

[J-12-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

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

OPINION

JUSTICE BROBSON

DECIDED: JUNE 22, 2022

In this discretionary appeal, we consider whether the Superior Court erred by concluding that Shaune Jarel Thorne, Sr.’s (Appellant) constitutional challenges to the lifetime registration requirements of Revised Subchapter H of Pennsylvania’s Sex Offender Registration and Notification Act (“SORNA”)¹ were waived because Appellant

¹ 42 Pa. C.S. §§ 9799.10-.42. In *Commonwealth v. Torsilieri*, 232 A.3d 567 (Pa. 2020), this Court provided a detailed history of Pennsylvania’s sexual offender registration law, beginning with Megan’s Law I, the Act of October 24, 1995, P.L. 1079 (Spec. Sess. No. 1), and continuing through the most recent iteration of SORNA, the Act of February 21, 2018, P.L. 27 (Act 10) and the Act of June 12, 2018, P.L. 140 (Act 29). See *Torsilieri*, 232 A.3d at 572-81. Act 10, as amended and reenacted by Act 29, which the General Assembly enacted to address this Court’s decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017) (holding that registration and notification provisions of SORNA were punitive), and the Superior Court’s decision in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017) (holding that designation of offender as sexually violent predator required proof beyond reasonable doubt), split SORNA into two subchapters: Revised Subchapter H, which applies to individuals who committed their sexual offenses on or after December 20, 2012, and Subchapter I, which applies to individuals who committed their sexual offenses after April 22, 1996, but before December 20, 2012, and whose

did not raise such challenges at the time of his sentencing or in a post-sentence motion but, instead, raised them for the first time in his brief to the Superior Court. After careful review, we conclude that this Court's legality of sentencing jurisprudence—*i.e.*, that challenges implicating the legality of a sentence cannot be waived—applies equally to constitutional challenges to Revised Subchapter H of SORNA. Consequently, we reverse the Superior Court's order, in part, and remand the matter to the Superior Court for further proceedings consistent with this opinion.

I. BACKGROUND

On February 5, 2019, a jury convicted Appellant of aggravated indecent assault of a child,² indecent assault of a person less than 13 years of age,³ corruption of minors,⁴ and indecent exposure⁵ in connection with the sexual abuse of Appellant's granddaughter (victim) from July 30, 2015, through July 30, 2017, at a time when the victim was between the ages of 9 and 11. Thereafter, on April 9, 2019, the Court of Common Pleas of Erie County (trial court) sentenced Appellant to an aggregate term of 10 to 20 years' imprisonment. The trial court also informed Appellant, who is a Tier III offender due to his convictions for aggravated indecent assault of a child and indecent assault of a person less than 13 years of age,⁶ that he was obligated to register as a sexual offender for his

period of registration has not yet expired. See *id.* at 580; see also 42 Pa. C.S. §§ 9799.11, 9799.52. Appellant, who as explained below committed his sexual offenses between July 30, 2015, and July 30, 2017, is subject to the registration provisions of Revised Subchapter H.

² 18 Pa. C.S. § 3125(b).

³ 18 Pa. C.S. § 3126(a)(7).

⁴ 18 Pa. C.S. § 6301(a)(1)(ii).

⁵ 18 Pa. C.S. § 3127.

⁶ See 42 Pa. C.S. § 9799.14(d)(7)-(8).

lifetime under Revised Subchapter H of SORNA.⁷ Appellant filed a timely post-sentence motion, which the trial court denied by order dated April 23, 2019.

Subsequent thereto, Appellant filed a notice of appeal to the Superior Court. In his Pennsylvania Rule of Appellate Procedure (Rule) 1925(b) statement, Appellant argued, *inter alia*, that the jury's verdict was against the weight and sufficiency of the evidence because the testimony of the Commonwealth's primary witness—*i.e.*, the victim—was contradicted by prior statements the victim had made during her Child Advocacy Center interview, inconsistent with the testimony of other Commonwealth witnesses, including the victim's mother, "tainted" by prior conversations the victim had with her mother, and inconsistent with the testimony of Appellant's "alibi defense" witness. When he filed his brief with the Superior Court, however, Appellant presented two additional issues for consideration, both of which Appellant had not raised before the trial court or in his Rule 1925(b) statement: (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);⁸ 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.

By decision dated December 24, 2020, the Superior Court affirmed Appellant's judgment of sentence. In so doing, the Superior Court first determined that the trial court did not palpably abuse its discretion by concluding that the verdict was not against the

⁷ See 42 Pa. C.S. § 9799.15(a)(3).

⁸ In *Apprendi*, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

weight of the evidence because the inconsistencies in the victim's testimony, including the victim's failure to initially report the sexual assault to her mother, were explained by the victim at the time of trial and are typical of a confused, frightened, victimized, and manipulated child. With respect to Appellant's challenges to the constitutionality of Revised Subchapter H of SORNA—*i.e.*, Appellant's *Apprendi* and cruel and unusual punishment challenges—the Superior Court, relying on its prior decision in *Commonwealth v. Reslink*, 257 A.3d 21 (Pa. Super. 2020), concluded that it was constrained to find Appellant's claims waived because Appellant presented his constitutional challenges to Revised Subchapter H's lifetime registration requirement for the first time in his appellate brief.

Appellant filed a petition for allowance of appeal with this Court, which we granted limited to the following issue, as phrased by Appellant:

Did the Superior Court panel err, misapprehending law/facts of record, or overlook controlling authority when it determined that [Appellant's] two SORNA challenges did not constitute challenges to the legality of the sentence and, as such, cannot be waived?

Commonwealth v. Thorne, 260 A.3d 922 (Pa. 2021).

II. PARTIES' ARGUMENTS

The parties' arguments on the limited issue of waiver are succinct and straightforward.⁹ Appellant contends that, by concluding that his constitutional challenges

⁹ Appellant devotes a large portion of his brief to the merits of his claims that the lifetime registration requirement set forth in Revised Subchapter H of SORNA constitutes an illegal sentence because it effectively extends Appellant's maximum sentence without a jury's finding of future dangerousness in violation of *Apprendi* and violates the constitutional prohibition against cruel and unusual punishment. Included therewith is a rather lengthy discussion of whether Revised Subchapter H constitutes punishment under the test developed by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). As explained more fully below, our decision today simply addresses the issue of whether *Apprendi* and cruel and unusual punishment challenges to Revised Subchapter H, which implicate the legality of a sentence, can be waived. The merits of Appellant's constitutional challenges to Revised Subchapter H will be for the Superior

to Revised Subchapter H of SORNA were waived because he raised them for the first time in his appellate brief, the Superior Court overlooked or failed to apply its own decisional authority, as well as authority from this Court, that *Apprendi* and cruel and unusual punishment challenges implicate the legality of a sentence and, therefore, cannot be waived. In support thereof, Appellant suggests that the Superior Court's reliance on its decision in *Reslink* is misplaced because, although Appellant's constitutional challenges to Revised Subchapter H are identical to the constitutional claims raised by the appellant therein, the cases relied upon by the Superior Court in *Reslink* to find waiver—i.e., *In re F.C. III*, 2 A.3d 1201 (Pa. 2010), and *Commonwealth v. Howe*, 842 A.2d 436 (Pa. Super. 2004)—“do not stand for the proposition that colorable challenges to the legality of sentence are waivable.” (Appellant's Br. at 40.)

In response, the Commonwealth contends that the Superior Court's prior decisions in *Reslink* and its progeny, *Commonwealth v. Snyder*, 251 A.3d 782 (Pa. Super. 2021),¹⁰ are dispositive on the waiver issue presented here. Essentially, the Commonwealth suggests that *Reslink* and *Snyder* require a finding of waiver because Appellant's constitutional challenges to Revised Subchapter H of SORNA are similar to the constitutional challenges raised in both *Reslink* and *Snyder* and Appellant, like the

Court to consider and address on remand. As a result, we do not address Appellant's merit-based arguments in this opinion.

¹⁰ In *Snyder*, the Superior Court noted that,

[a]fter *Reslink*, even assuming, *arguendo*, that some of [a]ppellant's constitutional claims [relative to Revised Subchapter H of SORNA] sound in legality of sentence, we are compelled to find waiver . . . [because] [a]ppellant did not raise [the] issues in the trial court, and *Reslink* has created an exception to the typical rules governing Rule 302(a) waiver and claims aimed at allegedly illegal sentences.

Snyder, 251 A.3d at 795.

appellants in *Reslink* and *Snyder*, did not first raise his constitutional challenges to Revised Subchapter H before the trial court.¹¹

III. ANALYSIS

Generally speaking, issues not properly raised and preserved before the trial court “are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302(a); see also *Hill*, 238 A.3d at 407 (noting that issues not raised in lower court are waived and cannot thereafter be raised for first time on appeal); *Commonwealth v. Barnes*, 151 A.3d 121, 124 (Pa. 2016) (“[A]n appellant waives any claim that is not properly raised in the first instance before the trial court and preserved at every stage of his appeal.”). A challenge that implicates the legality of an appellant’s sentence, however, is an exception to this issue preservation requirement. See, e.g., *Hill*, 238 A.3d at 407; *Barnes*, 151 A.3d at 124. “Stated succinctly, an appellate court can address an appellant’s challenge to the legality of his sentence even if that issue was not preserved in the trial court; indeed, an appellate court may [even] raise and address such an issue *sua sponte*.” *Hill*, 238 A.3d at 407. Both this Court and the Superior Court have previously held that *Apprendi*-based claims and claims invoking the constitutional prohibition against cruel and unusual punishment implicate the legality of a sentence. See *Commonwealth v. Wolfe*, 140 A.3d 651, 660 (Pa. 2016) (“[T]his Court has previously found that an asserted *Apprendi*-line violation implicated the legality of a sentence, . . . and that legality-of-sentence claims are not subject to the traditional waiver doctrine.”); *Commonwealth v. Gordon*, 942 A.2d 174, 175 (Pa. 2007) (“It seems to be a settled question in Pennsylvania that *Apprendi*-based challenges raise questions related to the

¹¹ Whether Appellant waived his constitutional challenges to Revised Subchapter H of SORNA presents a pure question of law. See *Commonwealth v. Hill*, 238 A.3d 399, 407 n.7 (Pa. 2020). “Accordingly, our scope of review is plenary, and our standard of review is *de novo*.” *Id.* (quoting *In re Grand Jury Investigation No. 18*, 224 A.3d 326, 332 (Pa. 2020)).

legality of a sentence.”); *Commonwealth v. Lawrence*, 99 A.3d 116, 122 (Pa. Super. 2014) (“Th[e] [Superior] Court has consistently enunciated three distinct categories of legality[-]of[-]sentence claims as a baseline[:]. . . ‘(1) claims that the sentence fell “outside of the legal parameters prescribed by the applicable statute[;]” (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in *Apprendi*.” (quoting *Commonwealth v. Robinson*, 931 A.2d 15, 21 (Pa. Super. 2007) (en banc))), *appeal denied*, 114 A.3d 416 (Pa. 2015); *Commonwealth v. Brown*, 71 A.3d 1009, 1015-16 (Pa. Super.) (“[A] claim that a sentence violates an individual’s right to be free from cruel and unusual punishment is a challenge to the legality of the sentence, rendering the claim unwaivable.”), *appeal denied*, 77 A.3d 635 (Pa. 2013).

Despite this legal authority addressing constitutional claims implicating the legality of a sentence, in *Reslink*, the Superior Court concluded that it was constrained to find that the appellant waived his *Apprendi*-based and cruel and unusual punishment challenges to Revised Subchapter H of SORNA because he “did not raise [the] claims before the trial court, in a motion to bar [the] application of SORNA, or in post-sentence motions . . . [but, rather,] raise[d] [the] claims for the first time on appeal.” *Reslink*, 257 A.3d at 25. In reaching this conclusion, the Superior Court relied upon *In re F.C. III* and *Howe* for the proposition that “[i]t is well-settled that issues not raised before the trial court cannot be advanced for the first time on appeal.” *Id.* In so doing, the Superior Court appears to have ignored that the constitutional challenge advanced in *In re F.C. III* and found to be waived did not implicate the legality of a sentence and that *Howe* did not even involve a finding of waiver because the appellant raised his constitutional challenge in a timely post-sentence motion. See *In re F.C. III*, 2 A.3d at 1205, 1211-12 (involving due process challenge to Section 12.1 of Pennsylvania Drug and Alcohol Abuse Control Act, Act of April 14, 1972, P.L. 221, as amended, added by Act of November 26, 1997, P.L. 501,

71 P.S. § 1690.112a, which permits parent or guardian to petition for civil involuntary commitment of their drug-dependent child to drug and alcohol treatment program); *Howe*, 842 A.2d at 441 (finding that appellant preserved constitutional challenge to prior iteration of Pennsylvania’s sex offender registration law by raising it in timely post-sentence motion—*i.e.*, motion for reconsideration of trial court’s denial of extraordinary relief). In fact, in *Reslink*, the Superior Court did not even discuss the authority establishing that constitutional challenges implicating the legality of a sentence cannot be waived, let alone provide any reasonable explanation as to why it had departed therefrom to conclude that *Apprendi*-based and cruel and unusual punishment challenges to Revised Subchapter H, even though they implicate the legality of a sentence, are waived if raised for the first time on appeal.¹²

The Commonwealth urges this Court to follow *Reslink* and *Snyder* and conclude that Appellant’s *Apprendi* and cruel and unusual punishment challenges to the lifetime registration requirement set forth in Revised Subchapter H of SORNA are waived because Appellant raised them for the first time in his brief to the Superior Court. Similar

¹² Since the Superior Court decided *Reslink*, a different three-judge panel of the Superior Court, as well as some of the Superior Court’s judges, have expressed criticism and dissatisfaction with the precedent established by *Reslink*. See *Snyder*, 251 A.3d at 795 n.11 (“Although we are bound to follow [*Reslink*], we note that *Reslink* constitutes an apparent inconsistency with respect to constitutional claims sounding in legality of sentence. As such, *Reslink* runs counter to well-settled aspects of Pennsylvania law. We read *Reslink* for the limited proposition that constitutional claims for relief directed at Pennsylvania’s sexual offender registration regime that concern the presumption of recidivism discussed in *Torsilieri* are subject to waiver under Rule 302(a), regardless of whether that claim sounds in legality of sentence.”); *Commonwealth v. Chittester* (Pa. Super., Nos. 256 WDA 2020 and 257 WDA 2020, filed May 20, 2021), slip op. at 4 (McCaffery, J., concurring) (“Although I agree we are bound by the decisions in *Reslink* and *Snyder* to conclude [the a]ppellant has waived his constitutional claims, I would urge the Pennsylvania Supreme Court to consider whether constitutional challenges to a sentence are subject to waiver.”); *Commonwealth v. Chai* (Pa. Super., No. 135 WDA 2018, filed April 13, 2021), slip op. at 9 (Bowes, J., concurring) (“[I]n my view, *Reslink* was wrongly decided and it constitutes a significant deviation from our established precedent concerning the ambit of waiver under Rule 302(a).”).

to the Superior Court, however, the Commonwealth has not advanced any reasonable explanation as to why we should treat constitutional challenges to Revised Subchapter H that implicate the legality of a sentence differently from any other constitutional challenge that implicates the legality of a sentence. More importantly, we, ourselves, cannot discern any reason as to why this Court's legality of sentencing jurisprudence should not apply equally to constitutional challenges to Revised Subchapter H. Thus, we conclude that Appellant did not waive his *Apprendi*-based and cruel and unusual punishment challenges to the lifetime registration requirement set forth in Revised Subchapter H by raising them for the first time in his brief to the Superior Court, because such claims implicate the legality of a sentence and, therefore, cannot be waived. Further, for purposes of clarification, we expressly disapprove *Reslink* to the extent that it unnecessarily limits a sexual offender's ability to raise constitutional challenges to Revised Subchapter H by requiring that those challenges be raised before the trial court.

While we recognize that the issue of whether the lifetime registration requirement set forth in Revised Subchapter H of SORNA constitutes an illegal sentence may be inextricably intertwined with the issue of whether Revised Subchapter H constitutes punishment, our decision today does not in any way establish that Revised Subchapter H is punitive in nature and/or that Appellant's underlying claims will be successful on the merits. Rather, our decision today is confined to the issue of waiver and the applicability of this Court's legality of sentencing jurisprudence to constitutional challenges to Revised Subchapter H. 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. See *Torsilieri*, 232 A.3d at 588-96. Moreover, nothing in this opinion should be construed as undermining our decision in *Commonwealth v. Lacombe*,

234 A.3d 602 (Pa. 2020), not to prescribe any one procedural mechanism as the exclusive means of challenging the individual application of sexual offender registration statutes. See *Lacombe*, 234 A.3d at 618. Accordingly, we reverse, in part, the order of the Superior Court and remand the matter to the Superior Court for further proceedings consistent with this opinion.^{13, 14}

¹³ The Commonwealth suggests that Appellant should not be entitled to a remand because, unlike in *Torsilleri* where the appellant offered affidavits and supporting documents from three experts at the time of the hearing on his post-sentence motion, Appellant did not present any scientific evidence or research at any stage of his criminal proceedings that would tend to establish that the lifetime registration requirement of Revised Subchapter H of SORNA constitutes punishment. We disagree. While not necessarily phrased in this manner, the Commonwealth's argument is essentially a perpetuation of its waiver argument. If, however, we were to conclude that Appellant is not entitled to a remand as the Commonwealth suggests or preclude Appellant from offering scientific evidence to establish the punitive nature of Revised Subchapter H on remand, Appellant would derive absolutely no benefit from our holding today. In other words, our ruling today—*i.e.*, that constitutional challenges to the lifetime registration requirement set forth in Revised Subchapter H implicate the legality of a sentence and, therefore, cannot be waived—would have no meaning if individuals seeking to challenge Revised Subchapter H on constitutional grounds were required to present evidence in support thereof during his/her underlying criminal proceedings in order to preserve the issue.

¹⁴ Chief Justice Baer dissents from our decision because, in his view, our conclusions—*i.e.*, that constitutional challenges to the lifetime registration requirement set forth in Revised Subchapter H of SORNA implicate the legality of a sentence and, therefore, cannot be waived and that 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—"simply are irreconcilable and place the jurisprudential cart before the horse." (Dissenting Op. at 1 (Baer, C.J., dissenting).) While we do not necessarily disagree, this Court granted review in this matter to address the limited issue of waiver, which we have done. We reiterate that our decision today does not in any way establish that Appellant's underlying claims will be successful on the merits. In other words, we have not concluded that Appellant can succeed on his *Apprendi*-based and cruel and unusual punishment challenges to Revised Subchapter H's lifetime registration requirement. The viability of such claims depends on whether Revised Subchapter H is punitive in nature such that Revised Subchapter H's lifetime registration requirements are part of Appellant's criminal sentence. To that end, our decision today enables the Superior Court, on remand, to manage this case as it sees fit under these peculiar circumstances.

Justices Todd, Dougherty and Wecht join the opinion.

Chief Justice Baer files a dissenting opinion in which Justices Donohue and Mundy join.