2014 PA Super 109

COMMONWEALTH OF PENNSYLVANIA Appellee v. LAWRENCE JONES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 859 WDA 2013

Appeal from the PCRA Order of May 14, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No.: CP-02-CR-0011852-2011

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and WECHT, J.:

OPINION BY WECHT, J.: FILED: May 28, 2014

Lawrence Jones appeals the trial court's order dismissing his petition filed under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541, *et seq*. We vacate the trial court's order and remand for further proceedings.

Under the circumstances of this case, and given the nature of our resolution, we need not review in detail the factual history of this case. On or about July 25, 2011, Jones was charged with one count of statutory sexual assault, a second-degree felony. ***See*** 18 Pa.C.S. § 3122.1(a). Jones allegedly engaged in sexual intercourse with a fifteen-year-old female not his wife when Jones was at least four years older than the victim.

Jones and the Commonwealth negotiated a plea agreement, pursuant to which Jones would plead *nolo contendere* to one count of indecent assault, a second-degree misdemeanor, and one count of corruption of the

morals of a minor, a misdemeanor of the first degree. ***See*** 18 Pa.C.S. §§ 3126(a)(1)(8), 6301(a)(1)(i). In return, the Commonwealth agreed to the imposition of a sentence of probation, with the duration of the sentence left to the trial court's discretion. The trial court accepted the plea and sentenced Jones to two years' probation, subject to certain case-specific conditions to which the Commonwealth and Jones agreed.

During the plea proceedings, the Commonwealth attested as follows:

> Regarding the charge, Your Honor, the Commonwealth is moving to amend the information from one charge of statutory sexual assault to one charge of indecent assault as well as one count of corruption of the morals of a minor. We have agreed to a sentence of probation to be set by the Court as well as the special conditions of probation. That's the sum of our agreement, Your Honor.

Notes of Testimony ("N.T."), 3/5/2012, at 2-3. Notably, the parties made no reference whatsoever to the imposition of any registration and reporting obligations under Megan's Law, ***see*** 42 Pa.C.S. §§ 9791-9799.9, which governed sex offender reporting obligations at the time that Jones entered his plea,[1] and applied neither to the crime charged (statutory rape) nor to

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[1] On December 20, 2011, our General Assembly enacted the Sex Offender Registration and Notification Act ("SORNA"), Act of December 20, 2011, P.L. 446, No. 111, § 12, codified at 42 Pa.C.S. §§ 9799.10, *et seq.*, which replaced Megan's Law as the law governing the registration and supervision of specified sex offenders. Among the stated purposes of the enactment was the reconciliation of the law of the Commonwealth with the requirements of the Adam Walsh Child Protection and Safety Act of 2006, United States P.L. 109-248, 120 Stat 587 (July 27, 2006). ***See*** 42 Pa.C.S. § 9799.10(1).

the crimes to which Jones pleaded guilty (indecent assault[2] and corruption of the morals of a minor).

In connection with his plea, Jones also executed a written guilty plea colloquy, entitled "*Nolo Contendere* Explanation of Defendant's Rights." On that form, Jones reviewed and acknowledged his understanding of the various constitutional rights that he relinquished by entering a plea of *nolo contendere*. Although that form cautioned Jones regarding the trial court's discretion to accept or reject the negotiated plea, and reviewed various potential consequences arising from the imposition of a sentence upon his plea, it contained no reference whatsoever to Megan's Law or sex offender registration obligations.

The applicable probation conditions were enumerated in a document captioned "Charge Specific Special Conditions," and included a number of provisions that echoed restrictions associated with Megan's Law. They specified, *inter alia*, that Jones attend and participate in a mental health treatment program and/or sex offender treatment program, as approved and directed by Jones' probation officer; follow all lifestyle restrictions or treatment requirements imposed by the therapist; refrain from consuming alcohol; avoid non-incidental contact with children under the age of

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[2] As noted, Jones pleaded guilty to second-degree indecent assault. Under Megan's Law, first-degree indecent assault incurred registration reporting obligations. ***See*** 42 Pa.C.S. § 9795.1(a)(1) (expired, Dec. 20, 2012).

eighteen; avoid places primarily used by children, such as schools and playgrounds; avoid any contact with the victim; and not undertake any employment or volunteer activity involving contact with children. Form, Charge Specific Conditions, at 1-2.

Jones did not appeal his judgment of sentence. However, on January 10, 2013, Jones timely filed a *pro se* PCRA petition.[3] Therein, Jones alleged the following basis for relief:

> I accepted a plea to Indecent Assault [and] Corruption of Minors. When that happened, I was told that I was not going to have to register as a sex offender. I now discover that I must register under [the Sex Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S. §§ 9799.10, *et seq.*] I would not have plead[ed] nolo contendere if I had been told that this was a possibility. I am not guilty and would have gone to trial. I am not receiving the benefit of the bargain.

