

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

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NO. 707-CR-2022

JOSEPH JOHN FIGUEROA,
Defendant

Jennifer Lynn Rapa, Esquire
Assistant District Attorney
Jeffrey G. Velander, Esquire

Counsel for Commonwealth

Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – September 20th, 2023

The issue Defendant raises in his Pre-Trial Motion and which we now address is whether Pennsylvania's registration requirements for sexual offenders in effect at the time of his arrest in Pennsylvania on September 12, 2022, which required Defendant to register as a sexual offender in this Commonwealth for the remainder of his life as a result of his 2003 conviction in New Jersey of sexual assault with penetration, the equivalent offense in Pennsylvania being aggravated indecent assault, is an unconstitutional *ex post facto law* as applied to Defendant. The statute in question, Subchapter I of SORNA II,¹

¹ Sexual Offender Registration and Notification Act, presently codified at 42 Pa.C.S.A. §§9799.10-9799.75 (SORNA II), first enacted on February 21, 2018 and immediately effective. The Act of June 12, 2018, P.L. 140, No. 29, effective immediately, reenacted the Act of February 21, 2018, P.L. 27, No. 10, the original version of SORNA II, with no relevant changes to the issue

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governs the registration of sexual offenders convicted of a sexually violent offense in jurisdictions outside this Commonwealth. See 42 Pa.C.S.A. §9799.56(b).

PROCEDURAL AND FACTUAL BACKGROUND

On February 14, 2003, Defendant, Joseph John Figueroa, pled guilty and was sentenced by a New Jersey court of law for the offense of sexual assault with penetration under New Jersey law, the equivalent Pennsylvania offense being aggravated indecent assault pursuant to 18 Pa.C.S.A. §3125, a felony of the second degree. The underlying out-of-state offense leading to this conviction occurred on July 2, 2002. Defendant's sentence included a period of imprisonment of three years and the requirement that Defendant register with the New Jersey State Department of Parole for an indeterminate term, which could be for his lifetime, pursuant to the New Jersey version of Megan's Law. As of September 12, 2022, Defendant was under a continuing obligation to maintain this registration.

Sometime prior to September 12, 2022, the date being unstated in the record before us, Defendant established a residence at 249 East Abbott Street, Carbon County, Pennsylvania. On this date, Defendant was outside his residence screaming and creating a public disturbance while completely naked, standing on Abbott Street and apparently intoxicated, during which time Defendant smashed the front window of one of his neighbor's homes causing shattered glass to cut an occupant within and forcibly placed

before us. SORNA II's predecessor, SORNA I, took effect on December 20, 2012. See former 42 Pa.C.S.A. §§9799.10-9799.41.

a small amount of marijuana into the hands of another neighbor. Defendant's conduct resulted in numerous criminal charges filed against him, including, *inter alia*, violating Section 4915.2 of the Crimes Code, 18 Pa.C.S.A. §4915.2, Failure to Comply With 42 Pa.C.S. Chapter 97, Subchapter I, Registration Requirements.²

DISCUSSION

Section 9799.55(b)(2)(ii), Subchapter I of SORNA II, 42 Pa.C.S.A. §9799.55(b)(2)(ii), provides that individuals who currently reside in this Commonwealth and have been convicted, *inter alia*, of an out-of-state offense equivalent to that defined by 18 Pa.C.S.A. §3125 (relating to aggravated indecent assault) committed on or after April 22, 1996, but before December 20, 2012, are subject to lifetime registration. See also 42 Pa.C.S.A. §9799.54(a)(4) (Applicability) and 9799.56(b)(4)(i), (ii) (Registration procedures and applicability). Section 4915.2 of the Crimes Code provides, *inter alia*, that those individuals subject to registration under 42 Pa.C.S.A. §9799.55(b) whose period of registration has not expired and who knowingly fail to (1) register with the Pennsylvania State Police as required under 42 Pa.C.S.A. §9799.56 (requiring

² The Criminal Information filed against Defendant charges him with committing the following offenses:

Count 1	Failure to Register	18 Pa.C.S.A. §4915.2(a) (3)
Count 2	Corruption of Minors	18 Pa.C.S.A. §6301(a) (1) (ii)
Count 3	Indecent Exposure	18 Pa.C.S.A. §3127(a)
Count 4	Simple Assault	18 Pa.C.S.A. §2701(a) (1)
Count 5	Criminal Mischief	18 Pa.C.S.A. §3304(a) (5)
Count 6	Open Lewdness	18 Pa.C.S.A. §5901
Count 7	Marijuana-Small Amount	35 P.S. §780-113(a) (31) (i)
Count 8	Possession of Drug Paraphernalia	35 P.S. §780-113(a) (32)
Count 9	Harassment	18 Pa.C.S.A. §2709(a) (3)
Count 10	Disorderly Conduct	18 Pa.C.S.A. §5503(a) (3)
Count 11	Public Drunkenness	18 Pa.C.S.A. §5505

registration within three business days of arrival in Pennsylvania for those individuals convicted or sentenced for an out-of-state offense equivalent to aggravated indecent assault), (2) verify their residence or be photographed as required under 42 Pa.C.S.A. §9799.60, or (3) provide accurate information when registering or verifying a residence, commit an offense graded as provided in Section 4915.2(c).³ 18 Pa.C.S.A. §4915.2.

Defendant argues he is not subject to registration under SORNA II which, as applied to him retroactively, is an unconstitutional, unenforceable *ex post facto* law and that, therefore, he cannot be convicted under Section 4915.2 for failing to register under an unconstitutional statute.⁴ In raising this defense, Defendant relies primarily on the Pennsylvania Supreme Court decision in Commonwealth v. Santana, 266 A.3d 528 (Pa. 2021).

In Santana, the defendant was convicted of rape in New York in 1983. Under New York's "Sex Offender Registration Act" ("SORA") enacted in 1995, and held to be a remedial civil statute by the New York Court of Appeals in People v. Buyund, 37 N.Y. 3d

³ Section 4915.2(c) of the Crimes Code provides that an individual subject to lifetime registration who knowingly fails to register with the Pennsylvania State Police or verify his residence or be photographed commits a felony of the second degree. 18 Pa.C.S.A. §4915.2(c)(2). For a second violation of failing to register or provide verification, the offense is graded as a felony of the first degree. 18 Pa.C.S.A. §4915.2(c)(3). If the offender when registering or verifying his residence knowingly provides inaccurate information, the offense is a felony of the first degree. 18 Pa.C.S.A. §4915.2(c)(4). Defendant has been charged with violation of 18 Pa.C.S.A. §4915.2(a)(3), failing to provide accurate information when registering, a felony of the first degree. Parenthetically, under the facts as presented, violation of 18 Pa.C.S.A. §4915.2(a)(1), failure to register as a sex offender, a felony of the second degree, would appear to be a more appropriate charge.

⁴ Defendant presents this issue in his Omnibus Pre-Trial Motion filed on February 9, 2023.

532 (2021), and hence enforceable retroactively, Santana was required to register and comply with SORA's terms and conditions for the remainder of his life. Santana moved from New York to Pennsylvania in 2015 which automatically triggered a duty to register and report in Pennsylvania under SORNA I. See 42 Pa.C.S. §9799.13(7)(i). While Santana immediately registered with the Pennsylvania State Police, he failed to provide accurate information and was charged with violating 18 Pa.C.S.A. §4915.1(a)(3), a second-degree felony.

Santana pled guilty and on July 18, 2017, one day before the Pennsylvania Supreme Court announced its decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (plurality), was given a state sentence in a state penitentiary. In Muniz, the Court held that the registration requirements of SORNA I constituted criminal punishment for the purposes of an *ex post facto* analysis and, consequently, was unconstitutional when retroactively applied to offenders whose offenses pre-dated the statute's enactment. Santana immediately filed a post-sentence motion to withdraw his plea and to have the charges filed against him dismissed. The trial court denied the motion, which decision was reversed by an *en banc* panel of the Superior Court and affirmed on allowance of appeal by the Pennsylvania Supreme Court.

In explaining its decision, the Supreme Court stated that “[w]hen applied retroactively, sexual offender registration laws implicate the third Calder [referring to Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)] category of retroactive provisions”

and that the relevant date for purposes of an *ex post facto* analysis is the date that the crime was committed. 266 A.3d at 537.⁵ The Court further explained that:

An *ex post facto* analysis concerning the third *Calder* category of laws distills to the following questions. First, a court must ask when the initial offense was committed. Second, the court must ask whether the challenged law was enacted after the occurrence of the triggering offense and was then applied retroactively. If so, the final question is whether that retroactive law is punitive or increases the penalty for the existing crime.

266 A.3d at 537.

In Santana, the Court answered these questions as follows: (1) the rape was committed in 1983; (2) SORNA I, whose effective date was December 20, 2012, was being applied retroactively (i.e., the statute did not exist when the offense giving rise to its application was committed) more than thirty years after the commission of the offense, even though Santana did not move to Pennsylvania until 2015;⁶ and (3) since Santana

⁵ In Calder, the United States Supreme Court identified four types of laws that traditionally constitute *ex post facto* violations:

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. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater 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 offense, in order to convict the offender.

3 U.S. at 390.

⁶ In Santana, the Court made clear that the relevant date for purposes of an *ex post facto* analysis is the date that the crime was committed. 266 A.3d at 534 (citation omitted). The Ex Post Facto Clauses of the Pennsylvania and United States Constitutions "do not focus on *where* crimes occurred; they focus on *when* crimes occurred." Id. (emphasis in original) (citation omitted). Accordingly, an individual "has as much of a constitutional right to be free from *ex post facto* laws that penalize him from pre-existing crimes that occurred outside

was subject to the same SORNA I requirements at issue in Muniz which the Court held to be punitive, their application to Santana amounted to an unconstitutional *ex post facto* violation requiring affirmance by the Pennsylvania Supreme Court of the Superior Court's order vacating Santana's judgment of sentence.

The answer to the first two questions raised under the framework set out in Santana applied to the present case likewise evidences the retroactive application of SORNA II. The offense at issue occurred on July 2, 2002, prior to SORNA II's enactment, and is only now, almost sixteen years later, being applied to Defendant.⁷ However, while the registration requirements of SORNA I in effect at the time of Santana's conviction were fundamentally the same as those examined in Muniz and found to be punitive in their effect, in response to Muniz, the General Assembly enacted SORNA II which consists of two subchapters: Subchapter H and Subchapter I. Subchapter H, 42 Pa.C.S.A. §§9799.10-9799.42, is based on the original SORNA statute (SORNA I) and is applicable to offenders who committed their offenses on or after the December 20, 2012 effective date of SORNA I. Subchapter I, 42 Pa.C.S.A. §§9799.51-9799.75, captioned "Continued Registration of Sex Offenders," is applicable to offenders, like Defendant, who

this Commonwealth as he does from *ex post facto* laws that penalize him from pre-existing crimes that occurred inside this Commonwealth." Id. (citation omitted).

⁷ At the time of the offense, Megan's Law II was in effect and provided under Section 9793(b) (1) for a ten-year period of registration. 42 Pa.C.S.A. §§9791-9799.7, Act of May 10, 2000, P.L. 74, No. 18, effective July 9, 2000, amended by Megan's Law III, 42 Pa.C.S.A. §§9791-9799.8, Act of Nov. 24, 2004, P.L. 1243, No. 152, effective January 24, 2005.

committed their offenses prior to the effective date of SORNA I and to whom the Muniz decision directly applied. See 42 Pa.C.S.A. §9799.52(1) (Scope).

In Commonwealth v. Lacombe, 234 A.3d 602, 626-27 (Pa. 2020), the Pennsylvania Supreme Court upheld the constitutionality of Subchapter I finding its registration requirements are non-punitive and, thus, retroactive application of those requirements does not violate the constitutional prohibition against *ex post facto* laws. “Nothing in Santana, which relates solely to SORNA I negates the holding of Lacombe, which relates to SORNA II.” M.T. v. The Pennsylvania State Police, 298 A.3d 466, 476 n.13 (Pa.Cmwlth. 2023) (citation omitted). In short, “Subchapter I [of SORNA II] does not constitute criminal punishment, and [any] *ex post facto* claims [] necessarily fail.” Lacombe, 234 A.3d at 626-27.

CONCLUSION


The statutory scheme set forth in SORNA II, enacted in response to Muniz and applicable to Defendant – imposing as it does the duty to register and the period for which registration is required – has been determined by our Supreme Court in Lacombe to be non-punitive in its effect. Section 4915.2 of the Crimes Code, in contrast, creates the crime. Section 4915.2 is an enforcement mechanism to enforce compliance with SORNA II; it imposes not the duty to register but the penalty for non-compliance.

Defendant’s *ex post facto* challenge focuses on SORNA II’s registration requirement, contending, in effect, that if Defendant was not legally required to register in Pennsylvania, that is, SORNA II was unconstitutionally retroactively applied to him, then

he cannot be convicted of a crime predicated on a failure to register under a statute which is constitutionally invalid. Defendant's predicate is erroneous and, as held in Lacombe, the registration provisions (including the registration period) in SORNA II serve a legitimate remedial purpose and are enforceable. Defendant does not contend that Section 4915.2 is being applied retroactively, nor could he successfully: this statute existed and was in effect when Defendant failed to comply with SORNA II.

Accordingly, Defendant's challenge to the constitutionality of SORNA II as violating the *ex post facto* clause of the United States and Pennsylvania Constitutions is misplaced, and his Omnibus Pre-Trial Motion on this issue has been DENIED.

BY THE COURT:


_____ P.J.