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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5532-18

IN THE MATTER OF
THE REGISTRATION OF
E.V., REGISTRANT.
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Submitted February 14, 2022 – Decided April 20, 2022

Before Judges Messano and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 98-07-1381.

Koulikourdis & Associates, attorneys for appellant E.V. (Peter J. Koulikourdis and Joseph Takach, on the brief).

Jeffrey H. Sutherland, Cape May County Prosecutor, attorney for respondent State of New Jersey (Gretchen A. Pickering, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Registrant E.V. appeals from a July 8, 2019 order denying his request to terminate his obligations under Megan's Law, N.J.S.A. 2C:7-1 to 23, and

community supervision for life (CSL), N.J.S.A. 2C:43-6.4.[1] We vacate the July 8 order and remand for further proceedings.

I.

In April 1999, E.V. pled guilty to third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). The charge arose from a 1998 incident in a bathroom at a rest stop when E.V. grabbed an eleven-year-old boy's genitals through his clothing. The victim was unrelated to E.V.

In September 1999, E.V. was sentenced to a three-year term of probation for the offense and required to register as a sex offender under Megan's Law. N.J.S.A. 2C:7-2. In July 2003, the sentencing judge executed an amended judgment of conviction (JOC) to include the condition that defendant be subject to community supervision for life (CSL), N.J.S.A. 2C:43-6.4.[2]

E.V. resided in New York City during his probationary period, as permitted by the Interstate Compact for Adult Offender Supervision. N.J.S.A. 2A:168-26 to -39. E.V. moved back to New Jersey in 2004 but returned

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[1] CSL was replaced with Parole Supervision for Life (PSL) in 2004. See L. 1994, c. 130, § 2 (codified at N.J.S.A. 2C:43-6.4 (1995)); L. 2003, c. 267, § 1 (PSL effective Jan. 14, 2004).

[2] The original JOC inadvertently failed to reference the CSL requirement.

to New York again in March 2007 and was supervised by the New York State Parole Board (NYSPB). He also participated in a mandatory offender-specific outpatient program for several years.

E.V. was not convicted of any new criminal offenses or parole violations following his sentence in 1999.[3] But in 2011, the Queen's District Attorney's Office received reports that E.V. initiated social relationships with five thirteen-year-old boys (New York allegations). The matter was referred to the NYSPB for investigation. During the investigation, it was revealed that E.V. had contact with minor children at an establishment that served alcohol, allegedly tried to "place his mouth" on a minor while at a Burger King parking lot, and reportedly exchanged hundreds of text messages with various children. One parent alleged E.V. would pick up her minor son and several schoolmates after school to take them to eateries and shopping without parental consent. Another parent stated he learned through his son's friend that he saw boys getting into E.V.'s vehicle after school.

Following a preliminary hearing, the NYSPB determined there was probable cause that E.V. violated his parole by: (1) having contact with minor

[3] E.V. was indicted for failing to re-register as a sex offender, N.J.S.A. 2C:7-2(d), when he moved back to New Jersey in 2012, but the indictment was subsequently dismissed with prejudice.

children, including contact in a motor vehicle and in an establishment that serves alcohol; and (2) consuming alcohol. Despite these findings, New York authorities did not file charges against E.V. for parole violations. Additionally, a Monmouth County grand jury declined to return a true bill of indictment based on the New York allegations.

E.V. was held in Rikers Island on a compact warrant while the NYSPB pursued its investigation. After approximately ninety days, he was transferred to a treatment center and remained there for three months. Upon his release in July 2012, E.V. took up residence in Wildwood.

In July 2016, E.V. filed a motion to terminate his obligations under Megan's Law and CSL. In support of his application, he submitted a psychological evaluation from Dr. John F. McInerney. The doctor concluded E.V. presented a low risk of re-offense and "continued registration as a sex offender . . . no longer serv[ed] the purpose originally intended[.]" Further, the doctor stated, "there is no evidence available that there have been other incidents before or since the charges of 1998." The doctor based his finding on E.V.'s clinical interview, psychological testing, and various background materials provided by E.V.'s counsel.

During argument on E.V.'s motion before Judge Michael J. Donohue in February 2017, it became evident E.V. failed to provide Dr. McInerney with details about the New York allegations. Approximately two weeks after hearing argument, Judge Donohue granted E.V.'s request to submit a supplemental report from the doctor.

In June 2017, the parties returned to court and Judge Donohue heard testimony from Dr. McInerney. The doctor testified E.V. failed to disclose the New York allegations. But Judge Donohue found Dr. McInerney also "accepted Registrant's explanation that he assumed the doctor knew about the incidents and that if the doctor thought them important, he would have asked Registrant about them." Further, the doctor opined E.V. "considered most of the allegations in the New York probation records to be simple misunderstandings." Thus, Dr. McInerney concluded, "[t]here is nothing in the present assessment to suggest that [Registrant's] low risk of reoffense has in any way changed."

