

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

WAYNE PATRICK SHOWER

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1422 MDA 2013

Appeal from the Order Entered July 19, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0006313-2005

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.:

FILED APRIL 15, 2014

The Commonwealth appeals from the July 19, 2013 order granting the "Petition to Enforce Plea Agreement or For a Writ of *Habeas Corpus*" filed by Appellee, Wayne Patrick Shower. After careful review, we affirm.

We summarize the relevant facts and procedural history of this case as follows. On December 5, 2005, the Commonwealth filed an information charging Appellee with one count each of aggravated indecent assault and indecent assault.¹ On March 3, 2006, Appellee pled guilty to indecent assault and the Commonwealth *nolle prossed* the aggravated indecent assault charge. On June 12, 2006, the trial court imposed a sentence of 11½ to 23 months' imprisonment. On March 12, 2013, Appellee filed a

¹ 18 Pa.C.S.A. §§ 3125(a)(7) and 3126(a)(7), respectively.

“Petition to Enforce Plea Agreement or For a Writ of *Habeas Corpus*.” The trial court conducted a hearing on May 31, 2013. On July 19, 2013, the trial court entered an order granting Appellee’s petition. On August 6, 2013, the Commonwealth filed a timely notice of appeal.²

On appeal, the Commonwealth raises four issues for our review.

1. Whether the trial court erred in determining that registration under SORNA is not a collateral consequence to a conviction and sentencing[?]
2. Whether the trial court erred in determining that the registration under SORNA violates the [E]x [P]ost [F]acto Clause[?]
3. Whether the trial court erred in holding that the determination by the Pennsylvania State Police that [Appellee] was now subject to registration under SORNA to be a violation of the [C]ontract [C]lause[?]
4. Alternatively, whether [Appellee] should have filed his request for relief as a *writ of mandamus* and included the Pennsylvania State Police as a party to the action[?]

Commonwealth’s Brief at 4.

We elect to address the Commonwealth’s third issue first, as we conclude it disposes of this appeal. The Commonwealth argues that the trial court erred in concluding that Appellee was entitled to relief as he “was

² The Commonwealth and the trial court have complied with Pa.R.A.P. 1925.

entitled to the benefit of his bargain[]" that he negotiated with the Commonwealth. Commonwealth's Brief at 22.

An *en banc* panel of this Court recently addressed this very issue in ***Commonwealth v. Hainesworth***, 82 A.3d 444 (Pa. Super. 2013) (*en banc*). In ***Hainesworth***, the defendant pled guilty to three counts of statutory sexual assault, three counts of indecent assault, and one count of criminal use of a communication facility. ***Id.*** at 445. At the time of Hainesworth's guilty plea, none of these offenses were triggering offenses requiring registration under the version of Megan's Law in effect at the time. ***Id.*** at 445-446. "This fact was acknowledged on the record during Hainesworth's plea colloquy." ***Id.*** at 446. Like Appellee in this case, while Hainesworth was serving his sentence, the new version of Megan's Law went into effect, along with its new tier-system and registration requirements. Hainesworth filed a motion seeking to terminate his supervision due to the new registration requirements. The trial court denied his motion but entered an order concluding that Hainesworth would not be subject to the new registration requirements. The Commonwealth filed a timely notice of appeal to this Court.

This Court began its analysis by noting that "the issue before [the Court] was properly framed by Hainesworth and the trial court as an analysis of contract law." ***Id.*** at 447. This Court then reviewed the transcript of Hainesworth's plea hearing, noting that "the trial court and Hainesworth

were assured no less than twice by the Commonwealth that the plea did not obligate Hainesworth to register as a sex offender.” **Id.** at 448. The **Hainesworth** Court concluded that “the record show[ed] that non-registration was a term of Hainesworth’s plea bargain.” **Id.**

Next, the **Hainesworth** Court addressed the cardinal legal question of the appeal, that is “whether it was error for the trial court to order specific performance of the terms of [Hainesworth’s plea] bargain.” **Id.** This Court concluded it was not erroneous for the trial court to order enforcement of the bargain’s terms. The **Hainesworth** Court noted the severity of the registration requirements.

