

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3199-21

IN THE MATTER OF
REGISTRANT K.M.

Argued January 23, 2023 — Decided February 6, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. ML-21-01-0058.

Michael R. Noveck, Assistant Deputy Public Defender, argued the cause for appellant K.M. (Joseph E. Krakora, Public Defender, attorney; Michael R. Noveck, of counsel and on the briefs).

Linda A. Shashoua, Assistant Prosecutor, argued the cause for respondent State of New Jersey (William Reynolds, Atlantic County Prosecutor, attorney; Mario C. Formica, Chief Counsel to the Prosecutor, of counsel; Linda A. Shashoua, on the brief).

PER CURIAM

Registrant K.M. appeals from a June 20, 2022 order denying his motion to reconsider his Registrant Risk Assessment Scale (RRAS) score. We reverse and remand for further proceedings consistent with this opinion.

By way of background, in 2008, a federal jury convicted registrant of conspiracy to transport minors in interstate commerce to engage in prostitution, 18 U.S.C. §§ 2423(a) and (e); transportation of minors in interstate commerce to engage in prostitution, 18 U.S.C. § 2423(a); and pictures/advertising involving the sexual exploitation of minors, 18 U.S.C. § 2252(a)(3)(B). These convictions stemmed from registrant and a co-conspirator, C.C., transporting two teenage sisters, A.B. and J.B., from Pennsylvania to New Jersey to engage in prostitution.

Registrant was sentenced to, and served, 200 months in prison. He was released in September 2021. His sentence included supervised release for life.

The facts considered by the trial court here arise from two sources: a prisoner release notification form issued by the Federal Bureau of Prisons and a federal district court opinion denying registrant's habeas corpus petition. At the initial tier classification hearing, the court had the prisoner release notification form. This document stated C.C. picked up the girls and took them to a motel in Allentown, Pennsylvania where he introduced them to registrant. The

following day, C.C. drove A.B. to Atlantic City and paid for her stay in a motel. C.C. told A.B., registrant "had driven J.B. to the Atlantic City area as well." C.C. then instructed A.B. on how to work as a prostitute, gave her a cellphone to use while working, "and directed her to communicate with him."

According to the prisoner release notification, J.B. stated she and A.B. met registrant and C.C. in Allentown. C.C. then called J.B. at her home in Allentown and arranged to pick her and her sister up and take them to an Allentown motel. While at the motel, C.C. called registrant to meet them. Registrant then transported J.B. to the Atlantic City area. Registrant and J.B. stayed in motel rooms in Egg Harbor and Absecon. Registrant instructed J.B. on how to work as a prostitute. When calls responding to a Craigslist advertisement placed by registrant began coming in, he informed J.B. and instructed her to have sex with the callers, but she refused and asked to be taken home. Instead of driving her home, registrant drove her to Philadelphia and left her there. Her father eventually picked her up.

The initial tier hearing occurred in March 2022. The State proposed an RRAS score of sixty-two. Registrant contested the scores for factors two (degree of contact), three (age of victim), five (number of offenses/victims), seven (length of time since last offense), and eight (history of antisocial acts).

Relevant to the issues raised on this appeal, the trial court found registrant was a high risk for factor two and moderate risk for factor five. The court gave registrant a total RRAS score of fifty, placing him in Tier Two, moderate range.

Registrant sought a stay of the court's decision pending appeal, contesting the court's findings regarding factors two and five. In opposition, the State provided a copy of the federal district court opinion. Unlike the prisoner release notification, the opinion noted A.B. had oral sex with two individuals at C.C.'s instruction.

Among the arguments registrant raised in his habeas petition was that his trial counsel was ineffective for failing to investigate and introduce C.C.'s statement taking responsibility for photographing both girls and C.C.'s claim registrant knew nothing about C.C.'s illegal activities, particularly with A.B. The district court rejected the argument, and found that even if C.C.'s statement were admitted it would not exonerate registrant on the intent to transport J.B. for purposes of prostitution and would only tend to do so regarding A.B.

Registrant also moved for reconsideration, arguing the newly proffered facts contained in the district court opinion showed he was only involved with J.B., who did not engage in penetration, and was not responsible for A.B. engaging in penetration. The State argued the conviction for conspiracy to

transport the girls with intent to engage in criminal sexual activity was evidence of registrant's culpability for the acts of penetration, which A.B. undertook at C.C.'s direction.

The trial judge reconsidered registrant's RRAS and concluded he was "culpable for both his and [C.C.'s] conduct, even for purposes of RRAS scoring."

She found as follows:

The facts presented at [r]egistrant's trial show that over the course of several weeks, [r]egistrant and [C.C.] worked together to meet with, stay in touch with, and transport both A.B. and J.B. As the jury found, [r]egistrant and [C.C.] were clearly working together: they frequently traveled together in the same vehicle and stayed at the same hotels. They employed the same tactics of photographing a minor, posting her photos as an advertisement on Craigslist, giving her a cell phone, and instructing her to take calls and engage in prostitution. It is safe to assume that both [r]egistrant and [C.C.] intended to share the profits from these activities, regardless of whether J.B. or A.B.'s conduct was responsible for those profits. Therefore, even though J.B. did not engage in any acts of penetration, it is likely that [r]egistrant intended to profit from the acts of penetration that A.B. did engage[] in.

The judge concluded registrant "poses a risk of again engaging in a conspiracy to transport minors for the purposes of engaging in criminal sexual activity" and denied the reconsideration motion.

