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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1128-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWARD MARSHALL,

Defendant-Appellant.

Submitted March 7, 2017 – Decided March 23, 2017

Before Judges Yannotti, Fasciale, and Gilson.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Indictment No. 14-02-2149.

Joseph E. Krakora, Public Defender, attorney
for appellant (Daniel S. Rockoff, Assistant
Deputy Public Defender, of counsel and on the
brief).

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

PER CURIAM

Following the denial of his motion to dismiss, defendant
Edward Marshall pled guilty to a third-degree violation of a

condition of his special sentence to community supervision for life (CSL), N.J.S.A. 2C:43-6.4(d). He was sentenced to time served and to parole supervision for life (PSL). He appeals from his judgment of conviction (JOC) entered on October 16, 2015. We reverse.

On April 19, 2004, defendant pled guilty to third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), for a crime he committed in 2003. On November 5, 2004, he was sentenced to one year of probation, Megan's Law requirements, and a special sentence of CSL under N.J.S.A. 2C:43-6.4 (prior to amendment).

At the time of his sentence in 2004, a violation of a condition of CSL was a crime of the fourth degree. L. 1994, c. 130. Effective July 1, 2014, the Legislature amended N.J.S.A. 2C:43-6.4(a) and (d) (the 2014 amendment), to upgrade a violation of a condition of CSL to a third-degree crime and to add convictions for a violation of a condition of CSL to the list of predicate crimes that mandate the imposition of PSL. L. 2013, c. 214.

In December 2014, a grand jury indicted defendant with two counts. Fourth-degree violation of the conditions of CSL, contrary to N.J.S.A. 2C:43-6.4(d), for allegedly failing to reside at an approved residence from May 29, 2014 to June 30, 2014 (count one). And third-degree violation of the conditions of CSL, contrary to

N.J.S.A. 2C:43-6.4(d), for allegedly failing to refrain from the purchase, use, or sale of a controlled dangerous substance from July 1, 2014, to September 3, 2014 (count two).

Defendant moved to dismiss count two of the indictment, arguing that application of the amended version of N.J.S.A. 2C:43-6.4 violated the constitutional prohibition against ex post facto laws. The trial court conducted oral argument on August 5, 2015, and issued an order denying the motion. In a written opinion, the trial court reasoned that:

The 2014 amendments did nothing more than modify the penalties for violations of CSL which occurred on or after July 1, 2014. Count [two] of the indictment charged a violation of the conditions of CSL subsequent to the effective date of the amendments. There is nothing in the reasoning of Perez which precludes such a result or requires that this court declare the amendments unconstitutional as applied to defendant.

Defendant pled guilty to count two on August 5, 2015, in exchange for the dismissal of count one. He did not preserve the right to appeal the denial of the ex post facto motion under Rule 3:9-3(f).

On October 16, 2015, the court sentenced defendant in accordance with the negotiated plea agreement to time served (220 days) and PSL under N.J.S.A. 2C:43-6.4(a). The judge signed a JOC on October 19, 2015.

Defendant filed a timely notice of appeal. He raises the following arguments:

THE COURT VIOLATED THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS BY APPLYING N.J.S.A. 2C:43-6.4, AS AMENDED IN 2014 – INCREASING THE PENALTIES FOR VIOLATING CSL FROM A FOURTH-DEGREE TO A THIRD-DEGREE OFFENSE, AND SUBSTITUTING PSL FOR CSL – TO A DEFENDANT SENTENCED TO CSL IN 2004 FOR CONDUCT THAT OCCURRED IN 2003.

THE 2014 AMENDMENT TO N.J.S.A. 2C:43-6.4(a), REQUIRING THE TRANSFER OF DEFENDANTS WHO VIOLATE A CONDITION OF COMMUNITY SUPERVISION FOR LIFE TO PAROLE SUPERVISION FOR LIFE, IS A FACIAL VIOLATION OF THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

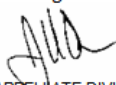
Initially, the State argues that defendant's appeal should be dismissed because he did not reserve the right to appeal the denial of his motion to dismiss under Rule 3:9-3(f). Given that defendant filed a motion to dismiss, we choose not to apply the rule because "[s]trict adherence to [its] requirements . . . 'would result in an injustice.'" State v. Gonzalez, 254 N.J. Super. 300, 304 (App. Div. 1992) (quoting R. 1:1-2) (considering the defendant's unreserved argument challenging the constitutionality of N.J.S.A. 2C:35-12).

Accordingly, we have considered defendant's arguments and the State's response. We reverse defendant's conviction for a third-degree violation of CSL for the reasons stated in State v. Hester, ___ N.J. Super. ___ (App. Div. 2017). We reject defendant's facial

constitutional challenge to the 2014 amendments to N.J.S.A. 2C:43-6.4(a) and (d). We conclude, however, that, as applied to defendant, the amendments to N.J.S.A. 2C:43-6.4(a) and (d), which upgraded a violation of a condition of CSL to a third-degree crime, and mandated imposition of a special sentence of PSL, violate the constitutional prohibition against ex post facto laws.

Reversed.

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


CLERK OF THE APPELLATE DIVISION