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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 1452 2018
	:	
CHARLES H. LEINTHALL,	:	
Defendant	:	

Criminal Law - Sexual Offenders Registration and Notification Act ("SORNA") - Registration and Notification Requirements - Constitutionality - Due Process - Irrebuttable Presumption - Pennsylvania Constitution - Reputation - Protected Interest - Infringement - Risk of Re-Offense – As-Applied Challenge

1. SORNA was originally enacted to "protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders." 42 Pa.C.S.A. § 9799.11(b)(1) (Declaration of Policy).
2. A presumption derived from a known or proven fact is irrebuttable when it cannot be refuted or contradicted by other evidence.
3. Based solely on a defendant's conviction of an enumerated sexual offense, SORNA irrebuttably presumes the defendant poses a high risk of reoffense and is a danger to the public: the defendant is provided no opportunity to be heard or contest this presumption.
4. SORNA's irrebuttable presumption that a defendant convicted of a sexual offense is likely to reoffend forms the basis of the registration and community notification requirements imposed by SORNA as a rational means to further the governmental interest of protecting the public from a perceived dangerous criminal element.
5. An irrebuttable presumption is unconstitutional when it (1) encroaches on an interest protected by the due process clause, (2) the presumption is not universally true, and (3) reasonable alternative means exist for ascertaining the presumed fact.
6. A statute containing an irrebuttable presumption infringing on a fundamental constitutional right will be found to violate a defendant's right to due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining the presumed fact is available.
7. Under the Federal Constitution, injury or damage to reputation is not protected. In contrast, the right to reputation is a fundamental right under Article I, Sections 1 and 11, of the Pennsylvania Constitution.
8. SORNA's presumption that a defendant convicted of a sexual offense is dangerous

and likely to reoffend, combined with its registration and notification requirements, infringes on the right to reputation - on a defendant's ability to function as a productive member of society (to obtain employment, education and housing) – guaranteed by the Pennsylvania Constitution.

9. As applied to Defendant – based on individualized risk assessments of Defendant, Defendant's age and the absence of a criminal history of criminal conviction of crimes of a sexual nature, as well as low recidivism rates generally for those convicted of a sexual offense – SORNA's universal presumption that all sexual offenders are at high risk of reoffense is not supported by the facts specific to Defendant.

10. Reasonable alternative means of assessing a convicted sexual offender's risk of reoffending exist, namely individualized risk assessment tools as are currently employed by and known to the State Sexual Offender's Assessment Board.

11. Constitutional challenges to a statute are of two types: facial and as-applied. A facial attack tests the statute's constitutionality based on its text alone while an as-applied attack contends that the application of the statute to a particular person under particular circumstances deprives that person of a constitutional right.

12. As applied to Defendant, SORNA violates due process by infringing on his right to reputation as guaranteed under the Pennsylvania Constitution based on a statutory presumption of recidivism, which presumption is not universally true, and where there is a reasonable alternative means for ascertaining the likelihood of recidivating.

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Michael S. Greek, Esquire — Counsel for Commonwealth
Matthew J. Mottola, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – January 6, 2021

The Sexual Offenders Registration and Notification Act ("SORNA"), 42 Pa.C.S.A. §§ 9799.10 - 9799.41, was originally enacted, *inter alia*, to "protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders." 42 Pa.C.S.A. § 9799.11(b)(1) (Declaration of Policy). Whether the underlying premise for these registration and notification requirements - that all sexual offenders are at high risk of reoffending and, therefore, dangerous - is constitutionally valid, is at the heart of Defendant's challenge to SORNA's registration requirements as applied to him.

Procedural and Factual Background

On November 5, 2018, the Defendant herein, Charles H. Leinthall, a fifty-two-year-old volunteer firefighter with the Jim Thorpe Fire Department, made some crude remarks of a sexual nature about a fourteen-year-old female who was at the fire station with her boyfriend and brusquely, but inappropriately, touched her buttocks and genital area through her clothing. Defendant was charged with Indecent Assault of a

Person Less than Sixteen Years of Age[1] and other related offenses. On January 3, 2019, Defendant pled guilty to the charge of Indecent Assault. At the time of his plea, both a sexually violent predator assessment by the State Sexual Offenders Assessment Board ("SOAB") and a pre-sentence investigation report were ordered.

On July 18, 2019, prior to sentencing, Defendant filed a Motion to Not Apply SORNA Registration. Therein, Defendant alleged that SORNA "violates his due process rights under the Pennsylvania Constitution [by infringing on] his right to reputation without the opportunity to be heard," and that SORNA creates an irrebuttable presumption that all "offenders who commit sex offenses are dangerous and likely to reoffend" with no opportunity provided to rebut this presumption. (Motion, ¶s 9, 23). Defendant's Motion further avers that because of this presumed fact and the perceived need to protect the public from this type of offender, those convicted of a sexual offense must register with the Pennsylvania State Police "to inform and warn law enforcement and the public of the potential danger" of convicted sexual offenders. (Motion, ¶ 20).

Hearings on Defendant's Motion were held on August 14, 2020, and September 18, 2020. By stipulation the parties agreed to admission of the following prepared by experts on the subject of recidivism rates of sexual offenders: (1) Affidavit of Professor Elizabeth J. Letourneau, PhD (Exhibit D-1), (2) Declaration of Testimony of Jill S. Levenson, PhD, LCSW (Exhibit D-2), (3) Declaration of R. Karl Hanson (Exhibit D-3), and (4) a research paper entitled "The Dark Figure of Sexual Recidivism" by Nicholas Scurich and Richard S. John of the University of California School of Law (Exhibit C-1). Also admitted by stipulation was the May 16, 2019, assessment of the State Sexual Offenders Assessment Board completed by Mary E. Muscari, PhD, board member

[1] 18 Pa.C.S.A. § 3126(a)(8).

(Exhibit D-4), and a Static-99R evaluation of Defendant completed by the Carbon County Adult Probation Office as part of its Pre-Sentence Investigation Report. Finally, the parties stipulated that studies have found the recidivism rates for adult sex offenders range from five percent to forty percent and that this rate is higher than the comparable rate for juvenile sexual offenders.

Both parties were given an opportunity to brief the issues raised by Defendant in his Motion. Defendant filed a principal brief in support of his Motion on October 13, 2020, and a supplemental brief on November 6, 2020. No brief has been filed by the Commonwealth, however, the Commonwealth did indicate in a statement filed on December 9, 2020, that the reasoning of Commonwealth v. Muhammad, 2020 WL 6245269 (Pa.Super. 2020) "would warrant a finding in this case that SORNA's irrebuttable presumption is unconstitutional as it applies to this Defendant."

DISCUSSION

Premised on the belief that convicted sex offenders are at high risk of reoffending and a danger to the public, Revised Subchapter H of SORNA, 42 Pa.C.S.A. §§ 9799.10 - 9799.42, applicable to offenses committed after December 20, 2012,[2] requires

[2] Following the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (plurality), in which the Court held that the registration and notification provisions of SORNA I, 42 Pa.C.S.A. §§ 9799.10 - 9799.41, were punitive and, therefore, in violation of the constitutional prohibition against *ex post facto* laws when applied retroactively to sexual offenders convicted before December 20, 2012, the effective date of SORNA I, the General Assembly enacted SORNA II, effective February 21, 2018, consisting of Subchapters H and I. As explained by the Court,

> Subchapter H is based on the original SORNA [I] statute and is applicable to offenders ... who committed their offenses after the December 20, 2012[,] effective date of SORNA [I]; Subchapter I is applicable to offenders who committed their offenses prior to the effective date of SORNA [I] and to whom the Muniz decision directly applied.

Commonwealth v. Butler, 226 A.3d 972, 981 n.11 (Pa. 2020). Subchapter I applies to crimes committed after April 22, 1996, but before December 20, 2012, when SORNA I became effective. Commonwealth v. Torsilieri, 232 A.3d 567, 580 (Pa. 2020).

Revised Subchapter H of SORNA II, which applies to Defendant, retained many of the provisions of SORNA I. For ease of discussion, unless otherwise indicated, our reference to SORNA in the text refers to the current version of SORNA challenged by Defendant.

convicted sexual offenders to register with the Pennsylvania State Police, 42 Pa.C.S.A. § 9799.16 (Registry), and thereafter to promptly notify the State Police of any material changes in their registration information. 42 Pa.C.S.A. § 9799.15(g) (In-person Appearance to Update Information). Under SORNA, sexual offenses are classified into one of three tiers, based upon the underlying crime committed, with individuals convicted of committing one or more of the offenses enumerated in Section 9799.14 required to register with the State Police as a convicted sexual offender for a designated period determined by which tier an offense is under: Tier I – fifteen years; Tier II - twenty-five years; and Tier III – for life. 42 Pa.C.S.A. §§ 9799.14 (Sexual Offenses and Tier System), 9799.15(a) (Period of Registration). Defendant, who pled guilty to Indecent Assault of a Person Less Than Sixteen Years of Age, is classified as a Tier II sex offender which requires him to register as a sexual offender for a period of twenty-five years.

Defendant challenges the constitutionality of SORNA as applied to him and others like him who have been convicted of an enumerated sexual offense requiring registration, but who have not been found to be a sexually violent predator ("SVP").[3] Specifically, Defendant contends that his conviction of such an offense, in and of itself, without any individual evaluation of his risk for reoffense or opportunity to challenge this presumption, dictates a finding that he is at high risk of committing additional sexual offenses and a danger to the public, the lynchpin driving the justification for SORNA's

[3] By definition, a sexually violent predator is an individual "determined to be a sexually violent predator under Section 9799.24 (relating to assessments) due to a mental abnormality or personality disorder that makes the individual likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. § 9799.12 (Definition of "Sexually Violent Predator"). The term "predatory" is defined as "an act directed at a stranger or a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization." 42 Pa.C.S.A. § 9799.12. (Definition of "Predatory").

registration and notification requirements for "the protection of the public from this type of offender." The statutory basis for this irrebuttable presumption that all sexual offenders pose a high risk of reoffense and danger to the public is found at 42 Pa.C.S.A. § 9799.11(a)(4) (Legislative Findings).[4] Quoting from our Supreme Court's decision in In the interest of J.B., 107 A.3d 1 (Pa. 2014), where SORNA's lifetime registration requirements as applied to juvenile offenders were found to violate the due process provisions of the Pennsylvania Constitution through use of the same irrebuttable presumption at issue here, Defendant argues that "irrebuttable presumptions are violative of due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact [is] available." In re J.B., 107 A.3d at 14-15 (quoting Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Clayton, 684 A.2d 1060, 1063 (Pa. 1996)).

In J.B., our Supreme Court explained that use of the irrebuttable presumption doctrine to determine whether a statute violates due process[5] is dependent on a finding that the existence of one fact conclusively presumes the truth of another, with this presumed fact being the basis for infringing on a protected interest or denial of benefits. In re J.B., 107 A.3d at 14. As applied to SORNA, the Supreme Court in J.B. held that a person's conviction (with respect to juveniles, the delinquency adjudication) of a sexual offense conclusively presumes that such person is at high risk of reoffense which in turn

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[4] Section 9799.11(a)(4) provides:

> (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.

42 Pa.C.S.A. § 9799.11(a)(4) (Legislative Findings). The General Assembly further found that registration would "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." 42 Pa.C.S.A. § 9799.11(a)(6) (Legislative Findings).

forms the basis for registration, with both the presumed fact and the requirement of registration impacting juvenile offenders' fundamental right to reputation as protected under the Pennsylvania Constitution. The Court further noted that while a juvenile has the opportunity to be heard and contest whether he committed the crime charged and should be adjudicated delinquent, he has no opportunity to be heard or contest the presumed fact, that he is at high risk of reoffending. In re J.B., 107 A.3d at 17. As laid out in J.B., the irrebuttable presumption doctrine sets forth a series of three questions, each requiring an affirmative answer, for a statute to be found to violate an offender's right to due process: (1) does the statute infringe on an interest protected by the due process clause; (2) does the statute utilize an irrebuttable presumption which is not universally true; and (3) is there a reasonable alternative means to ascertain the presumed fact. In re J.B., 107 A.3d at 15-16.

Protected Interest

Under the due process clause of the Fourteenth Amendment, no State may deprive any person "of life, liberty or property, without due process of law." U.S., Const. amend. XIV, §1. Injury or damage to reputation is not a protected interest. *See* Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding that reputation is not protected under the federal due process clause in the absence of a "more tangible" injury, creating the so-called "stigma-plus" line of federal cases concerning reputation). In re J.B., 107 A.3d at 12. In contrast, the right to reputation is a fundamental right under Article I, Sections 1 and 11, of the Pennsylvania Constitution.

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[5] The Supreme Court has refused to "pigeonhole" the irrebuttable presumption doctrine as a procedural or substantive due process challenge, addressing the claim simply as an "irrebuttable presumption"

Defendant contends that as applied to him,[6] SORNA violates his right to reputation under Article I, Section 1 of the Pennsylvania Constitution by creating an irrebuttable presumption that all sexual offenders, including Defendant, pose a high risk of committing additional sexual offenses and are a danger to the public. The presumption that Defendant is "particularly dangerous and more likely to offend than other criminals," combined with SORNA's registration requirements, negatively impact Defendant's "ability to obtain employment, education, and housing," and "impede[ ] [his] ability to function as a productive member of society." In re J.B., 107 A.3d at 16-17; Muhammad, 2020 WL 6245269 at **6-7 (Pa.Super. 2020); *see also* Exhibit D-1 (Affidavit of Professor Elizabeth J. Letourneau, PhD, p.6, ¶ 12) and Exhibit D-2 (Declaration of Testimony of Jill S. Levenson, PhD, LCSW, pp.1, 6-7) (referencing research regarding public perceptions of sexual offenders). Moreover, not only is the presumption without an evidentiary basis – arising solely from the fact of Defendant's

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challenge. Commonwealth v. Torsilieri, 232 A.3d 567, 581 (Pa. 2020).

[6] In Commonwealth v. Muhammad, 2020 WL 6245269 (Pa.Super. 2020), the Court noted that constitutional challenges are of two types, facial and as-applied, citing Commonwealth v. Brown, 26 A.3d 485, 493 (Pa.Super. 2011). In explaining the difference between the two types of constitutional challenges, the Court stated:

> A facial attack tests a law's constitutionality based on its text alone without considering the facts or circumstances of a particular case. The court does not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases. An as-applied attack on a statute is more limited. It does not contend that a law is unconstitutional as written, but that its application to a particular person under particular circumstances deprives that person of a constitutional right.

Id. at *4 (citations omitted).

Defendant does not challenge SORNA's statutory presumption that all sexual offenders are dangerous and pose a high risk of recidivism as written, but attacks the presumption as applied to the particular circumstances of this case. Consequently, unlike in Torsilieri, Defendant does not ask us to adjudicate "the constitutionality of SORNA based upon scientific challenges to legislative fact-finding regarding the likelihood of recidivism and the effectiveness of registration systems," *id*. at 574, where the separation of powers doctrine generally requires courts to defer to legislative findings in the absence of an infringement on constitutional rights and a scientific consensus undermining the legislative determination. Muniz, 164 A.3d at 1217 ("Although there are contrary scientific studies, we note there is by no means a consensus, and as such, we defer to the General Assembly's findings on this issue."); *see also* Torsilieri, 232 A.3d at 587-88, 596 (remanding to the trial court "to allow the parties to present additional argument and evidence to address whether a scientific consensus has developed to overturn the legislative

conviction of a sexual offense – the presumption is irrebuttable since SORNA provides Defendant with no means to contest the presumed fact. Muhammad, at *7. As found in J.B. and Muhammad, both dealing with the same statutory presumption and registration requirements at issue in this case, we similarly conclude that SORNA infringes on Defendant's due process right to reputation under our State constitution.

Validity of Presumption as Applied to Defendant

As applied to Defendant, the second prong of the irrebuttable presumption doctrine requires that we determine "whether SORNA's presumption that sexual offenders present a high risk for recidivism is true as to [Defendant]." Muhammad, *7. Based on the record before us, we find it is not.

Defendant, who was fifty-two years of age at the time of the offense, has no criminal history of conviction for crimes of a sexual nature. Following Defendant's plea, in accordance with SORNA Defendant was court ordered to be individually evaluated by the State Sexual Offenders Assessment Board to determine if he should be classified as a sexually violent predator. 42 Pa.C.S.A. § 9799.24(a). SORNA requires Defendant be assessed for "[a]ny mental illness, mental disability or mental abnormality," 42 Pa.C.S.A. § 9799.24(b)(3)(iii), and any "[f]actors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense." 42 Pa.C.S.A. § 9799.24(b)(4). Defendant's assessment in this case was performed by Dr. Mary E. Muscari who concluded Defendant did not meet the criteria to be classified as a sexually violent predator. (Exhibit D-4 (SVP Assessment)).

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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").

Dr. Muscari determined that Defendant did not suffer from any mental abnormality or personality disorder. On this point, Dr. Muscari found Defendant suffered from neither a paraphilic disorder or an antisocial personality disorder. (Exhibit D-4 (SVP Assessment, p.8)). Dr. Muscari described a paraphilic disorder as an "intense and persistent sexual interest" with partners who are not "phenotypically normal," "physically mature," or "consenting," and an antisocial personality disorder as being representative of "individuals whose behavior falls into patterns that include "failing to conform to social norms with respect to lawful behavior, impulsivity, frequent deceit and manipulation for personal gain, irritability, aggression, recklessness, irresponsibility, and high risk-taking behaviors." *Id.*

In addition to the sexual violent predator assessment performed by Dr. Muscari, the Carbon County Adult Probation Office conducted a Static-99R evaluation of Defendant, which empirically assesses an offender's risk for sexual recidivism based on well-known risk factors for reoffending. (Exhibit D-3 (Declaration of R. Karl Hanson, pp.1, 9-11)). Defendant scored a zero on this assessment, which placed him at below average risk for being charged or convicted of another sexual offense. *Id.* at 13. According to Dr. Hanson, this score "describes individuals whose risk for sexual recidivism is higher than the general population, but lower than most individuals with a sexual offense conviction." *Id*. at 13. Dr. Hanson further opines in his Declaration that it is expected that of those with this score, only 1.9% to 2.8% will be reconvicted for another sexual offense within 5 years, and that with 6 to 12 months of community supervision and focused counseling these offenders' scores can drop to a level of risk similar to those never convicted of a sex offense. *Id.*

In addition to the individualized risk assessments of Defendant made by Dr. Muscari and the Carbon County Adult Probation Office, Defendant placed in evidence "affidavits and supporting documents of three experts concluding that sexual offenders generally have low recidivism rates and questioning the effectiveness of sexual offender registration systems such as SORNA." Commonwealth v. Torsilieri, 232 A.3d 567, 574 (Pa. 2020).[7] The studies referred to in these documents place the recidivism rate for sexual offenders at between 3% and 20% depending on the sample and length of the follow-up period, with between 80% and 97% never being reconvicted for a sexual crime.

The Commonwealth presented no evidence of any contrary studies but claimed the recidivism rates presented by the Defendant were flawed since most sex crimes are not reported. (Exhibit C-1, "The Dark Figure of Sexual Recidivism," pp.4-5). As viewed by the Commonwealth, the true rate of recidivism is unknown and unknowable which, ironically, appears to undermine SORNA's presumption at the same time it attempts to preserve it. In response to this perceived flaw, the defense studies all concede the reality of sexual offenses not being reported, but explain why this underreporting does not affect the validity of their studies and findings as to convicted sexual offenders. *See*, *e.g.,* Exhibit D-1 (Affidavit of Professor Elizabeth J. Letourneau, PhD, p.4, ¶ 9(d)); Exhibit D-2 (Declaration of Testimony of Dr. Jill S. Levenson, PhD, LCSW, p.4); and Exhibit D-3 (Declaration of R. Karl Hanson, p.23).

Having reviewed the evidence of record, and in particular the assessments specific to Defendant made by Dr. Muscari and the Carbon County Adult Probation

[7] Defense Exhibits 1 through 3, inclusive, are the same documents placed in evidence by the defendant in Torsilieri and which were before the Supreme Court on the Commonwealth's appeal.

Office, we reject SORNA's universal presumption as applied to Defendant that his conviction of indecent assault alone under the facts of this case places him at a high risk to reoffend and find the presumption to be overly broad and unenforceable.

Reasonable Alternative Means

The final prong of the irrebuttable presumption test requires examination of whether reasonable alternative means exist to ascertain the presumed fact. As was determined in J.B. and Muhammad, such means already exist and are in use under SORNA. SORNA provides for individualized assessment of all adult sexual offenders convicted of a Tier I, II, or III offense by the State Sexual Offenders Assessment Board, which is "composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders," to determine whether the offenders are sexually violent predators. 42 Pa.C.S.A. §§ 9799.24, 9799.35. In re J.B., 107 A.3d at 19; Muhammad, *8. Further, as noted by the Court in Muhammad, the Sexual Offenders Assessment Board has "identified a variety of 'actuarial instruments' that are available and preferable for determining risk assessments," which tools "should be routinely used because they can help distinguish between low-risk and high-risk sex offenders." Muhammad, at *8 (internal quotations and citations omitted). Additionally, again as noted in Muhammad, "the [Sexual Offenders Assessment Board] itself could perform an individualized assessment, similar to the test it performs to determine whether individuals are [sexually violent predators]." *Id.* Finally, the Static-99R evaluation is widely used to assess the risk for sexual recidivism, is considered to be valid and reliable, and was, in fact, used in this case. *See* Exhibit D-3 (Declaration of R. Karl Hanson, pp.9-11). With the availability of these

alternative measures for assessing the likelihood of reoffense, acknowledged and found to be appropriate by both our Supreme and Superior Courts, we similarly conclude that individualized risk assessments provide a reasonable alternative means of determining whether an adult non-SVP offender poses a high risk for recidivity.

CONCLUSION

Because Defendant has been convicted of an enumerated sexual offense - indecent assault, he is presumed under SORNA to be a danger to the community and likely to reoffend, a presumption which requires that he register as a Tier II sex offender for twenty-five years. Because SORNA provides no procedure for Defendant to challenge this presumption, it is irrebuttable. As applied to Defendant, we find SORNA's irrebuttable presumption violates Defendant's right to due process under the Pennsylvania Constitution and is unenforceable.

BY THE COURT:

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P.J.