

**[J-12-2022] [MO: Brobson, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 20 WAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered December
	:	24, 2020 at No. 774 WDA 2019,
v.	:	affirming the Judgment of Sentence
	:	of the Court of Common Pleas of
	:	Erie County entered April 9, 2019 at
SHAUNE JAREL THORNE, SR.,	:	No. CP-25-CR-0002013-2018.
	:	
Appellant	:	SUBMITTED: January 24, 2022

DISSENTING OPINION

CHIEF JUSTICE BAER

DECIDED: JUNE 22, 2022

The majority holds that this Court’s legality-of-sentence jurisprudence (*i.e.*, that claims implicating the legality of sentences cannot be waived) applies to constitutional challenges to Revised Subchapter H of Pennsylvania’s Sex Offender Registration and Notification Act (“SORNA”) 42 Pa.C.S. §§ 9799.10-.42; thus, these claims are not subject to general issue preservation requirements. The majority, however, simultaneously declares, “The question of whether the lifetime registration requirement of Revised Subchapter H is punitive in nature and, therefore, part of Appellant’s criminal sentence subject to various constitutional protections applicable to criminal sentences currently remains open.” Majority Opinion at 9. I respectfully dissent because, in my view, these conclusions simply are irreconcilable and place the jurisprudential cart before the horse.

For a claim to implicate the legality of a sentence, there must be a “sentence” that is challenged. Here, Appellant does not challenge his criminal sentence of incarceration; rather, he attacks the lifetime registration requirements of Revised Subchapter H. While

Appellant has alleged that the challenged registration provisions are punitive, neither the Superior Court below nor the majority have entertained that claim. Further, to date, this Court has not held that Revised Subchapter H is punitive in nature or otherwise impacts one's criminal sentence. In my view, unless and until there is a determination that the challenged registration provisions are punitive and, therefore, a part of Appellant's criminal sentence, the registration provisions remain a civil collateral consequence of Appellant's criminal conviction, and cannot form the basis of a legality-of-sentence challenge.

As the majority observes, generally speaking, "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). An exception to this general rule of issue preservation exists, however, where a claim challenges the legality of a sentence. *Commonwealth v. Hill*, 238 A.3d 399, 407 (Pa. 2020). An appellate court may address an appellant's challenge to the legality of his sentence even if that claim was not preserved in the trial court; in fact, an appellate court may raise and address a challenge to the legality of sentence *sua sponte*. *Hill*, 238 A.3d at 407-08.

The legality-of-sentence doctrine is relevant here because Appellant presented the following claims for the first time in his Superior Court brief, without having presented them in the trial court: (1) whether the lifetime registration requirement set forth in Revised Subchapter H of SORNA constitutes an illegal sentence because it is punitive in nature and effectively extends Appellant's maximum sentence without a jury's finding of future dangerousness in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and (2) whether Revised Subchapter H's lifetime registration requirement constitutes an illegal sentence because it violates the constitutional prohibition against cruel and unusual punishment.

As the majority observes, this is not the first time that this Court has examined whether Revised Subchapter H is punitive in nature and, therefore, constitutes an illegal sentence. In *Commonwealth v. Torsilieri*, 232 A.3d 567 (Pa. 2020), a sexual offender challenged Revised Subchapter H based on expert affidavits disputing the legislative presumption in SORNA that all sexual offenders are dangerous and pose a high risk of recidivism, and that registration and notification procedures are required to protect the public from recidivist offenders.¹ *Id.* at 573. The sexual offender further contended that Revised Subchapter H was punitive in nature and violated various statutory and constitutional protections relating to criminal sentences.

