

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
 :
 vs. : No. CR-192-2017
 :
 CONARD CARPENTER, : Motion to Vacate Order for a
 Defendant : Sexually Violent Predator Hearing

OPINION AND ORDER

On December 29, 2017, Defendant pled guilty to Count 2, Sexual Assault, a felony of the second degree.¹ On October 17, 2016, at Defendant's home, Defendant put his penis into the mouth of his four-year old granddaughter.

In preparation for sentencing, the court ordered an evaluation by the Pennsylvania Sexual Offender Assessment Board (SOAB) to determine if Defendant met the criteria for designation as a Sexually Violent Predator (SVP). Pursuant to 42 Pa. C.S.A. § 9799.24, following receipt of the assessment, the Commonwealth filed a praecipe to schedule a hearing before the court to determine if Defendant is a sexually violent predator. A hearing is scheduled in the future to determine such.

However, by motion filed on April 24, 2018 and argued on May 21, 2018, Defendant seeks to vacate the order scheduling the hearing and preclude the court from determining if Defendant meets the criteria for designation as an SVP. Defendant's motion is based on the Superior Court decision in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017) which held that the procedure for designating an individual an SVP under section

¹ 18 Pa. C.S.A. §3124.1.

9799.24 was unconstitutional based on *Alleyne*² and *Muniz*.³

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 (H.B. 631) on February 21, 2018, the

² *Alleyne v. United States*, 570 U.S. 99 (2013).

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.

Unfortunately, this court is not certain that the legislature has reached 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 must look to Subchapter H, 42 Pa. C.S.A. §§ 9799.10 through 9799.42, in that Defendant committed his offense 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

³ *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), cert. denied, - U.S. -, 138 S. Ct. 925 (January 21, 2018).

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 argues that the changes enacted in connection with Act 10 are such that SORNA can no longer be considered punitive. In support of its argument, the Commonwealth references 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, Act 10 adds 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 is not convicted of an offense punishable by more than one year in jail, or after the commencement of his 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 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 comfort these changes bring 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.

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 concludes that the changes are not sufficient to overcome the reasoning and conclusions of *Muniz* that it is punitive. The changes are 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.

Accordingly, the court agrees with defendant and VACATES its Order setting a hearing to establish whether Defendant is a sexually violent predator. Because Act 10 is deemed to be punitive, its increased provisions with respect to sexually violent predators over Tier III lifetime offenders must be determined by a factfinder chosen by Defendant via a beyond the reasonable doubt standard. The mechanism set forth in Act 10/SORNA is ineffective and the Superior Court’s decision in *Butler* governs this court.

ORDER

AND NOW, this ____ day of June 2018 following a hearing and argument, the court GRANTS Defendant’s Motion to Vacate the Order for a Sexually Violent Predator Hearing.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
William J. Miele, Esquire (PD)
Gary Weber, Lycoming Reporter
Work file