

**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

NO. 1225 WDA 2016

**COMMONWEALTH OF PENNSYLVANIA
APPELLEE**

VS.

**JOSEPH DEAN BUTLER
APPELLANT**

BRIEF FOR APPELLEE

**APPEAL FROM THE JUDGMENT OF SENTENCE,
DATED AUGUST 4, 2016 BY THE HONORABLE WILLIAM R. SHAFFER
IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA DOCKETED AT CP-10-CR-0001538-2014**

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STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT APPELLANT IS A SEXUALLY VIOLENT PREDATOR UNDER 42 PA. C.S.A. § 9799.24 (e)(3)?

Answered in the Affirmative by the Trial Court

- II. WHETHER THE "SEXUALLY VIOLENT PREDATOR" DESIGNATION AS PROVIDED UNDER PENNSYLVANIA'S SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IS UNCONSTITUTIONAL AND VIOLATES APPELLANT'S FUNDAMENTAL RIGHT TO PROTECT HIS REPUTATION AS SECURED BY PENNSYLVANIA CONSTITUTION ARTICLE I SECTION 1?

Answered in the negative by the Trial Court

SUMMARY OF THE ARGUMENT

Appellant in the instant matter pleaded to an enumerable offense implicating SORNA registration under 42 Pa. C.S.A. § 9799.14 and requiring a determination to be made whether the offender meets the definition of a “sexually violent predator.”

At the SVP hearing on May 26, 2016 Ms. Lindemuth, a licensed counselor with the Sexual Offender Assessment Board presented testimony classifying Appellant as a SVP. Said evidence included Appellant’s prior inappropriate sexual encounters with two juvenile females, Appellant’s present case with a fifteen year old female, Appellant’s failed attempts at treatment and Appellant’s paraphilic disorder. Said testimony provided clear and convincing evidence that Appellant was an SVP.

Additionally, Appellant’s designation as a SVP under 42 Pa. C.S.A. § 9799.10 does not violate Appellant’s rights under Pennsylvania Constitution Article I, Section 1. Despite the fact that SORNA expands Appellant’s registration requirements, the courts have held that such requirements are nonpunitive in that they protect the citizens of the Commonwealth. As such SORNA is narrowly tailored to meet a compelling state interest and Appellant’s designation under SORNA should be affirmed.

ARGUMENT

- I. WHETHER THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT APPELLANT IS A SEXUALLY VIOLENT PREDATOR UNDER 42 PA. C.S.A. § 9799.24 (e)(3)?

(Answered in the Affirmative by the Trial Court)

Appellant's first argument challenges his classification as a Sexually Violent Predator (hereinafter SVP); alleging that the evidence presented at the SVP hearing on May 16, 2016 and July 20, 2016 was not clear and convincing to support the Trial Court's conclusion that Appellant was a SVP.

On July 27, 2015, Appellant entered into a guilty plea to one count of Statutory Sexual Assault (18 P.S. § 3122.1 (a)(1)) and one count of Corruption of Minors (18 P.S. § 6301 (a)(1)(ii)). As a result of Appellant's plea to the Corruption of Minors charge, Appellant was classified under 42 Pa. C.S. 9799.14 as a Tier I offender and required to register with the State Police for a period of 15 years. Moreover, said conviction triggered the Trial Court to order an assessment to be done by the Sexual Offender Assessment Board (hereinafter SOAB) to evaluate whether Appellant was a SVP.

It is the Commonwealth's burden at the SVP hearing to prove by clear and convincing evidence that offender is a SVP under 42 Pa. C.S.A. § 9799.24 (e)(3). The Commonwealth meets this burden when the evidence submitted is "so clear, direct, weighty and convincing as to enable the [trier of fact] to come to a clear conviction, without history of the truth of the precise facts at issue." **Commonwealth v. Meals**, 912 A.2d 213, 219 (Pa. 2006).

