SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2243-21

IN RE REGISTRANT
B.D.

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Submitted March 6, 2023 – Decided March 10, 2023

Before Judges Mitterhoff and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. ML-20-15-0048.

Joseph E. Krakora, Public Defender, attorney for appellant B.D. (Michael Denny, Assistant Deputy Public Defender, of counsel and on the brief).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent State of New Jersey (Natalie Pouch, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In 2019, B.D. pleaded guilty to second-degree luring or enticing a child, N.J.S.A. 2C:13-6(a), and was sentenced to a three-year prison term; the

judgment of conviction also subjected B.D. to Megan's Law[1] registration and imposed a special sentence of parole supervision for life, N.J.S.A. 2C:43-6.4. After B.D. was paroled, the State served him with a proposed Tier Two, Moderate Risk Classification, based on a score of forty-four points on the Registrant Risk Assessment Scale (RRAS). After a classification hearing, the judge entered an interim order assigning to B.D. the less onerous Tier One, Low Risk Classification pending a second hearing. Ultimately, after the second hearing and on further consideration of the parties' arguments, the trial judge assigned B.D. a score of thirty-six, indicating a Tier One classification with Tier Two notification and internet registration. The final order was stayed pending appeal. We find no merit in B.D.'s arguments and affirm.

Megan's Law was designed to combat "the danger of recidivism posed by sex offenders." In re Registrant J.D.-F., 248 N.J. 11, 22 (2021). The registration aspects of this enactment,[2] set forth the requirements under which convicted sex offenders must register with the State, while the community-notification aspects,[3] define the standards for determining the level of community

[1] N.J.S.A. 2C:7-1 to -23.

[2] N.J.S.A. 2C:7-1 to -5.

[3] N.J.S.A. 2C:7-6 to -11.

notification required for each offender. The notification requirements provide the basis for determining an offender's risk of recidivism. N.J.S.A. 2C:7-8(c).

Pursuant to N.J.S.A. 2C:7-8(a), the Attorney General is authorized to promulgate guidelines for "identify[ing] factors relevant to risk of re-offense" and "provid[ing] for three levels of notification depending upon the degree of the risk of re-offense." The guidelines developed and used for classifying registered sex offenders are the RRAS and its accompanying Registrant Risk Assessment Manual (RRAS manual), which explains how to use the RRAS. In re Registrant C.A., 146 N.J. 71, 82 (1996). The RRAS identifies thirteen factors relevant to determining a person's risk of recidivism:

- Degree of Force
- Degree of Contact
- Age of Victim
- Victim Selection
- Number of Offenses/Victims
- Duration of Offensive Behavior
- Length of Time Since Last Offense
- History of Antisocial Acts
- Response to Treatment

- Substance Abuse
- Therapeutic Support
- Residential Support
- Employment/Education Stability

For each of these thirteen factors, the individual is assigned a score between zero and three; zero expresses a low risk and three expresses a high risk of recidivism. C.A., 146 N.J. at 82. The scores for each factor are then adjusted[4] and tallied to give the individual a final score placing him into one of three Tiers. Id. at 83. An individual with a score of less than thirty-seven is placed into Tier One, and typically, only local police are notified of the presence of Tier One offenders. N.J.S.A. 2C:7-8(c)(1). An individual scoring between thirty-seven and seventy-four is placed into Tier Two and considered to be at moderate risk of recidivism, typically mandating notification of local law enforcement as well as certain community organizations, such as schools and religious institutions. N.J.S.A. 2C:7-8(c)(2). Individuals scoring seventy-four or higher are deemed to be at

[4] This adjustment accounts for the fact that certain factors, "particularly those related to extensiveness of antisocial behavior," tend to be more indicative of recidivism than others. C.A., 146 N.J. at 83.

high risk of recidivism and placed into Tier Three, typically mandating notification of the public at large. N.J.S.A. 2C:7-8(c)(3).

The process calls for the State to assign a score based on the RRAS, and if that score places the individual within either Tier Two or Tier Three, a judicial hearing must be held to give the individual an opportunity to challenge the score and scope of notification. C.A., 146 N.J. at 83; Doe v. Poritz, 142 N.J. 1, 107 (1995). At such a hearing, the State must provide clear and convincing evidence of the individual's risk to the community and the necessary scope of community notification. In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022). In challenging the State's proofs, the individual must show, by a preponderance of the evidence, that the proposed tier designation and scope of community notification do not comply with the RRAS or existing laws. In re Registrant G.B., 147 N.J. 62, 75 (1996). A trial judge ultimately determines the necessary scope of community notification, id. at 69, and that decision is reviewed for an abuse of discretion, B.B., 472 N.J. Super. at 619-20.

