2014 PA Super 142

COMMONWEALTH OF PENNSYLVANIA Appellee v. MIGUEL ANGEL PEREZ, II Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1410 MDA 2013

Appeal from the Judgment of Sentence July 24, 2013
In the Court of Common Pleas of Cumberland County
Criminal Division at No(s): CP-21-CR-0002975-2012

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

OPINION BY MUNDY, J.: **FILED JULY 09, 2014**

Appellant, Miguel Angel Perez, II, appeals from the July 24, 2013 judgment of sentence of nine to 23 months' imprisonment plus two years' probation after he pled *nolo contendere* to one count of indecent assault.[1] Relevant to this appeal, the trial court also ordered Appellant to register as a sex offender for a period of 25 years pursuant to the newly enacted registration requirements under Pennsylvania's Sex Offender Registration and Notification Act (SORNA). ***See*** 42 Pa.C.S.A. §§ 9799.14, 9799.15. After careful review, we affirm.

We summarize the relevant facts and procedural history of this case as follows. On January 23, 2013, the Commonwealth filed an information

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[1] 18 Pa.C.S.A. § 3126(a)(4).

charging Appellant with one count each of rape and sexual assault, four counts of aggravated indecent assault, and four counts of indecent assault.[2] On March 15, 2013, pursuant to a plea agreement with the Commonwealth, Appellant pled *nolo contendere* to one count of indecent assault as a first-degree misdemeanor. On July 23, 2013, Appellant filed a "Motion to find 42 Pa.C.S. § 9799.14 Unconstitutional as Applied and Apply Law Existing at the Time of the Offense." The trial court denied the motion on the same day and imposed a sentence of nine to 23 months' imprisonment to be followed by two years' probation. The trial court also directed Appellant to register as a sex offender for the next 25 years, pursuant to the new registration requirements under SORNA. ***See*** 42 Pa.C.S.A. §§ 9799.14(c)(1.2), 9799.15(a)(2). On August 2, 2013, Appellant filed a timely notice of appeal.[3]

On appeal, Appellant presents one issue for our review.

> Did the [s]entencing [c]ourt err when it denied Appellant's [m]otion to find [] 42 Pa.C.S. § 9799.14 unconstitutional as retroactively applied in this case and ordered Appellant to comply with sexual offender registration for a period of twenty-five (25) years rather than ten (10) years?

Appellant's Brief at 4.

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[2] 18 Pa.C.S.A. §§ 3121(a)(3), 3124.1, 3125(a)(1), 3125(a)(4), 3126(a)(1), and 3126(a)(4), respectively.

[3] Appellant and the trial court have timely complied with Pa.R.A.P. 1925.

Essentially, Appellant argues that the *Ex Post Facto* Clauses of the federal and state constitutions prohibit the retroactive application of the 25-year registration requirement to him. Appellant's Brief at 8, 17. As this issue solely presents a question of law, our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Elia***, 83 A.3d 254, 266 (Pa. Super. 2013) (citation omitted). We elect to address Appellant's federal constitutional claim first.[4]

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[4] Although the Supreme Court has addressed the federal version of SORNA on prior occasions, it has never had the occasion to address its constitutionality vis-à-vis the *Ex Post Facto* Clause. ***See United States v. Kebodeaux***, 133 S. Ct. 2496, 2505 (2013) (concluding Congress had the power under Article I, Section 8 of the Federal Constitution pursuant to Military Regulation and Necessary and Proper Clauses to retroactively apply SORNA); ***Reynolds v. United States***, 132 S. Ct. 975, 984 (2012) (concluding that SORNA's requirements would not apply retroactively to offenders whose offenses occurred prior to enactment until so directed by the Attorney General pursuant to 42 U.S.C. § 16913); ***Carr v. United States***, 560 U.S. 438, 458 (2010) (concluding on a statutory basis that imposition of criminal liability under SORNA for not adhering to registration requirements would not apply to offenders whose interstate travel preceded SORNA's enactment).