Pro Se PCRA petition, 1/10/2013, at 3.

On January 16, 2013, the trial court appointed PCRA counsel to represent Jones. On February 15, 2013, PCRA counsel filed a motion to stay SORNA's registration and reporting requirements. On February 27, 2013, the trial court denied Jones' request for a stay. On March 8, 2013, PCRA counsel filed an amended PCRA petition. Therein, Jones raised two bases for

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[3] As explained *infra* at length, we do not perceive Jones' petition as one that substantively asserts a right to relief under the PCRA, and we treat it as a non-PCRA petition based upon its substance and the relief sought. Nonetheless, the petition by whatever name was filed within one year of the date upon which Jones' judgment of sentence became final, and therefore would have been timely under PCRA section 9545(b)(1).

relief. First, Jones alleged that requiring him to register as a sex offender under SORNA, which took effect after he entered his guilty plea, was a violation of his protection against the imposition of *ex post facto* punishment. Second, Jones alleged that he "was unlawfully induced into taking the plea agreement" because sex offender registration reflected a sanction "that was not included with the special conditions of probation." Amended PCRA Petition at 2 ¶9; ***see*** Brief in Support of Amended PCRA Petition at 5-9.

On April 4, 2013, the Commonwealth filed its answer in opposition to Jones' petition. Therein, relying upon our Supreme Court's decision in ***Commonwealth v. Leidig***, 956 A.2d 399 (Pa. 2008), the Commonwealth argued that the SORNA requirements were non-punitive, but rather a collateral consequence of Jones' plea and sentence. As such, the registration requirements did not constitute *ex post facto* punishment. Consequently, Jones' *nolo contendere* plea was not unknowing or involuntary. Answer to Post-Conviction Relief Act Petition at 8-19.

On April 19, 2013, the trial court entered an order informing Jones of the court's intent to dismiss his amended PCRA petition without a hearing, as required by Pa.R.Crim.P. 907. Jones filed no opposition. On May 15, 2013, more than twenty days after the trial court filed its Rule 907 notice, the court entered a Final Order & Opinion dismissing Jones' petition. Jones timely filed a notice of appeal on May 17, 2013. On May 20, 2013, the trial court ordered Jones to file a concise statement of errors complained of on

appeal pursuant to Pa.R.A.P. 1925(b). Jones timely complied on May 29, 2013, and the court filed its Rule 1925(a) opinion on July 24, 2013.

Before this Court, Jones raises the following issues:

> 1) Whether the trial court erred in dismissing [Jones'] Petition when the Commonwealth seeks to require [Jones] to register as a sex offender based on a statute that was not in effect at the time of the plea and said statute increases the punishment for the offense?
>
> 2) Whether the trial court erred by refusing to rescind the plea when the Commonwealth has violated the agreement by impermissibly adding sex offense registration as a further penalty that was not contemplated by the parties?

Brief for Jones at 3. Underlying Jones' first issue is the argument that the imposition of reporting requirements under SORNA that did not apply at the time that he entered his negotiated plea violates his constitutional protections against *ex post facto* punishment. However, because we find his second issue dispositive, we need not pass on Jones' first issue.

Before we examine Jones' second claim, we must consider the form in which Jones filed his petition, and we must address the trial court's jurisdiction to hear this matter, as well as our jurisdiction to consider this appeal. As noted, *supra*, Jones' judgment of sentence called for two years of probation, with certain conditions. As of this writing, more than two years has passed since the commencement of Jones' two-year probationary term on March 5, 2012. Consequently, we must assume that the relevant probation sentence has expired, and that Jones no longer is under supervision for the instant claim. Because PCRA relief is available only to

petitioners who are "currently serving a sentence of imprisonment, probation or parole" "at the time relief is granted," 42 Pa.C.S. § 9543(a)(1)(i), we lack jurisdiction to consider this appeal to the extent that Jones asserts a claim that arises under the PCRA. ***See Commonwealth v. Jeffrey Williams***, 977 A.2d 1174, 1176 (Pa. Super. 2009) (quoting ***Commonwealth v. Hart***, 911 A.2d 939, 941-42 (Pa. Super. 2006)) ("As soon as [a defendant's] sentence is completed, [he] becomes ineligible for [PCRA] relief, regardless of whether he was serving his sentence when he filed his petition.").