Sometimes, the scope of notification does not pair up perfectly with the tier assigned to an offender. For example, in 2001, Megan's Law was amended to allow certain information in the State registry about sex offenders to be made publicly available on the internet. N.J.S.A. 2C:7-13(b); In re Registrant N.B.,

222 N.J. 87, 90 (2015). Some sex offenders, even those considered at moderate to low risk of recidivism, may still be required to register online, depending on the specific, unique facts of their cases. N.B., 222 N.J. at 89. Atypical cases in which the RRAS score is rendered suspect due to unique facts, require an adjustment of the level of community notification required; this situation is commonly referred to as falling outside the "heartland" of Megan's Law cases. G.B., 147 N.J. at 82.

In appealing the results obtained as to his risk of recidivism here, B.D. argues:

> I. THE COURT ERRED BY ORDERING THAT REGISTRANT BE SUBJECT TO TIER II INTERNET NOTIFICATION WITHOUT EXPERT TESTIMONY SUPPORTING THE DEPARTURE FROM THE RRAS SCORE, AND BECAUSE FACTS ALREADY CONSIDERED IN THE RRAS SCORE WERE DOUBLE-COUNTED AS JUSTIFICATION FOR THE DEPARTURE.
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> A. The State's request for a "reverse heartland" notification increase should not have been granted because it was not supported by expert testimony.
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> B. The hearing court double-counted information contained in the parole letter as justification for both the RRAS score and the notification increase.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONSIDERED ABUSE REGISTRANT HAD SUFFERED AS A CHILD AS JUSTIFICATION FOR RAISING HIS RRAS SCORE ON FACTOR 8, HISTORY OF ANTISOCIAL ACTS.

We find insufficient merit in these arguments to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), adding only a brief explanation for why we find no merit in B.D.'s arguments that: (1) the State was required to present expert testimony; and (2) the judge misapprehended or misapplied evidence about B.D.'s relationship with his sister.

I

B.D. initially argues that the State was required to present expert testimony supporting its argument in favor of Tier Two community notification and internet registry. B.D. argues that G.B. supports this contention. We disagree. There, a convicted sex offender sought to introduce expert testimony challenging the application of the RRAS to his case. 147 N.J. at 73. The trial judge deemed expert testimony unnecessary and, on appeal, the Supreme Court held that the offender should have been allowed to present expert testimony that "could tend to establish that [his] case includes important factors not addressed or adequately addressed by the [RRAS] score calculations." Id. at 88. That is not

the issue here since B.D. was not precluded from offering – and did not offer – expert testimony.

G.B. further recognized that expert testimony during Megan's Law hearings may be warranted, "in limited circumstances . . . to establish the existence of unique aspects of a registrant's offense or character that render the [RRAS] score suspect." Id. at 69. Arguing from this holding and from the recognition that offenders are generally expected to present expert testimony challenging their RRAS scores, B.D. argues that the State should have been required to present expert testimony supporting an increase in community notification.

B.D. also relies on B.B., where a trial judge decreased an offender's level of community notification from Tier Two down to Tier One and we reversed, holding there was insufficient evidence showing that the offender was so unlikely to re-offend that deviation from the RRAS score recommending Tier Two notification was warranted. 472 N.J. Super. at 624. B.D. argues from this that the State should have been required to present expert testimony in favor of upward adjustment. Specifically, he argues that the State should have presented

an expert to explain how the statements from the parole letter indicated registrant's risk of recidivism.[5]

We reject B.D.'s arguments. G.B. imposes no expert testimony requirement. The Court instead held that "variable factors should contribute, perhaps through expert testimony, to narrow tailoring of community notification to each registrant's individualized situation." 147 N.J. at 84 (emphasis added). That is, G.B. stands for the proposition that, while expert testimony may be helpful in some cases, it is not required, and in many cases unnecessary. Id. at 85. B.B. similarly does not stand for the proposition that the State must present expert testimony in favor of a notification increase. In B.B., the trial judge held that a notification decrease was warranted because the offender had "apparently

[5] In this letter, a parole officer described B.D.'s recent behavior: that he was "found wandering Main Street[,] Toms River, after a citizen called to report his erratic behavior, [and that B.D.] was intoxicated and with uncontrollable emotions." The officer also described that B.D. was taken to a hospital where he admitted that he had stopped taking his prescribed anxiety medication ten days earlier, and that in a recent random home visit, B.D. was observed using a smart phone in violation of his parole. During this visit, B.D. admitted to his parole officer that "he knew while he was in prison he would have a hard time on parole, as he [did] not think he [could] avoid alcohol or using internet for sexual gratification." He also admitted to his parole officer that, although he was not attracted to minors, he would have had sex with the victim the day of his arrest because he "wanted to get laid" and no one else had responded to his solicitations. B.D. then told his parole officer that he prefers anonymous sex with varied partners, does not want a relationship, and considers himself "hypersexual."

