

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0073-22

IN THE MATTER OF
REGISTRANT R.S.

Argued September 11, 2023 – Decided October 18, 2023

Before Judges Gilson and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. ML-22-04-0042.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Michael T. Denny, Assistant Deputy Public Defender, of counsel and on the briefs).

Matthew T. Spence, Assistant Prosecutor, argued the cause for respondent (Grace C. MacAulay, Camden County Prosecutor, attorney; Matthew T. Spence, on the brief).

PER CURIAM

Registrant R.S. appeals from an August 10, 2022 order classifying him as a Tier Two moderate risk offender under the Registration and Community Notification Law (Megan's Law), N.J.S.A. 2C:7-1 to -23. R.S. challenges the

trial court's findings that his sexual assault involved the use of force under factor one of the Registrant's Risk Assessment Scale (RRAS) and that his conduct was repetitive and compulsive. There is insufficient evidence to support the trial court's finding concerning force, but there is clear and convincing evidence that R.S.'s conduct was repetitive and compulsive. Therefore, we reverse in part and affirm in part. We remand with direction that the trial court enter a new order classifying R.S. as a Tier One low risk offender, but because his conduct was found to be characterized by a pattern of repetitive and compulsive behavior, his information is to be included on the Sex Offender Internet Registry. N.J.S.A. 2C:7-13(e).

I.

In 2016, A.W., who was then fourteen years old, reported that R.S., who is her grandfather, had sexually molested her for approximately two years. A.W. was interviewed by detectives and in a recorded statement she explained that every day for the last two years, R.S. had come into her bedroom around 7:00 a.m. and "massage[d] her body." One of the detectives who conducted the interview of A.W. summarized A.W.'s statements in a report. That report stated in part:

[A.W.] would pretend to be sleeping. [R.S.] would touch her breast underneath her shirt with his hand and

would squeeze her breast. [A.W.] further stated that [R.S.] would touch her vagina over her underwear. She said that this has occurred for two years on a daily basis, including this morning.

A.W.'s mother agreed to call R.S. and to allow the detectives to listen in to that call. During that call, R.S. apologized for touching A.W. in the way that A.W. had reported. A.W.'s mother also told R.S. that she knew that he had done the same thing to A.W.'s mother's sister years ago when the sister was a child.

The detectives also questioned R.S. and, in a recorded statement, R.S. admitted to touching A.W. for the past two years. A detective summarized R.S.'s statement as follows:

He said that he did touch her breast with his hands and touched her vagina over the clothes when she was sleeping in the bed in the morning before he went to work. He did say he touched her this morning. . . . [R.S.] further admitted to touching his daughter [] on the vagina with his hand under the clothes in the past.

R.S. was charged in an accusation with one count of second-degree sexual assault, N.J.S.A. 2C:14-2(b). He pled guilty to the charge and was evaluated at the Adult Diagnostic and Treatment Center at Avenel (ADTC). The psychologist who conducted the evaluation found that R.S.'s "repetitive criminal sexual behavior was performed compulsively." Accordingly, R.S. was sentenced to serve four years at the ADTC.

In December 2019, R.S. was released on parole from the ADTC. Thereafter, the State prepared an RRAS assessing R.S. with a score of forty-one. The State also prepared a statement of reasons seeking to tier R.S. at Tier Two, moderate risk. The State sought Internet publication, explaining in its statement of reasons,

[t]he State seeks internet notification. The State seeks notification to schools and community groups at the high and middle school levels. Normally [R.S.] would qualify for the incest exception however due to his status as repetitive and compulsive AND the fact that he has multiple victims overcomes the presumption against internet publication.

R.S. was served with the notification that the State would seek Tier Two classification with Internet notification. R.S. objected and the trial court conducted the initial tier hearing on August 4, 2022. At the hearing, R.S. objected to the scoring of only factor one, the degree of force on the RRAS submitted by the State. The State argued that because the victim had been asleep, R.S.'s conduct was a "moderate" use of force risk. R.S. contended that factor one should be scored as "low" because his sexual touching of the victim did not involve force.

