

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0000287-2017
vs. : CP-41-CR-0000499-2018
:
:
: CRIMINAL DIVISION
BRETT SMEAL, :
Appellant : 1925(a) Opinion

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

This opinion is written in support of this court's judgment of sentence dated April 18, 2018. The relevant facts follow.

On September 9, 2013, the appellant, Brett Smeal, was convicted of unlawful contact or communication with a minor based on an incident that occurred on June 13, 2013, and he was sentenced to six to twenty-three months' incarceration in the Lycoming County Prison. See CP-41-CR-0001336-2013. As a result of this conviction, the appellant is a Tier II sexual offender, who is required to register for a period of 25 years pursuant to Pennsylvania's Sexual Offender Registration and Notification Act (SORNA), 42 Pa. C.S. §§9799.10-9799.41.

In early December of 2016, the appellant moved from his registered address on Merrill Avenue to Newberry Street. The appellant did not register the change of address with the Pennsylvania State Police (PSP). Under Information 287-2017, the Commonwealth charged the appellant with failing to comply with sexual offender registration requirements in

violation of 18 Pa. C.S. §4915.1(a)(2), graded as a felony of the second degree.¹ The Commonwealth alleged that the appellant failed to update his address with the PSP as required by SORNA.

Under Information 499-2018, the Commonwealth charged the appellant with fifteen counts of failure to comply with sexual offender registration requirements in violation of 18 Pa. C.S. §4915.1(a)(1) and (a)(3). The Commonwealth alleged that the appellant failed to register and/or failed to provide accurate information regarding his employment, his Facebook account, and his email address.

On April 18, 2018, the appellant pled guilty to one count of failure to comply with sexual offender registration requirement under each Information. The court sentenced the appellant to two consecutive terms of three to six years' incarceration in a state correctional institution, for an aggregate sentence of six to twelve years' incarceration.

On May 1, 2018, the appellant filed a notice of appeal. In his concise statement of errors on appeal, the appellant indicated he was appealing his sentence because of "new laws regarding SORNA and required periods of registration." Quite frankly, the court does not know how the appellant thinks any new laws apply to him or entitle him to any relief. Without further explanation, the court assumes that the appellant somehow believes that he is entitled to relief based upon one or more of the following: the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017); the Superior Court's decision in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017); Act 10-2018; or Act 29-2018.

Initially, the court notes that the appellant did not raise any issues pertaining

¹ See Amendment Order, dated April 18, 2018, which amended the grading and the plea agreement.

to “new laws regarding SORNA and the required periods of registration” until he filed his appeal. “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R. App. P. 302(a). Therefore, whatever issues the appellant is attempting to assert in his concise statement are waived.

Even if the issues are not waived, they lack merit.

In *Muniz*, the Pennsylvania Supreme Court held that the retroactive application of SORNA violated the *ex post facto* clauses of the both the United States Constitution and the Pennsylvania Constitution. In other words, the *Muniz* decision held that it was unconstitutional to apply SORNA to individuals who committed a sexually violent offense before SORNA’s effective date of December 20, 2012. It did not hold that it was unconstitutional to apply SORNA to individuals who committed a sexually violent offense on or after December 20, 2012. The appellant committed the sexually violent offense of unlawful contact with a minor on June 13, 2013. Therefore, the appellant is not entitled to relief based on *Muniz*.

In *Butler*, the Superior Court held that the procedure for determining whether an individual was a sexually violent predator (SVP) was unconstitutional because the SVP designation increased Mr. Butler’s punishment by increasing the duration of his registration requirements without requiring proof beyond a reasonable doubt in violation of *Apprendi*² and *Alleyne*.³ The appellant was not found to be an SVP; therefore, *Butler* does not apply to any of the appellant’s cases.

In Act 10-2018 and Act 29-2018 (hereinafter “the Acts”), the legislature

² *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

³ *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013).

amended SORNA (42 Pa.C.S. §§9799.10-9799.42) and enacted and amended Subchapter I of the Judicial Code (42 Pa. C.S. §§9799.51-9799.75.) to address the decisions in *Muniz* and *Butler*. Since Subchapter I was designed to reinstate registration requirements for certain Megan's Law offenders, the court will refer to Subchapter I as Megan's Law for ease of reference.

The Acts clarified that SORNA was applicable to individuals who committed a sexually violent offense on or after December 20, 2012, and Megan's Law was applicable to individuals who committed a sexually violent offense on or after April 22, 1996 but before December 20, 2012 and whose period of registration had not expired. As the appellant's sexually violent offense was committed in 2013 and he was convicted of that offense, he is subject to SORNA. 42 Pa. C.S. §9799.11(c) ("This subchapter shall apply to individuals who committed a sexually violent offense on or after December 20, 2012, for which the individual was convicted.").

With respect to individuals such as the appellant who are subject to SORNA, the Acts also added provisions to allow telephonic verification instead of in-person reporting for certain law abiding individuals who committed Tier II and Tier III sexual offenses and who have been in compliance with their registration requirement for a three-year period. (see 42 Pa. C.S. §9799.25) and to allow lifetime registrants to petition for exemption from SORNA's requirements after 25 years (see 42 Pa. C.S. §9799.15 (a.2)). In adding these provisions, the legislature intended to address the *Muniz* and *Butler* decisions in a manner such that SORNA's registration requirements would not be construed as punishment. 42 Pa. C.S. §9799.11(b). The provisions regarding telephonic verification and petitioning for exemption did not become effective until this year and do not provide the appellant with any

relief at the present time.

The Acts also did not alter the appellant's obligation to register his address, employment, social media accounts or email addresses or the duration of his registration requirements under SORNA. Although an individual who committed the offense of unlawful contact with a minor under Megan's Law is only required to register for a period of 10 years, see 42 Pa. C.S. §9799.55(a)(1)(i)(A), that provision of Megan's Law does not apply to the appellant because he did not commit his offense on or after April 22, 1996, but before December 20, 2012. Instead, the appellant is required to register for a period of 25 years pursuant to SORNA because he committed the offense of unlawful contact with a minor on June 9, 2013 and he was convicted of that offense on September 9, 2013. See 42 Pa. C.S. §9799.12 (relating to definition of "sexually violent offense"); 42 Pa. C.S. §9799.14(c)(5)(classifying unlawful contact with a minor as a Tier II sexual offense); 42 Pa. C.S. §9799.15(a)(2)(requiring an individual convicted of a Tier II sexual offense to register for a period of 25 years).

For these reasons, the court does not believe that the appellant is entitled to any relief pursuant to *Muniz*, *Butler*, Act 10-2018, or Act 29-2018.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Dance Drier, Esquire (APD)
Work file

Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)