

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-946-2016  
vs. :  
: CRIMINAL DIVISION  
:  
:  
GEROLD DICK, : Notice of Intent to Dismiss PCRA  
Defendant : Without Holding an Evidentiary Hearing

**OPINION AND ORDER**

By way of background, Defendant Gerold Dick was convicted of criminal sexual conduct in the third degree and criminal sexual conduct in the fourth degree in Minnesota. On April 12, 1999, he was sentenced to 72 months' incarceration, 24 months' supervised release, and 10 years' conditional release. He was originally paroled in 2002 but he was recommitted in 2008 and 2009. His final date of discharge was May 17, 2012.

Defendant moved to Pennsylvania and began registering here on or about December 3, 2012. On or about March 1, 2016, Defendant moved and failed to register his new address with the Pennsylvania State Police (PSP). Defendant was charged with two counts of failure to comply with registration of sexual offender requirements.

On February 27, 2017, Defendant pled guilty to one count of failure to comply with sexual offender registration requirements, a felony of the second degree. On May 16, 2017, the court sentenced Defendant to undergo 4 to 8 years' incarceration in a state correctional institution in accordance with the terms of the plea agreement.

Defendant filed a timely PCRA petition in which he asserted that he had no requirement to register in 2016 because Megan's Law III was unconstitutional and, pursuant

to *Muniz*,<sup>1</sup> SORNA could not be applied retroactively; therefore, his conviction and sentence should be vacated. The court cannot agree.

Defendant was convicted of criminal sexual conduct in the third degree and fourth degree. These convictions would require Defendant to register under Minnesota law. Minn. Stat. §243.166, subd. 1b(1)(iii). Defendant would be required to register his addresses and vehicles. Minn. Stat. §243.166, subd. 4a. The period of registration would be “until ten years elapsed since the person initially registered in connection with the offense, or until the probation, supervised release, or conditional release period expires, whichever occurs later.”

Minn. Stat. §243.166 subd. 6(a). However, if the person “is incarcerated due to a conviction for a new offense or following a revocation of probation, supervised release, or conditional release for any offense, the person shall continue to register until ten years have elapsed since the person was last released from incarceration or until the person’s probation, supervised release, or conditional release period expires, whichever occurs later.” Minn. Stat. §243.166, subd. 6(c). Defendant was last released from incarceration on May 17, 2012. Therefore, under Minnesota law he is required to register until at least May 17, 2022.

Under Pennsylvania law, though, Defendant would be required to register for life, because his Minnesota conviction is equivalent or substantially similar to involuntary deviate sexual intercourse (IDSI).

Minnesota law defines criminal sexual conduct in the third degree as follows:

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is no more than

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<sup>1</sup> *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017).

36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant shall be a defense;

(b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant. In any such case if the actor is no more than 120 months older than the complainant, it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor reasonably believes the complainant to be 16 years of age or older. In all other cases, mistake as to the complainant's age shall not be a defense. Consent by the complainant is not a defense;

(c) the actor uses force or coercion to accomplish the penetration;

(d) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated or physically helpless;

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and is in a position of authority over the complainant. Neither mistake as to the complainant's age nor content to the act by the complainant is a defense;

(f) the actor has a significant relationship to the complainant and the complainant was at least 16 but under 18 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(g) the actor has a significant relationship to the complainant, the complainant was at least 16 but under 18 years of age at the time of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;....<sup>2</sup>

Minn. Stat. §609.344, subd. 1.

“Sexual penetration” means any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not the emission of semen occurs:

(1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or

(2) any intrusion however slight into the genital or anal openings:

(i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose;

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<sup>2</sup> The remaining provisions pertain to psychotherapists, clergy and other religious or spiritual advisors, individuals who work for or volunteer with correctional or treatment facilities, individuals who are agents of an entity that provides special transportation services; and individuals who perform massage or other bodywork for hire. None of those provisions would apply to Defendant.

