UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2199

September Term, 2015

JOE NATHANIEL BYINGTON

v.

STATE OF MARYLAND et al.

Wright,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R.

Filed: December 27, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2015, Joe Nathaniel Byington, appellant, filed in the Circuit Court for Montgomery County a complaint for declaratory judgment against the State of Maryland and the Maryland Department of Public Safety and Correctional Services, seeking a declaration that he be removed from the requirement of registering as a sex offender or, in the alternative, that the terms of his registration be in accordance with the laws in place at the time of his crime. The court denied the complaint and appellant noted this timely appeal, raising the following two questions, which we have slightly rephrased:

I. Did the lower court err in finding that appellant must continue to register under the Maryland Sex Offender Registration Act (MSORA)?

II. Did the lower court err in finding that retroactive application of the restrictions added to MSORA after the date of appellant's offense did not violate the *ex post facto* clause of Article 17 of the Maryland Declaration of Rights?

For the reasons that follow, we shall affirm.

FACTS

Appellant was convicted on February 7, 2001, of one count of third-degree sex offense. *See* Md. Code Ann., Article 27 (Art. 27), §464B, now codified at Md. Code Ann., Criminal Law (Crim. Law), §3-307. His conviction was based on an act seven months earlier in which he, then 36 years old, engaged in vaginal intercourse and digital penetration with the then 15-year-old daughter of his live-in girlfriend. On March 16, 2001, the court sentenced appellant to two and one half years of incarceration, all but 9 months suspended, and three years of supervised probation. When appellant was released from prison on April 25, 2001, he received notice that he was required to register as a sexually violent offender.

Almost fourteen years later, on February 13, 2015, appellant filed a complaint seeking a declaratory judgment that he be removed from the requirement of registering as a sex offender because, according to appellant, the sex offender statute in effect at the time of his offense required him to register for ten years, not life, as the State alleged. In the alternative, appellant argued that, should he still be required to register as a sex offender, he should have to meet the reporting requirements in place when he committed the offense, rather than the more burdensome requirements that are currently imposed on third-degree sex offenders. On September 17, 2015, the court held a hearing. After hearing the parties' arguments, the court dismissed appellant's complaint for declaratory judgment. It is from that dismissal that appellant appeals, presenting essentially the same arguments that were made in circuit court.

DISCUSSION

I.

Appellant argues that Maryland's sex offender registration statute in effect when he committed the third-degree sex offense was ambiguous, and as a result, he could have been classified as either an "offender," which required him to register as a sex offender for ten years, or a "sexually violent offender," which required him to register for life. Citing the rule of lenity, he argues that he is "entitled to the more favorable classification," and because he has registered for more than ten years, he should be removed from the sex offender registry. The State disagrees, arguing that the statute was not ambiguous but clearly classified appellant as a "sexually violent offender." The State points out that, although that classification originally required appellant to register for life, he is now only

required to register for 25 years because of the 2010 amendments to the MSORA. We agree with the State.

To determine appellant's current sex offender status, we shall start with the statutes in effect when appellant committed the sex crime. Appellant was convicted of a third-degree sex offense under Art. 27 §464B, which provided:

> (a). . . A person is guilty of a sexual offense in the third degree if the person engages in:
>
> * * *
>
> (4) A sexual act with another person who is 14 or 15 years of age and the person performing the sexual act is at least 21 years of age; or
>
> (5) Vaginal intercourse with another person who is 14 or 15 years of age and the person performing the act is at least 21 years of age.

In 2002, this section was re-codified without substantive change to Md. Code Ann., Crim. Law §3-307.[1]

At the time of appellant's offense, the Maryland General Assembly had grouped sex offenders into four categories, two of which are relevant here. One category was called "sexually violent offender[s]." That term was defined by statute as "an individual who …[h]as been convicted of a sexually violent offense" and a "sexually violent offense" included "a violation of . . . §464B" – the crime of which appellant was convicted. *See* Art. 27 § 792(a)(10)(i), (11)(i). The statute further provided that a sexually violent offender

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[1] Section 3-307(a) provides that a person may not: "(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or (5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old."

was required to register annually "for 10 years; or . . . [l]ife *if* . . . convicted of a violation of any of the provisions of §§462 through *464B* of this article[.]" *See* Art. 27 §792(d)(3), (5)2 (emphasis added). A second category of sex offenders were called "offenders." That term was defined by statute as "an individual who is ordered by the court to register [as a sex offender] and who . . . [h]as been convicted of a crime that involves conduct that by its nature is a sexual offense against an individual under the age of 18 years[.]" *See* Art. 27 §792(a)(6)(viii). An offender was required to register annually for 10 years. *See* Art. 27 §792(d)(3), (5)(i).

