

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3174-16T1

J.C.,

Appellant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

Argued March 6, 2018 – Decided March 22, 2018

Before Judges Yannotti and Mawla.

On appeal from the New Jersey State Parole Board.

Michael C. Woyce argued the cause for appellant (Murphy & Woyce, attorneys; Michael C. Woyce, on the briefs).

Gregory R. Bueano, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney for respondent; Melissa H. Raksa, Assistant Attorney General, of counsel; Gregory R. Bueano, on the brief).

PER CURIAM

J.C. appeals from a March 29, 2017 final decision of the New Jersey Parole Board (Board) denying his request to have

unsupervised visitation and reside with his minor children. We affirm.

We derive the following facts from the record. J.C. is a convicted sex offender who was sentenced to Parole Supervision for Life ("PSL") under Megan's Law, N.J.S.A. 2C:43-6.4. Specifically, J.C. was convicted of one count of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4), and two counts of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a).

In April 2009, the local police department and the Burlington County Prosecutor's Office investigated allegations that J.C. had sexually assaulted his nieces, B.T., A.P., and A.T. The investigation revealed J.C. had engaged in sexually inappropriate conduct with the victims while they were between the ages of twelve and fifteen. B.T. informed investigators that when she was twelve, she fell asleep at J.C.'s house while babysitting his children. She awoke to J.C. touching her breasts under her shirt. B.T. also told investigators that after this incident, J.C. digitally penetrated her vagina on at least twenty-five occasions.

A.P. reported while she was sleeping at J.C.'s residence, he climbed into bed with her and touched her arms and back under her shirt, and attempted to touch her breasts. A.T. reported two instances of inappropriate touching, which occurred after she had fallen asleep at J.C.'s residence. The first time, A.T. awoke to

find J.C. in bed with her, fondling her stomach, arms, legs, and breasts under her clothing. When A.T. tried to pull away, J.C. told her, "You need to stay away from me, I can't control myself." The second time, J.C. inappropriately touched her stomach and legs.

After J.C. entered his guilty plea, he was sentenced to three years' imprisonment. The court also imposed PSL as part of his sentence. N.J.S.A. 2C:43-6.4(b) requires the Board to supervise persons sentenced to PSL "subject to conditions appropriate to protect the public and foster rehabilitation." J.C. was also adjudged to be a repetitive and compulsive sex offender, and thus confined to the Adult Diagnostic and Treatment Center (ADTC) in Avenel.

In May 2014, J.C. was released from prison and was thereafter subject to PSL. According to the terms of PSL applicable to sexual offenders against minors, an offender must refrain from residing with a minor without the prior approval of his parole officer. As a result, J.C. has been and continues to be forbidden from residing with minors, including his three minor children.¹

¹ For purposes of PSL, "residing" with minors includes "[s]taying overnight at a location where a minor is present" N.J.A.C. 10A:71-6.12(e)(3).

In September 2014, J.C. expressed a desire to begin residing with his wife and children. J.C.'s parole officer informed him of the process he would need to follow in order for the Board to grant him living with children (LWC) privileges. Pursuant to these instructions, J.C. entered sex offender treatment with MaryAnne Giello, MSS, LCSW, who agreed to assist him with the LWC evaluation process. Giello conducted an LWC evaluation of J.C. over five non-consecutive days.

While on PSL supervision, J.C.'s parole officer suspected he had not been spending every night at his approved residence. In February 2015, the Board administered a maintenance polygraph examination, and J.C. admitted he had fallen asleep numerous times at his wife and children's residence. As a result, J.C. was referred to the Board's electronic monitoring program, which he completed in October 2015.

In April 2016, Giello submitted J.C.'s LWC evaluation to the Board. She recommended the Board allow J.C. unsupervised visits with his children, and eventually transition him to overnight visitation. Giello noted J.C. had "denie[d] an ongoing attraction to adolescent females and children" and found him to be a low-to-moderate risk offender.

J.C.'s parole officer reviewed Giello's evaluation and recommended the LWC privileges be denied. In June 2016, Assistant

District Parole Supervisor Attaa Alston reviewed J.C.'s case and concurred with the parole officer's findings. Alston noted a concern that J.C.'s daughters were unaware of why their father no longer lived with them, which Alston found troubling because J.C.'s daughters were similar in age to J.C.'s victims at the time of the assaults. Alston was also alarmed by J.C.'s comments during an interview that boundaries in his household were "loose" and "lines 'often blurred.'" Alston concluded it would be inappropriate for J.C. to reside at home with his children because the assaults against his nieces occurred while they were asleep.

When J.C. received Alston's denial, he sought an addendum to Giello's evaluation to address Alston's concerns regarding his daughters' lack of awareness of J.C.'s crimes. Giello submitted an addendum based on a June 2016 interview with J.C.'s daughters. The addendum reported J.C.'s daughters understood J.C. had touched their cousins "inappropriately," and if J.C. touched them inappropriately, they would report it to a responsible adult. Giello also reported J.C.'s daughters expressed an interest in reunification with their father. J.C.'s wife submitted a certification to the Board in support of awarding J.C. LWC privileges.

In November 2016, J.C. requested LWC privileges. J.C.'s parole officer interviewed J.C. The parole officer expressed

concern over the stability of J.C.'s marriage because his wife had engaged in a romantic relationship during their separation, only to reconcile with J.C. not long before the interview. The parole officer also noted Giello's report indicated J.C. wanted to have a stable, monogamous relationship with a woman, and did not believe reconciling with his wife was in his best interest "due to her erratic and unreliable behavior."

In December 2016, J.C.'s Parole Officer Marcy Szebenyi and Sergeant Ken Ward interviewed J.C. and his wife. Contrary to Giello's finding that J.C. had only expressed interest in adult females, J.C. informed Szebenyi and Ward he felt sexual attraction to adolescent females, specifically, thirteen year-old females. Ward also noted J.C.'s wife did not have a complete understanding of his crimes, did not believe her husband was capable of assaulting their daughters, and failed to present an adequate safety plan for her daughters.

On December 15, 2016, District Parole Supervisor Stephens issued a decision denying J.C.'s request for LWC privileges, reasoning that:

- [J.C.] was classified during his ADTC evaluation as a repetitive and compulsive offender;
- [J.C.'s] daughters [eleven to twelve years old] are the same index age and gender as his victims, who were [twelve

to thirteen] years old at the time the offenses began;

- [J.C.'s] offenses were incestu[ous] [sic] in nature (victims were his nieces);
- Responses provided by [J.C.] during [the December 2016] interview with parole personnel indicate a continued attraction towards [thirteen]-year old females (as well as adult females); [J.C.] also admitted that one of the reasons he committed his offenses against his victims was due to having the opportunity to do so while the victims were staying/sleeping over [at] his residence;
- Responses provided by [J.C.'s wife] during [the December 2016] interview with parole personnel indicate a lack of full understanding of the totality of [J.C.'s] offenses against his victims and an inability to demonstrate an appropriate safety plan in the event one of her children ever approached her with a claim of inappropriate behavior on the part of [J.C.].

J.C. appealed Stephens' determination to a Board Panel, which affirmed the decision to deny LWC privileges. J.C. then appealed the Board Panel's decision to the full Parole Board, which issued a final decision affirming the denial of LWC privileges. This appeal followed.

On appeal, J.C. argues he was deprived of procedural due process by the Board. J.C. also challenges the Board's decision, arguing the denial of LWC privileges was tantamount to the

deprivation of his fundamental due process right to rear his children.

We begin by reciting our standard of review. Appellate review of parole determinations "focuses upon whether the factual findings made by the Parole Board could reasonably have been reached on sufficient credible evidence in the record." Trantino v. N.J. State Parole Bd., 166 N.J. 113, 199 (2001) (citing Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24 (1998)). "This limited scope of review is grounded in strong public policy concerns and practical realities." Id. at 200.

"To a greater degree than is the case with other administrative agencies, the Parole Board's decision-making function involves individualized discretionary appraisals." Id. at 201 (citing Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 358-59 (1973)). This court "may overturn the Parole Board's decisions only if they are arbitrary and capricious." Ibid. "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances." Ibid. (quoting Worthington v. Fauver, 88 N.J. 83, 204 (1982)).

