RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0973-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

T.P.A.,

Defendant-Appellant.

Submitted December 5, 2017 – Submitted January 23, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 10-06-1034.

Joseph E. Krakora, Public Defender, attorney for appellant (Michele A. Adubato, Designated Counsel, on the brief).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Christian E. Schlegel, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from an order entered by the Law Division on August 11, 2016, which denied his petition for post-conviction relief (PCR). We affirm.

I.

Defendant was charged in Indictment No. 10-06-1034 with two counts of aggravated sexual assault, N.J.S.A. 2C:14-2(a) (counts one and two); third-degree aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a) (count three); and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). On November 15, 2010, defendant pled guilty to counts one and two. The State agreed to dismiss the other counts.

At the plea hearing, defendant admitted that C.R. was born in May 1989, and between the years of 1994 and 1997, C.R. was residing with defendant. Defendant admitted that on one occasion, he performed fellatio upon C.R. Defendant acknowledged at that time, C.R. was less than thirteen years of age.

Defendant also admitted that K.A. was born in January 1996, and between 2002 and 2008, K.A. was residing with him. Defendant admitted that on one occasion, he penetrated K.A.'s vagina with his penis. At the time, K.A. was less than thirteen years of age.

The judge sentenced defendant on March 18, 2011. On count one, the judge sentenced defendant to thirteen years of incarceration, without a specified period of parole ineligibility,

but ordered that he submit a DNA sample and comply with Megan's Law, N.J.S.A. 2C:7-1 to -23. The judge stated that Nicole's Law, N.J.S.A. 2C:44-8, applied and precludes defendant from having any contact with the victims except on further order of the court or the Family Part. On count two, the judge imposed a concurrent sentence of thirteen years of imprisonment, and required defendant to serve eighty-five percent of that sentence pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

In addition, the judge stated that while defendant should be sentenced to community supervision for life (CSL) on count one, and parole supervision for life (PSL) on count two, he was imposing PSL on both counts because it is "redundant and counterproductive to impose both CSL and PSL" and PSL "is more encompassing." It should be noted, however, that the judgment of conviction states that defendant was sentenced to CSL on count one and PSL on count two.

In September 2015, defendant filed a pro se motion to correct what he claimed was an illegal sentence. The court treated the motion as a petition for PCR and appointed counsel to represent defendant. PCR counsel filed a brief on defendant's behalf, arguing that defendant had been denied the effective assistance of counsel.

Defendant argued that the sentencing judge had improperly sentenced defendant to Internet notification under Megan's Law,

asserting that he was exempt from such notification under N.J.S.A. 2C:7-13(d)(2). Defendant also argued that CSL is punitive in nature and violated his right against double jeopardy, as guaranteed by the Constitutions of the United States and the State of New Jersey.

Defendant therefore argued that sentencing counsel was ineffective. He asserted that he should be re-sentenced or allowed to withdraw his guilty plea. He sought an evidentiary hearing on the petition.

On August 11, 2016, the PCR judge heard oral argument on the petition, and on that date filed a written opinion and order denying PCR. The judge found that defendant had not been improperly sentenced to Internet notification under Megan's Law, and imposition of CSL was not a violation of defendant's right against double jeopardy. The judge determined that defendant was not entitled to an evidentiary hearing on his petition. This appeal followed.

On appeal, defendant argues:

> POINT I
> DEFENDANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE UNITED STATES AND NEW JERSEY CONSTITUTIONS BY HIS ATTORNEY'S FAILURE TO ARGUE THAT HE WAS EXEMPTED FROM MEGAN'S LAW REGISTRATION ON THE INTERNET PURSUANT TO [N.J.S.A.] 2C:7-13(d)(2).

POINT II
THE PCR COURT'S DENIAL OF DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING WAS ERRONEOUS.

POINT III
PETITIONER'S REQUEST TO WITHDRAW HIS GUILTY PLEA SHOULD HAVE BEEN GRANTED BECAUSE THE [IMPOSITION] OF CSL CONSTITUTED DOUBLE JEOPARDY.

II.

We turn first to defendant's contention that he was denied his constitutional right to the effective assistance of counsel under the United States and New Jersey Constitutions because his attorney failed to argue at sentencing that under N.J.S.A. 2C:7-13(d)(2), his Megan's Law registration record should not be made available to the public on the State's Internet registry.

