

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0992-22

IN THE MATTER OF
REGISTRANT J.S.

Argued October 11, 2023 – Decided October 30, 2023

Before Judges Whipple, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. ML-21-03-0041.

Samuel C. Carrigan, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Michael Denny, Assistant Deputy Public Defender, of counsel and on the brief).

Tara Carlin, Assistant Prosecutor, argued the cause for respondent (Lachia L. Bradshaw, Burlington County Prosecutor, attorney; Tara Carlin, of counsel and on the brief).

PER CURIAM

Registrant J.S.¹ appeals from an October 31, 2022 order classifying him as a Tier Two sex offender, with Tier Three notification requirements pursuant to Megan's Law, N.J.S.A. 2C:7-1 to -23. We affirm, substantially for the reasons expressed by Judge Richard J. Nocella in his thoughtful oral opinion.

I.

We glean the following facts from the motion record. In June 2015, J.S. pled guilty to an amended count of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a). He was sentenced to counseling and a one-year term of juvenile probation. A few months later, he pled guilty to one count of disorderly persons theft, N.J.S.A. 2C:20-3(a), which resulted in a violation of his probation.

J.S. incurred additional charges, and in March 2016, pled guilty to the probation violation, as well as second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), and second-degree luring/enticing a child, N.J.S.A. 2C:13-6(a). He was sentenced to a two-year term for the probation violation, two consecutive three-year terms for his remaining charges, and Megan's Law registration requirements. The judge ordered J.S. to serve his aggregate eight-year sentence

¹ We use initials to preserve the confidentiality of these proceedings. R. 1:38-3(c)(9).

at the New Jersey Training School for Boys (Training School) in Jamesburg.

In June 2021, when J.S. was twenty-years old, the Training School conducted his pre-release evaluation. The evaluation reflected that J.S. "incurred a total of [sixty] institutional infractions" while detained, including infractions for lewd conduct, indecent exposure, and sexual assault. His last sexual infraction was in January 2020. The evaluator concluded it was "very concerning that nine of [J.S.'s] infractions [were] sexual in nature," and that it was "imperative . . . [J.S.] be subjected to mandatory supervision upon his release[,] given his physically and sexually aggressive behavior in the community and in this correctional setting."

Upon his release from the Training School, J.S. complied with his Megan's Law registration requirements. In February 2022, the State notified him that it would formally move to classify him as a Megan's Law Tier Three registrant, based on its determination that he scored an eighty-three on the Registration Risk Assessment Scale (RRAS).² J.S. objected to the proposed classification,

² The RRAS was "designed to provide prosecutors with an objective standard on which to base the community notification decision mandated by [Megan's Law] and to assure that the notification law is applied in a uniform manner throughout the State." In re C.A., 146 N.J. 71, 100-01 (1996). The RRAS "is used to assess whether a registrant's risk of reoffending is low, moderate or high." In re A.D., 441 N.J. Super. 403, 407 (App. Div. 2015).

and a hearing was scheduled before Judge Nocella to address the dispute.

During argument before Judge Nocella on October 7, 2022, J.S.'s attorney argued the State incorrectly scored J.S. on two of the thirteen risk factors³ under the RRAS, specifically, factor two—degree of contact used during the offense, and factor eleven—therapeutic support, and that J.S. should be classified as a Tier Two offender. Regarding factor two, J.S.'s counsel claimed there was no evidence that J.S.'s sexual offenses involved penetration, so his high-risk score of fifteen on this factor should be reduced to five. Additionally, counsel contended J.S.'s score under factor eleven should be reduced from three to zero because he was in therapy. J.S.'s attorney also represented that J.S. was "working on getting a psychosexual therapist[,] besides the therapist he currently ha[d,]" due to a recommendation that J.S. should attend psychosexual therapy sessions in person.

The State conceded J.S. was entitled to an adjustment on his score for

³ As more fully discussed herein, "[t]he risk assessment criteria are: Degree of force; Degree of contact; Age of victim; Victim selection; Number of offenses/victims; Duration of offensive behavior; Length of time since last offense (while at risk); History of antisocial acts; Response to treatment; Substance abuse; Therapeutic support; Residential support; and Employment/educational stability." In re T.T., 188 N.J. 321, 328 n.5 (2006) (quoting Att'y Gen. Guidelines for Law Enf't for the Implementation of Sex Offender Registration & Cmty. Notification Laws, Exhibit E at 4-8; Exhibit F (rev'd Feb. 2007)).

factor eleven, and that his overall RRAS score should be reduced by three points. However, the State disputed J.S. was entitled to any further reduction on factor two, considering his degree of contact during his offenses. The assistant prosecutor explained that in 2014, before J.S. pled guilty to an amended endangering charge, law enforcement officers took statements from two of his minor victims, and as a result, "[t]here was probable cause found for the charge of endangering that . . . include[d] the fact[] of fellatio being performed" on J.S.