However, we note that all of the Courts of Appeals have concluded that the federal version of SORNA does not violate the federal *Ex Post Facto* Clause, save the District of Columbia Circuit, which has not addressed the question, and the Federal Circuit. ***See United States v. Elkins***, 683 F.3d 1039, 1045 (9th Cir. 2012); ***United States v. Felts***, 674 F.3d 599, 606 (6th Cir. 2012); ***United States v. Leach***, 639 F.3d 769, 773 (7th Cir. 2011); ***United States DiTomasso***, 621 F.3d 17, 25 (1st Cir. 2010), *abrogated on other grounds*, ***Reynolds v. United States***, 132 S. Ct. 975 (2012); ***United States v. Guzman***, 591 F.3d 83, 94 (2d Cir. 2010), *cert. denied*, ***Guzman v. United States***, 130 S. Ct. 3487 (2010); ***United States v. Shenandoah***, 595 F.3d 151, 158-159 (3d Cir. 2010), *cert. denied*, ***Shenandoah v. United States***, 560 U.S. 974 (2010); ***United States v.***

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Article I, Section 10 of the Federal Constitution prohibits the several States from enacting any "*ex post facto* Law[.]"[5] U.S. Const. Art. I, § 10. As the Supreme Court recently pointed out, "[t]he phrase '*ex post facto* law' was a term of art with an established meaning at the time of the framing." ***Peugh v. United States***, 133 S. Ct. 2072, 2081 (2013). As identified by Justice Samuel Chase in ***Calder v. Bull***, 3 U.S. (Dall.) 386 (1798), the Supreme Court has historically analyzed challenges under the *Ex Post Facto* Clause pursuant to four distinct categories.

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater

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Gould, 568 F.3d 459, 466 (4th Cir. 2009), *cert. denied*, ***Gould v. United States***, 559 U.S. 974 (2010); ***United States v. Young***, 585 F.3d 199, 203-206 (5th Cir. 2009); ***United States v. Ambert***, 561 F.3d 1202, 1207 (11th Cir. 2009); ***United States v. May***, 535 F.3d 912, 919-920 (8th Cir. 2008); *cert. denied*, ***May v. United States***, 556 U.S. 1258 (2009), *abrogated on other grounds*, ***Reynolds v. United States***, 132 S. Ct. 975 (2012); ***United States v. Hinckley***, 550 F.3d 926, 938 (10th Cir. 2008), *cert. denied*, ***Hinckley v. United States***, 556 U.S. 1240 (2009), *abrogated on other grounds*, ***Reynolds v. United States***, 132 S. Ct. 975 (2012).

[5] Relative to his federal constitutional challenge, Appellant's Rule 1925(b) statement only states that the retroactive application violates "Article 1, Section 9 of the United States Constitution." Appellant's Rule 1925(b) Statement, 8/15/13, at 2. However, Article I, Section 9 of the Federal Constitution is not applicable to the instant constitutional challenge, as Article I, Section 9 is solely devoted to constraints on Congressional power, whereas Section 10 is solely devoted to constraints on state power. ***See generally*** U.S. Const. Art. I, §§ 9, 10. However, because we consider this to be merely a typographical error, we decline to find waiver on this basis.

> punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390. The instant case deals with the third category in ***Calder***, a law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[.]" ***Id.*** "The touchstone of this Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" ***Peugh***, ***supra*** at 2082, *quoting* ***Garner v. Jones***, 529 U.S. 244, 250 (2000). We conduct our analysis in two steps. First, we must look to the legislature's subjective purpose. ***Smith v. Doe***, 538 U.S. 84, 92 (2003) (internal quotations marks and citations omitted). "If the intention of the legislature was to impose punishment, that ends the inquiry." ***Id.*** However, if the legislature prefers to refer to the statute as imposing a civil regulatory scheme, a more searching inquiry in the second step is required. ***Id.*** In conducting this second step inquiry, "we must [] examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." ***Id.*** The Supreme Court has held that only the "clearest proof" will suffice to override the legislature's preferred classification of the statute. ***Id.***

As noted by the trial court, the General Assembly stated in its policy declarations that the provisions of SORNA were not criminal.

> **§ 9799.11. Legislative findings and declaration of policy**
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> …
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> **(b) Declaration of policy.--**The General Assembly declares as follows:
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> …
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> (2) It is the policy of the Commonwealth to require the exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection and **shall not be construed as punitive**.