The trial court did not accept either party's arguments. Instead, the trial court found a moderate use of force, reasoning that R.S.'s conduct of

"squeezing" A.W.'s breasts constituted force. Accordingly, the trial court agreed with and accepted the State's RRAS score of forty-one and classified R.S. as a Tier Two offender.

The court also found that there was clear and convincing evidence that R.S.'s conduct had been repetitive and compulsive. In making that finding, the court relied on the ADTC report, as well as other evidence, that had been submitted at the tier hearing. The court, therefore, directed community notification and Internet publication.

II.

R.S. now appeals from the August 10, 2022 order. He presents the following two arguments for our consideration:

POINT I – THE HEARING COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT SUFFICIENT FORCE HAD BEEN USED IN THE OFFENSE TO JUSTIFY A MODERATE RISK SCORE ON RRAS FACTOR ONE.

POINT II – THE HEARING COURT ABUSED ITS DISCRETION BY FINDING THAT THE SENTENCING COURT'S DETERMINATION THAT THE REGISTRANT WAS REPETITIVE AND COMPULSIVE SATISFIED THE CLEAR AND CONVINCING BURDEN OF PROOF APPLICABLE TO THE STATE AT THE MEGAN'S LAW HEARING.

"The burden is on the State to prove by clear and convincing evidence both a [Megan's Law] registrant's risk to the community and the scope of notification necessary to protect the community." In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022) (citing In re Registrant R.F., 317 N.J. Super. 379, 383-84 (App. Div. 1998)). The evidence presented "must be 'so clear, direct and weighty and convincing as to enable . . . a judge . . . to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" Ibid. (quoting In re Registrant J.G., 169 N.J. 304, 331 (2001)) (omissions in original).

We review a trial court's conclusions regarding a registrant's tier designation and scope of notification for an abuse of discretion. Ibid. "[A]n abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicitly departed from established policies, or rested on an impermissible basis.'"" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

A. The Finding of Force Under Factor One.

After a sex offender is released from confinement, Megan's Law requires the offender to register with local law enforcement agencies and to notify the community. In re T.T., 188 N.J. 321, 327 (2006); In re Registrant M.F., 169

N.J. 45, 52 (2001); N.J.S.A. 2C:7-2. The degree of notification required is determined by the offender's risk of re-offense. See State v. C.W., 449 N.J. Super. 231, 260-61 (App. Div. 2017). A registrant may be classified as Tier One (low risk of re-offense), Tier Two (moderate risk of re-offense), or Tier Three (high risk of re-offense). Id. at 260.

Using the RRAS, the State scored R.S. with forty-one points, which would make him a Tier Two offender. That score included five points for factor one, degree of force, which the State assessed as a moderate risk. R.S. objected to his score only for factor one, contending that there should be no points because his conduct had not involved physical force or use of threats.

In finding that R.S.'s assault of A.W. involved the use of force, the trial court relied on a police report. Courts are permitted to base determinations on reliable documents, even those containing hearsay. In re Registrant C.A., 146 N.J. 71, 95 (1996). Nevertheless, the court must determine that the evidence is "relevant and trustworthy." See N.J.R.E. 101(a)(3). Consequently, hearsay evidence that is reliable under the totality of the circumstances of the statement being considered is "admissible and sufficient to allow the State to sustain its burden of presenting a prima facie case." In re Registrant C.A., 146 N.J. at 95-96.

Accordingly, the trial court acted within its discretion in reviewing the detective's report. The question, nevertheless, becomes whether A.W.'s report that R.S. squeezed her breasts amounts to clear and convincing evidence of the use of force. The trial court pointed to nothing else other than that statement. There was no other testimony that the squeezing compelled A.W. to submit. Therefore, even if we accept that A.W. reported that R.S. had squeezed her breasts, that evidence by itself does not establish clear and convincing evidence of the use of force.

Consequently, we reverse the portion of the classification order that determined that R.S. was a Tier Two moderate risk offender. We remand with direction that a new order be entered scoring R.S. with thirty-six points on the RRAS and classifying him as a Tier One offender.