On October 31, 2022, Judge Nocella issued an oral opinion, finding J.S. should be "designated a Tier [Two] offender with Tier [Three] notification" requirements, based on his "moderate risk . . . score of [seventy] points." Judge Nocella initially concluded that J.S.'s RRAS score should be adjusted from a high to a moderate-risk range because the State failed to establish by "clear and convincing evidence," under factor two, that any of J.S.'s sexual offenses involved penetration. Accordingly, the judge reduced J.S.'s factor two score by ten points, from fifteen to five. Judge Nocella also lowered J.S.'s factor eleven score from three to zero, due to the State's prior concession that J.S. was receiving therapeutic support. These adjustments reduced J.S.'s overall RRAS score to seventy points, placing him in the Tier Two range.

Having recalculated J.S.'s RRAS score, Judge Nocella explained he still

needed to "make a value judgment in determining the proper tier classification and scope of community notification based on all of the evidence available." Such evidence included the fact that J.S. reoffended "many times" before he pled guilty and was sentenced to serve an eight-year term at the Training School. The judge also pointed to the fact that while detained, J.S. incurred sixty infractions, "which included . . . lewd conduct, indecent exposure, and sexual assault."

Next, the judge observed that Dr. Zachary Yeoman evaluated J.S. on June 30, 2022, and recommended J.S. be classified as a Tier Two offender. The judge also noted Dr. Yeoman opined that J.S. could manage his risk of re-offense "effectively" if he followed the six conditions outlined in the doctor's treatment plan. The judge referenced each of the conditions, including that J.S.: be monitored by a psychosexual therapist; engage in "family psychotherapy"; have his medication monitored by a psychiatrist if he "continued[d] to take psychotropic medication"; and "maintain consistent employment."

Judge Nocella found that as of the October 7 hearing, J.S. admittedly was not fully compliant with Dr. Yeoman's treatment plan, and, in fact, met only one of the six conditions—employment—and was "working on getting a psychosexual therapist." Therefore, the judge concluded:

a [T]ier [T]wo supervision . . . would not be appropriate unless these six items were happening and they're not.

The only one that is happening is [J.S. is] working. So[,] the court does believe . . . a deviation from the [RRAS] is appropriate[,] . . . and the court does make that finding by clear and convincing evidence.

After reiterating J.S. accrued sixty infractions while detained at the Training School, "which included the . . . sexual . . . offenses [of] . . . lewd conduct, indecent exposure, and sexual assault[,] " and again citing J.S.'s failure to abide by Dr. Yeoman's treatment plan, Judge Nocella determined "by clear and convincing evidence an upward . . . modification" was "appropriate" and J.S. should be "place[d] . . . on a Tier Three notification" level. J.S.'s counsel then interjected that following the October 7 hearing, J.S. found a psychosexual therapist and commenced seeing that therapist in person. The judge stated this was a "step in the right direction" and he was "happy to hear" about this development, but "it [did not] change the [c]ourt's decision." Judge Nocella entered a conforming order that day.

II.

On appeal, J.S. presents one argument for our consideration, specifically:

POINT I

THE HEARING COURT ABUSED ITS DISCRETION WHEN, WITH NO SUPPORTING EXPERT TESTIMONY, IT DETERMINED THAT TIER III NOTIFICATION WAS REQUIRED DESPITE THE REGISTRANT SCORING IN THE TIER II RANGE.

This argument is unavailing. We add the following comments.

"We review a trial court's conclusions regarding a Megan's Law registrant's tier designation and scope of community notification for an abuse of discretion." In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022). "[A]n abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "A trial court's interpretation of the law and the . . . consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The purpose of Megan's Law is "to protect the community from the dangers of recidivism by sexual offenders." C.A., 146 N.J. at 80 (citing N.J.S.A. 2C:7-1(a)). In fact, "[t]he expressed purposes of the registration and notification procedures [under Megan's Law] are 'public safety' and 'preventing and promptly resolving incidents involving sexual abuse and missing persons.'" In re Registrant A.A., 461 N.J. Super. 385, 394 (App. Div. 2019) (quoting N.J.S.A. 2C:7-1). "The law is remedial and not intended to be punitive." Ibid. (citing

Doe v. Poritz, 142 N.J. 1, 12-13 (1995)).