42 Pa.C.S.A. § 9799.11(b)(2) (emphasis added).

Appellant concedes that this statement from the General Assembly satisfies the first prong of the ***Smith*** framework as to the legislature's subjective intent, and Appellant does not argue to the contrary. ***See*** Appellant's Brief at 9 n.3. We will therefore proceed to the second prong and more searching inquiry required by ***Smith***.[6]

In analyzing the second prong of ***Smith***, the Supreme Court in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144 (1963), mandated a seven-

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[6] The trial court did not engage in the second part of the ***Smith*** test and instead rested on the General Assembly's statement quoted above as well as the cases of ***Commonwealth v. Lee***, 935 A.2d 865 (Pa. 2007), and ***Commonwealth v. Fleming***, 801 A.2d 1234 (Pa. Super. 2002), which discussed the civil nature of predecessor statutes, and not the current statute at issue in this case. ***See*** Trial Court Opinion, 9/5/13, at 3-4.

factor test to determine whether the effects of a statute are sufficiently punitive to override the legislature's preferred categorization.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-169. Having concluded above that the General Assembly intended this statute to be considered non-punitive, in analyzing the ***Kennedy*** factors "we look behind the legislature's **preferred** classification to the law's substance, focusing on its purpose and effects." ***Smith***, ***supra*** at 107 (Souter, J., concurring in the judgment) (emphasis added). This analysis is not one of mathematics, as the Supreme Court has since clarified that "[t]his list of considerations is, however, 'neither exhaustive nor dispositive.'" ***United States v. One Assortment of 89 Firearms***, 465 U.S. 354, 365 n.7 (1984). Accordingly, no one factor controls the analysis in either direction. ***Id.***

Turning to the first factor, Appellant argues that the new registration requirements impose an affirmative restraint by the very language of the statute. Specifically, Appellant notes that "[t]he statute at issue requires periodic, in-person verification of a registrant's personal information in

addition to *ad hoc* appearances to update information as changes occur and appearances to disclose intended international travel at least twenty-one (21) days prior." Appellant's Brief at 18. The relevant sections of the Act described above by Appellant, provide in part, as follows.

> **§ 9799.15. Period of registration**
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> …
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> **(e) Periodic in-person appearance required.--** Except as provided in subsection (f) and subject to subsections (g) and (h), an individual specified in section 9799.13 **shall appear in person** at an approved registration site to provide or verify the information set forth in section 9799.16(b) (relating to registry) and to be photographed as follows:
>
> (1) An individual convicted of a Tier I sexual offense shall appear annually.
>
> (2) An individual convicted of a Tier II sexual offense shall appear semiannually.
>
> (3) An individual convicted of a Tier III sexual offense shall appear quarterly.
>
> (4) An individual required to register pursuant to section 9799.13(7.1) shall appear annually.
>
> …
>
> **(g) In-person appearance to update information.--**In addition to the periodic in-person appearance required in subsections (e), (f) and (h), an individual specified in section 9799.13 **shall appear in person** at an approved registration site within three business days to provide current information relating to:
>
> (1) A change in name, including an alias.

(2) A commencement of residence, change in residence, termination of residence or failure to maintain a residence, thus making the individual a transient.

(3) Commencement of employment, a change in the location or entity in which the individual is employed or a termination of employment.

(4) Initial enrollment as a student, a change in enrollment as a student or termination as a student.

(5) An addition and a change in telephone number, including a cell phone number, or a termination of telephone number, including a cell phone number.

(6) An addition, a change in and termination of a motor vehicle owned or operated, including watercraft or aircraft. In order to fulfill the requirements of this paragraph, the individual must provide any license plate numbers and registration numbers and other identifiers and an addition to or change in the address of the place the vehicle is stored.

(7) A commencement of temporary lodging, a change in temporary lodging or a termination of temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.

(8) An addition, change in or termination of e-mail address, instant message address or any other designations used in Internet communications or postings.

(9) An addition, change in or termination of information related to occupational and professional licensing, including type of license held and license number.

…

> **(i) International travel.--**In addition to the periodic in-person appearance required in subsection (e), an individual specified in section 9799.13 **shall appear in person** at an approved registration site no less than 21 days in advance of traveling outside of the United States. The individual shall provide the following information:
>
> (1) Dates of travel, including date of return to the United States.
>
> (2) Destinations.
>
> (3) Temporary lodging.
>
> …

42 Pa.C.S.A. §§ 9799.15(e), 9799.15(g), 9799.15(i) (emphases added).

We begin by noting that with regard to the Federal *Ex Post Facto* Clause and sex offender registration schemes, we do not write on a blank slate. Rather, we must take into account the prior precedential decisions of the United States Supreme Court. In ***Smith***, the Supreme Court rejected the argument that the Alaska registration requirements involved an affirmative disability or restraint, in part because the Alaska statute "does not require these updates to be made in person." ***Smith***, ***supra*** at 100-101. In addition, our Supreme Court suggested that this factor could weigh in favor of a defendant if the statute imposed a restraint directly, rather than through a secondary effect. ***See Commonwealth v. Williams***, 832 A.2d 962, 974 (Pa. 2003) (stating, "[t]he conclusion that the provisions here at

issue do not work an affirmative disability is buttressed by the fact that the source cases cited by [***Kennedy***] in support of this factor each involved a statute imposing a deprivation or restraint upon the individual directly, rather than through a secondary effect[]").[7]

With this statute, we conclude that Appellant's distinction is persuasive. Applied to Appellant, who was convicted of a Tier II offense, he is affirmatively required by the language of the statute to appear in-person at a facility a minimum of 50 times over the next 25 years. Although some in-person visits for updates may be required based on Appellant's free choices in life, such as moving to a new address or changing his appearance, the Act requires these 50 in-person visits even if there is no change to his information whatsoever. This is not a "secondary effect" of SORNA, but rather this is an affirmative constraint on Appellant's conduct imposed directly by SORNA itself. Based on these considerations, we conclude that the first ***Kennedy*** factor weighs in favor of finding SORNA punitive.

The second ***Kennedy*** factor is whether the registration requirement has been historically regarded as punishment. For this factor, Appellant argues that the Act's registration requirements are tantamount to probation and parole supervision, which Appellant views as "a historic [form of]

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[7] In ***Williams***, our Supreme Court was considering a claim under the Due Process Clause, not the *Ex Post Facto* Clause. However, we find ***Williams*** helpful to our analysis, as our Supreme Court utilized the same seven ***Kennedy*** factors in its discussion.

punishment." Appellant's Brief at 19. Appellant also highlights that "[f]ailure to appear and provide accurate information results in mandatory minimum incarceration of two (2), three (3), five (5) or seven (7) years." ***Id.***, *citing* 42 Pa.C.S.A. § 9718.4.

The position Appellant takes is one previously held by the United States Court of Appeals for the Ninth Circuit in ***Smith***. ***Doe I v. Otte***, 259 F.3d 979, 987 (9th Cir. 2001), *reversed*, ***Smith v. Doe***, 538 U.S. 84 (2003). However the Supreme Court rejected the analogy, concluding as follows.

> The Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint imposed. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.

Smith, ***supra*** at 101-102 (internal citations omitted). Although Appellant is correct that the "in-person" registration requirement renders the statute meaningfully different from that in ***Smith*** for the purposes of the first ***Kennedy*** factor, Appellant does not argue how that difference renders it

constitutionally different for this second factor. As a result, we conclude the second ***Kennedy*** factor weighs against finding SORNA punitive.

The third factor involves the requirement of scienter.[8] "The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." ***Kansas v. Hendricks***, 521 U.S. 346, 362 (1997) (citation omitted). Here, Appellant argues that this factor weighs in favor of concluding the Act is punitive because "nearly all of the offenses which incur registration upon conviction … require a showing on intentional or knowing mental status." Appellant's Brief at 19.

In ***Smith***, the Alaska statute at issue had similar registration requirements as the statute in the instant appeal. Specifically, the Alaska statute's requirement to register, and the duration of the registration requirement, was triggered based on the underlying offense the defendant was found guilty of.

> If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender must notify his local police department if he moves. A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution.

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[8] Scienter is defined as "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission." Black's Law Dictionary 1373 (8th ed. 2004).

Smith, ***supra*** at 90.

