RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5204-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

E.C.,

Defendant-Appellant.

Submitted June 7, 2017 – Decided August 2, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 14-05-0553.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender, of counsel and on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Laura Sunyak, Assistant Prosecutor, of counsel and on the brief; Stephen E. Parrey, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant was indicted and charged with three counts of first-degree attempted murder, N.J.S.A. 2C:11-3 and 2C:5-1 (counts one, two and three); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) (count four); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7) (count five); two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (counts six and seven); two counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts eight and nine); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count ten); second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(1) (count eleven);[1] two counts of second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(1) (counts twelve and thirteen); and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4 (counts fourteen and fifteen). The charges stemmed from defendant setting fire to his home where he resided with his fiancée, their seven-year-old daughter, A.C., and his fiancée's sixteen-year-old son, D.C., whom defendant had raised.

On April 29, 2016, defendant entered a negotiated guilty plea to counts six, eleven, and fourteen in exchange for dismissal of

[1] Although the indictment referenced N.J.S.A. 2C:12-1(b)(7), which is not the correct statutory citation for aggravated arson, a subsequent amendment corrected the error.

the remaining counts and a recommended aggregate ten-year prison term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.[2] The agreement included a provision that the State would seek no-victim contact orders in relation to the two minor victims, but defendant would argue against the no contact order with his biological daughter, A.C.

In his plea allocution, defendant admitted torching his home with tiki oil after an argument with his fiancée while A.C. and D.C. were sleeping upstairs in their bedroom. Unbeknownst to defendant, his fiancée managed to escape. However, as the home filled with smoke, defendant went to the children's bedroom, repeatedly slashed D.C.'s face with a knife and dangled A.C. by her arms over the edge of the roof until firefighters coaxed defendant into submission and were able to rescue her. Defendant's fiancée was the victim of the aggravated arson charged in count six, D.C. was the victim of the aggravated assault charged in count eleven, and A.C. was the victim of the child endangerment charged in count fourteen.

[2] On the State's motion, technical amendments were made to all three counts without objection. See R. 3:7-4. Counts six and fourteen were amended to reflect November 14, 2013, as the date of the offense. Count eleven was amended to reflect 2013 as the date of the offense and O.C. as the victim, and to correct the statutory citation.

On July 21, 2016, defendant was sentenced in accordance with the plea agreement. The trial court ordered defendant to have no contact with the children for the duration of his sentence and mandatory parole supervision period. When defense counsel questioned the court's authority for imposing "a no contact provision . . . as part of a sentence to state prison[,]" the court responded that "in the context of a domestic violence case, . . . it can last for the term of the period of incarceration or parole." A judgment of conviction was entered on July 22, 2016 and this appeal followed.

On appeal, defendant raises a single argument:

> POINT I
>
> THE COURT'S IMPOSITION OF AN ORDER PREVENTING DEFENDANT FROM HAVING CONTACT WITH HIS MINOR DAUGHTER IS UNLAWFUL AND MUST BE VACATED.

Because the court had the authority to impose the no contact order under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, we affirm.

In State v. Beauchamp, 262 N.J. Super. 532, 538-39 (App. Div. 1993), we discussed the effect of remedial orders entered pursuant to the PDVA by a sentencing court. "[W]e distinguish[ed] between those provisions of the judgment of conviction which were designated as conditions of parole and those which were intended to regulate defendant's conduct as would any order issued pursuant

to the [PDVA]." Id. at 538. We concluded that "[t]he latter . . . were within the plenary authority of the court at the time the judgment of conviction was entered," and "the Superior Court retains the same plenary power to enter appropriate remedial orders against the defendant as are authorized by the [PDVA] and are customarily entered in the Family Part." Id. at 538-39.

N.J.S.A. 2C:25-27(a) provides:

> When a defendant is found guilty of a crime or offense involving domestic violence and a condition of sentence restricts the defendant's ability to have contact with the victim, the victim's friends, co-workers, or relatives, or an animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household, that condition shall be recorded in an order of the court and a written copy of that order shall be provided to the victim by the clerk of the court or other person designated by the court.

Under the PDVA, domestic violence occurs when an individual commits one or more predicate acts, enumerated in N.J.S.A. 2C:25-19(a), upon a person protected under the Act as defined in N.J.S.A. 2C:25-19(d).

Defendant points out that "nearly two years after the incident, but prior to sentencing, N.J.S.A. 2C:25-19(a) was amended to include a catchall provision among the enumerated offenses," specifically:

> Any other crime involving risk of death or serious bodily injury to a person protected under the "[PDVA.]
>
> [N.J.S.A. 2C:25-19(a)(18).]

Accordingly, defendant argues the court "was without authority to impose a no-contact order with respect to A.C. because this catchall provision should not be given retroactive effect." Defendant asserts, "[a]pplication of the catchall provision against defendant would violate fundamental protections against ex post facto laws" because neither aggravated arson nor child endangerment were enumerated offenses prior to the effective date of the amendment. We disagree.

Both the United States and the New Jersey Constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3. "The purpose of the Ex Post Facto Clauses is to guarantee that criminal statutes 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" State v. Muhammad, 145 N.J. 23, 56 (1996) (emphasis omitted) (quoting Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17, 23 (1981)).

"The Ex Post Facto Clause is 'aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.'" State v. Perez, 220 N.J. 423, 438 (2015) (quoting

Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 504, 115 S. Ct. 1597, 1601, 131 L. Ed. 2d 588, 594 (1995)).

