NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. FLETCHER W. DAY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 233 MDA 2013

Appeal from the Order Entered on January 4, 2013
In the Court of Common Pleas of Dauphin County
Criminal Division at No.: CP-22-CR-0003326-1997

BEFORE: BENDER, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J.: **FILED JUNE 20, 2014**

Fletcher Day appeals the trial court's January 4, 2013 order. That order dismissed Day's "Petition for Judicial Bypass of Ex Post Facto Act 111 of 2011 and Act 91 of 2012."[1] We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] Act 111 of 2011 and Act 91 of 2012 refer to the original and amended bills that were subsequently enacted by our General Assembly as the Sex Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S. § 9799.10 *et seq*. We will refer to Day's petition as "Petition for Judicial Bypass" or "petition," and to the legislation as "SORNA."

On December 20, 2011, the General Assembly replaced Megan's Law with SORNA, "to strengthen registration requirements for sex offenders and to bring Pennsylvania into compliance with the Adam Walsh Child Protection and Safety Act, 42 U.S.C. §§ 16901 *et seq*." ***Commonwealth v. Sampolski***, 2014 PA Super 74, ___ A.3d ___, at *2 (Pa. Super. 2014). SORNA established a three-tier system of sexual offenses, with each tier mandating a different period of required registration. ***Id.*** Rape, to which

(Footnote Continued Next Page)

On April 13, 1998, Day pleaded guilty to rape, aggravated assault, sexual assault, and unlawful restraint,[2] charges which arose following a violent assault on Day's ex-girlfriend. Thereafter, the trial court imposed an agreed upon sentence of three to ten years' imprisonment. Day's counsel did not file post-sentence motions, even though Day requested counsel to do so. Thus, on appeal, we reinstated Day's right to file post-sentence motions *nunc pro tunc*, and remanded the case to the trial court. ***Commonwealth v. Day***, No. 2027 MDA 2000, slip op. at 8 (Pa. Super. Aug. 30, 2001).

On remand, Day filed post-sentence motions, in which he sought, *inter alia*, to withdraw his guilty plea. Counsel was appointed, who thereafter filed amended post-sentence motions alleging that plea counsel was ineffective. On June 11, 2002, Day's post-sentence motions were denied by operation of law. On June 17, 2002, Day filed a notice of appeal. On appeal, a panel of this Court concluded that Day had not been apprised fully of the possibility that fines could be imposed upon him as a result of his guilty plea. Thus, the panel held that Day's guilty plea was not knowing, voluntary, and intelligent, and vacated Day's judgment of sentence.

(Footnote Continued) ———————————

Day pleaded *nolo contendere*, is a "Tier 3" offense, and requires lifetime registration. 42 Pa.C.S. §§ 9799.14(d)(2); 9799.15(a)(3).

[2] 18 Pa.C.S. §§ 3121(a)(1), 2702(a)(1), 3124.1, and 2902(1), respectively.

Commonwealth v. Day, No. 841 MDA 2002, slip. op. at 11-12, 15 (Pa. Super. June 10, 2003).

On March 11, 2004, Day entered a *nolo contendere* plea to the same charges to which he earlier had pleaded guilty. On the same date, Day was sentenced to five years' probation on the rape count, five years of concurrent probation on the aggravated assault count, and twelve months of concurrent probation on the unlawful restraint count. The trial court imposed no penalty on the sexual assault count, finding that it merged with the rape count.

During the *nolo* plea hearing, Day was instructed that, pursuant to the plea agreement, the Commonwealth would not seek to have Day assessed for purposes of determining whether he met the criteria to be classified as a sexually violent predator pursuant to the relevant provisions of Megan's Law in effect at that time. ***See*** 42 Pa.C.S. § 9795.4(b) (expired on December 20, 2012 pursuant to 42 Pa.C.S. § 9799.41). However, Day also was apprised by the assistant district attorney of the following with regard to his requirement to register with the Pennsylvania State Police pursuant to Megan's Law:

> Just briefly, Mr. Day, this is the notification requirement of the registration of sexual offenders pursuant to 42 Pa.C.S. Section 9795, having been convicted of the above offenses, upon release or parole or incarceration or commencement of a sentence of parole, if you change your address thereafter, you are required to notify the Pennsylvania State Police of that address within 10 days. If you move to another state, you are required to register as a sexual offender with the state police and any local police

> agency of the state within 10 days of establishing residency there.
>
> You shall continue indefinitely until terminated by the court. In any event, for not less than 10 years. A failure to comply with these constitutes a felony of the third degree.

Notes of Testimony ("N.T."), 3/11/2004, at 14-15.

Apparently, Day complied with his reporting requirements at all times following his *nolo contendere* plea. On December 3, 2012, Day received a letter from the Pennsylvania State Police informing him that, pursuant to newly-enacted SORNA and based upon the crimes to which Day pleaded *nolo contendere*, he now was classified as a "Tier 3" offender. So designated, Day was informed that he would have to register as a sexual offender with the Pennsylvania State Police for the remainder of his lifetime, and that he was required to verify that registration every three months at an approved registration site. ***See*** Letter, 12/3/2012, ¶2. On December 19, 2012, Day filed a *pro se* "Petition for Judicial Bypass," in which he alleged that the lifetime registration requirement was a change from what he believed to be a ten-year reporting requirement, constituting an *ex post facto* violation of his constitutional rights. ***See*** Petition for Judicial Bypass, 12/19/2012, at ¶¶ 6-8. The trial court dismissed Day's petition on January 4, 2013, concluding that Day failed "to state a cognizable claim." ***See*** Order, 1/4/2013.

On February 4, 2013, Day filed a notice of appeal. On February 12, 2013, the trial court directed Day to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Day timely

complied. On May 3, 2013, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

On February 19, 2014, after initial briefing by the parties and oral argument, we entered an order directing the parties to file supplemental briefs addressing this Court's recent decision in ***Commonwealth v. Hainesworth***, 82 A.3d 444 (Pa. Super. 2013) (*en banc*). Both parties have filed supplemental briefs accordingly.

In his principal brief, Day presents the following question for our review: "Whether the retroactive application of Megan's Law requiring new classification and new registration/verification requirements violate *ex post facto* laws, due process, and double jeopardy clauses of the United States and Pennsylvania Constitutions while violating [Day's] rights and negotiated plea agreement?" Brief for Day at 4.

Before we may assess whether Day is entitled to relief on the substantive merits of his claim, we must make two preliminary determinations. First, we must determine whether we have jurisdiction in this case. Second, if we have jurisdiction, we then must determine whether Day is entitled to relief pursuant to our recent ***Hainesworth*** decision. We begin with the jurisdictional question.

Generally speaking, all post-conviction petitions for collateral relief must be brought pursuant to the dictates of the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-46. Indeed, the PCRA is the sole means of collateral relief in Pennsylvania, so long as the PCRA provides a potential

remedy for the claim that is raised by the litigant. ***See Commonwealth v. Taylor***, 65 A.3d 462, 466 (Pa. Super. 2013); 42 Pa.C.S. § 9542 (The PCRA "shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis."). All petitions for relief filed pursuant to the PCRA must be filed within one year that a judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). This time limit is jurisdictional, and cannot be avoided by titling the petition something other than a PCRA petition. ***Taylor***, 65 A.3d at 466, 468.

Instantly, Day's Petition for Judicial Bypass was filed approximately eight years after his judgment of sentence became final. Thus, if we were to construe his petition as a PCRA petition, it would be facially untimely and we would lack jurisdiction to consider this appeal. However, in ***Commonwealth v. Partee***, 86 A.3d 245 (Pa. Super. 2014), we recently considered a similar challenge to the imposition of the new requirements of SORNA upon a sexual offender. In ***Partee***, the appellant entered into a plea agreement that was structured in such a way that the charges to which the appellant would plead would subject him only to a ten-year reporting requirement pursuant to Megan's Law. ***Id.*** at 249. The appellant subsequently violated the plea agreement, and was resentenced. Upon resentencing, the appellant learned that the charges to which he had pleaded guilty now required registration pursuant to SORNA for a period of

twenty-five years. ***Id.*** at 246. The appellant filed a petition for *habeas corpus*, seeking to enforce the terms of the original plea bargain that required only ten years of sexual offender reporting. The trial court considered the petition to be a PCRA petition, and concluded that the petition was untimely. ***Id.*** at 246-47.

We disagreed with the trial court. We held, *inter alia*, that the appellant's challenge to the application of the newly-enacted terms of SORNA did not fall within the purview of the PCRA, and that the PCRA could not provide a remedy for the appellant's challenge. We noted that such a challenge did not fall within any of the statutory bases for relief set forth in 42 Pa.C.S. § 9543(a)(2). We explained that, by challenging the post-sentence application of SORNA, the appellant's petition:

> is not an attack on [the appellant's] sentence, nor is he alleging that he is innocent of the offenses of which he was convicted. [The appellant] is not asserting that his conviction or sentence resulted from a violation of the Constitution, ineffective assistance of counsel, an unlawfully-induced plea, obstruction by government officials of his right to appeal, newly-discovered evidence, an illegal sentence, or lack of jurisdiction. In short, we agree with [the appellant] that his claim does not fall within the scope of the PCRA and should not be reviewed under the standard applicable to the dismissal of PCRA petitions. . . . Furthermore, it is not subject to the PCRA's time constraints, and hence, we have jurisdiction to entertain it.

Id. at 247.

Day's Petition for Judicial Bypass materially is the same as the petition filed in ***Partee***. Day is not challenging his conviction or his sentence based upon any of the bases set forth in 42 Pa.C.S. § 9543(a)(2). Thus, like in

Partee, the PCRA cannot provide Day the remedy that he seeks. Day's petition falls outside of the scope of the PCRA and, therefore, is not subject to the PCRA's time limit. Hence, we have jurisdiction in this appeal.

We now turn to our discussion of whether ***Hainesworth*** provides Day with the relief that he seeks. Since the filing of his Petition for Judicial Bypass, Day has maintained that, *inter alia*, the post-sentence application of SORNA to his registration obligations has violated the terms of his *nolo contendere* plea agreement. ***See*** Petition for Judicial Bypass, 12/19/2012 at 2 ¶6. In ***Hainesworth***, we considered the effect that SORNA had on plea negotiations that included agreements pertaining to the registration and notification requirements for sexual offenders. The parties have addressed the application of ***Hainesworth*** to this case in their supplemental briefs. For the reasons that follow, we conclude that ***Hainesworth*** is inapplicable to the instant matter.

In ***Partee***, we set forth a comprehensive discussion of ***Hainesworth***, which follows:

> [I]n ***Hainesworth***, 82 A.3d 444 (Pa. Super. 2013), [] this Court specifically enforced a negotiated plea agreement that did not require the defendant to report as a sex offender under Megan's Law, despite subsequent amendments to the statute that would have subjected him to reporting requirements. Hainesworth entered a negotiated guilty plea to three counts each of statutory sexual assault and indecent assault, and one count each of indecent assault and criminal use of communication facility in February 2009. None of these convictions required registration under the then-prevailing version of Megan's Law, 42 Pa.C.S. § 9791. Other charges that would have imposed a

> registration requirement were withdrawn by the Commonwealth pursuant to the plea negotiations.
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> Hainesworth filed a motion seeking to terminate supervision effective one week prior to the effective date of SORNA. The trial court denied the petition to terminate supervision, but held that application of SORNA's registration requirements to Hainesworth violated due process.
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> On appeal, this Court, sitting *en banc*, concluded first that Hainesworth correctly framed the issue as one of contract law, and applied the standard of review applicable to whether a plea agreement had been breached: "what the parties to this plea agreement reasonably understood to be the terms of the agreement." ***Hainesworth***, *supra* (quoting ***Commonwealth v. Fruehan***, 557 A.2d 1093, 1095 (Pa. Super. 1989)). We look to the "totality of the surrounding circumstances" and "[a]ny ambiguities in the terms of the plea agreement are construed against the [Commonwealth]." ***Commonwealth v. Kroh***, 654 A.2d 1168, 1172 (Pa. Super. 1995). The dispositive question was "whether registration was a term of the bargain struck by the parties." ***Hainesworth***, 82 A.3d at 448. We examined the record. The terms of the plea agreement were set forth and included a discussion of the fact that the offenses to which the defendant was pleading guilty did not require registration and supervision as a sex offender. We distinguished ***Commonwealth v. Benner***, 853 A.2d 1068 (Pa. Super. 2004) (Benner was always subject to a reporting requirement, albeit ten years instead of a lifetime, and the record did not support Benner's contention that he had bargained for non-registration as a term of his plea), and held that the plea agreement "appears to have been precisely structured so that Hainesworth would not be subjected to a registration requirement." ***Hainesworth***, 82 A.3d at 448.

Partee, 86 A.3d at 247-48 (citations modified).

Instantly, the record demonstrates that the only Megan's Law aspect that specifically was part of Day's plea bargain was the Commonwealth's promise not to pursue a sexually violent predator designation. Unlike ***Hainesworth***, Day explicitly was instructed that he would have to register

pursuant to Megan's Law. N.T., 3/11/2004, at 14-15. Nonetheless, Day contends that, according to the terms of his agreement, he was only required to register for ten years, and that the lifetime reporting requirement imposed upon him by SORNA constituted a breach of the specific terms of his agreement. The record belies Day's claim. Day specifically was instructed that he was required to report indefinitely until such requirement was terminated by the court, and that it would be **at least** ten years. ***Id.*** Nowhere in the agreement, as reported on the record, did the parties bargain for a reporting term of **only** ten years. Therefore, the lifetime reporting requirement imposed upon Day by SORNA did not violate a specific term contemplated by, and agreed to, by the parties during the plea negotiations. Consequently, ***Hainesworth*** is unavailing in Day's case.

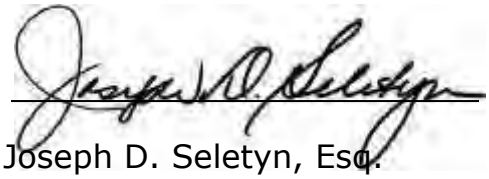
Finally, we turn to the specific claims raised by Day in his brief, namely that the SORNA's lifetime registration requirements, as applied to his specific situation, violated his constitutional right to due process and the constitutional protections against *ex post facto* laws and double jeopardy. Unfortunately for Day, we are unable to review these allegations, because he has waived them due to his failure to support the claims with pertinent authority. According to Pennsylvania Rule of Appellate Procedure 2119(a), an appellant must support the arguments set forth in his appellate brief with "such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a). The failure to support an argument with such authorities

results in waiver of that claim. ***Commonwealth v. Antidormi***, 84 A.3d 736, 754 (Pa. Super. 2014).

Although Day cites the relevant constitutional provisions supporting his claim, he fails entirely to support his argument with binding relevant cases from this Court, or from any Court for that matter. The only case cited by Day is ***Fletcher v. Peck***, 10 U.S. 87 (1810), a case from 1810. Day does not cite any one of the litany of cases addressing *ex post facto*, due process, or double jeopardy that have been decided in the two hundred years since ***Fletcher***. Moreover, Day fails to cite, or attempt to distinguish, any of the cases addressing similar challenges made to Megan's Law, SORNA's predecessor. These failures preclude us from meaningfully addressing Day's claims, and necessarily produce the type of undeveloped argument that must result in waiver of Day's substantive claims. Hence, "as [Day] has cited no legal authorities nor developed any meaningful analysis, we find this issue waived for lack of development." ***Commonwealth v. McLaurin***, 45 A.3d 1131, 1139 (Pa. Super. 2012) (citing ***Commonwealth v. Johnson***, 985 A.2d 915, 924 (Pa. 2009)); Pa.R.A.P. 2119(a).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/20/2014