As noted above, Appellant is required to register for 25 years because he was convicted of a Tier II sexual offense. ***See*** 42 Pa.C.S.A. §§ 9799.14(c)(1.2); 9799.15(a)(2). However, in ***Smith***, the Supreme Court concluded that the scienter factor vis-à-vis the Alaska statute was entitled to "little weight" in its analysis because "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime." ***Smith***, ***supra*** at 105. Appellant has not argued any meaningful distinction between the two statutes vis-à-vis this factor to permit us to depart from the Supreme Court's instruction. Therefore, we follow the Supreme Court's direction in determining that this factor does not weigh in favor of concluding that SORNA is punitive in nature.

The fourth ***Kennedy*** factor is whether SORNA has the effect of promoting deterrence and retribution. Appellant argues that some of the legislative findings suggest a deterrent purpose behind the statute.

> **§ 9799.11. Legislative findings and declaration of policy**
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> **(a) Legislative findings.--**The General Assembly finds as follows:
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> …
>
> (2) This Commonwealth's laws regarding registration of sexual offenders need to be strengthened. The Adam Walsh Child Protection and Safety Act of 2006 provides a mechanism for the Commonwealth to increase

> its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of this Commonwealth.
>
> …
>
> (4) Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest.
>
> (5) Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.
>
> (6) Release of information about sexual offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.
>
> (7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.
>
> …

42 Pa.C.S.A. § 9799.11(a).

There can be no doubt, and we believe the Commonwealth acknowledges such, that the statute has a deterrent purpose and effect. The above-quoted findings significantly promote deterrence insofar as the dissemination of the required information allows law enforcement and

communities at large to engage in pre-emptive self-protection. However, the Supreme Court has instructed that this observation is not the end of the inquiry on this factor.

> The State concedes that the statute might deter future crimes. Respondents seize on this proposition to argue that the law is punitive, because deterrence is one purpose of punishment. This proves too much. Any number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal … would severely undermine the Government's ability to engage in effective regulation.

Smith, ***supra*** at 102. Additionally, "[c]ourts have found that some deterrent effect does not negate the overall remedial and regulatory nature of an act and deterrence can serve both criminal and civil goals." ***State v. Trosclair***, 89 So. 3d 340, 353 (La. 2012) (citations omitted). We also note the Supreme Court of Louisiana's suggestion that a legislature can create a statute of deterrence without crossing the line as to make it punitive, by considering the nature of the offenders who will be subject to its parameters.

> [A]rguably retributive aspects, such as the length of supervision, though directly related to the degree and nature of the offense, have nevertheless been found to be consistent with the regulatory objectives if reasonably related to the danger of recidivism. By imposing conditions of supervision on sex offenders with child victims, the provision herein is specifically designed to reduce the likelihood of future crimes and is, therefore, reasonably related to the danger of recidivism.

Id.

As noted above, there is much in this statute designed for deterrence, as well as some aspects of retribution given the new length of registration. However, taking into account the high risk of recidivism, the General Assembly is permitted to have some deterrent and retributive effects in its legislation as long as they are "consistent with … regulatory objectives [and are] reasonably related to the danger of recidivism." ***Id.*** We conclude that the effects of this statute are so reasonably related. As a result, we conclude this factor weighs against finding SORNA to be punitive.

The fifth ***Kennedy*** factor is "whether the behavior to which it applies is already a crime[.]" ***Kennedy***, ***supra***. Appellant ties his argument on this factor to that of his argument on the factor of scienter. Appellant's Brief at 21. Like the third factor, we follow the Supreme Court's lead in concluding this factor is of "little weight."

> The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

Smith, ***supra*** at 105. We follow the Supreme Court's rationale in concluding that while past conduct is the beginning point of the statute, this consideration is proper, because the General Assembly's concern is the high rate of recidivism. Therefore, this factor is of little weight in our analysis.

The sixth factor is the statute's rational connection to an alternative purpose. Appellant concedes in his brief that the statute "is rationally connected to the Commonwealth's compelling interest in seeking to prevent crimes of a sexual nature, particularly those committed against children." Appellant's Brief at 21. We agree and conclude that this factor weighs against finding the statute punitive.

The final ***Kennedy*** factor is the statute's excessiveness in relation to its regulatory purpose. In support of this factor, Appellant points out that "[n]o court or other agency is empowered to terminate an adult registrant's duties even upon offering the clearest proof of rehabilitation and lack of future dangerousness." ***Id.*** at 22. To the extent Appellant argues that the statute is excessive because it paints all sex offenders within its tiers with a broad brush without individualized evaluation of the danger each poses, the Supreme Court rejected such an argument in ***Smith***.