Another significant problem concerns the trial court's jurisdiction to decide Jones' petition in the first instance. When the underlying proceedings involved a guilty plea, PCRA relief is limited to circumstances in which the petitioner establishes that his plea was "unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent." 42 Pa.C.S. § 9543(a)(2)(iii). In his *pro se* petition, Jones asserted that his plea was unlawfully induced, and that he was actually innocent. He asserted that he would have proceeded to trial had he known that he would have been required to register as a sex offender with the Pennsylvania State Police. *Pro Se* PCRA Petition at 3. He renewed his claim of unlawful inducement in his counseled, amended PCRA petition.

The prayer for relief in Jones' amended petition sought vacatur of his judgment of sentence and a new trial (and hence, implicitly, withdrawal of his plea); vacatur of his judgment of sentence and a remand for re-

sentencing to exclude him from SORNA's registration and reporting requirements; an evidentiary hearing on his claims; or other relief as deemed appropriate by the trial court. Amended PCRA Petition at 3 (unnumbered). However, in his brief in support of his amended petition, Jones requested only the following relief: "[T]he defendant should be permitted to conclude his sentence according to the express terms of the agreement." Brief in Support of Amended PCRA Petition at 9.

While the PCRA provides that it "shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis," it further provides that it "is not intended . . . **to provide relief from collateral consequences of a criminal conviction**." 42 Pa.C.S. § 9542 (emphasis added); ***cf. Commonwealth v. Masker***, 34 A.3d 841, 843-44 (Pa. Super. 2011) (*en banc*) (holding that the PCRA does not afford relief arising from ineffective assistance of counsel in connection with the collateral classification of a defendant as a sexually violent predator under Megan's Law). Thus, we have held that "a petition raising a claim for which the PCRA does not offer a remedy will not be considered a PCRA petition." ***Commonwealth v. Deaner***, 779 A.2d 578, 580 (Pa. Super. 2001) (citing ***Commonwealth v. Fahy***, 737 A.2d 214, 223-24 (Pa. 1999)). Although no Pennsylvania Court yet has held that SORNA's sex offender registration and reporting requirements are "collateral consequences" of a criminal conviction, we have

so held with regard to its predecessor versions of Megan's Law, which vary only in form and detail, not substance, from SORNA. ***See Leidig***, 956 A.2d at 403-06 (Pa. 2008); ***Commonwealth v. Price***, 876 A.2d 988, 992 (Pa. Super. 2005). Thus, we assume, without deciding, that what was deemed a collateral consequence of sentence under Megan's Law would be deemed a collateral consequence of sentence under SORNA.

As noted, the principal relief sought by Jones is specific enforcement of his plea agreement with the Commonwealth, a claim that, for the foregoing reasons, is not cognizable under the PCRA. In light of this fact, and the plain language of PCRA section 9542, as well as our assumption that SORNA's registration and reporting requirements are, like its predecessors' provisions, collateral consequences of Jones' conviction, we find that Jones failed to plead a PCRA claim upon which relief could be granted. Thus, one of two circumstances must be the case: First, because Jones' claim is not cognizable under the PCRA, no remedy is available; or second, because Jones' claim is not cognizable under the PCRA, he may seek relief by other means without regard to the PCRA's various strict pleading and timeliness requirements. We find the latter to be the case.

In ***Commonwealth v. Hainesworth***, 52 A.3d 444 (Pa. Super. 2013) (*en banc*), the case we rely upon below in assessing the merit of Jones' claim, we granted relief from SORNA registration requirements under circumstances bearing a considerable resemblance to this case. However, in that case, the defendant did not style his pleading as a PCRA petition:

Instead, on December 13, 2012, nearly four years after he entered his plea, he filed what we characterized as a "motion seeking termination of his supervision." ***Id.*** at 446. Therein, he sought prospective protection from the application of SORNA's registration and reporting provisions, which were set to take effect seven days later, on December 20, 2012. ***Id.*** Notably, his motion was filed nearly one year after SORNA was enacted, on December 20, 2011.

We offer this chronology to underscore the fact that, were we to have considered Hainesworth's filing as a *de facto* petition under the PCRA, it would have been facially untimely under the PCRA's one-year jurisdictional time limit. ***See*** 42 Pa.C.S. § 9545(b). Moreover, because the law Hainesworth sought protection from, SORNA, had been on the books for nearly a year, Hainesworth would have had no apparent recourse to any exception to the one year time limit, ***see*** 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii), which may apply only if the defendant sought relief within sixty days of discovering the asserted basis for relief. ***See*** 42 Pa.C.S. § 9545(b)(2). Put simply, in order to reconcile our ***Hainesworth*** decision with the PCRA, we must recognize that the relief requested both was sought, and was granted, entirely outside the strictures of the PCRA.

