

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT STEPHEN FLEMING	:	
	:	
Appellant	:	No. 1404 EDA 2017

Appeal from the Judgment of Sentence November 23, 2015
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0003920-2014

BEFORE: GANTMAN, P.J., DUBOW, J., and KUNSELMAN, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED OCTOBER 10, 2018

Appellant, Robert Stephen Fleming, appeals *pro se* and *nunc pro tunc* from the judgment of sentence entered in the Chester County Court of Common Pleas, following his jury trial convictions for involuntary deviate sexual intercourse (“IDSI”) with a child less than 16, IDSI with a child less than 13, incest with a child less than 13, incest with a child between 13 and 18, aggravated indecent assault of a child less than 16, aggravated indecent assault of a child, corruption of minors, endangering the welfare of children (“EWOC”), and indecent assault.¹ For the following reasons, we affirm in part, vacate in part, and remand with instructions.

The relevant facts and procedural history of this case are as follows. On

¹ 18 Pa.C.S.A. §§ 3123(a)(7), 3123(b), 4302(b)(1), 4302(b)(2), 3125(a)(8), 3125(a)(b), 6301(a)(1)(ii), 4304(a), 3126(a)(7), and respectively.

August 31, 2015, a jury convicted Appellant of four counts of indecent assault, two counts each of IDSI with a child less than 16, IDSI with a child less than 13, incest with a child less than 13, and incest of a child between 13 and 18, and one count each of aggravated assault of a child less than 16, aggravated assault of a child less than 13, corruption of minors, and EWOC, stemming from Appellant's repeated sexual assault of his daughter. The court sentenced Appellant on November 23, 2015, to an aggregate term of thirty-seven (37) to eighty-six (86) years' incarceration. That same day, the court adjudicated Appellant a sexually violent predator ("SVP") and informed Appellant of his lifetime registration requirement under the Sex Offender Registration and Notification Act ("SORNA") at 42 Pa.C.S.A. §§ 9799.10-9799.41, as both a Tier III offender and an SVP. On December 3, 2015, Appellant timely filed post-sentence motions, which the court denied on April 29, 2016.

On September 2, 2016, Appellant filed a *pro se* letter to the court, which the court deemed Appellant's timely first *pro se* petition filed under the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. §§ 9541-9546. That same day, the PCRA court appointed PCRA counsel. On March 31, 2017, the PCRA court granted relief in part and reinstated Appellant's direct appeal rights *nunc pro tunc*. Appellant filed a timely notice of appeal from the judgment of sentence *nunc pro tunc* on April 27, 2017. In two *pro se* letters to the court dated May 8, 2017, and May 10, 2017, Appellant requested to proceed *pro se* on direct appeal. On May 17, 2017, the trial court informed this Court of Appellant's

request. This Court directed the trial court on June 29, 2017, to conduct a **Grazier**² hearing. The trial court held a **Grazier** hearing on July 17, 2017, and subsequently determined Appellant waived counsel knowingly, voluntarily, and intelligently. On July 18, 2017, the court ordered Appellant to file a concise statement of errors complained of on appeal per Pa.R.A.P. 1925(b); Appellant failed to comply.

Appellant raises one issue for review:

[WHETHER APPELLANT PROPERLY PRESERVED HIS ISSUES
ON APPEAL?]

(Appellant's Brief at 7-13).³

As a prefatory matter, "to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to [Rule] 1925. Any issues not raised in a [Rule] 1925(b) statement will be deemed waived." **Commonwealth v. Castillo**, 585 Pa. 395, 403, 888 A.2d 775, 780 (2005) (quoting **Commonwealth v. Lord**, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998)). "Rule 1925(b) waivers may be raised by the appellate court *sua sponte*." **Commonwealth v. Hill**, 609 Pa. 410, 427, 16 A.3d 484, 494 (2011).

² **Commonwealth v. Grazier**, 552 Pa. 9, 713 A.2d 81 (1998).

³ In his brief, Appellant raises approximately 28 issues, many of which are unclear. For the purposes of disposition, we summarized Appellant's primary issue.

Instantly, the court ordered Appellant on July 18, 2017, to file a Rule 1925(b) statement. Appellant, however, failed to comply. Accordingly, Appellant waived all issues on appeal. ***See Castillo, supra; Lord, supra.***

As a second prefatory matter, we observe:

[A]ppellate briefs and reproduced records must materially conform to the requirements of the Pennsylvania Rules of Appellate Procedure. Pa.R.A.P. 2101. This Court may quash or dismiss an appeal if the appellant fails to conform to the requirements set forth in the Pennsylvania Rules of Appellate Procedure. ***Id.***; ***Commonwealth v. Lyons***, 833 A.2d 245 (Pa.Super. 2003)[, *appeal denied*, 583 Pa. 695, 879 A.2d 782 (2005)]. Although this Court is willing to liberally construe materials filed by a *pro se* litigant, *pro se* status confers no special benefit upon the appellant. ***Id.*** at 252. To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing. ***Commonwealth v. Rivera***, 685 A.2d 1011 ([Pa.Super.] 1996).

Commonwealth v. Adams, 882 A.2d 496, 497-98 (Pa.Super. 2005). The applicable rules of appellate procedure mandate that an appellant's brief **shall** consist of the following matters, separately and distinctly entitled and in the following order:

- (1) Statement of jurisdiction.
- (2) Order or other determination in question.
- (3) Statement of both the scope of review and the standard of review.
- (4) Statement of the questions involved.
- (5) Statement of the case.
- (6) Summary of argument.

- (7) Statement of the reasons to allow an appeal to challenge the discretionary aspects of a sentence, if applicable.
- (8) Argument for appellant.
- (9) A short conclusion stating the precise relief sought.
- (10) The opinions and pleadings specified in Subdivisions (b) and (c) of this rule.
- (11) In the Superior Court, a copy of the statement of errors complained of on appeal, filed with the trial court pursuant to Rule 1925(b), or an averment that no order requiring a statement of errors complained of on appeal pursuant to [Rule] 1925(b) was entered.

Pa.R.A.P. 2111(a). Further,

Briefs and reproduced records **shall** conform in all material respects with the requirements of these rules as nearly as the circumstances of the particular case will admit, otherwise they may be suppressed, and, if the defects are in the brief or reproduced record of the appellant and are substantial, the appeal or other matter may be quashed or dismissed.

Pa.R.A.P. 2101 (emphasis added). **See also** Pa.R.A.P. 2114-2119 (addressing specific requirements of each subsection of appellate brief).

Noncompliance with Rule 2116 is particularly grievous because the statement of questions involved defines specific issues for review. **Commonwealth v. Maris**, 629 A.2d 1014 (Pa.Super. 1993). **See also** Pa.R.A.P. 2116(a) (explaining statement of questions involved must state concisely issues to be resolved). Moreover,

The argument **shall** be divided into as many parts as there

are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119(a) (emphasis added). **See also *Commonwealth v. Noss***, 162 A.3d 503, 509 (Pa.Super. 2017) (explaining arguments which are not appropriately developed are waived on appeal); ***Commonwealth v. Knox***, 50 A.3d 732 (Pa.Super. 2012), *appeal denied*, 620 Pa. 721, 69 A.3d 601 (2013) (reiterating failure to cite to legal authority to support argument results in waiver).

Instantly, Appellant's *pro se* appellate brief falls short of the requisite standards. Appellant's brief lacks a statement of the scope and the standard of review, a summary of the argument, legal argument sufficient to allow appellate review, and a separate conclusion section stating the precise relief sought. **See** Pa.R.A.P. 2111(a). Further, Appellant attempts to raise approximately 28 issues in his brief, but fails to discuss them appropriately with citations to legal authority under separate headings in the one and one-half (1½) page argument section of the brief. **See** 2116(a), 2119(a). Appellant's gross deviation from procedural rules governing appellate briefs precludes meaningful review and constitutes waiver of his issue(s) for appellate review. **See *Noss, supra*; *Knox, supra***. For the foregoing reasons, Appellant has waived all appellate issues. Accordingly, we affirm. **See generally *In re K.L.S.***, 594 Pa. 194, 197 n.3, 934 A.2d 1244, 1246 n.3

(2007) (stating where issues are waived on appeal, we should affirm rather than quash appeal).

Nevertheless, we are mindful of recent case law calling into question the validity of Appellant's SVP status. Consequently, we elect to review the legality of Appellant's sentence *sua sponte*. **See Commonwealth v. Randal**, 837 A.2d 1211 (Pa.Super. 2003) (*en banc*) (explaining challenges to illegal sentence cannot be waived and may be raised by this Court *sua sponte*, assuming jurisdiction is proper; illegal sentence must be vacated); **Commonwealth v. Butler**, 173 A.3d 1212 (Pa.Super. 2017), *allowance of appeal granted*, ___ PA. ___, ___ A.3d ___ (July 31, 2018) (addressing legality of appellant's SVP status *sua sponte*).

