NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
v.	:	
	:	
ERIC SCOTT POPEJOY	:	
	:	
Appellant	:	No. 56 MDA 2021

Appeal from the Judgment of Sentence Entered January 24, 2019
In the Court of Common Pleas of Wyoming County Criminal Division at No(s): CP-66-CR-0000120-2017

BEFORE: LAZARUS, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.: **FILED APRIL 19, 2022**

Appellant Eric Scott Popejoy appeals *nunc pro tunc* from the judgment of sentence imposed following his conviction for one count of failure to register[1] under the Sexual Offender Registration and Notification Act (SORNA I).[2] Appellant argues that his conviction is unconstitutional based on *ex post facto* principles and our Supreme Court's decision in ***Commonwealth v. Muniz***, 164 A.3d 1189 (Pa. 2017). Following our review, we reverse Appellant's conviction and vacate the judgment of sentence.

By way of background, Appellant was convicted of lewd or lascivious conduct involving a person less than sixteen years old in the state of Florida for an incident that occurred in 1992. At the time of Appellant's crime and

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[1] 18 Pa.C.S. § 4915.1(a)(1).

[2] 42 Pa.C.S. §§ 9799.10-9799.41 (eff. 2012).

conviction, Florida had not yet enacted any sex offender registration requirements. In 2015, Appellant relocated to Pennsylvania. At that time, Appellant was designated as a tier-one offender under SORNA I and ordered to register for a fifteen-year period.

On January 25, 2017, Appellant was charged with one count of failure to register. Thereafter, the Commonwealth amended the criminal information to include two additional counts of the same offense. On November 13, 2018, a jury convicted Appellant of one of the three charges.

On January 24, 2019, the trial court sentenced Appellant to twenty-seven to sixty months' incarceration. Appellant did not file a direct appeal.

On April 29, 2020, Appellant filed a *pro se* Post-Conviction Relief Act[3] (PCRA) petition seeking to reinstate his appeal rights *nunc pro tunc*. The PCRA court appointed counsel, who filed an amended petition on Appellant's behalf. Ultimately, on December 4, 2020, the PCRA court reinstated Appellant's direct appeal rights *nunc pro tunc*. Appellant filed a timely notice of appeal and a court-ordered Pa.R.A.P. 1925(b) statement.[4] The trial court issued a Rule 1925(a) opinion addressing Appellant's claims.

On appeal, Appellant raises the following issues:

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[3] 42 Pa.C.S. §§ 9541-9546.

[4] The record reflects that Appellant requested an extension of time in which to file his Rule 1925(b) statement, which the trial court granted. After the transcripts of testimony were filed, Appellant filed his statement with the trial court.

1. Whether [Appellant's] charges, convictions and sentences, under 18 Pa.C.S. § 4915.1(a)(1), are unconstitutional in that they were achieved under 18 Pa.C.S. § 4915.1(a)(1) in conjunction with SORNA [I] (2012) and are in violation of the *Ex Post Facto* Clause of the United States and Pennsylvania Constitutions and pursuant to ***Muniz***, where [Appellant's] predicate sex offense occurred in or prior to 1992?
2. Whether the Commonwealth failed to establish, beyond a reasonable doubt, that [Appellant] possessed a duty to register under SORNA (2012) where his alleged failure to register in this case was not a crime under SORNA (2012) as a result of ***Muniz*** and, therefore, his conviction and judgment of sentence, under 18 Pa.C.S. § 4915.1(a)(1), is illegal and must be vacated?

Appellant's Brief at 3.

Before reaching the merits of Appellant's claims, we must address whether the trial court had jurisdiction to reinstate Appellant's direct appeal rights *nunc pro tunc*. ***See Commonwealth v. Reid***, 235 A.3d 1124, 1143 (Pa. 2020) (stating that, "to confirm proper jurisdiction, it is appropriate for an appellate court to consider *sua sponte* the timeliness of a PCRA petition from which *nunc pro tunc* appellate rights have been reinstated").

As noted previously, Appellant did not file a direct appeal. Therefore, his judgment of sentence became final on Monday, February 25, 2019, and Appellant had until February 25, 2020 to file a timely PCRA petition. ***See*** 42 Pa.C.S. § 9545. Accordingly, Appellant's April 29, 2020 PCRA petition was facially untimely. ***See id.***

However, the record reflects that Appellant initially sought reinstatement of his direct appeal rights on January 2, 2020. ***See*** *Pro Se* Motion for Reinstatement of Appeal Rights, 1/2/20 (reflecting Appellant's

claim that trial counsel failed to file a requested direct appeal). Rather than treat Appellant's filing as a timely first PCRA petition, ***see Commonwealth v. Taylor***, 65 A.3d 462, 466 (Pa. Super. 2013) (stating that "all motions filed after a judgment of sentence is final are to be construed as PCRA petitions"), and appointing PCRA counsel as required by Pa.R.Crim.P. 904(C), the trial court denied Appellant's motion without a hearing. ***See*** Trial Ct. Order, 3/24/20. Likewise, the trial court did not issue a Pa.R.Crim.P. 907 notice or give Appellant an opportunity to respond.