Crediting the sexual offender's expert evidence, the trial court in *Torsilieri* held that the registration provisions at issue violated due process by impairing the sexual offender's right to reputation, as protected by the Pennsylvania Constitution, through the use of an irrebuttable presumption. *Id.* at 574. Germane to the instant appeal, the trial court further held that Revised Subchapter H was punitive and, therefore, constituted a part of the sexual offender's criminal sentence, which rendered the registration provisions subject to all the constitutional and statutory protections applicable to sentences as alleged by the sexual offender. *Id.* at 588. The trial court also concluded that Revised Subchapter H violated the separation-of-powers doctrine by preventing trial courts from imposing individualized sentences, and violated *Commonwealth v. Alleyne*, 570 U.S. 99 (2013), and *Apprendi*, *supra*, by allowing "the imposition of enhanced punishment based on an irrebuttable presumption of future dangerousness that is neither determined by the finder

¹ In *Torsilieri*, the sexual offender presented his constitutional challenges to newly-enacted Revised Subchapter H by filing *nunc pro tunc* post-sentence motions in the trial court. *Torsilieri*, 232 A.3d at 573. The Commonwealth did not contend that the claims were waived.

of fact nor premised upon proof beyond a reasonable doubt.” *Torsilieri*, 232 A.3d at 575 (citing Tr. Ct. Order, July 10, 2018, at 3).

On direct appeal from the trial court’s declaration of the statute’s unconstitutionality, this Court declined to resolve on the record before us whether the challenged registration provisions violate due process by impairing the sexual offender’s right to reputation. Instead, we found that a remand was “necessary to allow the parties to present additional argument and evidence to address whether a scientific consensus has developed to overturn the legislative determinations in regard to adult sexual offenders’ recidivation rates and the effectiveness of a tier-based registration and notification system as they relate to the prongs of the irrebuttable presumption doctrine.” *Id.* at 587-88.

We next addressed in *Torsilieri* the Commonwealth’s challenge to the trial court’s finding that Revised Subchapter H was punitive and constituted a part of the sexual offender’s criminal sentence, which rendered the registration requirements subject to the various constitutional and statutory protections as alleged by the sexual offender. Acknowledging that the trial court’s analysis of this issue did not rely overtly on the sexual offender’s scientific evidence, this Court concluded that the trial court may have weighed the factors relevant to a determination of whether the statute was punitive based upon that court’s acceptance of the expert evidence. *Id.* at 590. Thus, we held that, following presentation of additional scientific evidence on remand, the trial court must reevaluate the factors relevant to a determination of whether the statutory provisions are punitive. *Id.* at 594. Accordingly, we vacated that portion of the trial court’s order declaring the registration requirements of Revised Subchapter H of SORNA punitive and unconstitutional and remanded for further proceedings. *Id.* at 596.

As of today, this Court has not yet rendered any rulings on whether Revised Subchapter H is punitive. Indeed, the majority in the case at bar accurately finds that this issue “currently remains open.” Majority Opinion, at 9. Absent a prior ruling that Revised Subchapter H is punitive or a determination that Appellant has established the punitive nature of the registration requirements in this appeal, I fail to comprehend how the registration requirements constitute a part of the criminal sentence that may be used to implicate the legality-of-sentence doctrine.

The majority appears to assume, without deciding, that Appellant’s registration requirements constitute a part of his criminal sentence for purposes of applying the legality-of-sentence doctrine. Instead of delving into Appellant’s contentions that his registration requirements under Revised Subchapter H are punitive, the majority’s analysis focuses exclusively on the propriety of the Superior Court’s decision in *Commonwealth v. Reslink*, 257 A.3d 21 (Pa. Super. 2020). While I find that *Reslink* adds little to my analysis, I discuss the Superior Court’s decision therein, as it serves as the basis of the majority’s holding.

Reslink is the lead intermediate appellate case to hold that challenges to sexual offender registration requirements do not implicate the legality of sentence and, thus, are governed by issue preservation principles. In rejecting *Reslink*’s holding, the majority first correctly concludes that the cases relied upon in *Reslink* to support the conclusion that a sexual offender waives his constitutional challenges to Revised Subchapter H by failing to preserve them in the trial court are inapposite, as those cases did not involve challenges to the legality of a sentence. Majority Opinion, at 7-8. Second, the majority accurately observes that the Superior Court in *Reslink* neither discussed authority establishing that constitutional challenges implicating the legality of a sentence cannot be

waived, nor provided persuasive reasoning why the legality-of-sentence doctrine was inapplicable to constitutional challenges to Revised Subchapter H. *Id.* at 8.

