IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-815-2016**
	:	
	:	
MELVIN MANEVAL,	**:**	
Appellant	**:**	**1925(a) Opinion**

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

By Order dated September 13, 2017, following a hearing, the court found that the Commonwealth proved by clear and convincing evidence that Appellant, who was convicted of an aggravated indecent assault, a felony of the second degree, met the criteria to be classified as a sexually violent predator (SVP).

By Order dated September 13, 2017, again following a hearing, the court sentenced Appellant to a term of incarceration in a state correctional institution, the minimum of which was four years and the maximum of which was ten years. Appellant filed a timely motion for sentence reconsideration, which the court summarily denied on October 1, 2017. On October 12, 2017, Appellant filed a notice of appeal. In response to the court's directive that Appellant file a concise statement of matters complained of on appeal, Appellant filed said concise statement on November 2, 2017.

Appellant raises two issues in his concise statement. First, Appellant avers that the sentencing court abused its discretion by sentencing him to a sentence "that was at the very top of the aggravated range." Second, Appellant argues that in light of the Superior Court's decision in ***Commonwealth v. Butler***, 2017 PA Super 344, 2107 Pa. Super. LEXIS

873 (October 31, 2017), the court's determination that Appellant was an SVP "was in error."

The court will first address defendant's ***Butler*** argument. Subsequent to the court's September 13, 2017 Order finding that Appellant met the criteria to be designated an SVP, the Superior Court issued its Opinion in ***Butler.*** The Superior Court specifically held that the portion of the Sexual Offender Registration and Notification Act (SORNA) for designating a convicted defendant as a sexually violent predator, 42 Pa. C.S.A. § 9799.24 (e) (3), violates the federal and state constitutions.

The court reasoned that in accordance with the Supreme Court's decision in ***Commonwealth Muniz***, 164 A.3d 1189 (Pa. 2017), SORNA registration requirements are deemed to be punitive and part of the criminal punishment imposed upon a convicted defendant. Because SORNA's increased registration requirements constitute punishment under the federal and/or state constitutions, retroactive application of SORNA's registration requirements violates the federal and/or state constitutions. ***Muniz***, at 1208. "Thus, as our Supreme Court has stated, if registration requirements are punishment, then the facts leading to registration requirements need to be found by the fact-finder chosen by the defendant, be it a judge or jury, beyond a reasonable doubt." ***Butler***, at *10 (citations omitted).

The court concluded that the Supreme Court's holding in ***Muniz*** that registration requirements under SORNA constitute a form of punishment was dispositive to the issue in ***Butler***, which is similar to that raised by the appellant in this case.

> [S]ince our Supreme Court has held that SORNA registration requirements are punitive or a criminal penalty to which individuals are exposed, then under ***Apprendi*** [***v. New Jersey***, 530 U.S. 466 (2000)] and ***Alleyne*** [***v. United States***, 133 S. Ct. 2151 (2013)], a factual finding, such as whether the defendant has a 'mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexual violent

> offenses[,]' 42 Pa. C.S.A. § 9799.12, that increases the length of registration must be found beyond a reasonable doubt by the chosen factfinder.

Butler, at *11-12.

Thus, the Superior Court concluded that the SORNA statutory criminal scheme for designating and proving a convicted defendant as a sexually violent predator "cannot withstand constitutional scrutiny." ***Butler***, at *12. The court concluded that "trial courts may no longer designate a convicted defendant as an SVP, nor may they hold SVP hearings, until our General Assembly enacts a constitutional designation mechanism." ***Butler***, at *12.

Defendant did not raise this issue prior to, during or following his sentencing or SVP hearing. Defendant raised this issue for the first time on appeal. Generally, issues not raised before the trial court are waived for appellate purposes. Pa.R.A.P. 302 (a). However and as clearly set forth in ***Butler***, these general principles are not applicable to illegal sentences, which may be addressed on direct appeal without proper preservation of the issue in the lower court.

Butler, though, might not ultimately apply in this case. First, a petition for reargument or reconsideration was filed in the ***Butler*** case on November 13, 2017, and remains pending. Second, the SVP designation in this case did not increase the length of Appellant's registration period. Appellant was convicted of aggravated indecent assault, which is a Tier III offense. 42 Pa.C.S.A. §9799.14(d)(7). An individual convicted of a Tier III offense must register quarterly for life. 42 Pa.C.S.A. §9799.15(a)(3), (e). An SVP also must register quarterly for life. 42 Pa.C.S.A. §9799.15(d), (f). Therefore, unlike Butler who,

absent the SVP designation, would have only been required to register for 15 years as a Tier I offender convicted of corruption of minors, Appellant is required to register quarterly for life regardless of the SVP designation.

Nevertheless, the court acknowledges the broad holding in ***Butler*** that courts may not designate a convicted defendant as an SVP until the General Assembly creates a constitutional designation mechanism, and it anticipates that the Order designating Appellant as an SVP and directing him to comply with the SORNA requirements because of such designation will be reversed and the case will be remanded in order that Appellant be re-sentenced consistent with those SORNA provisions that do not apply to an SVP.

The second issue asserted by Appellant is his claim that the court abused its discretion in imposing a sentence at the top of the aggravated range.