As set forth below at greater length, we find only modest substantive distinctions between ***Hainesworth*** and this case, and no material distinction between the form, timing, or relief sought by each party. Only the **styling** of the respective petitions differs, inasmuch as Jones purported to file his

request for relief under the mantle of the PCRA. In ***Hainesworth*** and the instant case, the petitioners sought the same relief: specific enforcement of a prior plea bargain. Under the circumstances before us, to have found jurisdiction in ***Hainesworth*** but not to find jurisdiction in this case would require us to elevate form over substance. ***Cf. Commonwealth v. Yager***, 685 A.2d 1000, 1006 (Pa. Super. 1996) (declining to find a defective plea colloquy to be grounds for PCRA relief because the substance the colloquy is designed to serve was satisfied despite the formal flaw). Moreover, in so doing, we would imperil relief for an entire category of claims that, for the following reasons, have merit under certain circumstances.

As recent history demonstrates, our General Assembly exercises its legislative prerogative to change the law governing the registration of sex offenders with some regularity. The potential adverse effects of such changes on offenders, who accepted a plea bargain in part based upon the assurance or reasonable inference that they would not be subject to sex offender registration and reporting requirements, arise at varying intervals after entry of such pleas, including after parties have been released from their sentences entirely, rendering them ineligible for relief under the PCRA. We find no support in statutory or case law for closing the door to consideration on such claims, and ***Hainesworth***, albeit *sub silentio*, stands for the proposition that such relief may be available under appropriate circumstances.

It would be fundamentally unfair to individuals in such a position to deny them relief for failing to satisfy the criteria of the PCRA, when, regardless, the PCRA affords them no avenue to seek specific enforcement of the terms of their plea bargain. As recognized by PCRA section 9542, as well as various precedents issued by our Supreme Court since its enactment, the PCRA does not anticipate – and therefore cannot provide an avenue for relief for – all legitimate post-sentencing claims for relief. ***See Fahy***; ***Deaner***, *supra*.

Under these circumstances, we find that, as in ***Hainesworth***, Jones makes out a claim for which relief is available, and over which the trial court had jurisdiction. Inasmuch as Jones timely appealed the trial court's decision in this matter, this Court has jurisdiction over this case. Although Jones nominally sought relief under the PCRA, and although the procedures that followed tracked the procedures that apply to claims thereunder, we find no material impediment to our review. The learned trial court considered Jones' claims and rejected them on substantive, not procedural grounds. Similarly, before this Court, the Commonwealth opposes Jones' claims on substance, not procedure. Consequently, we will review Jones' claim as one that is substantively identical to the claim raised in ***Hainesworth***, a petition for specific performance of Jones' plea agreement. ***Cf. Commonwealth v. Pate***, 617 A.2d 754, 759 (Pa. Super. 1992) (declining to remand for preparation of proper Pa.R.A.P. 1925 opinion where we could discern court's sound rationale for the decision challenged). ***But***

see Commonwealth v. Anderson, 801 A.2d 1264, 1266-67 (Pa. Super. 2002) (remanding for procedural irregularity and emphasizing that, contrary to "exalt[ing] form over substance," the ruling was necessitated because the irregularity impeded this Court's ability to review the case).[4]

In seeking relief from the Commonwealth's alleged breach of his negotiated *nolo contendere* plea agreement, Jones effectively sets forth a claim for breach of contract, as to which principles of contract interpretation and enforcement apply. ***See Hainesworth***, 82 A.3d at 447. "Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation. Our standard of review over questions of law is *de novo* and to the extent necessary, the scope of our review is plenary." ***Ragnar Benson, Inc., v. Hempfield Twp. Mun. Auth.***, 916 A.2d 1183, 1188 (Pa. Super. 2007) (citation and internal quotation marks omitted).

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[4] It is worth noting that the obverse circumstance is a commonplace in Pennsylvania courts. We not infrequently treat pleadings that are not called PCRA petitions, but that raise issues that are cognizable under the PCRA, as though they were PCRA petitions, subject to all of the rules that apply to PCRA filings. We consistently have held that it is the substance, rather than the form, of the filing that dictates how it must be considered. ***See, e.g., Commonwealth v. Godschalk***, 679 A.2d 1295, 1296 n.1 (Pa. Super. 1996) (citing ***Commonwealth v. Hess***, 414 A.2d 1043 (1980) (in petition, defendant requested *habeas corpus* relief, but petition was not titled as such; petition should be treated as *habeas corpus* petition); ***Fortune***/***Forsythe v. Fortune***, 508 A.2d 1205 (Pa. Super. 1986) (the substance rather than the form of a motion is controlling in determining procedural issues)).