Moreover, although Appellant continued to seek relief from the trial court, ***see*** *Pro Se* Correspondence, 3/18/20; *Pro Se* Mot. for Extension of Time, 4/9/20, the trial court did not appoint PCRA counsel until May 5, 2020. Because Appellant was denied the right to counsel on his timely filed first PCRA petition, the trial court's March 24, 2020 order cannot stand. ***See Commonwealth v. Albrecht***, 720 A.2d 693, 699 (Pa. 1998) (stating that "[t]he denial of PCRA relief cannot stand unless the petitioner was afforded the assistance of counsel"); ***see also Commonwealth v. Stossel***, 17 A.3d 1286, 1290 (Pa. Super. 2011) (explaining that "where an indigent, first-time PCRA petitioner was denied his right to counsel – or failed to properly waive that right – this Court is required to raise this error *sua sponte* and remand for the PCRA court to correct that mistake").

Under these circumstances, we conclude that a breakdown in court operations prevented Appellant from exercising his rights pursuant to his timely filed first PCRA petition. ***See, e.g., Commonwealth v. Mojica***, 242

A.3d 949, 953 (Pa. Super. 2020) (addressing the merits of a *pro se* petition where the petitioner's missteps in amending his PCRA petition were directly attributable to the PCRA court's error, and noting that, under Pa.R.Crim.P. 905(a), amendments to PCRA petitions "shall be freely allowed to achieve substantial justice"), *appeal denied*, 252 A.3d 595 (Pa. 2021); ***Commonwealth v. Lopez***, 2019 WL 2406726 at *3-4 (Pa. Super. filed June 6, 2019) (unpublished mem.) (concluding that it was necessary to address the claims raised in a facially untimely PCRA petition because a breakdown occurred at the PCRA level); ***see also*** Pa.R.A.P. 126(b)(1)-(2) (stating that non-precedential decisions filed by this Court after May 1, 2019 may be cited for persuasive value).

In any event, because the trial court subsequently granted Appellant's requested *nunc pro tunc* relief, it is unnecessary for us to remand the matter for further proceedings. Therefore, we will proceed to address the merits of Appellant's claims.

Appellant argues that SORNA I's registration requirements violated *ex post facto* principles and ***Muniz*** when applied to his Florida conviction retroactively. Appellant's Brief at 6. In support, Appellant notes that when he committed the underlying offense in 1992, Florida did not have a law requiring him to register as a sex offender. ***Id.*** Although Appellant acknowledges that he became subject to Florida's lifetime registration requirement in 1997, he argues that an *ex post facto* analysis is based on the date "when the crime was committed." ***Id.*** at 10 n.7 (citing ***Muniz***, 164 A.3d

at 1195). Therefore, Appellant concludes that, because SORNA I's registration requirements imposed greater punishment on Appellant than the law in place at the time he committed the original offense in 1992, SORNA I violates *ex post facto* principles when applied to him retroactively. ***Id.*** at 11-13.

Appellant also asserts that because SORNA I's registration requirements were inapplicable to him, he could not be held criminally liable for failing to register under Section 4915.1(a)(1). ***Id.*** at 14-15 (citing ***Commonwealth v. Santana***, 241 A.3d 660, 670 (Pa. Super. 2020) (***Santana I***) (*en banc*) (concluding that because SORNA I violated *ex post facto* principles when applied to the defendant retroactively, he could not be convicted for failing to register), *aff'd*, 266 A.3d 528 (Pa. 2021) (***Santana II***)). Therefore, Appellant asks this Court to reverse his conviction and vacate the judgment of sentence. ***Id.*** at 15.

The Commonwealth concedes that Appellant's 1992 conviction predated the enactment of SORNA I and that Appellant's registration requirements were applied retroactively. Commonwealth's Brief at 6. However, the Commonwealth argues that neither SORNA I nor Appellant's conviction for failure to register violate *ex post facto* principles because Appellant was already subject to Florida's lifetime registration requirement when he relocated to Pennsylvania in 2015. ***Id.*** (citing ***Santana I***, 241 A.3d at 677 (Stabile, J., dissenting) (concluding that there was no *ex post facto* violation because the defendant was already subject to out-of-state registration requirements when he relocated to Pennsylvania)). Therefore, the

Commonwealth concludes that because Appellant was subject to registration under SORNA I, his conviction for failure to register must stand.

Appellant's claims raise a question of law. Therefore, "our standard of review is *de novo*, and our scope of review is plenary." ***Commonwealth v. Brensinger***, 218 A.3d 440, 456 (Pa. Super. 2019) (*en banc*) (citation omitted).

By way of background, we reiterate that the Pennsylvania legislature enacted SORNA I in 2012. In 2017, our Supreme Court held that SORNA I's registration requirements were "punitive in effect." ***Muniz***, 164 A.3d at 1218. As a result, the Court concluded that SORNA I violated *ex post facto* principles when applied to individuals who committed a sexual offense before December 20, 2012, the effective date of SORNA I.[5] ***See id.*** at 1223.

