IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**: No. CP-41-CR-0000115-2017**
Appellant	**:**
vs.	**: CRIMINAL DIVISION**
	:
	:
KELLI VASSALLO,	**: 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 order dated December 27, 2018 and entered on January 7, 2019, in which the court granted the Motion to Preclude SVP Hearing filed by Kelli Vassallo (hereinafter "Vassallo"). The relevant facts follow.

On August 1, 2018, Vassallo 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 a Sexually Violent Predator (SVP). The Board conducted an assessment, Vassallo was deemed to meet the criteria to be so classified, and the Commonwealth filed a Praecipe to schedule a hearing to determine such.

On October 31, 2018, Vassallo filed a motion to preclude the scheduling and/or conducting of a hearing to determine if she was to be designated an SVP. Vassallo based her motion on : (1) the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), which held that the registration requirements of Pennsylvania's Sexual Offender Registration and Notification Act (SORNA) were punitive; (2) the Pennsylvania Superior Court's decision in *Commonwealth v. Butler*, 173 A.3d 1212

(Pa. Super. 2017), which held that the procedure under 42 Pa. C.S.A. §9799.24 for determining whether an individual should be designated an SVP was unconstitutional in that it did not provide for a trial by jury or proof beyond a reasonable doubt; and (3) this court's decision in *Commonwealth v. Carpenter*, CP-41-CR-0000192-2017, which held that, despite the passage of Act 10, SORNA was still punitive and the procedures for designating an individual as an SVP were still unconstitutional.

The Commonwealth vehemently opposed Vassallo's motion. The Commonwealth argued that the changes to SORNA as a result of the passage of Act 10 and Act 29 rendered SORNA non-punitive. The Commonwealth also argued that the type of fact-finding required for an SVP designation was not rooted in the historic jury function. Finally, the Commonwealth asserted that the court should not conduct an unrestrained facial analysis as employed in *Muniz*, but rather a narrowly tailored analysis confined to SORNA as applied to Vassallo.

The court rejected the Commonwealth's arguments, found that it was bound to follow both *Muniz* and *Butler*, and granted Vassallo's motion. The Commonwealth appealed.

A sea change in the law regarding sexual offender registration came on July 19, 2017 when the Pennsylvania Supreme Court decided *Muniz* and held that Pennsylvania's registration provisions constituted punishment under Article I, Section 17 of the Pennsylvania Constitution and thus could not be applied retroactively.

In light of the decision in *Muniz,* the Superior Court held in *Butler* that the provisions for designating an offender an SVP set forth in SORNA were unconstitutional. Specifically, the Superior Court held that 42 Pa. C.S.A. § 9799.24 (e) (3) violated both the

federal and state constitutions. In *Butler,* defendant's designation as an SVP exposed him to an increased registration requirement from 15 years to life. 42 Pa. C.S.A. § 9799.15 (a) (6). In evaluating the constitutional propriety of such a designation, the Superior Court noted that *Muniz* concluded that the registration requirements of SORNA constituted punishment for purposes of the federal and state constitutions. Because the registration requirements constituted punishment, the Superior Court concluded that the facts leading to those requirements needed to be found beyond a reasonable doubt by the factfinder and not by a judge utilizing a clear and convincing burden of proof standard at sentencing. Thus, section 9799.24 (e) (3) was declared unconstitutional and trial courts were directed to no longer hold SVP hearings or designate convicted defendants as SVP's "until our General Assembly enacted a constitutional designation mechanism."

With the passage of Act 10 of 2018 on February 21, 2018 and Act 29 of 2018 on June 12, 2018, the legislature hoped to address the *Muniz* and *Butler* decisions. Rather than alter the SVP designation mechanism, however, the legislature amended other provisions of the Sexual Offender Registration and Notification Act (SORNA) with the goal that SORNA and its requirements would no longer be considered punitive.

This court found that the legislature did not achieve its intended result.