In support of his second issue, Jones argues that federal and Pennsylvania law provide that agreements made by a prosecutor in connection with plea negotiations must be upheld. Brief for Jones at 10-13 (citing, *inter alia*, ***Santabello v. New York***, 404 U.S. 257 (1971); ***Commonwealth v. Anderson***, 995 A.2d 1184, 1190 (Pa. Super. 2010)). In ***Anderson***, this Court made the following observations:

> "Assuming the plea agreement is legally possible to fulfill, when the parties enter the plea agreement on the record, and the court accepts and approves the plea, then the parties and the court must abide by the terms of the agreement." ***Commonwealth v. Parsons***, 969 A.2d 1259, 1268 (Pa. Super. 2009) (*en banc*). Likewise,
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> > [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.
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> ***Commonwealth v. Fruehan***, 557 A.2d 1093, 1094 (Pa. Super. 1989) (quoting ***Commonwealth v. Zuber***, 353 A.2d 441, 444 (Pa. 1976)).
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> > Although a defendant has no constitutional right to have an executory plea agreement specifically enforced, once a plea actually is entered, and was induced by a prosecutor's promise . . ., that promise must be fulfilled. In determining whether a particular plea agreement has been breached, we look to what the parties to this plea agreement reasonably understood to be the terms of the agreement.
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> ***Fruehan***, 557 A.2d at 1094-95 (internal citations and quotation marks omitted). Where the Commonwealth violates a term of the plea agreement, the defendant is entitled to receive the

> benefit of the bargain. ***Commonwealth v. Potosnak***, 432 A.2d 1078, 1081 (Pa. Super. 1981).

Anderson, 995 A.2d at 1191 (citations modified).

Jones argues that the record is clear that his agreement with the Commonwealth did not entail sex offender registration. To the contrary, the Commonwealth stated on the record that Jones and the Commonwealth had agreed to accept a plea of probation, subject to certain conditions. Those conditions were enumerated in a document that was signed by Jones and the sentencing judge and was entered into the record. Those conditions did not include any reporting requirements under Megan's Law. Thus, "[i]t is clear that the parties did not consider sex offen[der] registration as a term of the agreement." Brief for Jones at 12. In seeking to impose SORNA's registration and reporting requirements, the Commonwealth breached the parties' agreement. Pursuant to ***Commonwealth v. Kroh***, 654 A.2d 1168, 1170 (Pa. Super. 1995), Jones asks that the Commonwealth be directed to impose only the probation conditions specified in the plea agreement, and refrain from imposing any others, including sex offender registration.

In opposing Jones' argument, the Commonwealth principally relies upon our Supreme Court's decision in ***Leidig***, *supra*. In ***Leidig***, the defendant pleaded *nolo contendere* to aggravated indecent assault. 956 A.2d at 400. During the plea hearing, the defendant was advised by the trial court that his guilty plea would subject him to assessment by the Sexual Offender's Assessment Board to determine whether he was a sexually

violent predator. ***Id.*** at 401. No mention was made at that time to the effect that the defendant's plea would subject him to Megan's Law's registration and reporting obligations. ***Id.*** However, at sentencing, the defendant was sentenced to a term of imprisonment and was informed that he would be subject to Megan's Law's registration and reporting requirements for ten years. ***Id.*** Later that day, counsel for the defendant and the Commonwealth approached the court to discuss the prospect that, under a new version of Megan's Law that had taken effect in the interim between the defendant's criminal activity and his sentencing, the defendant's plea would result in lifetime reporting obligations under Megan's Law. The court and counsel ultimately agreed that the prior version of Megan's Law, which was applicable at the time of the defendant's crime, should govern, subjecting the defendant to only ten years of Megan's Law obligations. However, the probation and parole office later informed the defendant that he would be subject to the then-current version of Megan's Law, and therefore subject to lifetime reporting obligations. ***Id.*** at 401-02.