To succeed on his PCR claim of ineffective assistance of counsel, a defendant must meet the test established by Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 60-61 (1987). Under Strickland, a defendant must show that counsel's performance was deficient and, if so, that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

As noted, defendant argues that he is exempt under N.J.S.A. 2C:7-13(d)(2) from having his Megan's Law registration record made

available to the public on the Internet registry. N.J.S.A. 2C:7-13(d)(2) states

> d. The individual registration record of an offender whose risk of re-offense has been determined to be moderate and for whom the court has ordered notification in accordance with paragraph (2) of subsection c. of [N.J.S.A. 2C:7-8] shall not be made available to the public on the Internet registry if the sole sex offense committed by the offender which renders him subject to the requirements of [N.J.S.A. 2C:7-1 to -23] is one of the following:
>
> . . . .
>
> (2) A conviction or acquittal by reason of insanity for a violation of [N.J.S.A.] 2C:14-2 or [N.J.S.A.] 2C:14-3 under circumstances in which the offender was related to the victim by blood or affinity to the third degree or was a resource family parent, a guardian, or stood in loco parentis within the household . . . .

Defendant argues that he was denied the effective assistance of counsel because at sentencing his attorney failed to argue that the exemption in N.J.S.A. 2C:7-13(d)(2) applied to him, based on his relationship to the victims. Defendant further argues that his attorney erred by failing to challenge the determination by the Adult Diagnostic and Treatment Center (ADTC) that his criminal conduct was part of a pattern of repetitive and compulsive behavior. He asserts that his attorney should have obtained an

opinion from a psychologist questioning the validity of the ADTC's finding.

The PCR judge correctly found, however, that defendant does not fall within the purview of N.J.S.A. 2C:7-13(d)(2). The judge noted that defendant was convicted of two offenses involving separate victims who resided in defendant's household. Although the Court in In re N.B., 222 N.J. 87, 100-02 (2015), held that the exemption applies to multiple acts with the same family member, defendant was convicted of sexual assaults upon two different family members. Thus, defendant does not qualify for the exemption under N.J.S.A. 2C:7-13(d)(2).

The judge also noted that defendant was disqualified from the exemption pursuant to N.J.S.A. 2C:7-13(e), which states:

> Notwithstanding the provisions of paragraph d. of this subsection, the individual registration record of an offender to whom an exception enumerated in paragraph (1), (2) or (3) of subsection d. of this section applies shall be made available to the public on the Internet registry if the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, or the State establishes by clear and convincing evidence that, given the particular facts and circumstances of the offense and the characteristics and propensities of the offender, the risk to the general public posed by the offender is substantially similar to that posed by offenders whose risk of re-offense is moderate and who do not qualify under the enumerated exceptions.

As the PCR judge observed, defendant committed sexual assaults on different dates and occasions, and his behavior qualified as repetitive and compulsive. The PCR judge noted that the sentencing judge found aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (risk that defendant will reoffend); and nine, N.J.S.A. 2C:44-1(a)(9) (need to deter defendant and others from violating the law). The sentencing judge's findings were based on defendant's continuing course of criminal conduct and the report of Dr. Mark Frank of the ADTC, who found that defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

On appeal, defendant argues that at sentencing, his attorney should have challenged the ADTC's finding and obtained a psychological report to support such a challenge. Defendant did not submit a psychological report in support of his petition. See R. 3:22-10(c) (requiring affidavit or certification for factual claims that form the basis for a claim of relief). However, even if defendant's counsel had obtained such a report and successfully challenged the ADTC's finding, defendant still would not qualify for the exemption because he had committed sexual assaults upon two separate victims.

Accordingly, there is no merit to defendant's claim that he was denied the effective assistance of counsel because his attorney

failed to argue that he was exempt from Internet notification under N.J.S.A. 2C:7-13(d)(2).

III.

Next, defendant argues that he should have been permitted to withdraw his plea because imposition of CSL violated his right against double jeopardy. Defendant argues that CSL has a severe impact on an individual's daily life and its punitive nature constitutes a multiple punishment for the same offense in violation of the Double Jeopardy Clause. He contends he was not aware of the punitive aspects of CSL, and therefore his guilty plea was not knowing or voluntary.