Through Act 10, the legislature established a "two-track registration program." The legislature slightly amended Chapter 97 Subchapter H of Title 42, and enacted an entirely new Subchapter I. 42 Pa. C.S.A. § 9799.51 et seq. Subchapter I was created to exclusively regulate individuals whose offenses occurred on or after April 22, 1996 and before December 20, 2012. 42 Pa. C.S. §§9799.52. Subchapter H is substantially similar to SORNA, and Subchapter I to a large extent models former Megan's Law II.

In this case, the court looked to Subchapter H, 42 Pa. C.S.A. §§ 9799.10 through 9799.42, in that Vassallo committed her offenses on or after December 20, 2012.

Returning to *Muniz,* in determining whether SORNA was punitive, the Court applied the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to the facts of the case. *Mendoza-Martinez* has been considered for decades as the established rubric for determining whether a law is punitive or civil in nature.

In applying the well-established rubric, the Court in *Muniz* first determined that the General Assembly's intent in enacting SORNA was twofold. It was intended to comply with federal law and it was intended "not to punish, but to promote public safety through a civil regulatory scheme." Determining that the intent of the General Assembly was to enact a civil scheme, the *Muniz* Court then conducted an analysis of the *Mendoza-Martinez* factors to determine whether SORNA was sufficiently punitive in effect to overcome the General Assembly's stated non-punitive purpose.

First, the Court found that the in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon the offender. The Court held that this factor weighed in favor of finding SORNA's effect to be punitive.

Second, in addressing whether the sanction has been historically regarded as punishment, the Court commented that the public internet website utilized by the Pennsylvania State Police broadcasts worldwide, for an extended period of time, the personal identification information of individuals who have served their sentences. The Court noted that this exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation-even through the clearest proof. *Muniz,* citing *Commonwealth v. Perez,* 97

A.3d 750, 765-66 (Donohue, J., concurring).

The Court concluded that this factor weighed in favor of finding SORNA's effect to be punitive because the publication provisions, when viewed in the context of the current Internet-based world, were comparable to shaming punishments and more akin to probation.

The Court found the factor of whether the statute comes into play only on a finding of scienter to be of little significance in their inquiry.

The next factor addressed by the Court was whether the operation of the statute promotes the traditional aims of punishment. The Court noted that retribution, in its simplest terms, affixes culpability for prior conduct and that SORNA is applicable only upon a conviction for a predicate offense. The court noted that the information SORNA allows to be released over the Internet goes beyond otherwise publicly accessible conviction data and included: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description. The Court noted that SORNA increased the length of registration, contained mandatory in-person reporting requirements and allowed for more private information to be displayed online. The Court concluded that SORNA is much more retributive than the previous enacted Megan's Law and that this retributive effect, along with the fact that SORNA's provisions act as a deterrent for a number of predicate offenses, all weighed in favor of finding SORNA punitive.

The next factor concerned whether the behavior to which the statute applied was already a crime. The Court concluded that this factor carried little weight in the balance.

The next factor was whether there is an alternative purpose to which the statute may be rationally connected. The Court concluded that there was a purpose other than

punishment to which the statute might be rationally connected and that this factor weighed in favor of finding SORNA to be non-punitive.

The last factor addressed by the Court was whether the statute was excessive in relation to the alternative purpose assigned. In examining SORNA's entire statutory scheme and recognizing that SORNA categorized a broad range of individuals as sex offenders, including those convicted of offenses that do not specifically relate to a sexual act, the Court concluded SORNA's requirements were excessive and over-inclusive in relation to the statute's alternative assigned purpose of protecting the public from sexual offenders.

In balancing all of the factors, the Court noted that four of the five factors to which it gave weight, weighed in favor of finding SORNA to be punitive. The Court concluded that SORNA involved affirmative disabilities or restraints, its sanctions had been historically regarded as punishment, its operation promoted the traditional aims of punishment including deterrence and retribution, and its registration requirements were excessive in relation to its stated non-punitive purposes.