B. The Finding of Repetitive and Compulsive.

"[F]or the protection of the public," N.J.S.A. 2C:7-12 to -19 creates and sets forth rules for a "sex offender central registry . . . available to the public through the Internet" containing "information about certain sex offenders" N.J.S.A. 2C:7-12. Whether offenders' information is included on the Internet registry depends in part on their risk of re-offense. N.J.S.A. 2C:7-13(b).

N.J.S.A. 2C:7-13(b) provides:

The public may, without limitation, obtain access to the Internet registry to view an individual registration record, any part of, or the entire Internet registry concerning all offenders:

- (1) whose risk of re-offense is high; [or]
- (2) whose risk of re-offense is moderate or low and whose conduct was found to be characterized by a pattern of repetitive, compulsive behavior pursuant to the provisions of [N.J.S.A.] 2C:47-3

N.J.S.A. 2C:7-13(d) outlines limited exceptions that allow for the exclusion of certain offenders from the Internet registry, but N.J.S.A. 2C:7-13(e) explicitly provides those exceptions do not apply "if the offender's conduct was characterized by a pattern of repetitive, compulsive behavior"

We have previously interpreted the Internet registry statute's directive "that the information of a moderate[-] or low[-]risk sex offender appear on the registry 'if the offender's conduct was characterized by a pattern of repetitive, compulsive behavior[.]'" and held "the decision whether such an offender's individual registration record 'shall be made available to the public on the Internet registry' depends on the nature of his [or her] sexual offenses at the time he [or she] committed them and not on his [or her] mental condition at the time of the tier hearing." In re D.F.S., 446 N.J. Super. 203, 207-08 (App. Div. 2016) (quoting N.J.S.A. 2C:7-13(e)) (emphasis omitted).

N.J.S.A. 2C:47-3 allows courts to sentence certain sex offenders to serve their term of incarceration at the ADTC when the court finds, based on the results of a psychological examination, "the offender's conduct was characterized by a pattern of repetitive, compulsive behavior and further reveals that the offender is amenable to sex offender treatment and is willing to participate in such treatment" N.J.S.A. 2C:47-3(a) to (b). To sentence an offender to the ADTC, the court's finding must be supported by a preponderance of the evidence. In re D.F.S., 446 N.J. Super. at 219 (citing State v. Howard, 110 N.J. 113, 131 (1988)). At a Megan's Law tier hearing, however, the State must prove a low-risk or moderate-risk offender's conduct was characterized by a pattern of repetitive, compulsive behavior by clear and convincing evidence. See L.A. ex rel. Z.Kh. v. Hoffman, 144 F. Supp. 3d 649, 671 (D.N.J. 2015).

In classifying R.S., the trial court found that there was clear and convincing evidence that R.S.'s conduct was characterized by a pattern of repetitive, compulsive behavior. R.S. incorrectly argues that the trial court made that determination based on the decision to sentence R.S. to the ADTC. Although the trial court correctly noted that R.S. had been sentenced to the ADTC based on a finding that his conduct was the result of repetitive and compulsive behavior, at the tier hearing the trial court engaged in an independent

assessment and made the required finding by clear and convincing evidence. In doing so, the court relied on the un rebutted ADTC report. The court then assessed that report, together with all the other information that it had been provided at the tier hearing, and concluded that there was clear and convincing evidence that R.S.'s conduct was characterized by a pattern of repetitive and compulsive behavior. That finding is supported by the evidence presented at the tier hearing. Consequently, although R.S. is now to be reclassified as a low-risk offender, his information will still be required to be placed on the Internet registry.

C. Conclusion.

In summary, we reverse in part and affirm in part. We remand with direction that a new classification order be entered. R.S. is to be classified as a Tier One low-risk offender with a score of thirty-six. The order is also to provide that the appropriate information regarding R.S. is to be included on the Sex Offender Internet Registry.

Reversed in part, affirmed in part, and remanded. 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