On June 21, 2017, Judge Donohue denied E.V.'s application to terminate his Megan's Law and CSL obligations, finding:

> The New York records w[]ere in Registrant's possession at the time he presented to Dr. McInerney. Clearly, Registrant failed to disclose to the doctor the extensive 2011 contacts Registrant had with minor boys in New York [S]tate. At the time of oral argument, Registrant offered no explanation as to why such

> information was withheld from the doctor evaluating Registrant for purposes of these proceedings . . . .
>
> . . . .
>
> The most reasonable inference to be drawn from what is before the [c]ourt is that Registrant intentionally withheld this information as Registrant knew it would be damaging to his prospects of having a psychologist conclude that Registrant is not a risk to the safety of others; and this [c]ourt so finds. While Dr. McInerney was credible and believable in most respects, the [c]ourt found the doctor's dismissal of the New York allegations based solely on the representations of Registrant unreasonable. Registrant did admit to several of the allegations, but minimized them. . . . This [c]ourt finds that Registrant's partial corroboration of the New York allegations lends credence to the allegations as a whole.

Further, the judge concluded E.V.

> engaged in inappropriate conduct with regard to several underaged boys while subject to Megan's Law registration and [CSL . . . and t]he fact that neither New York nor New Jersey authorities took action against Registrant appears to be more a consequence perhaps of bureaucratic inefficiencies rather than a lack of proof.
>
> Based upon the above, this [c]ourt finds, clearly and convincingly and is of the firm belief based on all of the attendant facts, that Registrant continues to represent a threat to the safety of others.

Significantly, E.V. did not appeal from Judge Donohue's order.

In December 2018, approximately eighteen months after Judge Donohue issued his opinion, E.V. filed a motion, renewing his request to terminate his obligations under Megan's Law and CSL. The State again opposed E.V.'s application.

In support of his motion, E.V. submitted an updated, two-page report from Dr. McInerney. The report confirmed the doctor interviewed E.V. for two hours in June 2018 and spoke with E.V.'s parole officer, who informed him that E.V. was "fully compliant with all reporting requirements and she ha[d] no information to suggest that his risk of re-offense ha[d] changed." Additionally, Dr. McInerney stated E.V. "continue[d] to be distressed about the incident that resulted in problems when he relocated to New York in 2012," but E.V. "remain[ed] convinced that he has developed better judgment and self-control of his impulses and remain[ed] . . . at very low risk for re-offense."

Notwithstanding Judge Donohue's finding in June 2017 that E.V. "sent over forty text messages to one child; over ninety messages to a second child; over 100 messages to a third child and over 400 messages to a fourth child" and such behavior was "contrary to the conditions of his supervision," Dr. McInerney concluded that after E.V. pled guilty

> to a 1998 incident involving the sexualization of an [eleven]-year-old and a plea agreement to endangering

> the welfare of a child[,] [h]e has been compliant with all of the various requirements of probation and parole supervision under Megan's Law since that time. Assuming the veracity of [E.V.'s] explanation of the problematic incident that appears to have occurred after he briefly moved back to New York, he has not had any documented sexual offenses or indication of problematic behavior while under supervision.

Accordingly, the doctor concluded E.V. was "in the low[-]risk category with respect to reoffence as has been the case in my previous assessments."

A different judge heard argument on the motion on July 1, 2019; neither party produced Dr. McInerney to testify at that hearing. Following argument, the judge rendered a decision from the bench, denying E.V.'s application. She referred extensively to Judge Donohue's 2017 opinion and found there was "no reason to disturb" it. The motion judge reasoned that Dr. McInerney's report was "really only a year past when Judge Donohue entered his order," and Dr. McInerney's supplemental report "really just . . . reiterates the prior [report's] conclusions." She added, "really all we have between Judge Don[o]hue's decision and today is the passage of time and . . . an additional evaluation from Doctor McInerney that's dated July 24, 2018." Moreover, the judge stated:

> I . . . find no reason that I . . . should revisit Judge Don[o]hue's decision in this regard. . . . [I]t's extensive. It's detailed. [U]nder the doctrine of res judicata, . . . there's no reason for me to go back and undo what . . . Judge Don[o]hue found back in 2017 based on

> essentially the same arguments, the same information, the same medical conclusions that I have in front of me here today. . . . [U]nder res judicata, I have no . . . reason to disturb what Judge Don[o]hue did two years ago. So in that regard then I'm going to deny the [R]egistrant's motion to be relieved[,] finding that as Judge Don[o]hue did, that . . . he hasn't met the burden of showing by a preponderance of the evidence or clear and convincing evidence that he should he removed from Megan's Law or CSL respect[ively].

The judge entered a conforming order on July 8, 2019.

II.

On appeal, E.V. initially argues his application should not have "been precluded by the doctrine[s] of res judicata or collateral estoppel."[4] Secondly, he contends the motion judge "incorrectly decided that [he] did not satisfy the required criteria . . . to be terminated from his registration and community supervision requirements."

