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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2285-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOMINICK J. ATTINO,

Defendant-Appellant.

Submitted March 7, 2017 – Decided March 23, 2017

Before Judges Yannotti, Fasciale, and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 15-
09-1807.

Joseph E. Krakora, Public Defender, attorney
for appellant (Ruth E. Hunter, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jeffrey P. Mongiello,
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant Dominick Attino 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), and he was

sentenced to three years in prison to run concurrent to sentences he was already serving. Defendant was also sentenced to parole supervision for life (PSL). He appeals from the judgment of conviction (JOC) entered on December 22, 2015. We reverse.

On March 27, 1998, defendant was convicted of third-degree endangering the welfare of a child in violation of N.J.S.A. 2C:24-4(a) for crimes he committed in 1997. On August 7, 1998, he was sentenced to three years of probation and to CSL under N.J.S.A. 2C:43-6.4 (prior to amendment).

On August 19, 2003, defendant signed a two-page form acknowledging that he was subject to CSL and required to abide by twenty-one "general conditions," as contained in the version of the regulations then in effect, including a requirement to "[o]bey all laws." See N.J.A.C. 10A:71-6.11(b)(1). At that time, 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 CSL to the list of predicate crimes that mandate the imposition of PSL. L. 2013, c. 214.

On July 15, 2014 (fourteen days after the effective date of the 2014 amendment), defendant was arrested and charged with

possession with intent to distribute a controlled dangerous substance (CDS). On October 8, 2014, a grand jury returned an indictment (Indictment No. 14-10-2636) charging him with third-degree possession of a CDS in violation of N.J.S.A. 2C:35-10(a)(1) (count one), and two counts of third-degree possession with intent to distribute a CDS in violation of N.J.S.A. 2C:35-5(b)(13) (counts two and three).

On April 27, 2015, defendant pled guilty to count three, which was amended to charge conspiracy to distribute a CDS in violation of N.J.S.A. 2C:5-2 and 2C:35-5(b)(13). On June 26, 2015, the trial court sentenced defendant to five years in prison, with two-and-one-half years of parole ineligibility. Defendant was also sentenced to a concurrent five years in prison for a conviction on a separate crime under a separate indictment.

On September 15, 2015, a grand jury returned an indictment charging defendant with one count of third-degree violation of a condition of his CSL, contrary to N.J.S.A. 2C:43-6.4(d), for conduct he engaged in on or about July 22, 2015 (approximately one year after the effective date of the 2014 amendment).¹

¹ The indictment apparently refers to defendant's conviction on April 27, 2015, for charges arising out of his arrest on July 15, 2014, for a CDS offense in violation of the general CSL condition to "obey all laws."

Defendant pled guilty to violating CSL on October 26, 2015. He did not preserve any issues for appeal. During the plea colloquy, defendant initially stated that he did not "understand the PSL[,]" however, after consulting with his attorney, he acknowledged that PSL applied and said he had no further questions.

Prior to sentencing on December 18, 2015, defense counsel represented that defendant wanted to withdraw his plea. Defendant explained that he did not understand why he was subject to the 2014 amendment because he "was never made aware through [his] parole officer to sign new conditions" changing the violation of a condition of his CSL to a third-degree crime and requiring a special sentence of PSL.

After a discussion with his counsel, however, defendant decided not to withdraw his plea. The trial court then sentenced defendant, in accordance with the plea agreement, to a concurrent term of three years, and imposed a mandatory special sentence of PSL under N.J.S.A. 2C:43-6.4(a). The judge signed a judgment of conviction on December 22, 2015.

Defendant filed a notice of appeal on February 10, 2016. He raises the following argument on appeal:

PURSUANT TO STATE V. PEREZ, 220 N.J. 423 (2015), AND STATE V. F.W., 443 N.J. Super. 476 ([App. Div.] 2016), DEFENDANT WAS ONLY ELIGIBLE TO BE CONVICTED OF THE PRIOR FOURTH-DEGREE VERSION OF N.J.S.A. 2C:43-6.4[(D)] AND

SHOULD NOT HAVE HAD HIS COMMUNITY SUPERVISION
FOR LIFE (CSL) CONVERTED INTO PAROLE
SUPERVISION FOR LIFE (PSL).

Initially, we note that the State argues that defendant's appeal should be dismissed because defendant entered into an unconditional plea agreement, did not raise any constitutional arguments in the trial court, and did not preserve any issues for appeal pursuant to Rule 3:9-3(f). 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 arguments 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 conclude that, as applied to defendant, the amendments to N.J.S.A. 2C:43-6.4(a) and (d), which upgraded the violation of a condition of CSL to a third-degree crime, and mandated imposition of a special sentence of PSL, violated 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