> [T]o violate the Ex Post Facto Clauses, the statute in question must either (1) punish as a crime an act previously committed, which was innocent when done; (2) make more burdensome the punishment for a crime, after its commission; or (3) deprive a defendant of any defense available according to the law at the time when the crime was committed.
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> [Muhammad, supra, 145 N.J. at 56 (citations omitted).]

Applicable to this appeal is whether the August 10, 2015 amendment to the PDVA violates the Ex Post Facto Clauses by making "more burdensome the punishment for a crime, after its commission." Ibid. Significantly, "two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver, supra, 450 U.S. at 29, 101 S. Ct. at 964, 67 L. Ed. 2d at 23 (emphasis and footnotes omitted).

Under the first element, "[a] law is retrospective if it 'appl[ies] to events occurring before its enactment' or 'if it changes the legal consequences of acts completed before its effective date.'" Riley v. N.J. State Parole Bd., 219 N.J. 270, 285 (2014) (second alteration in original) (quoting Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96 L. Ed. 2d

351, 360 (1987)). In Riley, the Court held that the Ex Post Facto Clauses precluded retroactive application of the New Jersey Sex Offender Monitoring Act (SOMA), N.J.S.A. 30:4-123.89 to -123.99, to the defendant, who had completed his sentence and was under no form of parole supervision before passage of SOMA. Id. at 298.

Under the second element, "[t]here is no ex post facto violation . . . if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offen[s]e or the ultimate facts necessary to establish guilt." Perez, supra, 220 N.J. at 438-39 (emphasis omitted) (quoting State v. Natale, 184 N.J. 458, 491 (2005)). In Doe v. Poritz, 142 N.J. 1, 73 (1995), the Court held that the imposition of post-release registration and notification requirements of Megan's Law did not violate ex post facto prohibitions because it did not constitute punishment. Rather, the legislation "is clearly and totally remedial in purpose[,] . . . designed simply and solely to enable the public to protect itself from the danger posed by sex offenders[.]" Ibid. The Court further noted that "[t]he fact that some deterrent punitive impact may result does not . . . transform those provisions into 'punishment' if that impact is an inevitable consequence of the regulatory provision[[.]" Id. at 75.

Although the constitutional bar against ex post facto punishments may be applied to a civil measure if the purpose or effect of the measure is punitive in nature, Riley, supra, 219 N.J. at 285-86, "the relief a court may grant and the remedies that are made available under the [PDVA] are curative." D.N. v. K.M., 429 N.J. Super. 592, 606 (App. Div. 2013), certif. denied, 216 N.J. 587 (2014). Unlike the Criminal Code, the PDVA is essentially civil in nature and "is designed to remediate behavior." Id. at 605. To that end,

> [t]he Act empowers a court to restrain a defendant's contact and communication with the victim or members of the victim's family, N.J.S.A. 2C:25-29(b)(6), (7); modify parenting time, N.J.S.A. 2C:25-29(b)(3); restrict the right to purchase or possess firearms, N.J.S.A. 2C:25-29(b); enjoin use of a residence, N.J.S.A. 2C:25-29(b)(2); require completion of various counseling programs, N.J.S.A. 2C:25-29(b)(5); and impose civil penalties "of at least $50, but not to exceed $500[,]" N.J.S.A. 2C:25-29.1. However, . . . these provisions are designed to protect a victim from future infliction of violence. The Act does not pit the power of the State against the defendant. Rather, a putative victim of domestic violence presents evidence to the court and seeks available relief, not unlike many other remedial statutes designed to protect a specific class of plaintiffs from the wrongful conduct of another.
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> [Ibid.]

We reject defendant's contention that application of the catchall provision under the PDVA against defendant violated the constitutional proscriptions on ex post facto legislation because neither the purpose nor the effect of the provision is punitive. Rather, the provision is remedial in nature, designed to protect domestic violence victims. The August 10, 2015 statutory amendment to the PDVA expanded the definition of an act of domestic violence to include any "crime involving risk of death or serious bodily injury to a person protected under the [PDVA.]" N.J.S.A. 2C:25-19(a)(18). Under N.J.S.A. 2C:25-19(d), a person protected under the PDVA includes any person "who has been subjected to domestic violence by a person with whom the victim has a child in common," or "any person who is 18 years of age or older" and has been subjected to domestic violence by "a present" or former "household member."

N.J.S.A. 2C:25-27(a) confers authority on the court to order the no-contact provision to protect "a minor child residing in the household" when "a defendant is found guilty of a crime or offense involving domestic violence[.]" Under this provision, contrary to defendant's assertion, the minor child need not be the victim of the act of domestic violence in order to be afforded protection, but need only reside in the household when defendant is found guilty of a crime involving domestic violence. Here, the plain

language of N.J.S.A. 2C:25-27(a) encompasses defendant's conviction for aggravated arson, a crime involving domestic violence committed upon a person protected under the PDVA, his fiancée. No contact with A.C., "a minor child residing in the household" when defendant was found guilty of a crime involving domestic violence against his fiancée is clearly among the civil remedies authorized by the PDVA. See State v. J.F., 262 N.J. Super. 539, 544 (App. Div. 1993) (upholding the validity of the "no further contact with family" provision contained in the judgment of conviction).

Affirmed.