In addressing Pennsylvania's constitution, the Court added that SORNA's registration and online publication provisions place a unique burden on the right to reputation, which is particularly protected in Pennsylvania. Further, the Court concluded that, in part due to reputation concerns, the state and offender have an interest in the finality of sentencing that is undermined by the enactment of ever more severe registration laws. Concluding that Pennsylvania's ex post facto clause provided even greater protections than its federal counterpart, the Court concluded that SORNA's registration provisions were also unconstitutional under the state clause.

In this case, the Commonwealth argued that the changes enacted in

connection with Act 10 and Act 29 were such that SORNA can no longer be considered punitive. In support of its argument, the Commonwealth referenced the newly established process by which certain individuals may petition for removal from the registry and the provision that some periodic verification reporting requirements may be done remotely as opposed to in person.

With respect to the Commonwealth's first argument, the changes add a provision that provides a mechanism for individuals required to register under SORNA to petition a criminal court for removal or exemption from all or part of the registry after a period of 25 years. 42 Pa. C.S.A. § 9799.15 (a. 2). This allowance applies to Tier III and other lifetime registrants, including sexually violent predators. A registrant must file a petition seeking removal after 25 years of registration. A registrant may petition the trial court for exemption from SORNA requirements only if he or she is not convicted of an offense punishable by more than one year in jail, or after the commencement of his or her registration or release from custody, whichever is later. Lastly, the offender must be assessed by the Sexually Offender Assessment Board and prove to a court by clear and convincing evidence that he or she is not likely to pose a threat to the safety of any other person. 42 Pa. C.S.A. § 9799.59 (a). This court concludes that the process for obtaining an exemption is largely fanciful. The relief that these changes purport to afford are illusory at best.

Indeed, the court cannot foresee one being designated as an SVP and meeting the established criteria, and 25 years later proving the negative. The sexual offender's 25-year assessment would essentially need to contain conclusions diametrically opposed to or different than the previous assessment. Moreover, Vassallo cannot avail herself of these procedures as the duration of her registration does not exceed 25 years.

As to the law establishing periodic verification reporting requirements to be done remotely as opposed to in person, it allows the Pennsylvania State Police to set up a "telephonic verification system" which would permit Tier II and Tier III registrants, after three years of in-person compliance, to call the Pennsylvania State Police to complete all but one of their semiannual or quarterly verifications, provided the registrant has not been convicted of an offense punishable by imprisonment of more than one year during the three-year period of in-person compliance. 42 Pa. C.S.A. § 9799.25 (a.1) – (a.2). This allowance is not available to Tier I offenders or SVPs. This allowance is also not available for updates or changes to required information nor is it available for individuals experiencing homelessness.

This court concluded that the changes were not sufficient to overcome the reasoning and conclusions of *Muniz* that SORNA is punitive. The changes give a misleading impression and do not overcome the concerns set forth by the Justices in *Muniz.* The concern of the Justices regarding one's reputation had been essentially ignored by the legislature.

The legislature did not address any of the Superior Court's concerns in *Butler*.

Vassallo's conviction on Count 2, institutional sexual assault, would require her to register for 25 years as a Tier II sexual offender. If Vassallo, 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 argued that the designation mechanism set forth in Act 29 is outside the prohibition set forth in *Butler* for several reasons.

First, the Commonwealth argued 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 submitted 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 would not and could not ignore the directive of the higher courts simply because the legislature announced that it has "addressed" such.

The Commonwealth next argued that the fact-finding required for an SVP designation was not rooted in the historic jury function. In support of this, the Commonwealth relied 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 argued that the *Ice* decision was binding and supported 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, the court found it was 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* addressed the burden of proof. Those cases only addressed 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.").

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

[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.

> 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, was passionate, thorough and lengthy in its effort to designate Vassallo as an SVP. Indeed, Vassallo may merit such a designation. But, and despite the Commonwealth's protestations to the contrary, there was no question in this court's opinion, that SORNA remained punitive, the few changes made by the legislature were illusory at best, the legislature had not enacted a constitutional SVP designation mechanism, and the court was bound by the decisions of the higher courts and would not and could not 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*.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Michael Dinges, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)

Superior Court (original & 1)