Appellant argues that the statutory definitions of "offender" and "sexually violent offender" overlap, and that the ambiguity should be resolved in his favor under the rule of lenity. We disagree.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature, and to that end, we begin with the plain language of the statute. *Tribbitt v. State*, 403 Md. 638, 645-46 (2008)(citations omitted). "When construing a statute, we recognize that it should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory." *Id*. at 646 (quotation marks and citations omitted). We will "neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute[.]" *Id*. (quotation marks and citations omitted). If the plain language of the statute is unambiguous our inquiry ends. *Id*. "It is a fundamental principle of statutory construction that criminal statutes are to be construed narrowly so that courts will not extend the punishment to cases not plainly within the language used." *Id*. (quotation marks and citations omitted).

The rule of lenity is "an aid for dealing with ambiguity in a criminal statute." *Oglesby v. State*, 441 Md. 673, 681 (2015). The rule provides that "a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant." *Id.* "It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity." *Id.* (citation omitted). *See also Tribbett*, 403 Md. App. at 646 ("The rule of lenity . . . is a maxim of statutory construction which serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists.")(quotation marks and citation omitted). Assuming *arguendo* it is applicable, the rule of lenity does not help appellant.

As stated above, the statute specifically defines a "sexually violent offender" as a person who has been convicted of Art. 27 §464B, a third-degree sex offense. The statute defines an "offender" as a person who has been convicted of sexual crimes, not enumerated, where the victims are under the age of 18. Where there is a specific provision concerning an offense and a general provision, the specific provision controls over the more general provision. *Accord Smack v. Dept. of Health and Mental Hygiene*, 378 Md. 298, 313 (2003) (holding that in an employee discipline context where "there is a provision that specifically, and without any doubt, addresses the termination, as opposed to the discipline generally … that provision must control over a provision that applies, but only generally[.]"). Therefore, we agree with the State that here the more specific provision controls. This reading of the statute is more harmonious for those less culpable sex crimes, such as fourth-degree sex offenses, that would fall within the lower "offender" category. Because the plain language

of the statute is clear, the rule of lenity does not apply, and appellant was required to register for life.

Appellant directs us to an affidavit by Judge McGuckian, the judge who originally sentenced him. In the affidavit, Judge McGuckian states that when he sentenced appellant he would have categorized him as an "offender" and not a "sexually violent offender."[2] The affidavit, however, has no relevance to this situation because the sexual offender registration requirements are imposed by operation of law, not at the discretion of the sentencing court. *See* Art. 27, §792(d)(3)(both an offender and a sexually violent offender "shall register" in accordance with the terms set forth in the statute). We also note that when appellant was released from prison, he received a notice of registration that advised him that he was required to register as a "sexually violent offender," not as an "offender" but then erroneously advised him that he was to register annually for the next ten years.

[2] Specifically, Judge McGuckian states in his affidavit:

> I have carefully reviewed the transcript of the sentencing hearing and note that [appellant] had no criminal record prior to appearing before me and that it was my belief then that the offense occurred solely as a result of the injury that [appellant] sustained to his head.
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> I have also reviewed the transcript of the hearing on [appellant's] Motion for Modification held before me on July 12, 2002, and note my comment that "I think that the risk this gentleman poses is absolutely minimal . . . I think there is no risk to the public."
>
> Having reviewed the transcripts and pertinent documents regarding [appellant's] case, I would not have ordered that he be classified, upon release from incarceration, as a sexually violent offender. I would have ordered that [appellant] be categorized as an offender requiring registration for a period of ten years and no more.

This ambiguous notice likewise has no relevance in this situation because the lifetime registration requirement for a third-degree sexual offense was statutorily prescribed. Any error in the notice to registrant form issued after appellant's conviction and sentencing does not compel a different result. *Cf. Long v. Maryland State Department of Public Safety and Correctional Services*, 230 Md. App. 1, 9 (2016)(evidence that the defendant received an erroneous notice of registration does not affect our holding that the defendant was required to register as a sex offender as set forth in the statute).

In sum, appellant, having been convicted of a third-degree sex offense, fell within the category of a "sexually violent offender" and, by law, was required to register as a sex offender for life. However, as the State correctly points out, the 2010 amendments to the MSORA have re-classified appellant as a Tier II offender, reducing appellant's obligation to register from life to 25 years. *See* Md. Code Ann., Criminal Procedure (Crim. Proc.) §11-701(p)(1)(classifying as a Tier II offender those convicted of Crim. Law §3-307(a)(4)-(5) – a certain third-degree sex offense) and §11-707(a)(4)(Tier II sex offenders are required to register for 25 years).

II.

Appellant argues that even if he is still required to register as a sex offender, retroactive application of the amendments to the MSORA placed additional restrictions on him in violation of Maryland's *ex post facto* clause found in the Md. Declaration of Rights, Article 17 (Art. 17), and therefore, he should only be held to those restrictions in place when he committed the offense. In making this argument, appellant argues that Maryland's *ex post facto* clause is broader than its federal counterpart because it prohibits not only any

ex post facto law but also any *ex post facto* "oath or restriction." The State disagrees and argues that our recent decision in *Long*, *supra*, "soundly rejected" appellant's arguments.