“[R]egistration obviously has serious and restrictive consequences for the offender, including prosecution if the requirement is violated. Registration can also affect the offender’s ability to earn a livelihood, his housing arrangements and options, and his reputation.” **Commonwealth v. Gehris**, 54 A.3d 862, 879 (Pa. 2012) (Castille, C.J., Opinion in Support of Reversal). In fact, the requirements of registration are so rigorously enforced, even “[t]he occurrence of a natural disaster or other event requiring evacuation of residences shall not relieve the sexual offender of the duty to register.” 42 Pa.C.S. § 9799.25(e). As noted by Hainesworth, when a defendant agrees to a guilty plea, he gives up his “constitutional rights to a jury trial, to confrontation, to present witness, to remain silent and to proof beyond a reasonable doubt.” Hainesworth’s Brief at 22. In negotiating a plea that will not require him to register as a sex offender, the defendant trades a non-trivial panoply of rights in exchange for his not being subject to a non-trivial restriction. Fundamental fairness dictates that this bargain be enforced.

Id. at 449.

The Court also analogized **Hainesworth** in part to our Supreme Court's decision in **Commonwealth v. Zuber**, 353 A.2d 441 (Pa. 1976). In **Zuber**, the defendant entered into a negotiated plea bargain with "[t]he result of said negotiations [being] a promise by the Commonwealth to recommend a sentence of seven to fifteen years, and ... that the Commonwealth would join with defense counsel in a request to the State Board of Parole that the new sentence run [c]oncurrently with appellant's 'back time'" **Id.** at 443. Appellant argued and the Commonwealth conceded that its promise was hollow since "under the law of Pennsylvania in effect at the time appellant was sentenced, neither a court nor the Parole Board had the power to order that a back time and a front time sentence be served concurrently." **Id.** (internal quotation marks omitted). Our Supreme Court concluded that Zuber was entitled to the benefit of his bargain.

[T]here is an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant's plea. Our courts have demanded strict compliance with that duty in order to avoid any possible perversion of the plea bargaining system, evidencing the concern that a defendant might be coerced into a bargain or fraudulently induced to give up the very valued constitutional guarantees attendant the right to trial by jury.

...

Appellant Zuber asks this Court to modify his sentence on the murder conviction, reducing it to two and one-half years to fifteen years'

imprisonment. By so doing, appellant will then have received the benefit of the bargain made with the Commonwealth and still serve a prison sentence commensurate with the term contemplated by all of the parties to the plea proceedings. We agree that a sentence modification such as that suggested by the appellant affords the most appropriate remedy.

Id. at 444, 446. Based on these considerations, the **Hainesworth** Court rejected the Commonwealth's arguments and concluded "the parties to this appeal entered into a plea bargain that contained a negotiated term that Hainesworth did not have to register as a sex offender." **Hainesworth, supra** at 450. "As such, it was not error for the trial court to order specific enforcement of that bargain[.]" **Id.**

Turning to the case *sub judice*, we conclude that **Hainesworth** controls and disposes of this appeal. In this case, at the time Appellee entered his guilty plea, the Commonwealth set the parameters of the plea.

[Commonwealth]: ... We have reached an agreement in the case whereby the Commonwealth will be withdrawing the aggravated indecent assault. [Appellee] will be pleading guilty to the indecent assault charge. The agreed upon sentence is 11 and a half to 23 months plus costs. ...

N.T., 3/6/06, at 1. Next, after the plea was taken the parties commented on the registration consequences of Appellee's sentence.

[Commonwealth]: Your Honor, I believe due to the gradation being a M-1 that [Appellee] needs to be made aware of the Megan's Law registration requirements.

...

[Defense Counsel]: Your Honor, Section 9795.1 does seem to indicate that a 10-year registration would be required relating to indecent assault where the offense is a misdemeanor of the first degree. So I think that would take care of the first part. ...

Id. at 5.