The evidence presented at the SOAB hearing must address these fourteen (14) factors:

- (1) Facts of the current offense, including:
 - (i) Whether the offense involved multiple victims.
 - (ii) Whether the individual exceeded the means necessary to achieve the offense.
 - (iii) The nature of the sexual contact with the victim.
 - (iv) Relationship of the individual to the victim.
 - (v) Age of the victim.
 - (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
 - (vii) The mental capacity of the victim.
- (2) Prior offense history, including:
 - (i) The individual's prior criminal record.
 - (ii) Whether the individual completed any prior sentences.
 - (iii) Whether the individual participated in available programs for sexual offenders.
- (3) Characteristics of the individual, including:
 - (i) Age.
 - (ii) Use of illegal drugs.
 - (iii) Any mental illness, mental disability or mental abnormality.
 - (iv) Behavioral characteristics that contribute to the individual's conduct.
- (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of re-offense. 42 Pa. C.S.A. § 9799.24 (b).

At the time of the first hearing on May 25, 2016, an evaluator from the SOAB, was called to testify. Ms. Lindemuth, a licensed counselor, explained the 14 factors she considered as part of Appellant's assessment in addition to the various court records, observations of Appellant and other identifying information. Based upon this information, Ms. Lindemuth determined that Appellant met the definition of a SVP, citing at least two prior episodes in which Appellant engaged in inappropriate conduct of a sexual nature relating to two females who were twelve and fourteen years old at the time of the incidents. The victim of the instant case involved a fifteen

year old girl. “To deem an individual a sexually violent predator, the [Appellee] must first show [the individual] has been convicted of a sexually violent offense set forth in section [9799.14]” Commonwealth v. Prendes, 97 a.3d 337, 357-358 (Pa. Super. 2014) (citing Commonwealth v. Askew, 907 A.2d 624, 629 (Pa. Super. 2006). “Secondly, [Appellee] must show that the individual has a mental abnormality or personality disorder that makes [him] likely to engage in predatory sexually violent offenses.” Id at 358.

In the instant case, it is clear that the first criteria of a conviction is met. Appellant entered a plea of guilty to a Corruption of Minors charge, an enumerated offense under the statute. Moreover, it is also abundantly clear that Appellant has an abnormality; that being a paraphilic sexual interest in pubescent juveniles. At the hearing and in her report, Ms. Lindemuth notes that Appellant’s offense behaviors involve a single juvenile victim with **MULTIPLE** (emphasis added) instances of sexual behavior over the course of eight (8) months. Ms. Lindemuth also noted that the Appellant had been involved with treatment, but that said treatment was ineffective because the Appellant failed to use it. Based on Appellant’s history of his interest in pubescent females, his failed supervision and his mental abnormality/personality disorder; Ms. Lindemuth determined that Appellant was likely to reoffend and characterized him as a SVP.

It is interesting to note that although Appellant had his own expert witness testify, he relies on the alleged deficiencies in Ms. Lindemuth report and testimony to question a determination of SVP, rather than information gleaned from his own expert witness; Dr. Robert Wettstein. The Commonwealth submits that not only did Dr. Wettstein fail to follow the 14 factor assessment procedures outlined in 42 Pa. C.S.A. § 9799.24 (b) but that he characterized each of Appellant’s sexual abuse incident as acceptable behavior.

It is little wonder that after reading Dr. Wettstein's report and listening to his testimony that the Court failed to rely on his conclusion that Appellant was not a SVP and that Appellant's actions were merely the affect of his attention-deficit/hyperactivity disorder.

When 'reviewing the sufficiency of the evidence regarding the determination of SVP status, [the Appellate Court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied." Commonwealth v. Krouse, 799 A.2d 835, 838 (Pa. Super. 2002). It is clear from the testimony and report presented by Ms. Lindemuth that Appellant is a SVP. Although Appellant did not fall under each of the 14 assessment factors, a SVP status may be based upon the presence of some factors while the absence of other factors is not conclusive. As such, the Commonwealth has demonstrated by clear and convincing evidence that Appellant has a mental abnormality or personality disorder which makes him likely to reoffend and engage in sexually violent offenses and the Trial Court should be affirmed.

II. WHETHER THE “SEXUALLY VIOLENT PREDATOR’ DESIGNATION AS PROVIDED UNDER PENNSYLVANIA’S SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IS UNCONSTITUTIONAL AND VIOLATES APPELLANT’S FUNDAMENTAL RIGHT TO PROTECT HIS REPUTATION AS SECURED BY PENNSYLVANIA CONSTITUTION ARTICLE I SECTION 1?

(Answered in the negative by the Trial Court)

Article I, Section 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation and of pursuing their own happiness.” Pennsylvania Bar Association v. Commonwealth, 607 A.2d 850, 855 (Pa. Cmwlth. 1992).

A challenger to a statute on the basis of its constitutionality carries a heavy burden. In the Interest of J.B. 107 A.3d 1, 14 (Pa. 2014); Commonwealth v. Barud, 681 A.2d 162, 165 (Pa. 1996). It is presumed that “the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth. Commonwealth v. Davidson, 938 A.2d 198, 207 (Pa. 2007), citing 1 Pa. C.S.A. § 1922 (3). “Further, statutes enjoy a presumption of constitutionality, and such enactments will not be struck unless they clearly, plainly and palpably violate the Constitution.” Id.

Appellant argues that the SVP designation and corresponding reporting requirements under SORNA violate his rights and Appellant’s due process. This same argument raised by this Appellant has been raised by numerous individuals when Megan’s Law was enacted and again with the enactment of Megan’s Law II. In Commonwealth v. Howe, 842 A.2d 436 (Pa. Super. 2004), the court noted that although the law had changed that the Defendant’s interest in avoiding Megan’s Law disclosures is outweighed by the Commonwealth’s interest in protecting the public from sexual predators. (Citing Commonwealth v. Mountain, 711 A.2d 473, 478)

(Pa. Super. 1998). Though Megan's Law has been amended since our pronouncement in **Mountain**, the information subjected to disclosure is substantially the same under Megan's Law II. **Howe**, 842 A.2d at 446.

The same balancing test is appropriate with respect to the new registration requirements under SORNA. The Appellant must prove that the expanded requirements now imposed by SORNA are so great that they render the statute no longer narrowly tailored.

As with the former requirements of Megan's Law, the reporting requirement still only affect a limited class of persons; those persons who have been convicted of a qualifying sexual offense and are determined to be SVPs. The minimal increase in reporting requirements affect only those individuals and does not tip the scale and upset the presumption of constitutionality.

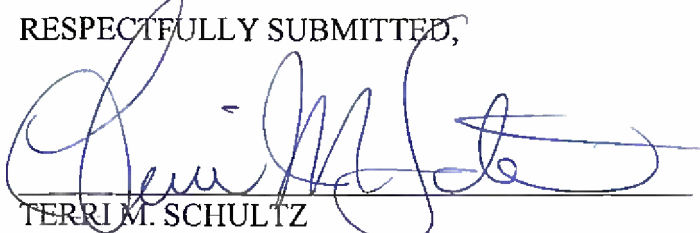
Although an individual's reputation may be damaged or tainted by his duty to register, in that information is now available via internet, such is a collateral consequence brought about by the individuals own actions. Each and every citizen is born with a clean slate and a good reputation. It is an individual's own actions which cause his reputation to become marred or tainted and place him in the limited class of persons affected by the statute. As such, SORNA serves a compelling state interest in that it protects the public from these individuals.

Based upon the foregoing, Appellant's "Sexually Violent Predator" designation under SORNA is constitutional and the Court's determination should be affirmed.

CONCLUSION

The Trial Court should be affirmed.

RESPECTFULLY SUBMITTED,



A handwritten signature in blue ink, appearing to read "Terri M. Schultz", is written over a horizontal line. The signature is fluid and cursive.

TERRI M. SCHULTZ
ATTORNEY FOR APPELLEE

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

COMMONWEALTH : NO. 1225 WDA 2016
VS. :
JOSEPH DEAN BUTLER :

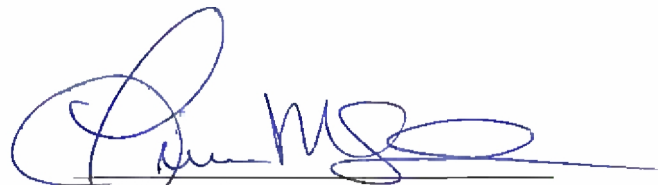
CERTIFICATE OF SERVICE

I, Terri M. Schultz, Assistant District Attorney, do hereby certify that a true and correct copy of the foregoing **Brief for Appellee** was served, in the manner set forth below, upon the following:

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