Maryland's *ex post facto* law, found in the Md. Declaration of Rights, Art. 17, provides: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required." The United States Constitution, Article 1, section 10, contains a similar provision and it provides: "No State shall . . . pass any . . . *ex post facto* Law[.]" In *Long*, we reaffirmed that the Court of Appeals has interpreted Maryland's *ex post facto* clause as being in *pari materia* with the less expansive federal *ex post facto* clause, not broader, as appellant would have us hold. *Long*, 230 Md. App. at 18 (citing *In re Nick H.,* 224 Md. App. 668, 684-86 (2015)(footnote omitted)(citing *Doe v. Department of Public Safety and Corrections*, 430 Md. 535, 551-52 (2013) and *Marks v. United States*, 430 U.S. 188, 193 (1977)). We see no reason to ignore our own precedent.

When appellant committed the crime of third-degree sexual offense, he was required to register annually in person for life with a local law enforcement agency. In his registration statement, he was required to provide, among other things: (1) his name and address; (2) a description of the crime committed; (3) the date of conviction; (4) the jurisdiction of conviction; (5) a list of all aliases he used; and (6) his social security number. Art. 27, § 792(e)(1).

Amendments to the MSORA, particularly those in 2009 and 2010, created additional requirements for registration. Because appellant has been re-classified as Tier

II offender, he is now required to register in person every six months for 25 years. Crim. Proc. §11-707(a)(1)(i), (4). Among other things, he is to provide the following information: (1) a list of all electronic mail addresses, computer log-in or screen names or identities, instant-messaging identities, and electronic chat room identities that he has used; (2) copy of his passport or immigration papers; (3) information regarding any professional licenses he holds; (4) the license plate number, registration number, and description of any vehicle (including all motor vehicles, boats, and aircraft) owned or regularly operated by him; (5) the permanent or frequent addresses or locations where all his vehicles are kept; (6) all landline and cellular telephone numbers and any other designations used by him for the purposes of routing or self-identification in telephonic communications; (7) a copy of his valid driver's license or identification card; (8) his fingerprints and palm prints; and (9) his criminal history, including the dates of all arrests and convictions, the status of parole, probation, or supervised release, and the existence of any outstanding arrest warrants. *Long*, 230 Md. App. at 10-12 (citing Crim. Proc. § 11–706(a)(1)-(18)).[3]

[3] Additionally, the police department may post on the internet a registrant's name, crime, and other identifying information, and the public can electronically transmit information about a registrant to the police or a parole agent. *See* Crim. Proc. §11-717. Registrants are also required to receive written permission before entering property where the registrant is a student or the registrant's child is a student or receives child care, and to promptly notify the property owner of registrant's presence on the property and purpose of visit, and a registrant is prohibited from entering onto real property of an elementary or secondary school or a child care provider. *See* Crim. Proc. §11-722(a)-(b). Also, a registrant is prohibited from working at a public or nonpublic school. *See* Crim. Proc. §11-722(c). Registrants are also required to provide notice within three days of changing their: legal name; residence; vehicle or license plate information; electronic mail or internet identifiers, computer log-in or screen name or identity, instant-message identity, or electronic chat room identity; home or cell phone number; or employment. *See* Crim. Proc.

We held in *Long*, *supra*, that retroactive application of the more restrictive MSORA amendments to Franklin Long, who had been convicted of a third-degree sexual offense (a child sexual offense) prior to the amendments, did not violate his rights under Art. 17 of the Md. Declaration of Rights. In determining that there was no *ex post facto* violation, we applied the "intent-effects test." *Long*, 230 Md. App. at 20. That test requires a reviewing court to first determine whether the legislative intent of the statute was punitive. If yes, the inquiry ends and there can be no retroactive application. If the statute's stated purpose is non-punitive, however, we must then assess whether its effect overrides the legislative purpose, and therefore, renders the statute punitive.

In applying that intent-effects test to the facts in *Long*, we held that the intent of the added restrictions of the 2009 and 2010 amendments to the MSORA "do not constitute punishment[,]" but were rather "part of a civil regulatory scheme" intended to "protect[] the health and welfare of the public and not to punish the offender." *Id*. at 21, 24. We additionally held that Long "failed to produce 'the clearest proof' that despite the non-punitive intent of the amendments, the effect of the 2009 and 2010 changes in the Act are punitive." *Id*. at 23-24 (citation omitted). *Long* is controlling. We note that, like *Long*, the statute in effect when appellant committed the third-degree sex offense already required

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§11-705(e)(1-6), (g), (j). Registrants are also required to notify law enforcement in writing if a registrant is absent from his home for more than seven days, obtains a temporary residence, or alters where he lives for more than five days. *See* Crim. Proc. §11-705(i).

that he supply "quite a bit of personal information" when registering as a sex offender. *Id*. at 20. This is in contrast to the facts in *Doe I*, *supra*, and *In re Nick H.*, *supra.*

In sum, appellant is a Tier II sex offender, subject to 25 years of registration, and retroactive application of the MSORA amendments do not violate his rights under Maryland's *ex post facto* clause. Accordingly, we affirm the ruling by the circuit court denying appellant's request for declaratory judgment.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.