Lastly, the majority concludes that *Reslink*'s holding, that constitutional challenges to Revised Subchapter H do not implicate the legality of sentence, is inconsistent with decisions of both this Court and the Superior Court, which hold "that *Apprendi*-based claims and claims invoking the constitutional prohibition against cruel and unusual punishment implicate the legality of a sentence." Majority Opinion at 6 (citing *Commonwealth v. Wolfe*, 140 A.3d 651, 660 (Pa. 2016); *Commonwealth v. Gordon*, 942 A.2d 174 (Pa. 2007); *Commonwealth v. Lawrence*, 99 A.3d 116 (Pa. Super. 2014); and *Commonwealth v. Brown*, 71 A.3d 1009 (Pa. Super. 2013), *appeal denied*, 77 A.3d 635 (Pa. 2013)).

I respectfully disagree because the aforementioned cases relied upon by the majority do not involve challenges to sexual offender registration provisions. Instead, the cases merely hold that challenges to sentences of imprisonment based upon *Apprendi* or the cruel and unusual punishment clauses of the state and federal charters constitute questions implicating the legality of sentence, as opposed to claims challenging the discretionary aspects of the sentence. Stated differently, the cases relied upon by the majority for the proposition that constitutional challenges to Subchapter H implicate legality of sentence are wholly distinguishable because they involve a challenge to what is indisputably a sentence, namely, a term of imprisonment.

In my view, the majority, like the Superior Court in *Reslink*, fails to appreciate that the threshold question in determining whether the legality-of-sentence doctrine applies to constitutional challenges to Revised Subchapter H is whether the claim asserted is actually a sentencing issue. In *Commonwealth v. Spruill*, 80 A.3d 453 (Pa. 2013), this Court examined "the proper scope of the 'illegal sentence' doctrine, which allows for

review of otherwise defaulted claims.” *Id.* at 454. Similar to my view of the instant case, the Court in *Spruill* found that under the unique circumstances presented, “the question is not whether a sentencing claim implicates the ‘legality’ of the sentence, so as to negate issue preservation principles; rather, we have the more elemental question of whether the claim posed is a sentencing claim at all.” *Id.* at 461.

Because the claim advanced in *Spruill* involved the defendant’s underlying conviction at trial and not his sentence, the Court found that “the failure to forward a contemporaneous objection to the court’s verdict cannot be excused by resort to an ‘illegal sentence’ doctrine.” *Id.* See also *Commonwealth v. Hill*, 238 A.3d at 408 (holding that the appellant waived the issue challenging his second conviction of driving under the influence by failing to preserve the claim in the trial court, as the asserted challenge to his conviction did not impact the legality of his actual criminal sentence).

The logic of those cases apply here where Appellant is challenging sexual offender registration requirements that have not been deemed punitive and have not been determined to be a part of his criminal sentence. The fact that Revised Subchapter H’s registration requirements may be held to be punitive in the future does not render them a part of Appellant’s criminal sentence today for purposes of invoking the exception to issue preservation principles set forth in the legality-of-sentence doctrine.

Absent a preliminary determination that Revised Subchapter H is punitive, it is inappropriate for this Court to deem Appellant’s claims as challenges to the legality of sentence. This is particularly true considering that no court has entertained or resolved Appellant’s contentions in this case that the registration provisions of Revised Subchapter H are punitive in nature.²

² I note that the Superior Court below summarily rejected Appellant’s constitutional challenges to his registration requirements with only a citation to Pa.R.A.P. 302(a) and that court’s previous decision in *Reslink*, *supra*, which we now disavow.

Accordingly, I would vacate the Superior Court's affirmance of Appellant's judgment of sentence, and remand to that court for it to determine first whether Appellant, on the record before that court, established that Revised Subchapter H is punitive in nature so as to constitute a part of his criminal sentence.³ If the Superior Court answers this inquiry in the affirmative, it should proceed to examine Appellant's substantive constitutional claims that the registration provisions violate *Apprendi*, *supra*, and the constitutional prohibition against cruel and unusual punishment.

Justices Donohue and Mundy join this dissenting opinion.

³ I observe that if Appellant has failed to demonstrate that the registration provisions of Revised Subchapter H are punitive in the case at bar, he would presumably have an avenue to seek collateral relief pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546, should this Court subsequently deem the registration requirements punitive in another case.