

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin E. Wright,	:	
Petitioner	:	
	:	
v.	:	No. 332 M.D. 2014
	:	Submitted: February 6, 2015
Commonwealth of Pennsylvania,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: June 24, 2015

Before this Court are the preliminary objections of the Pennsylvania State Police to Kevin E. Wright’s petition for review seeking a writ of mandamus directing the State Police to change Wright’s registration status under the Sexual Offender Registration and Notification Act (Megan’s Law IV).¹ Wright contends that his registration status must be changed from Tier III sex offender to Tier I sex offender because the charges to which Wright pled guilty were part of a single criminal episode. For the reasons set forth below, we overrule the State Police’s preliminary objections.

¹ 42 Pa. C.S. §§9799.10 – 9799.41. The case law refers to the Sexual Offender Registration and Notification Act as “SORNA” or “Megan’s Law IV.” See, e.g., *Coppolino v. Noonan*, 102 A.3d 1254, 1258 (Pa. Cmwlth. 2014). We refer to the act as “Megan’s Law IV.”

In May of 2004, the State of Delaware charged Wright with 40 counts of Possessing Child Pornography and Dealing in Child Pornography. In January of 2006, Wright pleaded guilty to five of the 40 counts. Individually, each of the five counts was a Tier I offense under Megan’s Law IV.² Wright was sentenced to two years of probation and ten years of registration. Wright began registering on January 24, 2006, and, shortly thereafter, moved to Pennsylvania.

On April 24, 2013, the State Police informed Wright that as a result of amendments to Megan’s Law,³ he was reclassified as a Tier III sex offender and required to report for life because Tier III includes offenders who, *inter alia*, have “[t]wo or more convictions of offenses listed as Tier I or Tier II sexual offenses.” 42 Pa. C.S. §9799.14(d)(16).⁴ On June 26, 2014, Wright filed a petition for review in this Court’s original jurisdiction seeking a writ of mandamus to order the State Police to classify him as a Tier I offender who will satisfy his ten-year registration requirement by January 24, 2016, or, alternatively, classify Wright as a Tier I

² The Act requires that sex offenders periodically register with local police for various spans of time depending on the severity of the offender’s crime. There are three different reporting periods corresponding to three levels of severity, ranging from 15 years of reporting for the least severe offenders (Tier I offenders) to lifetime reporting for the most egregious offenders (Tier III offenders). 42 Pa. C.S. §9799.15(a). Tier I offenders must register annually, Tier II offenders must register bi-annually, and Tier III offenders must register quarterly. 42 Pa. C.S. §9799.15(e).

³ The parties do not explain what changes in the law prompted the State Police to reclassify Wright. Presumably, the change in law corresponded to the evolution from Megan’s Law III to Megan’s Law IV. However, it is unclear why Wright would not have been classified as a Tier III offender under Megan’s Law III. *See* n.8, *infra*.

⁴ Essentially, Megan’s Law is a portion of the Sentencing Code relating to registration of sex offenders who are convicted of particular sexual offenses. *See A.S. v. Pennsylvania State Police*, 87 A.3d 914, 916 n.4 (Pa. Cmwlth. 2014). These enumerated offenses are known as “predicate” offenses. *Id.* at 930 (Brobson, J., dissenting).

offender of the equivalent Pennsylvania statute, 18 Pa. C.S. §6312(d) (Possession of Child Pornography), subject to a 15-year registration requirement.

On October 3, 2014, the State Police filed preliminary objections seeking dismissal of Wright's petition because he failed to establish a clear right to relief.⁵ The State Police assert that because this Court and the Superior Court are split on the issue of whether multiple sexual offenses stemming from a single criminal episode trigger lifetime registration under Megan's Law IV, Wright does not have a clear right to relief.⁶ In response, Wright argues that the split between this Court and the Superior Court is irrelevant. Because this Court must follow its own precedent, which holds that multiple sexual offenses stemming from a single criminal episode do not trigger a lifetime reporting requirement, Wright contends he has a clear right to relief.

The Commonwealth Court case on which Wright relies is *A.S. v. Pennsylvania State Police*, 87 A.3d 914 (Pa. Cmwlth. 2014). In that case, A.S., who was 21 years old, engaged in consensual sexual relations with a 16-year-old female. Because the age of consent in Pennsylvania is 16, their sexual relationship

⁵ "Mandamus is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff and a corresponding duty in the defendant and where there is no other adequate remedy at law." *Banfield v. Cortes*, 922 A.2d 36, 42 (Pa. Cmwlth. 2007). Mandamus cannot be invoked to establish a right. *Rummings v. Commonwealth*, 814 A.2d 795, 799 (Pa. Cmwlth. 2002). Courts may only grant mandamus when the right sought by the petitioner has already been clearly established. *Id.* "[W]here doubt as to the plaintiff's right or the defendant's duty exists, mandamus is neither appropriate nor available." *Petsinger v. Department of Labor & Industry, Office of Vocational Rehabilitation*, 988 A.2d 748, 756 (Pa. Cmwlth. 2010).