Pursuant to Section 4915.1 of the Crimes Code, "[a]n individual who is subject to registration under [SORNA] commits an offense if he knowingly fails to . . . register with the Pennsylvania State Police . . . ." 18 Pa. § 4915.1(a)(1).

In ***Santana I***, an *en banc* panel of this Court addressed whether an individual who committed a pre-SORNA sex offense in New York state could be held criminally liable for failing to register under 18 Pa.C.S. § 4915.1(a). ***Santana I***, 241 A.3d at 662. First, the Court clarified that, for purposes of

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[5] In response to ***Muniz***, the legislature enacted SORNA II, which divides sex offender registrants into two distinct subchapters — Subchapter H and Subchapter I — which classify offenders based on the date of the offense. ***See*** 42 Pa.C.S. §§ 9799.11(c), 9799.52.

an *ex post facto* analysis, the focus is on **when** the crimes occurred, rather than **where**. ***Id.*** at 669. Further, the Court relied on ***Muniz*** to conclude that, if SORNA I's registration requirements are inapplicable to an individual because of *ex post facto* concerns, then that person cannot be guilty of a crime proscribing a failure to comply with those registration requirements. ***Id.*** at 670.

On appeal, our Supreme Court affirmed. ***Santana II***, 266 A.3d at 539. The ***Santana II*** Court rejected the Commonwealth's argument that, because the defendant was subject to lifetime registration in New York at the time he relocated to Pennsylvania, the retroactive application of SORNA I was not an *ex post facto* violation. ***Id.*** at 535-36. Specifically, the Court explained that, for purposes of an *ex post facto* analysis, it does not matter whether Pennsylvania and New York "impose the same or different registration periods" or "whether a new resident's crossing of Pennsylvania's borders actually increased the length of [the defendant's] punishment. It does not even matter where [the defendant] committed the triggering offense. For present purposes, what matters most is **when** that crime occurred." ***Id.*** at 536.

The ***Santana II*** Court then explained that, because the defendant committed the triggering offense nearly thirty years before SORNA's enactment, the statute was clearly retroactive when applied to the defendant. ***Id.*** at 538. Further, because SORNA I imposed punitive registration requirements that did not exist at the time of the defendant's crime, the application of those requirements violated *ex post facto* principles. ***Id.*** at 538-

39. Finally, the Court concluded that, because Section 4915.1 criminalizes the failure to register under SORNA, "[i]t logically follows, . . . that, if [the defendant] did not have to register, *i.e.*, SORNA was unconstitutionally applied to him, then he could not have committed the crime." ***Id.*** at 539 n.49.

Here, in rejecting Appellant's challenge to his conviction for failure to register, the trial court emphasized that Appellant had visited the Wyoming County Adult Probation Department Office on numerous occasions. Trial Ct. Op. at 4. Therefore, the trial court concluded that "it [was] clear that [Appellant] knew that he was required to register under the law." ***Id.*** Further, the trial court explained:

> Contained within [Appellant's] Megan's Law packet was a document from Florida dated October 1, 1997 informing [Appellant] he had a lifetime registration requirement. Thereafter, in August of 2015, [Appellant] came to Pennsylvania to register. The Megan's Law Unit out of Harrisburg classified [Appellant] as a tier one with a fifteen (15) year registration from the date he registered in Pennsylvania.
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> [Appellant] failed to provide accurate registration information in January of 2017 and following atrial and after weighing all of the evidence, a competent jury found [Appellant] guilty of the same. Pursuant to the testimony of Corporal Fedor, [Appellant] was required to register in the Commonwealth of Pennsylvania during the time he failed to do the same.

Id. at 5.

Based on our review of the record, we are constrained to conclude that Appellant's conviction for failure to register is unconstitutional in light of our Supreme Court's decisions in ***Muniz*** and ***Santana II***. As noted previously, there is no dispute that SORNA I was applied to Appellant retroactively, given

that he committed the triggering offense in 1992, twenty years before the enactment of SORNA I.

At the time Appellant committed the underlying offense in 1992, neither Florida nor Pennsylvania had enacted any laws concerning sex offender registration requirements. Therefore, because SORNA I's registration requirements imposed greater punishment on Appellant than the law in effect in 1992, SORNA I violates *ex post facto* principles when applied to Appellant retroactively. ***See Santana II***, 266 A.3d at 539; ***Muniz***, 164 A.3d at 1223. Further, although Appellant became subject to Florida's lifetime registration requirement in 1997, that does not affect the *ex post facto* analysis in this case. ***See Santana II***, 266 A.3d at 536-38 (rejecting the Commonwealth's claim that SORNA I did not violate *ex post facto* principles when applied to the defendant retroactively because he had been previously subject to lifetime registration in New York).

Finally, because SORNA I violated *ex post facto* principles when applied to Appellant, his conviction for failure to register cannot stand. ***See Santana II***, 266 A.3d at 539 n.49; ***Santana I***, 241 A.3d at 670. Accordingly, we are constrained to reverse Appellant's conviction for failure to register and vacate his judgment of sentence.

Conviction reversed. Judgment of sentence vacated.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 04/19/2022