

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-288-2017
vs. :
: CRIMINAL DIVISION
:
:
ZACHARY ASKEY, : Motion to be Removed from SORNA
Defendant :

OPINION AND ORDER

Before the Court is Defendant’s “Motion to be Removed from SORNA” filed by the defendant on July 28, 2020.

By way of background, by Order of Court dated August 16, 2017, the defendant was sentenced with respect to one count of involuntary deviate sexual intercourse (IDSI). By virtue of his conviction, he was classified as a Tier III offender under SORNA. The underlying incident supporting the conviction occurred on February 7, 2017.

Following Defendant’s sentence, he unsuccessfully pursued PCRA relief.

Following the filing of Defendant’s motion, and in light of the Supreme Court’s decision in *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), the court entered an Order not treating the motion as a PCRA petition. The court also ordered that the Commonwealth file an Answer. The Commonwealth filed an Answer on October 12, 2020. The court scheduled a hearing/argument/conference for October 23, 2020. Defendant participated by remote technology. Following a colloquy, Defendant waived counsel. He indicated that he did not want a hearing to present facts in support of his motion. He specifically asserted that his request was “pretty straightforward” and could be decided on “just legal argument.”

Defendant argued that SORNA II remained punitive and could not be retroactively applied to him. He explained that he was being punished by being required to register for life and that his right to reputation was being infringed. According to Defendant, his registration requirements would make it harder to obtain future employment. Further, registering for life given his age of only 25 years was “too much.” He argued that he was not a menace to society, he made a simple mistake and that the recidivism rates for sexual offenders were “lower than anyone else.”

From a legal standpoint, Defendant relied on the Pennsylvania Supreme Court’s decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) and subsequent Superior Court decisions confirming such.

Defendant’s arguments, however, are misplaced. As this Court indicated in its Opinion and Order dated December 31, 2018 with respect to Defendant’s prior PCRA Petition, IDSI is a Tier III sexual offense. 42 Pa. C.S.A. § 9799.14 (d) (4). Tier III offenses require lifetime registration. 42 Pa. C.S.A. § 9799.15 (a) (3). Since the IDSI occurred after December 20, 2012, Defendant is subject to SORNA, and the Pennsylvania Supreme Court’s decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) does not apply in this case.

In response to *Muniz* and other lower court cases interpreting it, the legislature amended SORNA by enacting Act 10 on February 21, 2018, and Act 29 on June 12, 2018. These Acts are collectively known as SORNA II.

SORNA II divides sexual offenders into two subchapters:

- (1) Subchapter H, which applies to an offender who committed a sexually violent offense on or after December 20, 2012 (the effective date of SORNA I); and
- (2) Subchapter I, which applies to an offender who committed a sexually violent offense on or after April 22, 1996 but before December 20, 2012, whose period of registration has not expired, or whose registration requirements under a former sexual offender registration law has not expired.

Commonwealth v. Elliot, 2021 PA Super 58, 2021 WL 1245032, *2 (Pa. Super. 2021).

Acknowledging that SORNA II subchapter H applies, Defendant argues that the requirements are punitive and violate the ex post facto clauses of the Pennsylvania and United States Constitutions. Defendant argues that subchapter H is unconstitutional on its face and as applied to him.

Clearly, registration creates a stigma that an offender is a dangerous adult likely to commit further offenses. *Commonwealth v. Muhammed*, 241 A.3d 1149, 1158 (Pa. Super. 2020). This mark of disgrace profoundly affects one's ability to obtain employment, education and housing, which in turn impedes one's ability to function as a productive member of society. *Id.*

However, enacted statutes are afforded a presumption of validity.

Commonwealth v. Crawford, 2021 PA Super 102, 2021 WL 1975866, *3 (Pa. Super. 2021).

It is presumed that the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth. *Id.* A statute will only be struck down if it "palpably,

and plainly violates the constitution; [and] all doubts are to be resolved in favor of a finding of constitutionality.” *Id.* citing, *Commonwealth v. Mayfield*, 832 A.2d 418, 421 (Pa. 2003).

In a series of cases, both the Pennsylvania Supreme Court and Pennsylvania Superior Court remanded for evidentiary hearings claims that subchapter H is unconstitutional. The presumption that all sexual offenders pose a high risk of sexual recidivism may be overcome by a scientific consensus that overturns the legislative findings. *Commonwealth v. Torsilieri*, 232 A.3d 567 (Pa. 2020); *Commonwealth v. Snyder*, 2021 PA Super 63, 2021 WL 1324388 (Pa. Super. 2021); *Commonwealth v. Asher*, 244 A.3d 27 (Pa. Super. 2020).

While the General Assembly may enact laws which impinge on constitutional rights to protect the health, safety and welfare of society, any restriction is subject to judicial review to protect the constitutional rights of all citizens. *Torsilieri*, 232 A.3d at 575. A party challenging a statute must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the constitution. *Id.*

In *Torsilieri*, the Supreme Court acknowledged that, based on the evidence that the defendant presented before the trial court, he posed “colorable constitutional challenges” to subchapter H and in particular the following legislative determinations:

- (1) that all sex offenders pose a high risk of recidivism; and
- (2) that the tier-based registration system protects the public from the dangers of recidivism.

232 A.3d at 584.

In this particular case, Defendant’s petition, which he admitted another

inmate prepared for him, fails to address the *Torsilieri* decision. Defendant exercised his right to represent himself and concluded that he need not present any evidence nor make any record to support his contentions. Under these circumstances, the court cannot conclude that Defendant has sufficiently undermined the validity of the legislative findings.

Since Defendant did not present any expert witness affidavits or certifications to support his claim that the presumption of recidivism is unconstitutional as applied to him,¹ the court cannot grant his petition or hold an evidentiary hearing at this time.²

The court notifies the parties of its intent to dismiss Defendant's Petition. Defendant may respond to this proposed dismissal within twenty (20) days. Defendant has chosen to waive his right to counsel and represent himself, which is his right. If, however, in light of the *Torsilieri* decision and its requirement for expert scientific evidence, Defendant would like counsel appointed to assist him so that he can try to amend his petition and obtain expert witness affidavits or certifications to support his claims, he should indicate such in his response. The court is not trying to affect Defendant's decision one way or the other; the court is merely informing Defendant that it is his choice and if he wishes to change his mind about counsel, he may do so. If Defendant does not respond within twenty (20) days, the court will enter an order dismissing the petition.

¹ See Pa. R. Crim. P. 902(A); 42 Pa. C.S.A. §9545(d); *Torsilieri*, supra.

² The court recognizes that Defendant's petition is not a PCRA petition. While *Lacombe* clearly permits other types of petitions to challenge registration requirements, there is no established procedure for a petition such as Defendant's. Therefore, to give Defendant an opportunity to respond to the newer case law and fully develop his claims, the court borrowed some of the procedures from the PCRA rather than simply dismissing his petition.

ORDER

AND NOW, this ___ day of June 2021, the parties are hereby notified of this Court's intention to dismiss the 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,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
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Judge Lovecchio