⁶ The State Police also contend that Wright's petition is procedurally defective because he failed to attach a copy of his guilty plea to his petition, in violation of PA. R.C.P. No. 1019(i), and does not indicate whether his plea was oral or written, in violation of PA. R.C.P. No. 1019(h). Wright has since cured these errors.

was legal. However, A.S. persuaded the victim to take photographs of herself in sexual positions, which was unlawful child pornography. The victim also e-mailed the photos to A.S. at his request, which was a separate criminal offense. As a result, A.S. was charged with and pleaded guilty to two Tier I offenses.⁷ After reporting as a sexual offender for ten years, A.S. sought to remove his name from the sex offender registry. The State Police denied his request on the ground that under Megan's Law III, A.S. was required to report for life as a Tier III offender because he had pleaded guilty to multiple offenses.⁸ A.S. petitioned this Court for a writ of mandamus directing the State Police to remove his name from the registry. A.S. argued that he did not commit multiple predicate offenses within the meaning of Tier III because his two guilty pleas stemmed from one course of criminal conduct.

This Court granted A.S.'s petition. We reasoned that because technology has made the dissemination and receipt of illicit material so much easier, every single event where a minor takes a compromising picture can result in multiple charges and convictions. The ten-year reporting requirement would be

⁷ Specifically, A.S. pleaded guilty to one count of 18 Pa. C.S. §6312(b) (relating to sexual abuse of children in the context of causing a minor to be photographed engaging in a prohibited sexual act) and one count of 18 Pa. C.S. §6318(a)(5) (relating to unlawful contact with a minor for purposes of engaging in a violation of 18 Pa. C.S. §6312).

⁸ The State Police distinguish the instant matter from A.S. because Wright was classified under Megan's Law IV, whereas A.S. was subject to Megan's Law III. However, the language in the reporting sections at issue are nearly identical and provide no basis for distinction. The Megan's Law III language at issue in A.S. read:

(b) Lifetime registration.—The following individuals shall be subject to lifetime registration:

(1) An individual with two or more convictions of any of the offenses set forth in subsection (a) [regarding offenses that trigger ten-year reporting].

A.S., 87 A.3d at 916 n.4.

rendered meaningless by requiring lifetime reporting for offenders with multiple convictions arising from one criminal episode. We explained that

it is clear and free from doubt that the conduct here was a result of a “single criminal episode” to which A.S. pled guilty, that it was all part of one “logically related act” making it one conviction for the purpose of [Megan’s Law], and that A.S. had no opportunity to reform.

Id. at 922 (footnotes omitted). Thus, we held that when multiple sexual offenses occur as a result of one criminal episode, the offender has committed only one predicate offense. Accordingly, because A.S.’s two criminal offenses occurred in a single criminal episode, he was not subject to lifetime reporting for “two or more convictions” of Tier I offenses. *A.S.*, 87 A.3d at 916 n.4.

Wright argues that his case is indistinguishable from *A.S.* insofar as he was convicted of multiple sexual offenses stemming from a single criminal episode. Accordingly, his right to relief is clear. The State Police counter that Wright’s legal right to relief is not clear because the Superior Court has reached a different conclusion on the issue of whether multiple sexual offenses arising from a single criminal episode warrant registration as a Tier III offender. The State Police cite two cases from our sister court.

In the first case, *Commonwealth v. Lutz-Morrison* (Pa. Super., No. 1659 MDA 2013, filed September 18, 2014) (memorandum decision), the defendant pleaded guilty to three felony counts of sexual abuse of children during the course of a single criminal episode. At sentencing, the trial court classified him as a Tier III offender because he pleaded guilty to multiple offenses. The defendant appealed his classification to the Superior Court, which affirmed the decision of the trial court. The Superior Court recognized that its decision was at odds with

this Court’s decision in *A.S.* Nevertheless, the Superior Court followed its own precedent interpreting prior versions of Megan’s Law that held that “a defendant who is convicted of more than one Tier I offense [must] register as a lifetime offender, even if both convictions take place at the same hearing.” *Id.* at 11-12.

In the second case cited by the State Police, *Commonwealth v. Gehris* (Pa. Super., No. 1960 WDA 2008, filed March 26, 2010), a 42-year-old man entered an online chatroom and began corresponding with a police officer posing as a 19-year old girl. Through the course of their correspondence, the defendant sent the officer sexually explicit pictures of himself, requested pictures of a younger girl aged 13, and arranged a meeting with both girls at a motel 200 miles from the defendant’s home. The defendant was arrested when he arrived at the motel, and subsequently pleaded guilty to multiple Tier I charges. At sentencing, the trial court classified the defendant as a Tier III offender. He appealed to the Superior Court, which affirmed.