> In concluding the Act was excessive in relation to its regulatory purpose, the Court of Appeals relied in [] part on [the] proposition[] … that the statute applies to all convicted sex offenders without regard to their future dangerousness ….
>
> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." ***McKune v. Lile***, 536 U.S. 24, 34, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002); ***see also id.***[] at 33, 122 S.Ct. 2017 ("When convicted sex offenders reenter

society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against *ex post facto* challenges[,] laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. As stated in ***Hawker***[***v. New York***, 170 U.S. 189, 191 (1898)]: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application …." ***Ibid.*** The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.

… The Act, by contrast, imposes the more minor condition of registration. In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause.

The duration of the reporting requirements is not excessive. Empirical research on child molesters, for instance, has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." National Institute of Justice, R. Prentky, R. Knight, &

> A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues 14 (1997).

Smith, ***supra*** at 103-104.

With regard to the statute in the instant case, the General Assembly made similar findings. ***See*** 42 Pa.C.S.A. § 9799.11(a)(4) (stating, "[s]exual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest[]"). As a result, we conclude that the statute is not excessive towards its non-punitive objective, which weighs against finding SORNA punitive.

Having considered each of the seven factors, we now turn to the important task of balancing the factors.[9] As noted above, the only factor that weighs in favor of finding the statute punitive is the mandatory in-person appearances to update information even if there is no information to update. As a result, the question becomes whether this restraint is sufficient to overcome the high threshold set by the Supreme Court requiring the "clearest proof" to surmount the legislature's preferred classification of the statute as non-punitive.[10] ***Smith***, ***supra*** at 92.

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[9] Although the seven factors are certainly not exhaustive, we have confined our discussion to them as neither the Commonwealth nor Appellant suggest that any other factors exist for the purposes of this statute.

[10] Appellant cites to some of our sister states that have concluded that the ***Kennedy*** factors weigh in favor of finding their statutes punitive and hence
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After considering all seven factors, as analyzed above, we conclude that the one factor weighing in favor of finding SORNA punitive does not ultimately make the statute's retroactive application unconstitutional. Although, we conclude the mandatory in-person appearance requirement imposes an affirmative constraint on Appellant, we nevertheless conclude that the restraint is relatively minor when balanced against the remaining factors. As our Supreme Court has noted in past cases, the greater restraints imposed by sex offender registration stem from the public's benefit of said registration and the consequences that flow therefrom. However, our Supreme Court has also instructed that those effects, while not insignificant, are merely secondary and collateral to the requirements themselves.

(Footnote Continued) ———————————

their retroactivity is a violation of either the federal or state *ex post facto* clauses. ***See*** Appellant's Brief at 22-26. However, those states have found more factors weighing in favor of finding their respective statute punitive than we have in this case pursuant to the analysis above. ***See Doe v. State***, 189 P.3d 999, 1018 (Alaska 2008) (concluding that six of the ***Kennedy*** factors weighed in favor of finding the statute punitive); ***Wallace v. State***, 905 N.E.2d 371, 384 (Ind. 2009) (concluding that six of the seven factors weighed in favor of finding the statute punitive); ***State v. Letalien***, 985 A.2d 4, 24 (Me. 2009) (concluding the first and second factors weighed in favor of finding the statute punitive); ***Doe v. Dep't of Pub. Safety and Corr. Servs.***, 62 A.3d 123, 139 (Md. 2013) (concluding that registration was similar to probation and dissemination of his information was the equivalent of shaming); ***State v. Williams***, 952 N.E.2d 1108, 1113 (Ohio 2011) (concluding that the Ohio Constitution's *Ex Post Facto* Clause was violated because the statute required registration and updates in person and the statute precluded judicial review of sex offender classification); ***Starkey v. Dep't of Corr.***, 305 P.3d 1004, 1030 (Okla. 2013) (concluding five factors favored finding the statute punitive).