gone on with his life," and thus should not have to put his personal identifiers on the internet. 472 N.J. Super. at 624. As we noted, however, this "would apply to every registrant who has completed his sentence." Ibid. Moreover, we held in B.B. that the trial judge should have relied on "expert opinion or other evidence specific to the unique aspects of B.B.'s offense or character relevant to his risk of re-offense." Id. at 625 (emphasis added). Again, our holding suggested only that expert evidence is often helpful but ultimately concluded that it is not a prerequisite.

The trial judge was entitled to rely not only on the parole letter but other "evidence specific to the unique aspects," ibid., of B.D.'s offense and characteristics relevant to the risk of recidivism. And the judge did so, relying not only on the parole letter but also the video interrogation from the day of B.D.'s arrest, as well as the rest of his criminal record arising from the arrest. The letter, of course, provided information about the fact that B.D. was using a smartphone in violation of the terms of his parole, that he did not think he could avoid alcohol or using the internet for sexual gratification, that he admitted that every sexual partner he has had in the past ten years has come from internet contact, and that he admitted he would have had sex with a minor if no one else responded to his solicitations.

We also agree with the State that the judge was justified, on this record, in imposing internet publication. The case is similar to In re Registrant J.W., 410 N.J. Super. 125, 129 (App. Div. 2009), where the registrant pleaded guilty to attempting to engage in sexual conduct with an undercover officer posing as a minor. The judge there ordered Tier Two classification with internet publication of J.W.'s registration information and, on appeal, we held that the facts went "beyond the 'heartland' contemplated in a typical RRAS assessment," calling for a heightened level of notification "even if the RRAS score had been tallied [below Tier Two]." Id. at 130. In other words, even if J.W. had initially been placed into Tier One, the facts of his specific case could still justify Tier Two notification. There, we directed trial judges to make "value judgment[s] in determining the proper tier classification and scope of community notification based on all of the evidence available." Id. at 130 (emphasis added).

And, like J.W., the record supports the fact that B.D. attempted to solicit sexual favors from a minor via the internet. In J.W., we noted that the RRAS was developed before the emergence of the internet and online dating, and we therefore determined that "[i]nternet notification is particularly appropriate for a convicted offender who has employed the [i]nternet as a means to commit

serious, though virtual, sexual crimes or as a personalized first step to recruit a youthful victim for further direct sexual activity." Id. at 140-41.

II

B.D. also argues that the judge engaged in double counting of relevant factors in reaching his conclusions, analogizing to the prohibition of double-counting at sentencing. See, e.g., State v. Pineda, 119 N.J. 621, 627-28 (1990). We need not examine the limits of double-counting in this setting because the judge's findings on the various factors do not overlap to any prohibited degree.

What B.D. argues about Factor Five (the number of victims) and Factor Eight (history of anti-social acts) is that the judge reached what B.D. claims was a too expansive approach to the latter. He contends that the judge should not have, in making findings on Factor Eight, relied on evidence of "sexual abuse [he] suffered at the hands of his older sister when he was a child and young adult." Contrary to the trial judge's finding that there was no suggestion of "coercion, force, or that these contacts were non-consensual in nature," B.D., during the police interrogation following his arrest, stated that his sister had forced herself upon him when he was eleven. He argues that had the trial judge made a proper finding concerning his credibility, it would have found that this incident was nonconsensual and therefore not an antisocial act.

B.D. argues that an episode of sexual contact between two siblings, at a time when both were children, is not an antisocial act as contemplated by the RRAS manual. He argues that, although the encounter between him and his sister goes against the mores of society, it does not rise to the level of an uncharged crime. This argument, however, does not give a full appreciation for the evidence. While there may have been contact between B.D. and his sister when they were children, the record suggests much more. B.D. also engaged in sexual activity with his sister from the time he was twenty-two years old until he was thirty-two years old; he also believed his nephew might be his son. So, while it may be true that B.D.'s initial encounter with his sister occurred when he was eleven years old, B.D. provided no evidence to counter the State's assertion that the incestual relationship continued into adulthood without any evidence of force or coercion. The judge was entitled to find that this constituted clear and convincing evidence that B.D. periodically engaged in incestuous acts with his sister over an approximately eleven-year period, a form of sexual deviancy that may be counted under Factor Eight according to the RRAS manual. Because B.D. failed to show that any of these adult encounters were not consensual, we find no infirmity in the trial judge's determination.

Affirmed.