"[A] reviewing court is obligated to 'determine whether [the Board's] factual finding could reasonably have been reached on sufficient credible evidence in the whole record.'" Id. at 172

(quoting Trantino, 154 N.J. at 24). "A strong presumption of reasonableness attaches to the actions of administrative agencies." In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993). "The burden of showing the agency's action was arbitrary, unreasonable or capricious rests upon the appellant." Bowden v. Bayside State Prison (Dep't of Corr.), 268 N.J. Super. 301, 304 (App. Div. 1993).

As noted, J.C. argues he was denied due process. Specifically, he contends the PSL conditions that bar him from having unsupervised contact or residing with his children are arbitrary and capricious as applied to him because they violate his fundamental right to raise his children. He asserts the Board did not consider his children's best interests. He also argues the Board's decision is not adequately supported by the record.

The PSL conditions barring sex offenders who committed their crimes against children from having contact with minors are authorized by the PSL statute, N.J.S.A. 2C:43-6.4, and set forth in N.J.A.C. 10A:71-6.12(e) as follows:

If the victim(s) of an offense . . . is a minor, an offender serving a special sentence of parole supervision for life shall . . . be subject to the following conditions. The offender shall:

1. Refrain from initiating, establishing, or maintaining contact with any minor;

2. Refrain from attempting to initiate, establish, or maintain contact with any minor; and

3. Refrain from residing with any minor without the prior approval of the District Parole Supervisor or designated representative. Staying overnight at a location where a minor is present shall constitute residing with any minor for the purpose of this condition.

Furthermore, N.J.A.C. 10A:72-2.6(b) states:

If an offender serving a special sentence of community or parole supervision for life requests approval from the District Parole Supervisor or designee to initiate, establish, or maintain unsupervised contact with a minor child, the parent or legal guardian of the minor child shall be required to provide to the District Parole Office a written statement requesting that the offender be permitted to initiate, establish, or maintain unsupervised contact with the minor child. The statement shall include an acknowledgment by the parent or legal guardian that the parent or legal guardian is familiar with the circumstances of the sexual offense committed by the offender. For the purpose of this subsection, the parent or legal guardian of the minor child shall be a person other than the offender.

In addition, N.J.A.C. 10A:72-2.6(c) states:

An offender requesting to initiate, establish, or maintain unsupervised contact with a minor child shall be required to submit for consideration by the District Parole Supervisor or designee the written assessment from a sex offender treatment provider designated by the District Parole Supervisor or designee who has assessed the offender and the request by the offender to initiate,

establish, or maintain unsupervised contact with a minor child. The assessment shall include, but not be limited to:

1. A statement as to the assessed level of risk posed by the offender to the minor child;
2. A statement as to whether or not the offender initiating, establishing, or maintaining unsupervised contact with the minor child is conducive to the offender's relapse prevention plan;
3. A statement as to the appropriateness of informing the minor child of the circumstances of the sexual offense committed by the offender; and
4. The recommendation of the evaluator as to the appropriateness of the offender initiating, establishing, or maintaining unsupervised contact with the minor child.

Thereafter, "the District Parole Supervisor or designee shall evaluate the matter and determine whether the offender shall be permitted to initiate, establish, or maintain unsupervised contact with the minor child." N.J.A.C. 10A:72-2.6(d). After the district parole supervisor or designee has rendered a decision, the supervisor or designee "shall notify the offender in writing of the decision and the basis for the decision. The decision and the basis for the decision shall also be recorded in the chronological supervision report." N.J.A.C. 10A:72-2.6(e). Substantially the same procedure applies for requests to reside with a minor child. See N.J.A.C. 10A:72-2.5.

We are satisfied the Board complied with the aforementioned statutory and regulatory process, and J.C. was not deprived of procedural due process. Indeed, a parole officer informed J.C. about the LWC process. J.C. underwent sex offender treatment, was evaluated for LWC privileges, and the Board considered Giello's LWC evaluation. The Board also considered the request from J.C.'s wife to allow him to have unsupervised visitation privileges and/or permission to reside with his minor children pursuant to N.J.A.C. 10A:72-2.6(b).

