IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-115-2017**
	:	
vs.	:	
	:	
KELLI VASSALLO,	:	
Defendant	:	**Defendant's Motion to Preclude SVP Hearing**

OPINION AND ORDER

Before the court is Defendant's motion to preclude the scheduling and/or conducting of a hearing to determine if the defendant should be classified as a Sexually Violent Predator (SVP) under Pennsylvania's present Sexual Offender Registration and Notification Act (SORNA).

On August 1, 2018, Defendant pled guilty to Count 2, institutional sexual assault, a felony of the third degree, and Count 3, corruption of minors, as amended, a misdemeanor of the first degree. The court directed that an assessment be conducted by the Pennsylvania Sexual Offender Assessment Board (SOAB) to determine if Defendant should be classified as an SVP. The Board conducted an assessment, the defendant was deemed to meet the criteria to be so classified, and the Commonwealth filed a Praecipe to schedule a hearing to determine such.

The law governing registration of sexual offenders has significantly changed in the past few years. In response to a handful of court decisions identifying constitutional flaws in Pennsylvania's SORNA, 42 Pa. C.S. § 9799.10-9799.40, the legislature enacted Act 10 of 2018, effective February 21, 2018. On June 12, 2018, Act 29 of 2018 was enacted, effective immediately, which replaced Act 10, with minor changes. Because Defendant's offenses occurred after December 20, 2012, the effective date of SORNA, she is subject to provisions of

subchapter H of Act 29.

In *Commonwealth v. Conard Carpenter,* CR-192-2017 (June 2018), this court concluded that the changes enacted in Act 10 were not sufficient to overcome the constitutional deficiencies in its predecessor statute. The court concluded that because Act 10 remained punitive, the mechanisms set forth in it to determine one's SVP status remained unconstitutional pursuant to *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017).

Defendant's conviction on Count 2, institutional sexual assault, would require her to register as Tier II sexual offender. If Defendant, however, were designated as an SVP, she would be required to register for life and have additional registration requirements. Despite the Superior Court in *Butler* declaring that the SVP designation process was unconstitutional and directing the lower courts to no longer hold SVP hearings or designate defendants as SVP "until our General Assembly enacts a constitutional designation mechanism", the legislature amended SORNA without changing the SVP designation mechanism.

Under the present version of Act 29, the designation mechanism remains set forth under 42 Pa. C.S.A. § 9795.24. It is identical to the designation mechanism which the Pennsylvania Superior Court declared unconstitutional in *Butler.* The statute still provides that the court conducts a hearing and may designate an offender as an SVP if the Commonwealth has proven such by clear and convincing evidence. 42 Pa. C.S.A. § 9795.24 (e) (3). It still does not require proof beyond a reasonable doubt nor provide the right to a determination by a jury.

The Commonwealth argues that the designation mechanism set forth in Act 29 is outside the prohibition set forth in *Butler* for several reasons.

First, the Commonwealth argues that the legislative findings as to the policy of

Act 29 are specifically meant "to address" the decisions in *Butler*, as well as in *Commonwealth v. Muniz,* 164 A.3d 1889 (Pa. 2017). 42 Pa. C.S.A. § 9799.51 (b) (4). *Muniz* held that the sex offender requirements under SORNA constituted punishment for *ex post facto* purposes. The Commonwealth submits that the express legislative purpose of Act 29 and the changes enacted enjoy a strong presumption of constitutionality that should not justify the court "usurping the legislative power."

This argument, however, misses the point. This court is bound by the pronouncement in *Butler* which is crystal clear. A mechanism to determine one's SVP status which permits the court to do so on a clear and convincing standard is unconstitutional and the court may not hold a hearing to determine such. While *Butler* was based on a different statute, it is a distinction without a difference. Neither Act 10 nor Act 29 changed the SVP designation mechanism in any respect. The underlying issue in *Muniz* was whether the registration requirements constituted punishment. Because the *Muniz* court concluded that the registration requirements constituted punishment and an SVP designation increases that punishment, the mechanism to declare one an SVP was deemed unconstitutional. *Butler*, 173 A.3d at 1217-1218. It is only logical to conclude that despite the "changes" enacted by the legislature, if those changes do not alter the punitive nature of the statue, the SVP mechanism remains improper, ineffective and unconstitutional. The mandated charge to the lower courts, including this court, is to no longer hold hearings until a constitutional designation mechanism is enacted by the General Asssembly. *Id*. at 1218. According to *Butler*, a constitutional designation mechanism requires proof beyond a reasonable doubt and the choice of a jury as the fact-finder. Specifically, the *Butler* Court stated:

> since our Supreme Court has held that SORNA registration

> requirements are punitive or a criminal penalty to which individuals are exposed, then under *Apprendi* and *Alleyne*, a factual finding, such as whether a defendant has a "mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexually 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 fact-finder. Section 9799.24(e)(3) identifies the trial court as the finder of fact in all instances and specifies clear and convincing evidence as the burden of proof required to designate a convicted defendant as an SVP. Such a statutory scheme in the criminal context cannot withstand constitutional scrutiny.