CSL was part of the series of laws enacted in 1994, which are commonly known as Megan's Law. L. 1994, c. 130. State v. Perez, 220 N.J. 423, 436-37 (2015). N.J.S.A. 2C:43-6.4(a) initially provided that when imposing a sentence for certain enumerated offenses, including aggravated sexual assault, the court "shall include, in addition to any sentence authorized by this Code, a special sentence of [CSL]."

In 2003, the Legislature amended N.J.S.A. 2C:43-6.4(a) and replaced all references to CSL with PSL. Perez, 220 N.J. at 437 (citing L. 2003, c. 266, § 2). As amended in 2003, N.J.S.A. 2C:43-6.4(a) provides that if a person is convicted of certain enumerated

offenses, including aggravated sexual assault, the person shall be sentenced to a special sentence of PSL.

There are significant differences between CSL and PSL. Perez, 220 N.J. at 441-42. For example, a violation of CSL is punishable only as a crime; therefore, the Parole Board "cannot return a defendant to prison through the parole-revocation process." Perez, 220 N.J. at 441 (citing Sanchez v. N.J. Parole Bd., 368 N.J. Super. 181, 184 (App. Div. 2004)). On the other hand, a violation of PSL may be prosecuted as a fourth-degree offense, pursuant to N.J.S.A. 2C:43-6.4(d), but it may also be treated as a parole violation under N.J.S.A. 2C:43-6.4(b). Ibid.

Here, defendant was subject to CSL under the provisions of N.J.S.A. 2C:43-6.4(a) enacted in 1994 for the aggravated sexual assault charged in count one, which defendant admitted he committed between the years of 1994 and 1997. In addition, defendant was subject to PSL under the version of N.J.S.A. 2C:43-6.2(a) enacted in 2003, for the aggravated sexual assault charged in count two, which defendant had admitted he committed between 2002 and 2008.

The sentencing judge erred by stating that he was going to sentence defendant to PSL on both counts. Defendant could not be sentenced to PSL on count one. However, as we noted previously, the judgment of conviction correctly states that CSL was imposed on count one and PSL was imposed on count two.

We reject defendant's contention that imposition of CSL and PSL violated his right against double jeopardy because he was sentenced to both a custodial term and sentences of CSL or PSL. CSL and PSL are punitive, rather than remedial measures. Perez, 220 N.J. at 440; State v. Schubert, 212 N.J. 295, 307 (2012). However, the sentencing judge properly imposed CSL and PSL in the exercise of the court's sentencing authority. As the Court observed in Schubert, "the Legislature clearly indicate[d] that it viewed [CSL] as an integral part of a defendant's sentence." Schubert, 212 N.J. at 307. There is no indication that the Legislature had a different view regarding PSL.

We note that in Schubert, the Court held that the Double Jeopardy Clauses of the United States Constitution and the New Jersey Constitution preclude the imposition of CSL when the defendant has completed his sentence. Id. at 313. The Court said that defendant had a "legitimate expectation of finality in his sentence." Ibid. In this case, however, the sentencing judge did not impose CSL or PSL after defendant had completed his sentence. Therefore, defendant's claim that he was denied the effective assistance of counsel because his attorney did not object to the imposition of CSL and PSL on double jeopardy grounds is meritless.

We also reject defendant's contention that he should have been permitted to withdraw his plea because he allegedly was

misinformed as to the consequences of CSL or PSL. We note that in support of this claim, defendant did not submit a certification or affidavit to the PCR court. R. 3:22-10(c).

In any event, the record shows that before he entered his plea, defendant signed a form with "Additional Questions for Certain Sexual Offenses," which addressed both CSL and PSL. In answering the questions on the form, defendant indicated he understood the conditions that could be imposed as part of a sentence of CSL or PSL.

Furthermore, at the plea hearing, the judge questioned defendant and defendant confirmed that he had signed the form. Defendant also acknowledged that the answers to the questions on the form were his answers. In response to the court's inquiry, defendant indicated that he had reviewed the form with his attorney, and he did not have any questions with regard to the form.

Thus, the record does not support defendant's claim that he was misinformed about the punitive aspects of CSL and PSL. We therefore reject defendant's contention that the PCR court should have permitted him to withdraw his plea.

IV.

Defendant also argues that the PCR judge erred by denying his request for an evidentiary hearing. The PCR judge correctly found,

however, that an evidentiary hearing was not required. As noted, defendant failed to establish a prima facie case for relief. Moreover, the existing record was sufficient to resolve defendant's claims. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 354-55 (2013).

Affirmed.