More specifically, the issue is not whether the court abused its discretion, but rather if the court exhibited a manifest abuse of discretion. ***Commonwealth v. Bricker***, 41 A.3d 872, 875 (Pa. Super. 2012). A manifest abuse of discretion "is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will." ***Commonwealth v. Walls***, 592 Pa. 557, 926 A.2d 957, 961 (2007).

Appellant argues that "sufficient evidence was present at sentencing that dispelled some of the reasoning the court cited in justifying its aggravated range sentence, namely any perceived lack of remorse that the defendant had for his crimes." This statement in and of itself fails to even allege a basis for finding a manifest abuse of discretion.

In imposing a sentence, "the court shall follow the general principle that the

sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa. C.S.A. § 9721 (b). The court objectively weighed these considerations and imposed a sentence it decided was appropriate under all of the circumstances. The sentence was consistent with the protection of the public and reflected the substantial impact of the crime on the community and the victim. While the court considered Appellant's remorse, it found it to be somewhat lacking and found the other interests to be far more compelling.

As the court specifically noted in its sentencing order, it was aware that the sentence was an aggravated range sentence. In supporting such it noted as follows:

> "This was not a single act; it occurred over a series of years on a number of different occasions; the [c]ourt is of the opinion that [Appellant] does not fully accept the responsibility; the [c]ourt is of the opinion that [Appellant's] remorse is somewhat lacking; but most importantly and perhaps determinatively, this conduct was perpetrated on a young innocent child who was particularly vulnerable being a member of the family and there was a significant breach of trust." (Sentencing Order, pp. 1-2).

These conclusions are supported by the record. Although Appellant only pled guilty to one count of aggravated indecent assault, he acknowledged at his guilty plea hearing that the conduct occurred 14-15 times when the child was between seven and eleven years old. Guilty Plea Transcript, December 2, 2016, at 8-9. Furthermore, the court did not indicate that Appellant completely lacked remorse. Instead, the court found that Appellant did not fully accept responsibility and his remorse was somewhat lacking. The court expressed this opinion because Appellant made statements where he was rationalizing or minimizing his culpability. For example, Appellant made statements, which were referenced

in the Pre-Sentence Investigation report (PSI) that the victim initiated the contact by sitting on his lap and squirming around, which resulted in him becoming aroused. Sentencing Transcript, September 13, 2017 at 52-53. In one of the reports, Appellant indicated that he never penetrated the victim. Sentencing Transcript, at 53. At his guilty plea and in his sentencing hearing, Appellant also was making distinctions concerning the amount of penetration. Guilty Plea Transcript, December 2, 2016, at 9;[1] Sentencing Transcript, September 13, 2017, at 58-59.[2] Finally, the impact on the victim was profound. She explained how much the abuse hurt, how she was afraid that if she told anyone she would not have a family anymore, and how the events negatively affected her self-esteem. Sentencing Transcript, September 13, 2017, at 60-63.

Under all of the circumstances, the court's decision with respect to the

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[1] The following exchange took place during the guilty plea hearing:
THE COURT: And during this time period did you engage in digital penetration of her vagina?
[DEFENSE COUNSEL]: Your Honor, I believe that he would agree that he had a skin-to-skin contact with the victim and that he did touch her vaginal area, and that during these occasions he told police at least 14 to 15 – his fingertips penetrated her vagina. I believe he'd be willing to agree to that.
THE COURT: Do you agree to that?
[APPELLANT]: Yes.

[2] The following exchange occurred at the sentencing hearing:
THE COURT: …any changes, modifications, additions to the Pre-Sentence report?
[DEFENSE COUNSEL]: Just commentary, your Honor, with regard to the penetration questions which the [c]ourt has raised. I think there's some issue with the however slight matter, what occurred at the allocution in conjunction with Mr. Maneval maybe not necessarily expressing himself correctly, and that also goes to some of the issues that the writer of the PSI had had.
THE COURT: Well, let me just stop you. If he's not admitting that there was penetration then we're done. I'm vacating the guilty plea and we're going to trial.
[DEFENSE COUNSEL]: I think with regard to however slight. I think it was a different understanding of penetration.
THE COURT: Well, what did he mean when he said penetration? Penetration kind of means penetration. It goes through or in the opening, past the outside.
[DEFENSE COUNSEL]: However slight.
THE COURT: That's how I would think it – that's how I would interpret it.
[DEFENSE COUNSEL]: Yes.
THE COURT: However slight. All right, you can—we can talk about it, um, all we want. I understand. And, you know, without getting entirely too graphic here, there's different types of penetration. I understand that.
[DEFENSE COUNSEL]: Yes, and I think that was the issue and we have no desire to withdraw or –

sentence was just, fair and appropriate. Appellant and his interests were not the only considerations at sentencing. In simplistic but concise terms, crimes hurt people and society. Appellant's crime changed a young woman's life forever and had a permanent impact on the community.

Date: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Ken Osokow, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Work File
Gary Weber, Lycoming Reporter
Superior Court (original and 1)

THE COURT: Okay.
[DEFENSE COUNSEL]: Would ask the [c]ourt not to pursue that route.