We review a trial court's decision on a motion to terminate obligations under CSL or Megan's Law for an abuse of discretion. See In re J.W., 410 N.J. Super. 125, 130 (App. Div. 2009) (evaluating risk of re-offense under an abuse of discretion standard). An abuse of discretion occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from

[4] The record confirms the motion judge did not reference collateral estoppel when she rendered her decision.

established policies, or rested on an impermissible basis.'" Jacoby v. Jacoby, 427 N.J. Super. 109, 116 (App. Div. 2012) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

We "may find an abuse of discretion when a decision 'rest[s] on an impermissible basis' or was 'based upon a consideration of irrelevant or inappropriate factors.'" State v. S.N., 231 N.J. 497, 515 (2018) (alteration in original) (quoting State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017)). Further, "when the trial court renders a decision based upon a misconception of the law, that decision is not entitled to any particular deference and consequently will be reviewed de novo." Ibid. (quoting C.W., 449 N.J. Super. at 255). Thus, under the abuse of discretion standard, we "generally give no deference to a trial court decision that fails to 'provide factual underpinnings and legal bases supporting [its] exercise of judicial discretion.'" Ibid. (alteration in original) (quoting C.W., 449 N.J. Super. at 255).

A registrant may apply to terminate the obligations under Megan's Law "upon proof that the person has not committed an offense within [fifteen] years following conviction or release from a correctional facility . . . and is not likely to pose a threat to the safety of others." N.J.S.A. 2C:7-2(f). "Relief from Megan's Law registration may be granted upon proof by a preponderance of the

evidence that a person is not likely to pose a threat to the safety of others." In re J.M., 440 N.J. Super. 107, 116 (Law. Div. 2014).[5]

Similarly, a defendant may be relieved from CSL where "the person has not committed a crime for [fifteen] years since the last conviction or release from incarceration, whichever is later, and that the person is not likely to pose a threat to the safety of others if released from parole supervision." N.J.S.A. 2C:43-6.4(c). "However, a person requesting termination from CSL/PSL obligations must demonstrate the same evidence by satisfying the court by the higher burden of 'clear and convincing evidence.'" In re J.M., 440 N.J. Super. at 116.

Res judicata is a judicial doctrine that prevents relitigation of a controversy between the parties. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 172 (App. Div. 2000) (quoting Lubliner v. Bd. of Alcoholic Beverage Control for City of Paterson, 33 N.J. 428, 435 (1960)). Res judicata bars repetitive litigation when there has been a final judgment by a court of competent jurisdiction and the causes of action, issues, parties, and relief sought

[5] N.J.S.A. 2C:7-2(g), enacted in 2002, bars certain offenders from ever applying for termination of their registration requirements. The Supreme Court recently concluded that subsection (g) does not apply retroactively. In re G.H., 240 N.J. 113 (2019). The State does not suggest E.V.'s application is barred under subsection (g).

are substantially similar. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989); see also Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 318-19 (App. Div. 2002). "However, 'even where these requirements are met, the doctrine, which has its roots in equity, will not be applied when it is unfair to do so.'" In re Vicinage 13 of the N.J. Superior Ct., 454 N.J. Super. 330, 341 (App. Div. 2018) (quoting Olivieri v. Y.M.F. Carpet, 186 N.J. 511, 521 (2006)).

Mindful of these standards, we are satisfied the judge mistakenly exercised her discretion in relying on the doctrine of res judicata to deny E.V.'s application. Accordingly, we do not reach E.V.'s second argument regarding whether he met the criteria to allow for his Megan's Law and CSL conditions to be terminated, but rather vacate the July 8 order and remand for the trial court to reconsider his application on the merits in the first instance.

We hasten to add the State conceded before the trial court that E.V. was offense-free for fifteen years before his most recent application. Thus, the motion judge properly focused on whether E.V. met his burden in establishing he was not likely to pose a threat to the safety of others if released from his registration and CSL obligations. Understandably, the judge noted E.V. failed to make this very showing under both N.J.S.A. 2C:7-2(f) and 2C:43-6.4(c) when he moved before Judge Donohue for relief. But she also recognized some time

had passed since E.V.'s last application and that E.V. provided an updated evaluation for her consideration. Under these circumstances, we are persuaded the judge was obliged to assess E.V.'s application anew.

Given the passage of time since E.V.'s application was last heard, we encourage the judge on remand to direct the parties to provide whatever additional information the judge needs to properly assess whether E.V. has satisfied his respective burdens under N.J.S.A. 2C:7-2(f) and 2C:43-6.4(c). We offer no opinion as to the appropriate outcome of the hearing.

To the extent we have not addressed E.V.'s remaining arguments, we are satisfied they lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Vacated and remanded.

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

CLERK OF THE APPELLATE DIVISION