilege is Revoked" are not multiplicitous.

ORDER

AND NOW, this _____ day of February, 2015, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Omnibus Pre-Trial Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge