

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MICHAEL MUSCHICK

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1444 WDA 2013

Appeal from the Order Dated August 12, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0017069-2009

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED JUNE 24, 2014

Appellant, Michael Muschick, appeals from the order entered in the Allegheny County Court of Common Pleas, dismissing his petition seeking enforcement of negotiated plea agreement or, in the alternative, a writ of *habeas corpus*. We affirm.

The relevant facts and procedural history of this appeal are as follows. In May 2009, a state police investigation revealed that Appellant was sharing computer files containing child pornography. On June 9, 2010, Appellant entered a negotiated guilty plea to thirteen (13) counts of sexual abuse of children, 18 Pa.C.S.A. § 6312(b), (c). In exchange, the Commonwealth agreed to an aggregate sentence of five (5) years' probation. The parties also noted that Appellant was required to register as a sex offender for a period of ten (10) years, pursuant to Megan's Law. The court accepted the

plea and sentenced Appellant to the agreed-upon term of five (5) years' probation. The court also ordered Appellant to comply with certain probation conditions, including a condition that prohibited Appellant from possessing a personal computer or any other device with internet access. Appellant did not file a post-sentence motion or notice of appeal.

Appellant subsequently violated the terms of his probation by failing to report, having access to the internet, and testing positive for marijuana. The court conducted a probation violation hearing on March 7, 2012. At the conclusion of the hearing, the court revoked probation and re-sentenced Appellant to three (3) to twenty-three (23) months' incarceration, followed by five (5) years' probation. The court also granted immediate parole. Again, Appellant did not file a post-sentence motion or notice of appeal.¹

On July 10, 2013, Appellant filed a counseled petition seeking enforcement of plea agreement or, in the alternative, a writ of *habeas corpus*. In it, Appellant asserted:

5. One of the specific terms of the plea agreement between the Commonwealth and [Appellant] was that he...register as a sex offender under Megan's Law for a period of ten years. Because of the multiple charges to

¹ The certified record includes a transcript from a second probation violation hearing, which occurred on April 25, 2013. At that time, the Commonwealth announced Appellant had pled guilty to the new offense of failure to comply with sexual offender registration requirements. At the conclusion of the hearing, the court placed Appellant under the supervision of Justice Related Services, a treatment provider for sex offenders.

which he entered a guilty plea, [Appellant] could have been asked to register for his life.

6. [Appellant] recently received notification that he was now required to register as a sex offender for his lifetime. [Appellant] will be required to register his address and other information per the [Sex Offender Registration and Notification Act²]. This requirement became law...well after the plea was entered, and even after the probation violation...had occurred.

(Petition Seeking Enforcement of Negotiated Plea, filed 7/10/13, at 2). Appellant asked the court to enforce the "fundamental" term of the negotiated plea agreement that provided a ten-year registration period.

Also on July 10, 2013, the Commonwealth filed an answer, claiming the court should treat Appellant's filing as an untimely petition brought pursuant to the Post Conviction Relief Act ("PCRA").³ The court elected to consider Appellant's filing as a PCRA petition. On July 22, 2013, the court issued notice of its intent to dismiss the petition without a hearing, pursuant

² "The Sex Offender Registration and Notification Act ("SORNA"), commonly referred to as the Adam Walsh Act, became effective on December 20, 2012. By its terms, any individual who was then being supervised by the board of probation or parole was subject to its provisions." **Commonwealth v. Partee**, 86 A.3d 245, 246 (Pa.Super. 2014). SORNA replaced Megan's Law as the statute governing the registration and supervision of sex offenders. SORNA designates a conviction for sexual abuse of children, 18 Pa.C.S.A. § 6312(b), (c), as a "Tier II" sexual offense, subjecting a defendant to a twenty-five (25) year registration requirement. 42 Pa.C.S.A. § 9799.14(c)(4); 42 Pa.C.S.A. § 9799.15(a)(2). Two or more convictions for Tier II offenses subject a defendant to a lifetime registration requirement. 42 Pa.C.S.A. § 9799.14(d)(16); 42 Pa.C.S.A. § 9799.15(a)(3).

³ 42 Pa.C.S.A. §§ 9541-9546.

to Pa.R.Crim.P. 907. Appellant did not respond to the Rule 907 notice, and the court denied relief on August 12, 2013.

On August 30, 2013, Appellant timely filed a notice of appeal. The court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Appellant raises the following issues for our review:

DID THE TRIAL COURT ERR IN DISMISSING [APPELLANT'S] PETITION TO ENFORCE HIS PLEA AGREEMENT?

(A) DID THE COURT ERR IN CONSTRUING THE PETITION AS A PCRA PETITION, AND DEEMING IT UNTIMELY FILED?

(B) SHOULD THE TERMS OF [APPELLANT'S] AGREEMENT WITH THE COMMONWEALTH, INCLUDING THE LENGTH OF TIME HE WILL BE REQUIRED TO REGISTER UNDER THE ADAM WALSH ACT, BE STRICTLY ENFORCED?

(Appellant's Brief at 5).

On appeal, Appellant contends the 2010 negotiated plea agreement included a term requiring him to register as a sex offender for a period of ten years. In light of this term, Appellant asserts the court should have prevented the Commonwealth from relying on SORNA to require Appellant to register as a sex offender for the rest of his life. Appellant emphasizes "as the passage of time increases, so does one's reliance on the terms of a negotiated agreement." (Appellant's Brief at 23) (quoting **Commonwealth v. Ortiz**, 854 A.2d 1280, 1284 (Pa.Super. 2004), *appeal denied*, 581 Pa.

674, 863 A.2d 1145 (2004)). Appellant concludes the court erred in dismissing his petition to enforce the plea agreement, and this Court should confirm that Appellant must register as a sex offender for no more than ten years.⁴ We disagree.

When evaluating the terms of a negotiated plea agreement, we are guided by the following principles:

Although a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards. Furthermore, disputes over any particular term of a plea agreement must be resolved by objective standards. A determination of exactly what promises constitute the plea bargain must be based upon the totality of the surrounding circumstances and involves a case-by-case adjudication.

Any ambiguities in the terms of the plea agreement will be construed against the Government. Nevertheless, the agreement itself controls where its language sets out the terms of the bargain with specificity.

Commonwealth v. Kroh, 654 A.2d 1168, 1172 (Pa.Super. 1995) (internal citations omitted).

⁴ Appellant also argues the court should not have treated his filing as a PCRA petition, because his claim regarding the negotiated plea agreement does not fall within the scope of the PCRA. This Court has held that an identical claim was not subject to the PCRA. ***See Partee, supra*** at 247 (holding claim that ten-year registration requirement was essential term of negotiated plea agreement did not fall within scope of PCRA; appellant's petition seeking enforcement of plea agreement sought relief that was not cognizable under PCRA; therefore, claim was not subject to time constraints of PCRA).

“Plea bargains which are entered knowingly and voluntarily are viewed with favor in this Commonwealth. If a trial court accepts a plea bargain, the defendant who has given up his constitutional right to trial by jury must be afforded the benefit of all promises made by the district attorney.” ***Commonwealth v. Hainesworth***, 82 A.3d 444, 449 (Pa.Super. 2013) (quoting ***Commonwealth v. Fruehan***, 557 A.2d 1093, 1094 (Pa.Super 1989)). “Specific enforcement of valid plea bargains is a matter of fundamental fairness.” ***Hainesworth, supra*** at 449.

Significantly, “where the original sentence evolved from a plea bargain, and a defendant later violates his...probation, the defendant has effectively abrogated the underlying plea bargain.” ***Commonwealth v. Parsons***, 969 A.2d 1259, 1270 n.6 (Pa.Super. 2009), *appeal denied*, 603 Pa. 685, 982 A.2d 1228 (2009). “[W]here probation is violated, the trial court is free to impose any sentence permitted under the Sentencing Code and is not restricted by the bounds of a negotiated plea agreement between a defendant and prosecutor.” ***Partee, supra*** at 249.

The rationale for giving the trial court such discretion upon resentencing is grounded in the nature of a negotiated guilty plea, which is a two-sided agreement that imposes obligations on both the defendant and the Commonwealth. On the one hand, the Commonwealth agrees not to prosecute the defendant to the full extent of the law and to recommend a circumscribed punishment. The defendant, on the other hand, accepts this benefit with the implicit promise that he will abide by the terms of the agreement and behave in accordance with the legal punishment imposed by the court.

Id. at 249-50 (quoting **Commonwealth v. Wallace**, 582 Pa. 234, 242 n.6, 870 A.2d 838, 843 n.6 (2005)).

Instantly, the prosecutor announced the terms of the negotiated plea agreement at the plea hearing:

There is an agreement as to a proposed sentence. In exchange for a plea to all the counts in the criminal information, there would be a five-year period of probation. He, additionally, would be subject to a ten-year registration requirement under the terms of Megan's Law. While on probation I have had [Appellant] execute a document indicating several other controls that we would like to have placed on him. Most importantly, that he not have any access to any computer or system that would allow him to have access to the internet, that being a telephone, a computer terminal, or a computer at work. That lasts the length of five years.

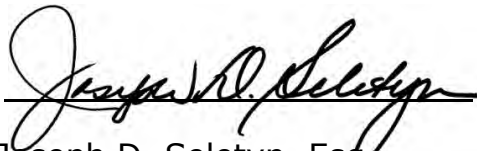
(**See** N.T. Guilty Plea Hearing, 6/9/10, at 2-3.) Appellant subsequently violated the conditions of his probation by failing to report to the probation office, having access to the internet, and testing positive for marijuana use. The court conducted a probation violation hearing on March 7, 2012. After receiving statements from the probation officer, testimony from Appellant's mother, and argument from counsel, the court found Appellant had violated the conditions of his probation. (**See** N.T. Violation Hearing, 3/7/12, at 13.)

Assuming that the ten-year registration requirement was a fundamental term of the negotiated plea agreement, Appellant is not entitled to specific performance of the agreement after he violated the conditions of his probation. **See Partee, supra; Parsons, supra.** Having failed to abide by the terms of the negotiated plea agreement, the agreement is no longer

in effect. **See Partee, supra.** Accordingly, we affirm the order denying Appellant's petition, albeit on different grounds. **See Commonwealth v. Johnson**, 941 A.2d 1286 (Pa.Super. 2008) (reiterating appellate court can uphold trial court's decision if there is any proper basis for result reached; appellate court is not constrained to affirm on grounds relied upon by trial court).

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014