- (ii) of the complainant's body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effect by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or
- (iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

Minn. Stat. §609.341, subd. 12. In the Pre-Sentence Investigation (PSI) report, Defendant stated he was convicted of having anal sex with the son of a friend.

In Pennsylvania, a person commits IDSI when the person engages in deviate sexual intercourse with a complainant:

- (1) by forcible compulsion;
  - (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
  - (3) who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;
  - (4) where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;
  - (5) who suffers from a mental disability which renders him or her incapable of consent; or
  - (6) Deleted by 2002, Dec. 9, P.L. 1350, No. 162, § 2, effective in 60 days.
  - (7) who is less than 16 years of age and the person is four or more years older than the complainant and the complainant and person are not married to each other.
- (b) Involuntary deviate sexual intercourse with a child.--A person commits involuntary deviate sexual intercourse with a child, a felony of the first degree, when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

18 Pa. C.S.A. §3123(a), (b). The definition of deviate sexual intercourse includes “[s]exual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal.” 18 Pa. C.S.A. §3101.

Both the Minnesota statute and the Pennsylvania statute criminalize anal intercourse with children. Based on the Minnesota statutes and Defendant's admission in the PSI report regarding this offense, Defendant's conviction for criminal sexual conduct in the third degree is equivalent or substantially similar to IDSI under Pennsylvania law. IDSI was/is a lifetime registration offense under Megan's Law II, Megan's Law III and SORNA. Furthermore, all of these statutes require an offender to notify the PSP of any change in address. Under the facts and circumstances of this case, SORNA did not increase Defendant's registration requirements. Therefore, it would not violate the *ex post facto* clauses of the United States Constitution or the Pennsylvania Constitution to require Defendant to register any change of address in March of 2016 or to prosecute him for failing to do so. *Commonwealth v. Haughout*, \_\_\_ A.3d \_\_\_, 2018 WL 5574277 (Pa. Super. Oct. 30, 2018).

Accordingly, regardless of whether Minnesota law or Pennsylvania law is applied to this case, Defendant had a duty to register any change of address in March of 2016 and he could be convicted and sentenced for failing to do so.

In the alternative, Defendant subjected himself to SORNA's registration requirements when he voluntarily moved to Pennsylvania in December of 2012. Although SORNA did not become effective until December 20, 2012, SORNA was enacted on December 20, 2011. As ignorance of the law is no excuse,<sup>3</sup> Defendant had fair notice of SORNA's provisions at or before the time he moved to Pennsylvania. A valid *ex post facto* claim requires an increase in punishment without fair notice. *Commonwealth v. McGarry*,

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<sup>3</sup> See *Commonwealth v. Johnson*, 188 A.3d 485 (Pa. Super. 2018)(ignorance of the law is no excuse; therefore, on the date the *Birchfield* decision was announced Johnson should have known that the enhanced criminal

172 A.3d 60, 68-69 (Pa. Super. 2017). As Defendant had fair notice of both Megan's Law and SORNA's provisions at the time he moved to Pennsylvania and became subject to them, he does not have a valid *ex post facto* claim.

It is of no moment that if Defendant failed to register today that he would be prosecuted under a different statutory section, 18 Pa. C.S.A. §4915.2. Section 4915.1 was in effect at the time Defendant committed his offense and was prosecuted. The recent changes as a result of Act 29 of 2018 did not de-criminalize Defendant's conduct and, in fact, the offense would still be a felony of the second degree. See 42 Pa. C.S.A. §9799.55(b)(2)(ii); 18 Pa. C.S.A. §4915.2(c)(2).

**ORDER**

AND NOW, this \_\_\_ day of December 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the court finds that no purpose would be served by conducting a hearing in this case. The court notifies the parties of the court's intention to dismiss the PCRA Petition. Defendant may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the court will enter an order dismissing the petition.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
William Miele, Esquire (PD)  
Gerold Dick, MZ 9217

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penalties for DUI related to a refusal to submit to a chemical test were without force and effect).

SCI Rockview, Box A, Bellefonte PA 16823  
Work file  
Gary Weber, Esquire (Lycoming Reporter)