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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2236-21**

R.R.,¹

Appellant,

v.

**NEW JERSEY STATE
PAROLE BOARD,**

Respondent.

Submitted February 8, 2023 – Decided March 29, 2023

Before Judges Accurso and Firko.

On appeal from the New Jersey State Parole Board.

R.R., appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Christopher C. Josephson, Deputy Attorney General, on the brief).

PER CURIAM

¹ We use initials throughout the opinion pursuant to Rule 1:38-3.

Following a parole revocation hearing, appellant R.R., a convicted sex offender, was found guilty of failing to comply with court-imposed restrictions on his internet access. R.R. now appeals from a February 23, 2022 final agency decision of respondent New Jersey State Parole Board (Board) finding he violated the terms of his parole supervision for life (PSL) under N.J.S.A. 2C:43-6.4, and ordering him to serve a twelve-month term of incarceration.² R.R. does not attack his guilty plea to the underlying charges or seek to withdraw it. Nor does he argue his original sentence was illegal.

In his self-authored merits and reply briefs, appellant raises the following points for our consideration:

POINT I

THE "NO INTERNET" SPECIAL CONDITION IMPOSED IS UNCONSTITUTIONAL BECAUSE IT IS OPPRESSIVELY OVERBROAD, ARBITRARY, CAPRICIOUS, AND IS NOT REASONABLY TAILORED TO THE NEEDS OF PUBLIC SAFETY AND THE REHABILITATIVE NEEDS OF THE OFFENDER.

POINT II

[PSL] IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SEPARATION OF POWERS DOCTRINE.

² According to the New Jersey Department of Corrections website, R.R. was released from State prison on August 16, 2022.

POINT III

THE ADDITIONAL SPECIAL CONDITIONS IMPOSED BY THE [BOARD] ARE UNCONSTITUTIONAL BECAUSE THEY ARE PROCEDURALLY BARRED BECAUSE THEY VIOLATE APPELLANT'S DOUBLE JEOPARDY RIGHTS.

For the reasons that follow, we affirm the Board's revocation of parole and the constitutionality of PSL. We, however, remand to the Board for reconsideration of R.R.'s internet and social media ban to comport with our federal and State constitutions and recent case law.

I.

We set forth the following procedural history to give context to the Board's decision. On January 27, 2014, R.R. pled guilty to first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a), and second-degree sexual assault, N.J.S.A. 2C:14-2(b). R.R. sexually assaulted his neighbor's eight-year-old son and admitted showing the child "gay websites" on his phone. R.R. informed investigators he had child pornography on his desktop computer depicting "six and seven" year-old girls in explicit poses.

After his plea allocution hearing, R.R. violated a restraining order issued against him and in favor of the victim, his mother, K.K., and their family. In 2014, while K.K. was driving down her street, R.R. was driving in the opposite

direction, turned around, and drove up to K.K. and her children. He yelled, "fuck you, you fucking bitch." K.K. reported R.R.'s actions to the police, who arrested him, and charged him with fourth-degree contempt, N.J.S.A. 2C:29-9(a). R.R. was referred for a psychological evaluation under the Sex Offenders Act, N.J.S.A. 2C:47-1, to the Adult Diagnostic and Treatment Center (ADTC) in Avenel, to determine his eligibility for sentencing under the Act.

The psychologist's report concluded R.R.'s sexual behavior "represents an escalating pattern of sexual misconduct involving children." On July 11, 2014, R.R. was sentenced to eight years' imprisonment on the sexual assault convictions, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and PSL. He was also sentenced to a concurrent twelve-month term on the contempt charge. R.R.'s guilty plea included registration under Megan's Law, N.J.S.A. 2C:7-1 to -23.

Following R.R.'s release from prison on November 26, 2020, and the commencement of his PSL term, he signed a form acknowledging the imposition of a special condition to his PSL, stating:

I am to refrain from the possession and/or utilization of any computer and/or device that permits access to the internet unless specifically authorized by the district parole supervisor or designated representative. If the district parole supervisor or designated representative permits use of a computer and/or device that is capable

of accessing the internet, I understand that I am subject to the following restrictions and conditions concerning my use:

(1) I am to refrain from accessing the internet from any computer and/or device at any time or for any reason unless authorized by the district parole supervisor or designated representative;

(2) I am prohibited from possessing or using any data encryption techniques and/or software programs that conceal, mask, alter, eliminate and/or destroy information and/or data from a computer and/or device;

(3) I agree to install on the computer and/or device, at my expense, one or more hardware or software system(s) to monitor my computer and/or device use if such hardware or software system(s) is (are) determined to be necessary by the district parole supervisor or designated representative;

(4) I agree to permit the monitoring of my computer and/or device activity by a parole officer and/or computer/device specialist through the use of electronic means;

(5) I am subject to periodic unannounced examinations of the computer and/or device by a parole officer or designated computer/device specialist, including the retrieval and copying of all data from the computer and/or device and any internal or external peripherals and removal of such equipment to conduct a more thorough inspection;

(6) I am to disclose all passwords used by me to access any data, information, image, program, signal or file on my computer/device.

R.R. also agreed to, refrain from purchasing, viewing, downloading, possessing, and/or creating a picture, photograph, negative, film, movie, videotape, Blu-ray, DVD, CD, CD-ROM, streaming videos, video game, computer generated or virtual image or other representation, publication, sound recording or live performance that is predominately oriented for description or depictions of sexual activity.

The Board reasoned that defendant is on mandatory PSL due to his guilty plea to sexual assault and his admission to having an eight-year-old boy perform oral sex on him. Defendant also admitted he touched the victim's penis and showed the victim internet pornography on his cellular phone on at least three separate occasions. Defendant scored above average risk for reoffending, and admitted to exploring his sexual attraction to children and habitually viewing child pornography, which escalated to sexually assaulting his victim to satisfy his deviant sexual urges.

Defendant's counselor identified his sexual behavior as part of a significant pattern of sexually acting out in a compulsive manner despite potential risks to his physical health, freedom, and reputation. Defendant was not recommended to use the internet upon release from ADTC. The imposition of this special condition was to provide defendant a more structured form of

supervision and to reduce the likelihood that he will engage in behavior that could lead to reoffending.

On August 17, 2021, a parole officer conducted a routine home visit at R.R.'s home. The parole officer observed a fire stick connected to a television and to the internet. R.R. admitted he had a smartphone in his bathroom and another smartphone and laptop computer in his vehicle, all with access to the internet. After conducting a search, the parole officer uncovered these items as well as an external hard drive. After the parole officer transported R.R. to the district office, the devices were searched and revealed pornographic pictures and a pornographic video depicting adult males. R.R. admitted to accessing the internet and signed a voluntary statement acknowledging misuse of his smart phones and laptop, and utilizing social media.

R.R. was arrested and served with a notice of probable cause hearing. The notice advised R.R. of his rights and the parole conditions he was charged with violating. R.R. waived the probable cause hearing, and the matter proceeded as a final parole revocation hearing.

Senior parole officer Harper testified at the hearing about R.R.'s parole violations. Harper outlined R.R.'s criminal and supervision history and testified that R.R. admitted during his ADTC evaluation to using his cellular phone to

access the internet and show the victim gay websites on at least three occasions. R.R. pled guilty to the violations and explained he purchased a smartphone to search for employment, and housing, and that he forgot about the other smartphone, which he purchased prior to his incarceration. He maintained he used the smartphones to listen to music and store photographs of himself and other adult males. According to R.R., he "made a good faith effort" to comply with the conditions of his parole, but without access to the internet, it was difficult to complete his college degree, apply for employment online, renew his driver's license, and conduct banking transactions.

The hearing officer found by clear and convincing evidence that R.R. violated the conditions of his supervision, which were serious, and thus warranted revocation of PSL. R.R. filed an appeal of the hearing officer's decision. On November 10, 2021, a two-member Board panel agreed with the hearing officer's recommendation, revoked R.R.'s PSL, and imposed a twelve-month term of incarceration. R.R. filed an administrative appeal of his PSL revocation and the twelve-month prison term. The Board affirmed the decision, finding R.R. had pictures of a sexual nature on one cellular phone and a video of a sexual nature on his other cellular phone. The Board also rejected R.R.'s

contention that PSL is unconstitutional and that revocation of PSL is the equivalent of a criminal prosecution.

II.

R.R. contends that when the no internet restriction was imposed, it was based solely upon the circumstances of his offense, which predates his release. R.R. also argues the internet restriction was based on a professional recommendation and not on his current re-entry and rehabilitative needs to pursue his higher education and career goals. R.R. claims, despite violating the conditions of his parole, the denial of his request for legitimate and legal internet use is oppressively overbroad, unreasonable, and unnecessary to protect the public, as attending college and applying for employment are not tied to criminal behavior.

"Our role in reviewing an administrative agency's decision is limited." Malacow v. N.J. Dep't of Corr., 457 N.J. Super. 87, 93 (App. Div. 2018) (citing Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009)). "Our review of the Parole Board's determinations is deferential in light of its expertise in the specialized area of parole supervision." J.I. v. N.J. State Parole Bd., 228 N.J. 204, 230 (2017) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002)).

We recognize that "to a greater degree than is the case with other administrative agencies, the . . . Board's decision-making function involves individualized discretionary appraisals." Trantino v. N.J. State Parole Bd., 166 N.J. 113, 201 (2001) (citing Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 358-59 (1973)). Such appraisals are presumed valid. McGowan, 347 N.J. Super. at 563. Accordingly, "we will reverse a decision of the Board only if the offender shows that the decision was arbitrary or unreasonable, lacked credible support in the record, or violated legislative policies." K.G. v. N.J. State Parole Bd., 458 N.J. Super. 1, 30 (App. Div. 2019) (citing Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24- 25 (1998)).

"CSL (community supervision for life) is a 'component' of Megan's Law, which 'has its statutory source in N.J.S.A. 2C:43-6.4, the Violent Predator Incapacitation Act.'"³ State v. R.K., 463 N.J. Super. 386, 400 (App. Div. 2020)

³ The penal code was amended in 2003 to replace CSL with PSL. L. 2003, c. 267, § 1, eff. Jan. 14, 2004; N.J.S.A. 2C:43-6-4 ("Special sentence of [PSL] imposed on persons convicted of certain sexual offenses"). Under the revised framework for dealing with convicted sex offenders subject to Megan's Law, violation of a general or specific condition of PSL can be handled administratively by the Parole Board as with any other violations of a parole condition. We emphasize in this regard that N.J.S.A. 2C:43-6.4(d) makes it an offense to violate a condition of CSL or PSL. However, as to PSL defendants, the option to pursue administrative revocation of parole may make it unnecessary to initiate a new criminal prosecution.

(quoting State v. Schubert, 212 N.J. 295, 305 (2012)). CSL "was 'designed to protect the public from recidivism by defendants convicted of serious sexual offenses.'" Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 237-38 (2008) (quoting Sanchez v. N.J. State Parole Bd., 368 N.J. Super. 181, 184 (App. Div. 2004)). "The Board has broad authority to impose conditions, so long as the conditions are 'deemed reasonable in order to reduce the likelihood of recurrence of criminal or delinquent behavior.'" R.K., 463 N.J. Super. at 400 (quoting N.J.S.A. 30:4-123.59(b)(1)).

N.J.A.C. 10A:72-14.1(a) "applies to the imposition of a special condition prohibiting an offender access to the internet . . . in the cases of offenders serving a special sentence of [PSL]." The regulation allows a special condition prohibiting internet access if: (1) "there is a specific and articulable reason and a clear purpose for the imposition of the internet access condition;" and (2) "the imposition of the internet access condition will act as an aid to the offender's re-entry effort, will promote the rehabilitation of the offender, is deemed necessary to protect the public, or will reduce recidivism by the offender." N.J.S.A. 10A:72-14.1(b)(1) and (2).

Under certain circumstances, restrictions can include prohibiting an offender "from the possession and/or utilization of any computer and/or device

that permits access to the internet unless specifically authorized by the [parole supervisor] or designee." N.J.A.C. 10A:72-14.1(c)(1). The condition is subject to annual review and the assessment shall include, but not limited to whether:

(1) there is a reasonable basis to preclude access to the internet; (2) internet use is consistent with the continued rehabilitation of the offender and will not compromise public safety; (3) the offender is in compliance with the conditions of supervision; (4) the offender has met the goals listed in [their] case plan agreement and is progressing in a pro-social manner; and (5) the offender's treatment provider, if the offender is presently participating in counseling, is of the opinion that internet access will promote the rehabilitation of the offender and assist the offender's re-entry efforts.

[N.J.A.C. 10A:72-14.4(a), (c)(1) to (5).]

In J.B. v. New Jersey State Parole Board, we rejected the defendants' challenge to a social media ban, finding it was "legitimately aimed at restricting . . . offenders from participating in unwholesome interactive discussions on the internet with children or strangers who might fall prey to their potential recidivist behavior." 433 N.J. Super. 327, 341 (App. Div. 2013). However, we noted "it is not the . . . Board's intention that these provisions bar appellants from having internet access to news, entertainment, and commercial transactions." Id. at 342.