After Alston indicated he would reject Giello's recommendation, J.C. sought an addendum to the recommendation, which Giello provided. The Board evaluated this new information when it considered J.C.'s request for LWC privileges. The Board then conducted two interviews with J.C., the latter of which included his wife. When the district parole supervisor issued an unfavorable determination, J.C. was afforded two levels of administrative review: first before a Board Panel, and then before the full Board, which issued a final agency decision.

Though J.C. did not appear before the Board for an evidentiary hearing, there is no requirement a PSL offender must be afforded a hearing to challenge a condition of supervision whenever the condition has a substantial impact upon a liberty interest. See J.I. v. N.J. State Parole Bd., 228 N.J. 204, 233-34 (2017) (holding

''[t]he balance of interests weighs in favor of giving a supervised offender the opportunity to respond in a meaningful way to' a near-total or absolute Internet ban imposed more than a year after the offender's release from confinement," but declining to extend the mandate of a hearing to every PSL offender whenever a condition of supervision substantially impacts a liberty interest).

The record shows J.C. was afforded ample due process and multiple layers of administrative review. He was informed of the process to obtain LWC. He was interviewed by his parole officer. He was afforded the ability to adduce evidence in support of his request. When the evidence he provided was challenged, he was permitted the ability to obtain supplemental proofs. The Board engaged in a deliberative process when it considered J.C.'s request. Contrary to J.C.'s claims, there were no "secret" evidence or proceedings. We reject J.C.'s contention that he was denied due process.

We also reject J.C.'s argument that the Board's decision violated his right to parent his children. The right to rear one's children is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972). This right, however, is not absolute. Id. at 230. The Supreme Court of the United States "ha[s] recognized that a state is not

without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." Parham v. J.R., 442 U.S. 584, 603 (1979). "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[.]" Prince v. Massachusetts, 321 U.S. 158, 167 (1944).

"[W]hen the State seeks, by statute, to interfere with family and parental autonomy, a fundamental right is at issue. That statute thus is subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling state interest." Moriarty v. Bradt, 177 N.J. 84, 103 (2003) (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

Our legal system "emphasize[s] the inviolability of the family unit, noting that '[t]he rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "[r]ights far more precious . . . than property rights"'" N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986) (alterations in original) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). "The interests of parents in this relationship have thus been deemed fundamental and are constitutionally protected." Ibid. "On the other hand, it has been recognized 'that a state is not without constitutional control over parental discretion in dealing with children when

their physical or mental health is jeopardized.'" Ibid. (quoting Parham v. J.R., 442 U.S. at 603).

As a convicted sex offender serving a PSL term, J.C.'s constitutional rights are circumscribed. See, e.g., Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). "The State . . . has an 'overwhelming interest' in ensuring that a parolee [is supervised] . . . [because parolees] are more likely to commit future criminal offenses" Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998). A State's interests in reducing recidivism among parolees may warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. See Knights, 534 U.S. at 121.

Here, the State's compelling interest in preventing J.C. from having unsupervised or overnight visitation with his minor children is borne of its interest in preventing recidivism. The Board denied J.C.'s request to grant LWC privileges because it determined the children would be exposed to danger if they had unsupervised contact or resided with J.C. Neither the statute nor the applicable regulations require the Board to engage in a "best interests of the child" analysis in order to adjudicate J.C.'s request for LWC.

Moreover, J.C. was not deprived of the right to raise his children; rather he was restrained from residing with them.

Although residing with children may be the better approach for rearing them, a restraint on unsupervised or overnight contact with one's children is not essential to the right to parent. The denial of LWC was based on the specific evidence before the Board underlying defendant's convictions, and more current evidence his proclivities had not abated, which continued to place his children at risk.

The Board considered and evaluated all of the evidence in depth and at length. Its denial of J.C.'s request for LWC privileges was supported by the substantial credible evidence in the record and was not arbitrary, capricious, or unreasonable.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION