

NO. 1 MAP 2017

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

JONATHAN R. GROVE,

Appellee.

BRIEF OF APPELLEE

Appeal From The November 29, 2016 Judgment Of
The Court of Common Pleas Of Schuylkill County Pennsylvania
No. CP-54-CR-1683-2015

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Is this appeal now moot in light of *Commonwealth v. Muniz*, No. 47 MAP 2016, -- A.3d. --, 2017 WL 3173066 (Pa. July 19, 2017), where this Court has held retroactive registration under SORNA unconstitutional under the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions?

Suggested answer: Yes

2. Does this Court have direct appellate jurisdiction over this appeal in light of its reasoning in *Graziano Constr. Co. v. Lee*, 409 A.2d 330 (Pa. 1979) (mem.), proscribing Supreme Court jurisdiction where the lower court “effectively applied” the case law retrospectively rather than striking a statute as unconstitutional?

Suggested answer: No

SUMMARY OF ARGUMENT

Appellee Grove was ordered to register as a sexual offender for an offense that was committed in 2003 when he was 15 years old. In 2012, Pennsylvania enacted the Sex Offender Registration and Notification Act. Due to a delayed report, Grove was prosecuted twelve years after his offense as an adult and sentenced and ordered to register as a sexual offender in 2016. The Court of Common Pleas, Schuylkill County, held that his registration as a sex offender was unconstitutional because it created an irrebuttable presumption that infringed on his fundamental reputation interests, directly applying this Court's decision in *In re J.B.*, 107 A.3d 1 (Pa. 2014). Thereafter, this Court ruled that the retroactive registration for offenses committed prior to SORNA's enactment were unconstitutionally punitive under the *Ex Post Facto* Clauses of the Pennsylvania and United States Constitutions. *Commonwealth v. Muniz*, No. 47 MAP 2016, -- A.3d. --, 2017 WL 3173066 (Pa. July 19, 2017).

Grove's underlying offense occurred long before SORNA's enactment. *Muniz* moots Grove's challenge because his registration has now been held to be unconstitutionally punitive under the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions. Should this Court determine Grove's challenge is not moot, this Court's reasoning in *Graziano Constr. Co. v. Lee*, 409 A.2d 330 (Pa. 1979) (mem.) divests this Court of jurisdiction over the instant matter because the

trial court directly applied this Court's holding in *In re J.B.* As such, the matter requires transfer to the Superior Court, which is the appropriate forum for this appeal.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS MATTER BECAUSE OF ITS DECISION IN *COMMONWEALTH V. MUNIZ*

A. In *Commonwealth v. Muniz*, This Court Held Registration Requirements Under SORNA To Be Unconstitutional When Applied Retroactively

On July 19, 2017, this Court decided *Commonwealth v. Muniz*, holding the retroactive application of the Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S. § 9799.10 et seq., unconstitutional under the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions. *Commonwealth v. Muniz*, No. 47 MAP 2016, -- A.3d. --, 2017 WL 3173066 (Pa. July 19, 2017). The instant case involves the retroactive application of SORNA for an offense committed prior to SORNA's enactment. Therefore, the instant case is moot.

In 2012, Pennsylvania effectuated SORNA to come into compliance with the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, 120 Stat. 587 (2006), which requires states to implement laws providing for registration of individuals who have committed sexual offenses.¹ 42 Pa.C.S. § 9799.10 et seq. SORNA was different from previous versions of registration under Megan's Law, with regard to the duration of registration, the offenses that require

¹ The federal act imposes a penalty on states that do not implement registration legislation. However, the act exempts states from penalty if implementation violates the state constitution. 42 U.S.C. § 16925(b).

registration, the restrictions registration imposes on registered individuals, and the consequences attendant to registration. *Muniz*, 2017 WL 3173066, at *16.

SORNA labels as a “sex offender,” *inter alia*, any “individual who, on or *after the effective date of this section*, is convicted of a sexually violent offense and who has a residence within this Commonwealth or is a transient.” 42 Pa.C.S. § 9799.13(1) (emphasis added), *invalidated on other grounds by Jackson v. Commonwealth*, 143 A.3d 468 (Pa. Commw. Ct. 2016). “Sexually violent offenses” include, among other things, offenses ranging from misdemeanors such as indecent assault and displaying sexually explicit material, to non-sexual crimes including invasion of privacy and interference with custody of children, to serious sexual misconduct such as rape. 42 Pa.C.S. § 9799.14, *invalidated on other grounds by Muniz*, 2017 WL 3173066.

In *Muniz*, this Court examined the application of SORNA to individuals who were convicted for offenses committed prior to the effective date of the legislation. The majority held that the registration scheme, which was applied retroactively, was unconstitutionally punitive and therefore in violation of the *Ex Post Facto* Clauses of the Pennsylvania and United States Constitutions. *Muniz*, 2017 WL 3173066, at *23, 26.

The Court reasoned that

SORNA’s registration and online publication provisions place a unique burden on the right to reputation, which is particularly protected in Pennsylvania; other states have also found the retroactivity of registration laws

unconstitutional under their state constitutions, partly due to reputation concerns; and both the state and offender have an interest in the finality of sentencing that is undermined by the enactment of ever-more severe registration laws.

Muniz, 2017 WL 3173066, at *26.

In reaching the conclusion that the registration requirements under SORNA are unconstitutional under the *Ex Post Facto* Clause, the Court looked not to the time of conviction but to the time of offense to determine the nature of the constitutional infraction. The Clause, originally established to assure federal and state legislatures did not enact arbitrary legislation following the American Revolution, *Miller v. Florida*, 482 U.S. 423, 429 (1987), has evolved to provide individuals with “‘fair warning’ about what constitutes criminal conduct, and what the punishments for that conduct entail.” *Muniz*, 2017 WL 3173066, at *3 (citing *Miller*, 482 U.S. at 430); *see also Commonwealth v. Rose*, 127 A.3d 794, 805 (Pa. 2015). This Court in *Muniz* cited the United States Supreme Court’s explanation of relief under the Ex Post Facto Clause: “Critical to relief under the Ex Post Facto Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Muniz*, 2017 WL 3173066, at *3 (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)).

Next, this Court did a thorough analysis to determine whether SORNA

imposed punishment and therefore implicated the *Ex Post Facto* Clause. See *Commonwealth v. Williams*, 832 A.2d 962, 971 (Pa. 2003). The Court used the analysis set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to determine that although SORNA's stated purpose is nonpunitive, the law is sufficiently punitive to overcome the nonpunitive purpose. *Muniz*, 2017 WL 3173066, at *16 (citing *Williams*, 823 A.2d at 971). The Court, in particular, reasoned that SORNA increased the length of registration, the mandatory in-person reporting requirements, and the dissemination and publication of registration information, and thus is more severe than previous versions, particularly in the "current internet-based world". *Muniz*, 2017 WL 3173066, at *19, 20. The Court further reasoned that the registration requirements are excessive and over-inclusive in relation to any nonpunitive purpose of protecting the public, *Muniz*, 2017 WL 3173066, at *22, and that there is an interest in the finality of sentencing that SORNA obfuscates. *Muniz*, 2017 WL 3173066, at *26. Finally, the Court reinforced this Court's previous holdings finding that SORNA implicates the constitutionally protected right to reputation. *Muniz*, 2017 WL 3173066, at *25-26; *In re J.B.*, 107 A.3d 1, 17 (2014). The Court held that "the *ex post facto* clauses of the United States and Pennsylvania Constitutions are implicated here because a holding rendering the effects of SORNA's registration requirements . . . would inflict greater punishment on appellant than the law in effect at the time he committed his crimes." *Muniz*, 2017

WL 3173066, at *3.

B. Appellee Grove Was Charged And Convicted For An Offense Committed Prior To SORNA's Enactment

Nine years prior to SORNA becoming effective in Pennsylvania, Appellee Grove, then 15 years old, was a juvenile under the law when he engaged in inappropriate sexual contact. His offenses remained unreported for almost 13 years. When he was 27-years-old, he was charged with Rape, Involuntary Deviate Sexual Intercourse, Involuntary Deviate Sexual Intercourse with a Child, and two counts of Indecent Assault. Grove was no longer under juvenile court jurisdiction at the time of prosecution. He pleaded guilty to one count of Indecent Assault and entered a no contest plea to another count of Indecent Assault in June 2016. All remaining charges were dismissed.

In September 2016, at his sentencing hearing, Grove was ordered to register as a “sexual offender.” 42 Pa.C.S. § 9799.12. Notably, in 2003, when Grove engaged in the acts that led to his conviction, no law required his registration as a sexual offender. The trial court, relying on *In re J.B.*, 107 A.3d 1 (holding registration of juvenile offenders a violation of due process), exempted Grove from the newly enacted registration requirements.