The defendant moved to withdraw his *nolo contendere* plea. He averred that, had he known that he would be subject to lifetime registration and reporting requirements, he would not have pleaded guilty. Therefore, he had not entered his plea knowingly and intelligently. The trial court denied the defendant's motion. This Court affirmed the defendant's judgment of sentence, and our Supreme Court granted allowance of appeal specifically to consider whether Megan's Law reporting requirements

constituted a direct or collateral consequence of a guilty plea. ***Id.*** at 402-03. If those requirements were collateral, rather than direct, then at the time of his plea the defendant undisputedly would not have been entitled to any information whatsoever regarding the application of Megan's Law obligations, and further would not be entitled to relief even if the court **mis**-informed him regarding the nature or duration of his obligations thereunder. ***Id.*** at 402-03 (collecting cases distinguishing direct from collateral consequences in several contexts); ***cf. Commonwealth v. Gomer Williams***, 832 A.2d 962, 974 (Pa. 2003) (deciding, in the context of an *ex post facto* argument, that "any disabilities imposed upon sexually violent predators flow solely from the secondary effects of [Megan's Law] registration and notification, and thus, constitute a potential **collateral** restraint." (emphasis added)). Based upon ***G. Williams*** and ***Commonwealth v. Lee***, 935 A.2d 865 (Pa. 2007) (holding that lifetime registration requirements for sexually violent predators are non-punitive), the Court in ***Leidig*** concluded as follows:

> Because the Megan's Law registration requirements, of whatever duration, are matters collateral to [the defendant's] plea, the Superior Court correctly concluded that in accepting [the defendant's] plea, the trial court need not have advised [the defendant] as to the length of the registration requirement, and that any misunderstanding as to the duration of the registration requirement was not a basis for post-sentence withdrawal of the plea.

956 A.2d at 406; ***accord Commonwealth v. Benner***, 853 A.2d 1068 (Pa. Super. 2004). While our ruling in the instant case in no way is in derogation

of ***Leidig*** and ***Benner***, we find that those cases are inapposite to the case at bar.

In ***Commonwealth v. Zuber***, our Supreme Court underscored just how imperative it is that plea bargains be honored in the breach:

> While it is true that the practice of plea bargaining is looked upon with favor, ***Commonwealth ex rel. Kerekes v. Maroney***, 223 A.2d 699 (Pa. 1966), the integrity of our judicial process demands that certain safeguards be stringently adhered to so that the resultant plea as entered by a defendant and accepted by the trial court will always be one made voluntarily and knowingly, with a full understanding of the consequences to follow. ***Santobello***, 404 U.S. 257. Hence, Rule 319 of the Pennsylvania Rules of Criminal Procedure requires that before a judge accepts a plea of guilty, a full inquiry be made of the defendant on the record to determine whether 'the plea is voluntarily and understandingly tendered.' ***See also Commonwealth v. Ingram***, 316 A.2d 77, 80-81 (Pa. 1974). . . .
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> Most pertinent to the instant appeal is the requirement that when counsel for both sides enter into a plea agreement, the terms of that agreement must be stated in open court. ***See Commonwealth v. Alvarado***, 276 A.2d 526, 528 (Pa. 1971); ***Commonwealth v. Wilkins***, 277 A.2d 341 (Pa. 1971).
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> Moreover, there is an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant's plea. ***Santobello***, *supra*; ***Alvarado***, *supra*; ***Wilkins***, *supra*. 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.
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> Therefore, in Pennsylvania, it is well settled that 'where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the

> benefit of the bargain.' ***Commonwealth v. Zakrzewski***, 333 A.2d 898, 900 (Pa. 1975).

353 A.2d 441, 443-44 (Pa. 1976) (emphasis and some citations omitted, other citations modified).

In November of 2013, after the parties had already briefed this appeal, this Court entered its unanimous *en banc* decision in ***Hainesworth***, which involved circumstances quite similar to this case. Hainesworth initially was charged with various counts of statutory sexual assault, aggravated indecent assault, indecent assault, and criminal use of a communications facility. ***Id.*** at 445. Of Hainesworth's charged offenses, only aggravated indecent assault was subject to Megan's Law reporting requirements at that time. ***Id.*** at 446. In 2009, Hainesworth entered a negotiated guilty plea that excluded his counts for aggravated indecent assault, which were withdrawn by the Commonwealth. When he entered his plea, Megan's Law rather than SORNA governed registration and reporting requirements for sex offenders. Although not subject to Megan's Law registration requirements, under SORNA, indecent assault is categorized as a "Tier II" sexual offense subject to a twenty-five-year reporting obligation. ***Id.***

On December 13, 2012, Hainesworth filed a motion seeking termination of his supervision in anticipation of the December 20, 2012 effective date of SORNA. On December 18, 2012, the trial court denied Hainesworth's motion to terminate supervision, but entered an order providing that Hainesworth would not be subject to SORNA registration, on

the basis that registration would "violate[] due process of law, fundamental fairness, and provisions of the negotiated plea agreement entered into between [Hainesworth] and the government. It would also destroy the process of negotiated plea agreements essential to the efficient disposition of criminal cases . . . ." ***Id.*** at 446-47 (quoting Trial Court Opinion, 12/19/2012, at 1-2). The Commonwealth appealed.

