

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
MICHAEL D'ERAMO,	:	No. 530 EDA 2018
	:	
Appellant	:	

Appeal from the PCRA Order, January 16, 2018,  
in the Court of Common Pleas of Bucks County  
Criminal Division at No. CP-09-CR-0007832-2012

BEFORE: LAZARUS, J., McLAUGHLIN, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED NOVEMBER 20, 2018**

Michael D'Eramo appeals from the January 16, 2018 order entered in the Court of Common Pleas of Bucks County that denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm in part, vacate in part, and remand for further proceedings consistent with this memorandum.

At the outset, we note that the record reflects that the conduct giving rise to appellant's aggravated indecent assault conviction occurred during the summer of 2011. At the time of the offense, Megan's Law III was in effect, and a person convicted of aggravated indecent assault was subject to

lifetime registration as a sexual offender. **See** 42 Pa.C.S.A. § 9795.1(b)(2)(i) (expired).<sup>1</sup>

The PCRA court set forth the following:

On June 18, 2013, [a]ppellant, then twenty (20) years old, entered a guilty plea to digitally penetrating a nine (9) year-old girl.[Footnote 2] On September 24, 2013, the trial court sentenced [a]ppellant to five (5) to ten (10) years' incarceration and seven years' probation thereafter.

[Footnote 2] The offenses were Unlawful Contact with Minors, 18 Pa.C.S.[A.] § 6318(a)(1); Aggravated Indecent Assault Without Consent, 18 Pa.C.S.[A.] § 3125(a)(1); Aggravated Indecent Assault - Complainant Less than 13 Years Old, 18 Pa.C.S.[A.] § 3125(a)(7); Corruption of Minors - Defendant Age 18 or Above, 18 Pa.C.S.[A.] § 6301(a)(1)(ii); and related misdemeanors.

Appellant filed a counseled PCRA Petition on September 11, 2014, followed by a Motion to withdraw his guilty plea a few weeks later. On May 6, 2015, [a]ppellant filed a counseled Amended PCRA Petition. We granted [a]ppellant's PCRA Petition on July 14, 2016, allowing him to withdraw his guilty plea, by agreement.

On August 30, 2016, [a]ppellant pled guilty again to the same charges and was sentenced to five (5) to ten (10) years' incarceration and ten (10) years' probation thereafter. Just under a year later, [a]ppellant filed a Motion to Modify Sentence on

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<sup>1</sup> Megan's Law III expired on December 20, 2012, when it was replaced by the Sexual Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S.A. §§ 9799.10-9799.41. The following year, our supreme court invalidated Megan's Law III in **Commonwealth v. Neiman**, 84 A.3d 603 (Pa. 2013).

August 14, 2017. We treated [a]ppellant's *pro se* Motion as a PCRA Petition. A counseled Amended PCRA Petition was filed on November 13, 2017. We filed our Notice of Intent to Dismiss on December 15, 2017, culminating in an Order denying [a]ppellant's PCRA Petition on January 16, 2018.

Appellant filed his Notice of Appeal on February 14, 2018.[]

Trial court opinion, 4/23/18 at 1-3.

The record reflects that the PCRA court then ordered appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. The PCRA court then filed its Rule 1925(a) opinion.

Appellant raises the following issues for our review:<sup>2</sup>

- [1.] Whether the [PCRA] court erred in dismissing [a]ppellant's request for relief pursuant to the [PCRA] by finding that it lacked jurisdiction over the matter?
- [2.] Whether Pennsylvania's Sexual Offender Registration and Notification Act (hereinafter SORNA), 42 Pa.C.S.[A. §§ 9799.10-9799.41, as applied retroactively to [appellant], whose offense predates December 20, 2012, is unconstitutional under the *ex post facto* clauses of the United States and Pennsylvania constitutions?

Appellant's brief at 4 (full capitalization omitted).

Appellant first contends that the PCRA court erred in dismissing his petition for lack of jurisdiction as untimely. Although the order from which

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<sup>2</sup> For ease of discussion, we have re-ordered appellant's issues.

J. S62033/18

appellant takes his appeal dismissed appellant's PCRA petition for that reason, in its Rule 1925(a) opinion, the PCRA court concludes that "[a]lthough [a]ppellant's [p]etition is **timely** and therefore we have jurisdiction, the substantive arguments are moot." (PCRA court opinion, 4/23/18 at 3 (emphasis added).)

To be certain, we note that all PCRA petitions, including second and subsequent petitions, must be filed within one year of when a defendant's judgment of sentence becomes final. 42 Pa.C.S.A. § 9545(b)(1). "A judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of the time for seeking the review." 42 Pa.C.S.A. § 9545(b)(3). The Supreme Court of Pennsylvania has held that the PCRA's time restriction is constitutionally sound. **Commonwealth v. Cruz**, 852 A.2d 287, 292 (Pa. 2004). In addition, our supreme court has instructed that the timeliness of a PCRA petition is jurisdictional. If a PCRA petition is untimely, a court lacks jurisdiction over the petition. **Commonwealth v. Callahan**, 101 A.3d 118, 120-121 (Pa.Super. 2014) (courts do not have jurisdiction over an untimely PCRA); **see also Commonwealth v. Wharton**, 886 A.2d 1120 (Pa. 2005).

Here, the PCRA court sentenced appellant on August 30, 2016. Appellant failed to file a direct appeal to this court, and consequently, appellant's judgment of sentence became final on September 29, 2016,

thirty days after imposition of sentence and the time for filing a direct appeal expired. **See** 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 903; **Commonwealth v. Cintora**, 69 A.3d 759, 763 (Pa.Super. 2013). Therefore, appellant's petition, filed August 14, 2017, is timely. As a result, the PCRA court had jurisdiction over appellant's PCRA petition.

Appellant next contends that he is serving an illegal sentence under our supreme court's decision in **Commonwealth v. Muniz**, 164 A.3d 1189 (Pa. 2017), wherein our high court held that SORNA's purpose was punitive and its retroactive application to past sexual offenders violates the **ex post facto** clause of the United States Constitution and the **ex post facto** clause of the Pennsylvania Constitution. In a case involving a timely filed PCRA petition, as is the case here, this court has held that "**Muniz** created a substantive rule that retroactively applies in the collateral context." **Commonwealth v. Rivera-Figueroa**, 174 A.3d 674, 678 (Pa.Super. 2017).

As stated, at the time appellant committed his crimes, Megan's Law III was in effect, and appellant was subject to lifetime registration as a sex offender as a result of his aggravated indecent assault conviction. **See** 42 Pa.C.S.A. 9795.1(b)(2)(i) (expired). In 2013, our supreme court struck down Megan's Law III as violative of the single-subject requirement of Article III, Section 3 of the Pennsylvania Constitution. **Neiman**, 84 A.3d at 607. SORNA replaced Megan's Law III. The record reflects that on July 14,

J. S62033/18

2016, the PCRA court granted appellant relief and permitted him to withdraw his guilty plea. On August 30, 2016, appellant again pled guilty to aggravated indecent assault and was sentenced under SORNA as a Tier III offender, which subjected appellant to the registration requirements set forth in Subchapter H, including lifetime registration.

On June 19, 2017, our supreme court decided ***Muniz***. In response to that decision, as well as this court's decision in ***Commonwealth v. Butler***, 173 A.3d 1212 (Pa.Super. 2017), ***appeal granted***, 190 A.3d 581 (Pa. 2018) (holding that certain of the sexually violent predator provisions of SORNA were unconstitutional), the Pennsylvania Legislature passed a law to replace the portions of SORNA that our supreme court invalidated. ***See*** 2018 Pa. Legis. Serv. Act 2018-2029 (H.B. 925) (approved June 12, 2018) ("Act 29"), amending Title 42 (Judicial Procedure) of the Pennsylvania Consolidated Statutes. Act 29 became effective on June 12, 2018. The registration requirements found in Subchapter I of Act 29 apply to defendants, like appellant, who committed their offenses on or after April 22, 1996, but before December 20, 2012.

Appellant correctly contends that retroactive application of SORNA's registration requirements to offenders, like appellant, who committed their crimes prior to December 20, 2012, is unconstitutional under ***Muniz***. The trial court and the Commonwealth maintain that because appellant was subject to lifetime registration under SORNA and is still subject to lifetime

registration under Act 29, appellant's complaint is moot.<sup>3</sup> Appellant's complaint, however, is not moot because

[SORNA] augment[ed] the registration requirements for all Tier III offenders, which included quarterly in person reporting and the posting of their personal information on the Pennsylvania State Police website. As our Supreme Court pointed out in **Muniz**, these additional registration requirements constitute a greater punishment than what Megan's Law [III] would have imposed and consequently, their retroactive application violates the **ex post facto** clause of the Pennsylvania Constitution.

. . . .

. . . . The Supreme Court made clear that the **ex post facto** clauses of the United States and Pennsylvania Constitutions are implicated by SORNA where application of the statute would inflict greater punishment on appellant than the law in effect at the time he committed his crimes. This is exactly what transpired here.

**Commonwealth v. Horning**, 193 A.3d 411, 2018 Pa.Super.LEXIS 787, \*11 (Pa.Super. 2018) (internal citations and quotation marks omitted).

Accordingly, we vacate that portion of appellant's judgment of sentence that requires him to register as a sex offender under SORNA.<sup>4</sup>

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<sup>3</sup> The trial court, however, concedes in its Rule 1925(a) opinion that resentencing is required.

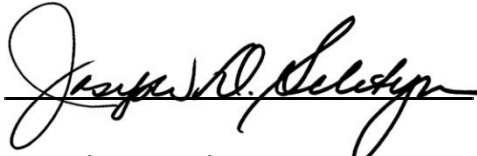
<sup>4</sup> We note that pursuant to **Horning**, which was filed on July 11, 2018, our decision does not preclude appellant from having to register as a sexual offender under Megan's Law III. **See Horning**, 2018 Pa.Super.LEXIS 787 at \*12 n.3 (noting that the decision that retroactive application of SORNA to defendant who committed his crimes when Megan's Law II was in effect was unconstitutional did not preclude defendant from having to register as a sexual offender under Megan's Law III). We finally note that retroactive

J. S62033/18

Order affirmed in part and vacated in part. Case remanded.

Jurisdiction relinquished.

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: 11/20/18

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application of the legislature's new amendments to SORNA, which became effective on June 12, 2018, is not before us.