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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5631-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOEL NESTE,

Defendant-Appellant.

Submitted March 7, 2017 — Decided March 23, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
15-02-0313.

Murphy & Woyce, attorneys for appellant
(Joseph S. Murphy, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jennifer E. Kmiecik,
Deputy Attorney General, of counsel and on the
brief).

Joseph E. Krakora, Public Defender, attorney
for amicus curiae New Jersey Office of the
Public Defender (Jesse M. DeBrosse, Assistant
Deputy Public Defender, on the brief).

PER CURIAM

Defendant pled guilty to third-degree violating a condition of his special sentence of community supervision for life (CSL), contrary to N.J.S.A. 2C:43-6.4(d). The trial court sentenced defendant to 119 days in the county jail, and to a special sentence of parole supervision for life (PSL). Defendant appeals from the judgment of conviction (JOC) dated July 13, 2015. We remand the matter to the trial court for further proceedings.

On November 19, 1998, defendant pled guilty to, among other charges, second-degree sexual assault in violation of N.J.S.A. 2C:14-2(a)(1) for crimes he committed in June 1998. The court sentenced defendant to a five-year term of incarceration, required that he comply with Megan's Law, and imposed a special sentence of CSL pursuant to N.J.S.A. 2C:43-6.4 (prior to amendment).

At that time, a violation of a condition of CSL was a crime of the fourth degree. L. 1994, c. 130. However, effective July 1, 2014, the Legislature amended N.J.S.A. 2C:43-6.4(a) and (d) (the 2014 amendments), to upgrade a violation of a condition of CSL to a third-degree crime and to add convictions for a violation of CSL to the list of predicate crimes that mandate the imposition of a special sentence of PSL. L. 2013, c. 214.

On February 20, 2015, a grand jury charged defendant with third-degree violation of the conditions of his CSL, contrary to

N.J.S.A. 2C:43-6.4(d), for allegedly failing to participate in and/or successfully complete a counseling or treatment program on various dates from August 1, to November 5, 2014 (after the effective date of the 2014 amendment). See N.J.A.C. 10A:71-6.11(b)(14).

On May 22, 2015, defendant pled guilty to a third-degree violation of a condition of CSL. During the plea colloquy, he acknowledged that as a result of his plea and conviction, he would be subject to PSL, and that if he violated his PSL, his parole could be revoked and he could be returned to prison for twelve to eighteen months. Defendant did not preserve the right to appeal the denial of any pre-trial motions.

On July 1, 2015, the trial court sentenced defendant, in accordance with the negotiated plea agreement, to 119 days in the county jail, which was time served. The court also imposed a mandatory special sentence of PSL under N.J.S.A. 2C:43-6.4(a). The judge entered a JOC dated July 13, 2015.

Defendant appeals and raises the following arguments:

POINT I

THE LEGISLATURE'S GRANT OF AUTHORITY TO THE DIVISION OF PAROLE TO SENTENCE INDIVIDUALS TO ADDITIONAL TERMS OF IMPRISONMENT UNDER N.J.S.A. 2C:43-6.4 IS AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY VIOLATING THE SEPARATION OF POWERS CLAUSE OF THE NEW JERSEY CONSTITUTION.

POINT II

PAROLE SUPERVISION FOR LIFE IS UNCONSTITUTIONAL BECAUSE IT IS A VIOLATION OF DEFENDANT'S RIGHT TO A JURY TRIAL; HIS RIGHT TO A PUBLIC HEARING; AND HIS RIGHT TO THE PRESUMPTION OF INNOCENCE.

As amicus curiae, the Public Defender has filed a brief on defendant's behalf arguing that:

POINT I

THE 2014 AMENDMENT TO THE CSL/PSL STATUTE IS UNCONSTITUTIONAL UNDER THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS AND STATE V. PEREZ, 220 N.J. 423 (2015).

We note that in his appeal, defendant does not challenge the amendment to N.J.S.A. 2C:43-6.4 that upgraded a violation of a condition of CSL from a fourth-degree to a third-degree offense. Defendant's appeal is limited to the imposition of PSL, pursuant to the amended N.J.S.A. 2C:43-6.4. Moreover, defendant does not challenge the sentence to PSL on ex post facto grounds.

Here, defendant argues that the PSL is unconstitutional because the amended statute unconstitutionally permits the Parole Board to revoke PSL and return him to jail for a violation of PSL. Defendant contends that the grant of such authority to the Parole Board constitutes an unconstitutional violation of the separation

of powers in the New Jersey Constitution. N.J. Const., art. III, ¶ 1.

Defendant further argues that his sentence to PSL is unconstitutional because revocation of PSL may result in his being sentenced to an additional period of incarceration, without having a jury determine the facts. He contends that imposition of such a sentence violates the principles enunciated in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He also argues that the Parole Board's revocation process constitutes a criminal prosecution, which violates his constitutional right to a public trial, and is a violation of due process.

The State argues that we should not consider the Public Defender's arguments that the 2014 amendments to N.J.S.A. 2C:43-6.4 constitutes a violation of the constitutional bar on ex post facto legislation. We agree. A party appearing as amicus curiae "must accept the case before the court as presented and cannot raise issues not raised by the parties." State v. O'Driscoll, 215 N.J. 461, 479 (2013) (quoting State v. Lazo, 209 N.J. 9, 25 (2012)).

We therefore decline to address that issue in this case. We note, however, that in State v. Hester, ____ N.J. Super. ____ (App.


Div. 2017), we have held that the 2014 amendments to N.J.S.A. 2C:43-6.4, which upgrade a violation of CSL from a fourth-degree to a third-degree offense, and mandate imposition of a special sentence of PSL, violate ex post facto principles when applied to persons who were convicted and sentenced to CSL before the effective date of the amendments.

Therefore, we remand this matter to the trial court for reconsideration of the JOC in light of our decision in Hester, and the issue raised by the Public Defender on defendant's behalf. In light of our decision in Hester, we need not address the issues raised by defendant on appeal because they are currently not ripe and may become moot.

Remanded for reconsideration in conformity with this opinion.

We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION