

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

SAMUEL ALLEN MCHENRY,
Defendant

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CP-41-CR-0000735-2017

Motion to Dismiss

OPINION AND ORDER

Samuel Allen McHenry (Defendant), through Counsel, filed a Motion to Dismiss on July 28, 2017. A hearing was held on November 13, 2017.

Background

On May 12, 2017, the Defendant was charged with Failure to Comply with Registration Requirements¹, a felony of the first degree, under Pennsylvania’s Sex Offender Registration and Notification Act (SORNA).² It is alleged that Defendant is a Tier II Registrant under SORNA and that he did terminate his employment and failed to notify the Pennsylvania State of Police of his employment change within 72 hours as required by Title 42 Section 9799.15(g)(3).

Discussion

Defense argues that the Defendant cannot be charged under SORNA as Commonwealth v. Muniz³ held the registration requirements of SORNA unconstitutional as violative of the PA’s Constitution’s *ex post facto* clause. The concurrence in Muniz by Justice Wecht, which is the law in Pennsylvania, states “applying the federal *ex post facto* standards also leads to the conclusion that SORNA

¹ 18 Pa.C.S.A. § 4915.1(a)(1).

² 42 Pa.C.S. §§9799.10-9799.41.

³ Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017). (Petition for a writ of certiorari filed.; DISTRIBUTED for Conference of 1/19/2018.)

is punitive and cannot be applied retroactively.” The Commonwealth argues that though it might not be able to charge Defendant under SORNA for failure to register, the charge is still valid under Megan’s Law III.

Like Muniz, on the date of Defendant’s original sentence, Defendant was subject to the registration requirements of Megan’s Law III. Purdon’s Statutes: 42 Pa.C.S.A. § 9795.1 (expired December 20, 2012, pursuant to 42 Pa.C.S.A. § 9799.41). Muniz’s request for relief was that he be able to comply with the ten year registration period under Megan’s Law III, which was the law in place at the time of his offense and conviction, instead of lifetime registration required by SORNA. The Supreme Court of Pennsylvania held that Muniz would not have to register under SORNA; it did not address whether he was still subject to the ten year registration period. Moreover, unlike Defendant here, Muniz was not seeking relief for being charged under the criminal offense of Title 18 Section 4915.1 (failure to comply with registration requirements).

Under Megan’s Law III Defendant was required to register as a sex offender for a period of ten (10) years. SORNA changed his registration period to a period of twenty five years. Though it seemed clear that post Muniz that Defendant would not have to register for 25 years, it had remained for the Court at the time of the filing of the Defense Motion an open legal question as to whether he was still required to register for the original 10 years, and whether he can be charged under a punitive statute that that is being applied retroactively. After the Supreme Court of Pennsylvania’s decision in Commonwealth v. Derhammer, No. 121 MAP 2016, 2017 Pa. LEXIS 3190 (Nov. 22, 2017) it is apparent to the Court that the Defendant cannot

be charged with failure to register under SORNA and there is not a valid statute in place under which to charge Defendant for failure to register.

In Derhammer, the Supreme Court of Pennsylvania considered whether the Commonwealth may punish an individual for conduct which was made a crime by an amended statute where the original version of the statute had been declared unconstitutional in its entirety.

It is undisputed that a conviction based on an unconstitutional statute is a nullity. In Siebold the Supreme Court explained that an offense created by an unconstitutional law “is not a crime” and [a] conviction under it...is illegal and void, and cannot be a legal cause of imprisonment.” Siebold, 100 U.S., at 376-77. It follows that Appellant’s conviction cannot be sustained to the extent it is based on Megan’s Law III as enacted in 2004.”

Commonwealth v. Neiman, 84 A.3d 603 (Pa. 2013), invalidated Act 2004-152 — which included Megan’s Law III — in its entirety. Neiman at 615. In Derhammer, the Commonwealth successfully argued to the Superior Court that in light of Megan’s Law III being a nullity, the Commonwealth could still be deemed to be charging under Megan’s Law II. The Supreme Court found that they could not, and as Justice Wecht explained in his concurrence in Derhammer, Megan’s Law II was not revived automatically upon Megan’s Law III’s invalidation. As a result of the decision in Derhammer, the Court must dismiss the charges in the above captioned matter.

ORDER

AND NOW, this 9th day of January, 2018, based upon the foregoing Opinion, the Motion to Dismiss is hereby GRANTED. Defendant's bail shall remain at \$25,000 unsecured bail pending any appeal which may be taken by the Commonwealth.

By the Court,

Nancy L. Butts, President Judge

cc: Peter T. Campana, Esquire
Ken Osokow, Esquire
Gary Weber, Esq.