As noted above, the record clearly shows that the nature of the plea agreement struck between the parties was that the Commonwealth would specifically *nolle pros* the aggravated indecent assault charge and allow Appellee to plead guilty to indecent assault only. ***See id.*** at 2. Under the registration requirements of Megan’s Law in effect at the time, aggravated indecent assault would have required Appellee to register for life, whereas indecent assault would only require a ten-year registration term. ***See*** 42 Pa.C.S.A. §§ 9795.1(a)(1), 9795.1(b)(2). However, now under SORNA, Appellee is back where he began, facing a lifetime registration requirement. ***See id.*** § 9799.14(d)(8) (listing a conviction for 18 Pa.C.S.A. § 3126(a)(7) as a Tier III offense), § 9799.15(a)(3) (stating, “[a]n individual convicted of a Tier III sexual offense shall register for the life of the individual[]”). Following the ***Hainesworth*** Court’s analysis, Appellee is entitled to the benefit of the plea bargain that he negotiated. ***See Zuber, supra; Hainesworth, supra.***

The Commonwealth acknowledges ***Hainesworth***, but maintains it is distinguishable for two reasons. First, the Commonwealth points out that unlike in ***Hainesworth***, Appellee was always required to register for some

period of time and “[Appellee]’s plea was not predicated on his ability to avoid registration requirements.” Commonwealth’s Brief at 23. Second, the Commonwealth avers that “the record is not clear that [Appellee] accepted the negotiated plea agreement to receive only a ten[-]year registration period.” *Id.*

It is true that in *Hainesworth*, the defendant pled guilty to a lesser offense in order to avoid registration in its entirety; whereas in this case, Appellee pled guilty to reduce his registration period from a lifetime to ten years. However, as a recent panel of this Court has suggested, this is a distinction without a legal difference.

Herein, Appellant was subject to a ten-year reporting requirement under the terms of the plea agreement and there is no indication that he bargained for non-registration as a part of his plea. However, the ten-year Megan’s Law registration period was discussed at the plea proceeding. While it was not an explicit term of the negotiated plea, it is apparent that Appellant’s negotiated plea agreement was structured so that he would only be subject to a ten-year rather than a lifetime reporting requirement, distinguishing the facts herein from those in [*Commonwealth v. Benner*], 853 A.2d 1068 (Pa. Super. 2004)]. The two charges carrying a lifetime registration requirement were withdrawn by the Commonwealth as part of the negotiations, leaving Appellant subject to the less onerous ten-year reporting requirement then imposed on indecent assault. Under our reasoning in *Hainesworth*, Appellant arguably would be entitled to the benefit of that bargain.

Commonwealth v. Partee, --- A.3d ---, 2014 WL 661735, *4 (Pa. Super. 2014).³

In the case *sub judice*, as noted above, the plea agreement was structured in a specific manner so that the one charge which carried a mandatory lifetime registration requirement was withdrawn by the Commonwealth. Instead, the Commonwealth agreed to accept Appellee's plea to the lesser charge of indecent assault, which carried "the less onerous ten-year reporting requirement[.]" **Id.** We cannot accept the Commonwealth's limitation of **Hainesworth's** logic and rationale to only plea bargains involving non-registration. The result of such a holding would be that **some** plea bargains would be enforced and others would not. We likewise reject the Commonwealth's assertion that there must be a firm explicit statement on the record as to the structure of the plea in order for **Hainesworth** to apply. Even **Hainesworth** itself did not have such a rigid requirement. The only portion of the transcript discussed in **Hainesworth** was as follows.

The terms of Hainesworth's plea were carefully laid out on the record, as can be seen in the following exchange:

[COURT ASSISTANT:] Is this Megan's Law?

³ Although in **Partee**, the Court ultimately concluded that **Hainesworth** did not apply because the defendant breached the same plea agreement by violating his probation, we nevertheless find the above analysis helpful to resolve this case.

[THE COMMONWEALTH:] It is not Megan's Law. Terms and conditions are as follows: At Count 1 on case 106, 11-and-a-half to 23-and-a-half months ['] incarceration. Costs and fees. No contact direct or indirect with the victim or the victim's family. At Count 2, 11-and-a-half to 23 concurrent to Count 1. Count 3, no further sentence. Count 6, one year probation consecutive to Count 2. Count 7, one year probation consecutive to Count 6. Count 8, one year probation consecutive to Count 7. Count 9, two years['] probation consecutive to Count 8. That's a total of five years['] probation.

[THE COURT:] These are felony sexual assault and they're not Megan's Law?

[THE COMMONWEALTH:] The Commonwealth will move to dismiss Counts 4, 5 and 10. They are not. They're statutory—

[THE COURT:] Statutory sexual assault, felony two.

[THE COMMONWEALTH:] Is not Megan's Law.

[THE COURT:] You're dismissing 4 and 5?

[THE COMMONWEALTH:] And 10.

[THE COURT:] 4, 5 and 10.

...

N.T. Guilty Plea, 2/27/09, at 2-3. Subsequently, the following exchange occurred:

[THE COURT:] [W]as the agreement stated correctly by the Commonwealth?

[COUNSEL FOR HAINESWORTH:] Yes, it was.
... Do you have any questions about anything
you read?

[HAINESWORTH:] No, sir

[THE COURT:] There's no restitution or
anything like that?

[THE COMMONWEALTH:] There is not, Your
Honor.

N.T. Guilty Plea, 2/27/09, at 5–6.

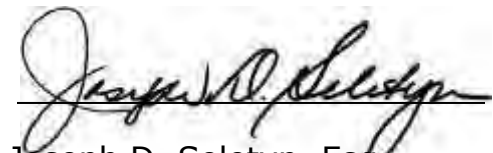
Hainesworth, supra at 447-448. It was based on this exchange that this Court concluded that “[i]t is unambiguous from the record that both parties to this appeal, and the trial court, understood that a registration requirement was not included as a term of Hainesworth’s plea agreement.” **Id.** at 448. We likewise conclude that it is unambiguous from this record that all parties in this case and the trial court understood that lifetime registration was not included in Appellee’s plea bargain, but also more importantly, that a ten-year registration term was. Based on these considerations, we find the Commonwealth’s attempts to distinguish **Hainesworth** unpersuasive. As a result, we conclude, as the Court did in **Hainesworth**, that the trial court did not err insofar that it concluded that Appellee was entitled to have the benefit of his plea bargain enforced.⁴

⁴ We note a bit of confusion in the proceedings below. In Appellee’s motion, he raised both the argument that he was entitled to the benefit of the plea bargain he negotiated which was addressed in **Hainesworth**, and that the
(Footnote Continued Next Page)

Based on the foregoing, we conclude that the trial court correctly granted Appellee's petition insofar that he was entitled to the benefit of the plea agreement that he negotiated with the Commonwealth.⁵ Accordingly, the trial court's July 19, 2013 order is affirmed.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014

(Footnote Continued) _____

retroactive application of SORNA would violate the Contracts Clause of the Federal and Pennsylvania Constitutions, which is of course, an analysis of constitutional dimension. Although the trial court concluded that Appellee was entitled to the benefit of his plea bargain, the trial court purported to list this under a heading pertaining to the Contracts Clause, but did not conduct any constitutional analysis. To the extent the trial court resolved Appellee's contract issue on non-constitutional grounds, this was entirely proper. **See Commonwealth v. Wilson**, 67 A.3d 736, 741 (Pa. 2013) (stating, "when considering matters which raise both constitutional and non-constitutional bases for relief, [courts] attempt to resolve the matter on non-constitutional grounds whenever practicable[.]") (citations omitted). However, to the extent it can be interpreted that our analysis differs from that of the trial court, we can affirm the trial court on any basis supported by the record. **Commonwealth v. Doty**, 48 A.3d 451, 456 (Pa. Super. 2012).

⁵ In light of our disposition of the Commonwealth's third issue, we need not address the Commonwealth's remaining contentions. Likewise, we express no opinion on the constitutional analyses conducted by the trial court. **See Wilson, supra.**