Registrant appealed from the June 2022 order and applied to us for a stay of the Tier Two classification notification pending the outcome of the appeal. We granted the stay and ordered the State may only apply a Tier One classification notification to law enforcement pending resolution of the appeal and directed the Appellate Clerk to issue an accelerated scheduling order.

Registrant argues the trial court should have assigned low risk scores to factors two and five. He asserts the court failed to do so because it conflated Megan's Law with criminal conspiracy and misinterpreted the facts in the record. Registrant argues the court must conduct a fact-sensitive inquiry before scoring him based on C.C.'s actions and cannot find him per se vicariously liable for purposes of deriving the RRAS score.

"We review a trial court's conclusions regarding a Megan's Law registrant's tier designation and scope of community notification for an abuse of discretion." In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022). "[A]n abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (internal quotations omitted) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). We apply the same standard in reviewing the denial of a motion for

reconsideration. Kornbleuth v. Westover, 241 N.J. 289, 301 (2020). However, "[a] trial court's interpretation of the law and the . . . consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

The purpose of Megan's Law is "to protect the community from the dangers of recidivism by sexual offenders." In re C.A., 146 N.J. 71, 80 (1996) (citing N.J.S.A. 2C:7-1a). "The law is remedial and not intended to be punitive." In re A.A., 461 N.J. Super. 385, 394 (App. Div. 2019) (citing Doe v. Poritz, 142 N.J. 1, 14 (1995)). The Megan's Law "[t]ier designations reflect a registrant's risk of re-offense, as determined by a judge assessing various information, including thirteen factors referenced in the RRAS." In re C.J., ____ N.J. Super. ____, ____ (2022) (slip op. at 4). The RRAS is used to establish a prima facie case for a tier classification and "is presumptively accurate and is to be afforded substantial weight—indeed it will even have binding effect—unless and until a registrant 'presents subjective criteria that would support a court not relying on the tier classification recommended by the Scale.'" In re G.B., 147 N.J. 62, 81 (1996) (quoting C.A., 146 N.J. at 109). "Judicial determinations regarding tier classification and community notification are made 'on a case-by-case basis within the discretion of the court[]' and 'based on all of the evidence available[,]'

not simply by following the 'numerical calculation provided by the [RRAS].'" In re C.J., slip op. at 24 (alterations in original) (citing In re G.B., 147 N.J. at 78-79).

In In re Registrant P.B., the registrant was convicted of third-degree child endangerment, N.J.S.A. 2C:24-4(a), after a police investigation determined he possessed depictions of child pornography on his computer. 427 N.J. Super. 176, 180 (App. Div. 2012). The State's RRAS showed a score of seventy-two, which placed P.B. on the high end of Tier Two. Ibid. P.B. argued the RRAS did not apply because in viewing photographs he had no contact with the victims. Id. at 181. The court stated:

We reject the notion that the RRAS "high risk" standard of "penetration" in criterion 2, "degree of contact," is satisfied by a showing that a registrant merely possessed depictions of penetrative sexual activity with children, without any concomitant indication that he played a role in the penetrative activity either as a participant or a producer.

[Id. at 182-83.]

The P.B. court reversed the trial court's RRAS findings, concluding "it seems evident . . . that, under the very terms of Megan's Law alone, the accused must have engaged in some kind of participation in penetrative activity before [they] can be deemed to be responsible for it on any level." Id. at 183.

According to the Registrant Risk Assessment Scale Manual, "[d]egree of contact is related to the seriousness of the potential harm to the community if re[-]offense occurs." N.J. Att'y General, Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws (rev'd Feb. 2007). The manual gives the following examples to assist in determining the level of risk:

Low risk example: fondles child victim over clothes; approaches adult victim on street and presses body against buttocks over clothing; exhibitionism or showing pornography to a child.

Moderate risk example: fondles under clothing.

High risk example: penetrates orifice with object, tongue, finger, or penis.

[Ibid.]

At the outset, we are unconvinced the trial judge adopted a per se rule that registrant's conviction for conspiracy automatically made him liable for penetration because the judge did review the facts of the underlying offense. However, our concern is the RRAS does not address registrant's conduct; a deeper inquiry into the facts by the judge was necessary.

Although A.B. engaged in penetration, the record is not clear regarding the role registrant played in achieving the penetration and how it relates to his

risk of re-offense. Although registrant was found vicariously liable for C.C.'s conduct, beyond meeting A.B. in Pennsylvania, the record does not shed light on how he participated in A.B. engaging in penetration and its relation to the risk for re-offense. Registrant did not transport A.B. to New Jersey, room with her, or photograph and create the advertisement leading to the penetration. According to the record, these tasks were undertaken by C.C. alone. The State bore the burden of proving registrant's role by clear and convincing evidence and we are unpersuaded the evidence in the record met this standard. In re Registrant J.G., 169 N.J. 304, 330 (2001).

Furthermore, we have searched the record and can find no support for the trial judge's conclusion registrant and C.C. "frequently traveled together in the same vehicle and stayed at the same hotels." The evidence is that each man drove a different vehicle and spent one night at the same hotel in different rooms. The trial judge also stated "[i]t is safe to assume that both [K.M.] and [C.C.] intended to share the profits from these activities" but we cannot find support for this assumption in the record.

For these reasons, we conclude the trial judge misapplied her discretion. We reverse and remand the June 2022 order and direct the judge to conduct further proceedings, including a hearing if necessary, and make the appropriate

findings. The Tier One classification shall remain in place while the remand proceedings take place.

Reversed 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