Four years later, but before Packingham v. North Carolina, 137 S. Ct. 1730 (2017), our Supreme Court decided J.I., and invalidated the "near-total internet ban" stating "the complete denial of access to the internet implicates a liberty interest, which in turn triggers due process concerns." 228 N.J. at 211. "Internet conditions should be tailored to the individual CSL offender, taking into account such factors as the underlying offense and any prior criminal history, whether the internet was used as a tool to perpetrate the offense, the rehabilitative needs of the offender, and the imperative of public safety." Id. at 224. The Court held the ban was "arbitrarily imposed" and "not tethered" to the objectives of "promot[ing] public safety, reduc[ing] recidivism, and foster[ing] the offender's reintegration into society." Id. at 211. Any internet access condition imposed on a CSL offender "must bear a reasonable relationship" to furthering those objectives. Id. at 222.

After J.I., the United States Supreme Court decided Packingham, invalidating a North Carolina statute criminalizing access to a social media website where the sex offender knew the site allowed minors to be members. 137 S. Ct. at 1733-35. The Court held the statute violated the First Amendment and was overbroad because it prohibited access to commercial and news websites. Id. at 1736-37.

We applied the J.I. factors in four consolidated appeals challenging social-networking, internet, and monitoring conditions, and upheld those conditions. See K.G., 458 N.J. Super. at 23-30. In discussing the facts in one of the cases, we noted circumstances somewhat similar to R.R.'s here, namely:

(1) [the] underlying offense involved the use of the internet and social-networking websites to solicit the minor; (2) [the defendant] consciously violated his previous internet-use conditions; (3) [the defendant] had not yet demonstrated a substantial period of compliance with conditions of PSL since his release from custody; and (4) defendant was working at a convenience store and had not demonstrated the need to use the internet or social-networking websites for a professional purpose.

[Id. at 37.]

We concluded that given "the nature of [the defendant's] underlying offense and his history of violating PSL conditions restricting internet access" the internet ban was "reasonably tailored to advance goals of public safety and rehabilitation and are not arbitrary, capricious, and unreasonable as applied to [that defendant]." Id. at 37-38.

In United States v. Holena, the defendant was subject to a condition of supervised release forbidding him from using the internet without his probation officer's approval. 906 F.3d 288, 290 (3d Cir. 2018). After violating the provision, the defendant was forbidden from using any "computers, electronic

communications devices, or electronic storage devices" for life. Ibid. The Third Circuit held that the provisions were unconstitutional because they contradicted one another and were not reasonably tailored to the defendant's conduct and history. Id. at 291-92.

The court set forth three factors to consider in conducting the fact-sensitive analysis regarding an internet ban: "the restriction's length, its coverage, and 'the defendant's underlying conduct.'" Id. at 292 (quoting United States v. Heckman, 592 F.3d 400, 405 (3d Cir. 2010)). Similarly, in United States v. Eaglin, the Second Circuit reversed a categorical prohibition on the defendant's use of any device to access the internet because the prohibition was not warranted by the defendant's history or necessary to further the goals of deterrence, public safety, or rehabilitation. 913 F.3d 88, 99 (2d Cir. 2019).

In R.K., the defendant argued his sentence was illegal because he was subject to an unconstitutional regulation imposing a social networking ban. 463 N.J. Super. at 392-93. The regulation required all sexual offenders on CSL to "refrain from using any computer and/or device to create any social networking profile or to access any social networking service or chat room in the offender's name or any other name for any reason unless expressly authorized by the district parole supervisor." Id. at 401. We held the regulation's "blanket social

media prohibition is both unconstitutional on its face and as applied to R.K." because it infringed on his right to free speech. Id. at 392-93. Applying Packingham, we reasoned the automatic ban rendered the defendant's sentence invalid. Id. at 409-10. We stressed:

The Board's regulations must avoid blanket bans on such valued rights. Supervised release conditions must be specifically designed to address the goals of recidivism, rehabilitation, and public safety, which are specifically tied to the individual parolee's underlying offenses. Statutes and regulations must not afford parole supervisors and officers unlimited personal discretion to determine what conditions are constitutionally permissive.

[Id. at 417-18.]

The Packingham Court underscored the exponential expansion of internet use and social media in today's society protected by the First Amendment right to free speech. The internet has become an indispensable tool for educational purposes, self-improvement, employment searches, work tasks, banking, and ever-expanding legitimate applications. We have recognized the internet and social media are essential resources to assist individuals reintegrate into society including attending school and locating employment. A blanket internet ban is overly broad.

