

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-685-2017
:
vs. : CRIMINAL DIVISION
:
:
NICHOLAS PABONE, : Notice of Intent to Dismiss PCRA
Defendant : Without Holding An Evidentiary Hearing

OPINION AND ORDER

This matter came before the court on Defendant’s *pro se* “Petition to Correct and/or Modify Unconstitutional Sentence Pursuant to *Com. v. Muniz*, J-121B-2016 (19 July 2017)” filed on December 11, 2017, which the court is treating as a Post Conviction Relief Act (PCRA) petition pursuant to *Commonwealth v. Johnson*, 803 A.2d 1291, 1293 (Pa. Super. 2002).

By way of background, Defendant pleaded guilty to first degree sexual abuse of a physically helpless person in violation of N.Y. Penal Law §130.65(2) and was sentenced to nine months’ incarceration on September 9, 2015, as a result of an incident that occurred on or about June 22, 2014. This conviction also carried lifetime registration requirements under New York law, see N.Y. CORRECT. LAW §168-a, et seq. Upon his release from incarceration, Defendant was registered with New York authorities as residing in Olean, New York.

Defendant came to the Williamsport area on or about May 22, 2016. He was a transient sleeping on sidewalks. He did not, however, appear at a Pennsylvania State Police barracks to register any address or register as a transient in accordance with Pennsylvania’s Sexual Offender Registration and Notification Act (SORNA). As a result, on June 4, 2016,

Officer Jason Dockey of the Williamsport Bureau of Police charged Defendant with failure to register in violation of 18 Pa. C.S. §4915.1(a.1)(1). On May 1, 2017, Defendant pled guilty to this offense and was sentenced to nine months to two years' incarceration in a state correctional institution, with credit for time served from June 4, 2016 to April 30, 2017.

On December 11, 2017, Defendant filed his PCRA petition. In his petition, Defendant asserts that as a result of the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), as well as the repeal of prior versions of Megan's Law, there is no valid Pennsylvania law requiring him to register as a sexual offender and he should be re-sentenced without any sexual offender registration for any period of time. As this was Defendant's first PCRA petition and he was indigent, the court appointed counsel to represent Defendant and direct counsel to file either an amended PCRA petition on Defendant's behalf or a no merit letter in accordance with *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988)(en banc). Due to a medical issue, counsel received an extension to file the amended petition or no merit letter. On June 25, 2018, PCRA counsel filed a motion to withdraw as counsel and a no merit letter.

After an independent review of the record, the court finds that Defendant's petition lacks merit and he is not entitled to any relief. Defendant misapprehends the effect of the *Muniz* decision on his case. It was the *retroactive* application of SORNA to offenders whose crimes occurred prior to the passage of SORNA that the Pennsylvania Supreme Court declared unconstitutional in *Muniz*. In other words, the *Muniz* decision did not declare Pennsylvania's SORNA unconstitutional with respect to all offenders, but only those

offenders whose crimes occurred prior to the passage of SORNA. In explaining the general purpose of *ex post facto* prohibitions, the Pennsylvania Supreme Court noted: “Critical to relief under the *Ex Post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Muniz*, 164 A.3d at 1195 (quoting *Weaver v. Graham*, 450 U.S. 24, 30, 101 S. Ct. 960 (1981)).

SORNA was enacted on December 20, 2011, and became effective on December 20, 2012. Defendant’s crime occurred in June 2014, approximately eighteen months after SORNA became effective. Therefore, applying SORNA to Defendant violates neither the *ex post facto* clause of the United States Constitution nor the Pennsylvania Constitution.

If Defendant did not want to be subject to the registration requirements of Pennsylvania’s SORNA, he should have stayed in New York and not relocated or moved to Pennsylvania. He was on fair notice, however, both at the time he committed his crime and at the time he came to Pennsylvania of the registration requirements under Pennsylvania’s SORNA for sexual offenders who were living, working or attending school in Pennsylvania. He voluntarily subjected himself to those requirements by moving to Pennsylvania after the enactment of SORNA.

ORDER

AND NOW, this ___ day of November 2018, upon review of the record and pursuant to Rule 907(1) of the Pennsylvania Rules of Criminal Procedure, the parties are hereby notified of this court's intention to dismiss Defendant’s petition without holding an

evidentiary hearing. 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.

The court notes that Defendant is no longer incarcerated in Pennsylvania. For a period of time, the court was unable to locate Defendant. However, a recent search of the New York Sex Offender Registry indicates that Defendant is homeless in Rochester, New York. The court does not know how to get a copy of this decision to Defendant other than to send it to the Sex Offender Registry in Rochester.

The court also grants PCRA counsel's motion to withdraw. Petitioner may represent himself or hire private counsel but the court will not appoint counsel to represent Defendant further in this matter.

By The Court,

Marc F. Lovecchio, Judge

cc: District Attorney
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Work file