On further appeal, our Supreme Court rendered a split 3-3 decision, resulting in an affirmance of the Superior Court’s order. *Commonwealth v. Gehris*, 54 A.3d 862 (Pa. 2012).⁹

In an opinion in support of affirmance, Justice Todd, joined by Justices Eakin and McCaffery, recognized that even though her colleagues voting in support of reversal offered “a reasoned, plausible, policy-based rationale for interpreting [the reporting requirements of Megan’s Law], I nevertheless believe we are constrained by the clear and unambiguous language chosen by the legislature.” *Gehris*, 54 A.3d at 862. That clear and unambiguous language of

⁹ Supreme Court decisions are not binding if there is no majority holding. *Zauflik v. Pennsbury School District*, 72 A.3d 773, 783 (Pa. Cmwlth. 2013).

Megan's Law mandated that offenders with multiple violations were subject to the reporting requirements for Tier III offenders no matter when the violations occurred. Justice Todd explained:

Although the overall structure of [Megan's Law] conditions its registration scheme, in part, on the nature of particular sexual offenses, since lifetime registration is required of those who commit the arguably more serious offenses enumerated in [Megan's Law], I find it significant that the legislature also chose to impose the very same lifetime registration requirement for those convicted of two or more of any of the offenses..., the vast majority of which are offenses against children. This, from my perspective, evidences a deliberate legislative judgment, consistent with its objective of protecting public safety, to make the differing length of registration requirements dependent not only on the nature of the specific sexual offenses for which an individual is convicted, but, also, on the occurrence of a multiplicity of certain types of offenses, particularly those committed against children. In my view, this reflects a considered determination by the legislature that, in order to protect the safety and general welfare of the public, the frequency with which a convicted defendant is determined to have engaged in certain types of prohibited conduct with children is a particularly important factor in determining whether he or she should be subject to lifetime registration.

Id. at 867-68 (footnote omitted). For these reasons, Justice Todd opined that multiple convictions stemming from one criminal incident should require Tier III classification and lifetime reporting under Megan's Law.

Chief Justice Castille and Justices Saylor and Baer reached the opposite conclusion. In an opinion in support of reversal, Chief Justice Castille wrote:

It is evident that in drafting [the tiered system], the General Assembly meant to set up a graduated registration scheme. In this tiered approach, more serious (primarily violent) offenders

and “true” recidivists who squander a given opportunity to reform are understandably subject to lifetime requirements. By contrast, lesser, first-time offenders, especially those who are nonviolent, receive an opportunity for rehabilitation and eventual freedom from the requirements if they “stay on the path” for ten years.

Without in any way condoning the criminal conduct that led appellant to his current circumstances, we would conclude that the record in this case directs application of the ten-year registration requirement. Appellant’s two Megan’s Law offenses were nonviolent, perhaps triggered by situational problems in his marriage and career, and arose out of the same course of conduct, which ultimately did not result in direct harm to any actual victims. Appellant had no criminal past, much less a history of Megan’s Law offenses, and was taken into custody without resisting. In open court, he expressed remorse and regret and accepted responsibility for his actions. He voluntarily undertook psychotherapy and has embraced the treatment, was not found to be a sexually violent predator and, in fact, was described by a former [Sexual Offender Assessment Board] member as a good candidate for rehabilitation....[W]e would conclude that [the tiered system] embodies the recidivist philosophy and reflects a belief that first-time and lesser offenders are capable of reform and rehabilitation if given an opportunity to do so under the still-punitive aegis of relatively lighter discipline, as well as the threat of harsher treatment next time, should there be a next time.

Id. at 879. Accordingly, Chief Justice Castille opined that in order for an offender to be classified as Tier III based on multiple sexual offenses, his or her crimes cannot have occurred in a single criminal episode.

The State Police do not argue that either *Lutz-Morrison* or *Gehris* are binding on this Court. Instead, it cites these cases to demonstrate that the current state of the law in Pennsylvania is unsettled regarding whether lifetime registration as a sex offender is required when the offender was convicted of multiple sexual

crimes stemming from a single criminal episode. Thus, the State Police contend that Wright cannot establish a clear right to relief. We disagree. Because this Court is bound by its own precedent, we do not view the law as “unsettled” on the registration issue before us. See *State Farm Mutual Auto Insurance Co. v. Department of Insurance*, 720 A.2d 1071, 1073 (Pa. Cmwlth. 1998)(explaining that “[s]tare decisis binds [this Court] to follow decisions of our own...until they are either overruled or compelling reasons persuade us otherwise.”) Our holding in *A.S.*, 87 A.3d 914, was clear: multiple offenses arising from the same criminal episode do not warrant the offender’s lifetime registration as a Tier III offender under Megan’s Law. Accordingly, because Wright’s right to relief is clear under this Court’s precedent, we overrule the State Police’s preliminary objections to his petition for writ of mandamus. The inconsistency that exists between this Court’s jurisprudence and the Superior Court’s is for the Supreme Court or the General Assembly to resolve.

For these reasons we overrule the State Police’s preliminary objections and direct the State Police to file an answer.

MARY HANNAH LEAVITT, Judge

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	:	
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ORDER

AND NOW, this 24th day of June, 2015, the Preliminary Objections of the Pennsylvania State Police in the above-captioned matter are OVERRULED.

MARY HANNAH LEAVITT, Judge