To justify an adjudication on the merits, a controversy must continue through all stages of judicial proceedings—through the trial and appellate stages—and the parties must continue to have a “personal stake in the outcome” of the lawsuit.

Mistich v. Com., Pa. Bd. of Probation and Parole, 863 A.2d 116, 119 (Pa. Cmmw. Ct. 2004) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990)). Courts will not enter judgments that have no effect. *Britt v. Department of Public Welfare*, 787 A.2d 457, 460 (Pa. Cmmw. Ct. 2001). Therefore, if there is no actual case or controversy in existence at all stages of the review, the case is moot. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 599 (Pa. 2002). *See also De Funis v. Odegaard*, 416 U.S. 312 (1974) (actual case or controversy must exist at all stages of appellate review); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (same); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (same).

A legal question may become moot during the appellate process as a result of an intervening change in the facts of the case or an applicable law. *Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist.*, No. 49 MAP 2016, 2017 WL 2859007, at *7 (Pa. July 5, 2017). *See also Conti v. Pa. Dept. of Labor & Industry*, 175 A.2d 56 (Pa. 1961) (Court held moot an appeal on the question of validity of a minimum wage order when during the pendency of the action, the General Assembly enacted the Minimum Wage Act of 1961). In the instant case, this Court's decision in *Commonwealth v. Muniz* renders the constitutionality of SORNA as applied to Appellee moot.

This Court's holding in *Muniz* is directly applicable to Grove because his offense was committed long before the date SORNA became effective. Grove's

registration as a sexual offender is therefore unconstitutionally punitive and in violation of the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions.

II. IF THIS COURT RULES THE INSTANT APPEAL IS NOT MOOT, THIS COURT’S DECISION IN *GRAZIANO CONSTR. CO. V. LEE*, 409 A.2D 330 (PA. 1979) (MEM.), DIVESTS THE COURT OF JURISDICTION OVER THE INSTANT APPEAL

A. The Trial Court Directly Applied *In re J.B.*, 107 A.3d 1 (Pa. 2014)

In its opinion, the trial court walked through this Court’s 2014 holding in *J.B.* and found that the “registration requirements violate the due process rights of one who is prosecuted as an adult for a sexual offense committed while a juvenile.” (Trial Ct. Op. 5.) The court did not invalidate a statute of this Commonwealth. *See* 42 Pa.C.S. § 722(7).

Nothing in *J.B.*’s holding limited its application to children whose cases were processed before they turned age 18; the Court’s analysis applies with equal force to young people like Grove, who was a child at the time of the underlying offense even though he was actually prosecuted for the offense several years later. The reasoning employed by the Court explicitly invokes the heightened reputational interest of juveniles and the low rates of recidivism of young people. *In re J.B.*, 107 A.3d at 16-18.

The trial court notes that in coming to its decision, this Court relied on research that the conduct of young people is “less likely to be ‘evidence of

irretrievabl[y] deprav[ed] [character],” (Trial Ct. Op. 3-4 (citing *In re J.B.*, 107 A.3d at 18-19 (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)))). The court concluded that SORNA improperly employed an “irrebuttable presumption that all juvenile offenders ‘pose a high risk of committing additional sexual offenses,’” because the presumption was “not universally true” and a “reasonable alternative means” existed for determining which juvenile offenders were “likely to reoffend.” (Trial Ct. Op. 2 (quoting *In re J.B.*, 107 A.3d at 14 (quoting 42 Pa.C.S. § 9799.11(a)(4)))).

This Court recognized that the Pennsylvania Constitution establishes a fundamental right to reputation. *In re J.B.*, 107 A.3d at 16-17. SORNA infringed this right by labeling children as “sexual offenders” and declaring that they posed a risk to the community. *Id.* at 16. This legislative finding, the Court concluded, was irrebuttable: SORNA did not afford juvenile offenders a “meaningful opportunity” to challenge the presumption of high re-offense risk. *Id.* at 17 (“[A] process which eliminates consideration of the paramount factor, in this case the likelihood of committing additional sexual offenses, does not provide procedural due process, as it blocks the opportunity to be heard on the relevant issue.”)

Finding that an irrebuttable presumption encroached a constitutionally-protected interest, the Court went on to examine if the presumption was universally true. *Id.* at 17-19. Relying on expert affidavits submitted to the trial court that

detailed several studies on this issue, the Court recognized that “many of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation.” *Id.* at 17. Furthermore, “[w]hile adult sexual offenders have a high likelihood of reoffense, juvenile sexual offenders exhibit low levels of recidivism (between 2–7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration.” *Id.* Thus, the Court held “the *vast majority* of juvenile offenders are unlikely to recidivate.” *Id.* at 18 (emphasis added).

Finally, the Court found reasonable alternative means of ascertaining whether a juvenile offender poses a high risk of recidivism existed. *Id.* at 19-20. “A reasonable alternative, in fact, is already in use in Pennsylvania under SORNA:” the SOAB individualized assessment under Act 21. *Id.* at 19. Thus, the Court concluded that SORNA’s juvenile offender registration requirements violated due process. *Id.* at 19-20.

The trial court, applying *J.B.*, and without an independent analysis of the statute’s constitutionality, reasoned that the

presumption upon which the SORNA registration requirement is based is that sexual offenders pose a high risk of committing additional sex offenses. As the *J.B.* Court noted, that premise is statistically supported only as it relates to those who have committed a sexual offense as an adult. The presumption is not universally true as to those who commit a sexual offense while a juvenile.

(Trial Ct. Op. 5.) The trial court determined that because “the presumption has proved to be inaccurate as applied to Grove,” (*id.*) “SORNA’s registration requirements violate the due process rights of one who is prosecuted as an adult for a sexual offense committed while a juvenile.” (*Id.*)

B. *Graziano* Divests This Court Of Jurisdiction Over The Instant Appeal And Requires That This Court Transfer The Case To The Superior Court

Typically, in matters where the Court of Common Pleas has held a treaty, statute, or law unconstitutional, parties must directly appeal to the Pennsylvania Supreme Court. 42 Pa.C.S. § 722(7). Although the trial court declared Grove’s registration unconstitutional, it did so by applying this Court’s ruling in *J.B.* Therefore, this Court lacks jurisdiction over the instant case, *See Graziano Const. Co. v. Lee*, 409 A.2d 330 (Pa. 1979) (mem.), and must transfer the case to the Superior Court to resolve the issue. 42 Pa.C.S. § 5103 (a matter commenced in any other tribunal shall be transferred to the proper court as if originally filed in the transferred court).

The application of a previous court ruling does not invoke exclusive jurisdiction; rather the trial court must independently assess the constitutionality of a statute before it. *Id. Graziano* involved the appeal of an order discharging a bond directly to this Court pursuant to 42 Pa.C.S. §722(7). *Graziano*, 409 A.2d 330. The Supreme Court declined jurisdiction and issued an accompanying memorandum

opinion which found that there was no order from the Court of Common Pleas declaring a statute of the Commonwealth unconstitutional as is required under 42 Pa.C.S. § 722(7). *Graziano*, 409 A.2d at 332. The Court noted that “[the Court of Common Pleas] effectively applied the rule of [previous decisions] retrospectively.” *Id.* The Court stated that “effectively appl[ying] [case law] retrospectively . . . is certainly not the same as actually declaring the Pennsylvania foreign attachment provisions to be repugnant to the constitution.” *Id.*

In the instant case, the trial court effectively applied the case law of this Court retrospectively and held that Grove’s registration was unconstitutional. (Trial Ct. Op. 4-5.) Grove did not meet the statutory definition of “juvenile offender” in SORNA because, due solely to his age at the time of prosecution, he could not be adjudicated delinquent. *See* 42 Pa.C.S. § 9799.12 (defining “juvenile offender”). But no court has determined that his offense or character merited treatment different from other childhood offenders. Accordingly, the Pennsylvania Supreme Court’s rationale in *In re J.B.* directly applies equally to Mr. Grove. As in *Graziano*, the lower court relied on developed case law and applied a known rule; appellant’s challenge to that holding rests in the Superior Court, not this Court. 42 Pa.C.S. § 5103.

CONCLUSION

For the foregoing reasons, Appellee Grove requests this Court render an opinion noting its lack of jurisdiction in the instant case because the challenge to registration is moot under *Muniz* or, in the alternative, that *J.B.* directly applies and the appropriate forum for resolution of this question is in the Superior Court.

Respectfully submitted,

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