Id. at 1217-1218.

While this court appreciates the separation of powers, it will not and cannot ignore the directive of the higher courts simply because the legislature announces that it has "addressed" such.

The Commonwealth next argues that the fact-finding required for an SVP designation was not rooted in the historic jury function. In support of this, the Commonwealth relies on the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160 (2009) and the California Supreme Court decision in *People v. Mosely*, 344 P.3d 788 (Ca. 2015). The Commonwealth argues that the *Ice* decision is binding and supports the conclusion that, even if the registration requirements for an SVP constitute punishment, the court may nevertheless engage in judicial fact-finding. The argument, while facially appealing, belies the holdings in *Muniz* and *Butler*.

The Pennsylvania Supreme Court in *Muniz* held that the registration requirements constituted punishment and the provisions in the statute at issue were unconstitutional under the *ex post facto* clauses of both the state and federal constitutions. *Butler* found that because an SVP designation increases an individual's registration requirements and the registration requirements constituted punishment, an SVP designation

had to be proven beyond a reasonable doubt to the factfinder, judge or jury, chosen by the parties.

While the *Ice* decision is binding regarding the federal right to a jury trial, *Ice* is not binding with respect to state constitutional issues. Furthermore, the decision in *Ice* related to the imposition of consecutive sentences, and not registration requirements or SVP designations. Therefore, it is also factually distinguishable.

The California court decision in *People v. Mosely*, which relied on *Ice* to determine that judicial fact-finding was acceptable for determining if an offender had to register in that state, clearly is not binding on Pennsylvania courts. Moreover, *Mosely* is also distinguishable. In addition to finding that sex offender registration and residency requirements were not sentencing matters in which, historically, the jury played any traditional role at common law, the California Supreme Court in *Mosely* found that the registration provisions did not constitute punishment, and even if the residency requirement[1] constituted punishment, it was severable from the other registration requirements.

Finally, neither *Ice* nor *Mosely* addresses the burden of proof. Those cases only address the right to a jury trial. *Butler*, on the other hand, is a binding Pennsylvania case which held that the SVP designation mechanism was unconstitutional, because it did not require proof beyond a reasonable doubt. 173 A.3d 1218 ("In sum, we are constrained to hold that section 9799.24(e)(3) of SORNA violates the federal and state constitutions because it increases the criminal penalty to which a defendant is exposed without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt.").

[1] The California statute prohibits any person for whom registration is required from residing within 2,000 feet of any public or private school, or park where children regularly gather.

The Commonwealth further argues that the court's analysis should be narrowly construed to the statute and those subject to its provisions "as opposed to the sort of unrestrained facial analysis employed in *Muniz.*" This analysis, briefed in great detail by the Commonwealth in *Commonwealth v. Ultsh,* CR-1379-2017 (Lycoming County), not only relies on the dissent in *Muniz* but ignores the clear fact that this court must adhere to the decisions of its higher courts.

For centuries, the doctrine of *stare decisis* has been a bedrock of legal jurisprudence. It is a Latin phrase that literally means "to stand on the decisions." This is a doctrine of following the rules rendered in previous judicial decisions. As the United States Supreme Court clearly noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992),

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system can do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process, 149 (1921). Indeed, the very concept of the rule of law underlying our own constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Id. at 854.

The Commonwealth, to its credit, is passionate, thorough and lengthy in its effort to designate the defendant as an SVP. Indeed, Defendant may merit such a designation. But, and despite the Commonwealth's protestations to the contrary, there is no question in this court's opinion, that the statute remains punitive, the few changes are illusory at best, the legislature has not enacted a constitutional SVP designation mechanism, and the court is bound

by the decisions of the higher courts and will not and cannot hold an SVP hearing and engage in judicial fact-finding with a clear and convincing burden of proof. Perhaps the Pennsylvania Supreme Court will alter this analysis when it rules on the appeal in *Butler*, but until that time this court is required to follow both *Muniz* and *Butler*.

O R D E R

AND NOW, this 7th day of November 2018, following a hearing, argument and the briefing, this Court **GRANTS** Defendant's Motion to Preclude an SVP hearing.

By The Court,

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Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Nicole Ippolito, Esquire (ADA)
Michael A. Dinges, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File