Recently, the Pennsylvania Supreme Court held that the registration requirements under SORNA constitute criminal punishment. **Commonwealth v. Muniz**, 640 Pa. 699, 164 A.3d 1189 (2017). In light of **Muniz**, this Court held: "[U]nder **Apprendi** and **Alleyne**, a factual finding, such as whether a defendant has a mental abnormality or personality disorder that makes him...likely to engage in predatory sexually violent offenses, that increases the length of registration must be found beyond a reasonable doubt by the chosen fact-finder."⁴ **Butler, supra** at 1217 (internal quotations and

⁴ **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and **Alleyne v. United States**, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

citations omitted). This Court further held: "Section 9799.24(e)(3) of SORNA^[5] violates the federal and state constitutions because it increases the criminal penalty to which a defendant is exposed without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt." **Id.** at 1218. The **Butler** Court concluded that trial courts can no longer designate convicted defendants as SVPs or hold SVP hearings, "until [the] General Assembly enacts a constitutional designation mechanism." **Id.** (vacating appellant's SVP status and remanding to trial court for sole purpose of issuing appropriate notice under 42 Pa.C.S.A. § 9799.23, governing reporting requirements for sex offenders, as to appellant's registration obligation).^{6, 7}

⁵ **See** 42 Pa.C.S.A. § 9799.24(e)(3) (stating: "At the hearing prior to sentencing, the court shall determine whether the Commonwealth has proved by clear and convincing evidence that the individual is a sexually violent predator").

⁶ Following **Muniz** and **Butler**, the Pennsylvania General Assembly enacted legislation to amend SORNA. **See** Act of Feb. 21 2018, P.L. 27, No. 10 ("Act 10"). Act 10 amended several provisions of SORNA, and also added several new sections found at 42 Pa.C.S.A. §§ 9799.42, 9799.51-9799.75. In addition, the Governor of Pennsylvania recently signed new legislation striking the Act 10 amendments and reenacting several SORNA provisions, effective June 12, 2018. **See** Act of June 12, 2018, P.L. 1952, No. 29. These modifications do not apply to Appellant's SVP adjudication, however, which the trial court imposed in 2015 under the original SORNA.

⁷ We recognize the Pennsylvania Supreme Court has taken **Butler** up for review on the Commonwealth's petition for allowance of appeal. The Supreme Court's review of **Butler**, however, remains in its early stages. Further, unless and until our Supreme Court rules otherwise, **Butler** remains binding authority.

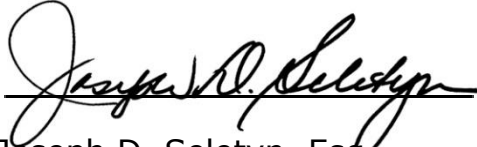
Here, the court adjudicated Appellant an SVP under SORNA on November 23, 2015. On December 3, 2015, Appellant filed a post-sentence motion, which the court denied on April 29, 2016. Appellant timely filed his first *pro se* PCRA petition on September 2, 2016. On March 31, 2017, the PCRA court granted relief and reinstated Appellant's direct appeal rights *nunc pro tunc*. Appellant filed a timely notice of appeal *nunc pro tunc* on April 27, 2017. While Appellant's direct appeal was pending, our Supreme Court decided ***Muniz*** on July 19, 2017, and this Court decided ***Butler*** on October 31, 2017. In light of ***Muniz*** and ***Butler***, Appellant's SVP status constitutes an illegal sentence, which we can review *sua sponte*. ***See Randal, supra***. Therefore, we vacate Appellant's SVP status and remand the case to the trial court to issue a revised notice to Appellant pursuant to 42 Pa.C.S.A. § 9799.23 in accordance with ***Butler***. Accordingly, we affirm the judgment of sentence in all respects, but vacate Appellant's SVP status, and remand with instructions.⁸

Judgment of sentence affirmed in part and vacated in part; case remanded with instructions. Jurisdiction is relinquished.

⁸ Due to our disposition, we deny Appellant's *pro se* open "Motion for Default Judgment."

J-S36032-18

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/18