Here, less than one month after his release, R.R. requested internet access for educational purposes. The Board denied his request because R.R. had recently enrolled in sex offender counseling. Before considering R.R.'s request for internet access, the Board indicated it wanted him to attend a sufficient number of counseling sessions. We conclude the Board's denial and blanket prohibition on internet and social media access prior to R.R. attending counseling sessions, runs afoul of our holding in R.K., 463 N.J. Super. at 418. We remand to the Board to reconsider the terms and conditions of R.R.'s internet and social media access under the criteria set forth in N.J.A.C. 10:72-14.1(b), consistent with our opinion and his needs to reintegrate into society, including attending school and locating employment. A blanket internet ban is overly broad.

III.

R.R. next argues PSL is unconstitutional because it violates the separation of powers doctrine under N.J. Const. Art. III, par. 1, by improperly delegating to the Board—an arm of the executive branch—the power to impose sentences, which is reserved for the judicial branch. We squarely addressed these arguments in State v. Bond, 365 N.J. Super. 430, 440-42 (App. Div. 2003). In

Bond, we held CSL conditions "mirror . . . the statutory and administrative regulations governing parole."

We highlighted that the Legislature granted authority to the Board to supervise persons subject to CSL under N.J.S.A. 2C:43-6.4b. Ibid. This Legislative mandate granted the Board authority to "promulgate rules and regulations" to further the purpose of CSL (or PSL). Id. at 442. The Legislature was fully aware of the Board's supervisory role when it "delegated authority" to the Board to set forth the conditions of CSL and PSL, in light of the "pre-existing supervisory scheme." Id. at 443. R.R.'s argument that N.J.S.A. 2C:43-6.4b violates the separation of powers doctrine lacks merit.

Equally unavailing is R.R.'s contention that the additional special conditions imposed by the Board are unconstitutional and procedurally barred because they violate his rights against double jeopardy. Our Supreme Court has explained that the double jeopardy clause does not apply to parole revocation proceedings because such proceedings do not "constitute punishment," and they are not "punitive" in nature. State v. Black, 153 N.J. 438, 454 (1998). The mere fact that a defendant may face additional "sanctions" for violating a condition of parole "does not violate the constitutional protections against double jeopardy." Ibid.

IV.

When the Board revokes parole, its decision must be supported by clear and convincing evidence. N.J.A.C. 10A:71-7.12(c)(1). Evidence is clear and convincing when:

The trier of fact can rest "a firm belief or conviction as to the truth of the allegations sought to be established." It must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue."

[In Re Registrant J.G., 169 N.J. 304, 330-31 (2001) (first quoting In re Purrazzella, 134 N.J. 228, 240 (1993); and then quoting In Re Registrant R.F., 317 N.J. Super. 379, 384 (App. Div. 1998)).]

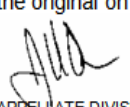
There was clear evidence that R.R. violated the conditions of his parole. Indeed, he admitted to the violations. Nonetheless, the Board should only revoke parole for serious and persistent violations of parole. N.J.A.C. 10A:71-7.12(a)(1); see also Hobson v. State Parole Bd., 435 N.J. Super. 377, 391 (App. Div. 2014) ("Absent a conviction of a crime, the Board has [revocation] authority only if the parolee 'has seriously or persistently violated the conditions of [their] parole.'" (quoting N.J.S.A. 30:4-123.60)). Further, the Board must determine "whether [the] revocation of parole is desirable." N.J.A.C. 10A:71-7.12(c)(2).

The record adequately supports the Board's determination that R.R. seriously violated the terms of parole. Moreover, R.R. was advised by the Division of Parole on numerous occasions that violations could result in revocation and a return to custody. Despite this history, R.R. admitted to violating the conditions of his PSL.

Again, we do not condone R.R.'s violations of conditions of PSL and note that an offender must abide by conditions of PSL until relief is granted. J.I., 228 N.J. at 229. In sum, having considered the record in light of the applicable legal principles, we affirm the revocation of parole for the reasons expressed in the Board's decision. However, we remand to the Board to reconsider R.R.'s internet ban and to consider less restrictive conditions on his internet and social media access that comports with our federal and State constitutions and recent case law. To the extent we have not addressed any of R.R.'s remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, and remanded in part to the Board, for further proceedings consistent 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