An *en banc* panel of this Court first carefully distinguished the Commonwealth's framing of the issue, which, as in this case, focused upon the collateral and non-punitive aspects of sex offender registration, from Hainesworth's, which focused upon his entitlement to the benefit of his plea agreement:

> [T]he issue before us was properly framed by Hainesworth and the trial court as an analysis of contract law. We therefore apply the standard of review invoked by Hainesworth: "In determining whether a particular plea agreement has been breached, we look to 'what the parties to this plea agreement reasonably understood to be the terms of the agreement.'" ***Fruehan***, 557 A.2d at 1095 (internal citations omitted). Such a determination is made "based on the totality of the surrounding circumstances," and "[a]ny ambiguities in the terms of the plea agreement will be construed against the [Commonwealth]." ***Kroh***, 654 A.2d at 1172 (internal citations omitted).

Hainesworth, 82 A.3d at 447 (citations modified).

We then reviewed the terms of Hainesworth's agreement, which were carefully entered into the record. In particular, during the plea proceedings, the court asked whether the plea to be entered was subject to Megan's Law, and the Commonwealth responded that it was not. ***Id.*** at 447-48. The

Commonwealth further explained that the counts that would incur Megan's Law obligations were to be dismissed under the agreement. ***Id.*** at 448.

> 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. Moreover, these statements were made as part of the Commonwealth's recitation of the terms of the plea agreement. . . . It 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. We observed that the plea agreement "appear[ed] to have been precisely structured so that Hainesworth would not be subjected to a registration requirement." ***Id.*** Thus, we found that non-registration was a term of Hainesworth's plea bargain.

We next considered whether the trial court erred in ordering specific performance of the original plea agreement. Noting the importance of plea bargains to Pennsylvania's system of criminal justice, ***see Zuber***, *supra*, we addressed the considerable burdens associated with sex offender registration:

> "[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, 878 (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.

Hainesworth, 82 A.3d at 449 (Pa. Super. 2013) (citations modified).

In rejecting the Commonwealth's arguments, we emphasized that ***Leidig*** and ***Benner***, the cases primarily relied upon by the Commonwealth in ***Hainesworth*** and the case *sub judice*, were distinguishable. In neither of those cases did the Court face the question of whether specific performance was due as a consequence of contract principles. ***See Hainesworth***, 82 A.3d at 450. Unlike the defendants in ***Leidig*** and ***Benner***, Hainesworth did not contend that his plea was not knowing and voluntary; he simply sought enforcement of the terms of his plea agreement.[5] The same is true in the

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[5] In ***Hainesworth***, we also observed that, unlike in that case, in ***Benner*** the defendant "was always subject to a registration requirement, which he was aware of at the time of his plea." 82 A.3d at 450. The same was true in ***Leidig***, where the issue was an exacerbation of the registration requirements to be imposed, not the very fact of their imposition. ***See*** 956 A.2d at 401-02. While this subtle distinction was less critical to our ***Hainesworth*** reasoning than the divergence of the legal arguments raised in those cases from those raised in ***Hainesworth***, it is a relevant distinction just the same. It is one thing to quibble over the price where one knows there is a price to be paid; it is something else entirely to be faced, *post hoc*, with a price of whatever magnitude when no such price was presented as part and parcel of the underlying transaction. Here, as in ***Hainesworth***, what is at issue is not the duration or degree of the registration requirements; it is the imposition of sex offender registration upon someone who entered a plea that entailed no such requirement whatsoever. In short,
(Footnote Continued Next Page)

instant case: Jones seeks specific performance of his probation sentence and the conditions imposed thereto, with the exclusion of any later-imposed SORNA obligations.

Of Hainesworth's charged offenses, only aggravated indecent assault was subject to Megan's Law reporting requirements at the time of his sentencing. 82 A.3d at 446. In the instant case, however, the original charge against Jones of statutory rape, like those charges to which he ultimately pleaded guilty (second-degree indecent assault and corruption of the morals of a minor), was not subject to Megan's Law at the time that he entered his plea. Thus, as on-point as ***Hainesworth*** appears, a material distinction nonetheless remains between that case and the case *sub judice*.

In the case before us, there is no clear record evidence of a *quid pro quo* in the form of the systematic withdrawal of charges that would have required registration under the law applicable at the time of the plea or a conviction, had Jones opted to proceed to trial. While the Commonwealth in ***Hainesworth*** made clear on the record that Megan's Law was not implicated, in this case no such discussion occurred. Thus, the question we face is whether the absence of any indication of an agreed-upon and affirmative step to **avoid** application of Megan's Law when Jones entered his plea requires a different outcome than in ***Hainesworth***.

(Footnote Continued) ———————————

as in ***Hainesworth***, Jones was denied the benefit of his bargain to a categorically greater extent than was Benner or Leidig.

Unlike in ***Hainesworth***, had Jones proceeded to trial on the criminal complaint and been convicted of statutory rape, he still would not have faced Megan's Law consequences for his convictions. Thus, unlike in ***Hainesworth***, we cannot infer an affirmative meeting of the minds regarding the inclusion or exclusion of Megan's Law consequences for Jones' crimes. We lack evidence of a conscious decision at any point in the proceedings below to adjust the charges specifically to ensure that Megan's Law reporting requirements would not apply. In light of the criminal information as originally formulated, any such discussions would have been gratuitous because Jones never faced the prospective application of Megan's Law. However, we do have a detailed record of a negotiated *nolo contendere* plea that spelled out strict secondary obligations associated with Jones' probation. That is to say, we have an agreement between the Commonwealth and Jones that, on its face, reflected the parties' expectations as to the consequences that would follow from Jones' plea. Reinforcing this characterization of the agreement and proceedings below is the Commonwealth's own declaration during the plea proceedings: "That's the sum of our agreement." N.T., 3/5/2012, at 2-3 (emphasis).

We have held as follows:

> [T]he rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract.
>
> When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language

> used in the agreement, which will be given its commonly accepted and plain meaning. When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances.
>
> A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.

Miller v. Poole, 45 A.3d 1143, 1146 (Pa. Super. 2012) (internal quotation marks, citations, and modifications omitted).

Although we have no evidence of a bargained-for exchange expressly addressing Megan's Law, we cannot ignore the fact that a plea agreement so precisely defined, not only with regard to the mutually agreed-to sentence of probation itself but also with regard to the conditions that would attend that probation, reflected the parties' entire agreement regarding the disposition of Jones' charges. It was that deal, not that deal plus whatever collateral consequences might attach in the future, that induced Jones to sacrifice the "non-trivial panoply of rights" we underscored in ***Hainesworth***, *supra*.

We also note the incongruity that would result if we were to deny Jones relief in this case. In ***Hainesworth***, investigators evidently believed that they had probable cause to try the defendant for aggravated indecent assault, a charge subject to reporting and registration requirements under the law that applied at the time of his plea. They offered, and he accepted, a deal that enabled him to avoid that consequence. Here, investigators never charged Jones with a Megan's Law reporting crime such as aggravated

indecent assault, suggesting that Hainesworth's conduct was more grave than Jones' in the eyes of the respective investigators. If we were to deny Jones relief under these circumstances, the result would be that Jones, a party deemed by investigators to be worthy of less strict punishment than Hainesworth, would be stuck with unanticipated obligations under SORNA that Hainesworth avoided based upon a subtle distinction in the respective proceedings that does not go to the heart of the principles we endeavored to protect in ***Hainesworth***.

We hold that the terms of Jones' negotiated plea bargain were fully articulated in the documentary and trial record. Neither party to the negotiated plea could have anticipated the imposition of more severe sanctions or collateral obligations than stated on, or entered into, the record. Based upon this agreement, Jones sacrificed his fundamental constitutional rights. He cannot fairly be denied the benefit of his bargain.[6]

For the foregoing reasons, we vacate the trial court's order dismissing Jones' amended PCRA petition, which we treat as a stand-alone petition for enforcement of Jones' plea agreement as entered into the record. We also

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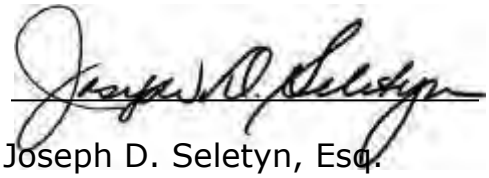
[6] Even if we grant *arguendo* that the plea agreement was unclear as to the parties' intentions, if any, regarding the application of any enhanced sex offender reporting requirements enacted at a later date, we would resolve the question in Jones' favor. When a plea is ambiguous, we must adopt the interpretation that is most favorable to the defendant. ***See Hainesworth***, 82 A.3d at 447 (citing ***Kroh***, 654 A.2d at 1172).

find that the record is sufficient without further proceedings to require specific performance of Jones' plea bargain as set forth above, which, in turn, requires that he be relieved from SORNA's registration and reporting requirements. Accordingly, on remand we direct the trial court to enter an order that will effectuate this result.

Order vacated. Case remanded. Jurisdiction relinquished.

Ford Elliott, P.J.E. files a Dissenting Statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/28/2014