> Such liberty is, of course, tempered by the reality that registrants deemed sexually violent predators may, as a consequence of public notification, be foreclosed from certain employment positions, particularly those working with children. But any such restriction is in direct furtherance of the government's compelling interest in keeping sexually violent predators away from children to the extent possible.
>
> The conclusion that the provisions here at issue do not work an affirmative disability is buttressed by the fact that the source cases cited by [***Kennedy***] in support of this factor each involved a statute imposing a deprivation or restraint upon the individual directly, rather than through a secondary effect. Here, by contrast, any disabilities imposed upon sexually violent predators flow solely from the secondary effects of registration and notification, and thus, constitute a potential collateral restraint. Such secondary effects, therefore, do not fall within the same category as incarceration or deprivation of citizenship as they are not imposed directly by the state.

Williams, ***supra*** (internal citations omitted).[11]

Based on all of these considerations, we ultimately conclude that Appellant has not shown by the "clearest proof" that the effects of SORNA are sufficiently punitive to overcome the General Assembly's preferred categorization. ***See Smith***, ***supra*** at 92. Therefore, we further conclude that the retroactive application of SORNA to Appellant does not violate the

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[11] We recognize that ***Williams*** dealt with a predecessor statute, but we note that the secondary effects described above by our Supreme Court flow from registration under any statutory scheme.

Ex Post Facto Clause of the Federal Constitution. ***See Peugh***, ***supra***; ***Calder***, ***supra***.

We next address Appellant's argument with regard to the Pennsylvania Constitution. Article I, Section 17 of the Pennsylvania Constitution states that "[n]o *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa. Const. Art. I, § 17. This Court has recently held that "the standards applied to determine an *ex post facto* violation under the Pennsylvania Constitution and the United States Constitution are comparable." ***Commonwealth v. Rose***, 81 A.3d 123, 127 (Pa. Super. 2013) (*en banc*). Our Supreme Court has previously declined to hold that the *Ex Post Facto* Clause of the Pennsylvania Constitution imposes greater protections than Article I, Section 10 of the Federal Constitution. ***See Commonwealth v. Gaffney***, 733 A.2d 616, 622 (Pa. 1999) (stating that Gaffney "failed to present any compelling reason for our departure from the standards appropriate for determining whether an *ex post facto* violation pursuant to the federal constitution has occurred and we find no independent reasons for doing so[]").

It is axiomatic that when presenting a claim for higher protections under the Pennsylvania Constitution, the Appellant must discuss the following four factors:

1) text of the Pennsylvania constitutional provision;

> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991). The ***Edmunds*** analysis is mandatory and a failure to provide it precludes the consideration of a state constitutional claim independent of its federal counterpart. ***See, e.g.***, ***Commonwealth v. Baker***, 78 A.3d 1044, 1048 (Pa. 2013) (concluding that Baker's failure to provide an ***Edmunds*** analysis precluded considering whether Article I, Section 13 of the Pennsylvania Constitution provided higher protections that the Eighth Amendment of the Federal Constitution on cruel and unusual punishments).

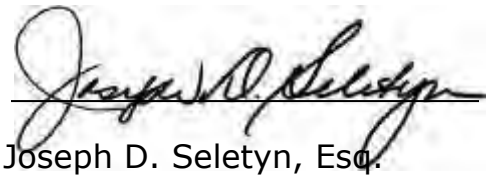
Here, Appellant's brief does not include the required ***Edmunds*** analysis to consider whether under this specific statute, the Pennsylvania Constitution would provide higher *ex post facto* protections than Article I, Section 10 of the Federal Constitution. Instead, Appellant cites older tests that predate ***Smith*** for this issue. Because we have already resolved his federal *ex post facto* claim using framework promulgated by the United States Supreme Court, and Appellant does not argue that the Pennsylvania Constitution provides higher protection, his claim under the Pennsylvania Constitution likewise fails. ***See Baker***, ***supra***; ***Edmunds***, ***supra***.

Based on the foregoing, we conclude that the new registration regime pursuant to SORNA is constitutional under the Federal and State *Ex Post Facto* Clauses. As a result, the trial court did not err when it retroactively applied the new requirements and classification to Appellant. ***See Elia***, ***supra***. Accordingly, the trial court's July 24, 2013 judgment of sentence is affirmed.

Judgment of sentence affirmed.

Judge Donohue files a Concurring Opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014