Megan's Law "[t]ier designations reflect a registrant's risk of re-offense, as determined by a judge assessing various information, including thirteen factors referenced in the RRAS." In re Registrant C.J., 474 N.J. Super 97, 106 (App. Div. 2022) (citing A.A., 461 N.J. Super. at 402). The RRAS was developed for the State's use "to establish its prima facie case concerning a registrant's tier classification and manner of notification." T.T., 188 N.J. at 328 (quoting C.A., 146 N.J. at 110). The RRAS "is presumptively accurate and is to be afforded substantial weight—indeed it will even have binding effect—unless and until a registrant 'presents subjective criteria that would support a court not relying on the tier classification recommended by the Scale.'" In re Registrant G.B., 147 N.J. 62, 81 (1996) (quoting C.A., 146 N.J. at 109).

"Although a tier classification made on the basis of the [RRAS] should be afforded deference, a court should not rely solely on a registrant's point total when it conducts a judicial review of a prosecutor's tier level classification or manner of notification decisions." C.A., 146 N.J. at 108. Stated differently, "[j]udicial determinations regarding tier classification and community notification are made 'on a case-by-case basis within the discretion of the court[]' and 'based on all of the evidence available[,] not simply by

following the 'numerical calculation provided by the [RRAS].'" C.J., 474 N.J. Super. at 120 (all but first alteration in original) (quoting C.A., 146 N.J. at 109) (quoting G.B., 147 N.J. at 78-79).

The RRAS contains four categories of review: "seriousness of [the] offense, offense history, personal characteristics, and community support." State v. C.W., 449 N.J. Super. 231, 260 (App. Div. 2017) (citation omitted). "The first two categories, '[s]eriousness of [o]ffense' and '[o]ffense [h]istory,' are considered static categories because they relate to the registrant's prior criminal conduct." C.A., 146 N.J. at 103. The next two categories, "[c]haracteristics of '[o]ffender' and '[c]ommunity [s]upport,' are considered to be dynamic categories because they are evidenced by current conditions." Ibid. The "static factors" relate to past criminal conduct and weigh more heavily under the RRAS than the dynamic factors. In re Registrant J.M., 167 N.J. 490, 500 (2001).

The "seriousness of offense" category takes into account: (1) degree of force; (2) degree of contact; and (3) age of the victim(s). C.A., 146 N.J. at 103. The "offense history" category covers: (4) victim selection; (5) number of offenses/victims; (6) duration of offensive behavior; (7) length of time since last offense; and (8) any history of anti-social acts. Ibid. The "personal

characteristics" category accounts for the registrant's: (9) response to treatment and (10) substance abuse. Id. at 103-04. The final category, "community support," considers a registrant's: (11) therapeutic support; (12) residential support; and (13) employment/educational stability. Id. at 104.

"Each factor is assigned a risk level of low (0), moderate (1), or high (3), and '[t]he total for all levels within a category provides a score that is then weighted based on the particular category.'"⁴ A.A., 461 N.J. Super. at 402 (alteration in original) (quoting C.A., 146 N.J. at 104). "An RRAS score [totaling] 0 to 36 is low risk; 37 to 73 moderate risk; and 74 or more, high risk." T.T., 188 N.J. at 329.

If the risk of re-offense is deemed low, only "law enforcement agencies likely to encounter the [registrant]" are notified. N.J.S.A. 2C:7-8(c)(1). If the risk of re-offense is considered moderate, schools and community organizations within the community also must be notified. N.J.S.A. 2C:7-8(c)(2). But if the risk of re-offense is high, "members of the public likely to encounter the [registrant]" must be notified. N.J.S.A. 2C:7-8(c)(3). The State ultimately bears

⁴ The point total for the category of "[s]eriousness of [c]rime," "which is designed to predict the nature of any re-offense . . . is multiplied by five." C.A., 146 N.J. at 104. On the other hand, the categories of "[o]ffense [h]istory," "[c]haracteristics of [o]ffender" and "[c]ommunity [s]upport" "are multiplied by three, two, and one respectively." Ibid.

the burden of proving—by clear and convincing evidence—a registrant's risk to the community and the scope of notification necessary to protect the community. In re Registrant R.F., 317 N.J. Super. 379, 383-84 (App. Div. 1998).

Understanding the State is responsible for initiating the tier classification process, the Supreme Court has "prescribed a two-step procedure for evidence production." C.A., 146 N.J. at 83. "In the first step, the prosecutor has the burden of going forward with prima facie evidence that 'justifies the proposed level and manner of notification.'" Ibid. (quoting Doe, 142 N.J. at 32). "In the second step, assuming the prosecutor's burden is met, the registrant then has the burden of producing evidence challenging the prosecutor's determinations on both issues." Id. at 83-84 (quoting Doe, 142 N.J. at 32). "Once the State has satisfied its burden of going forward, the court 'shall affirm the prosecutor's determination unless it is persuaded by a preponderance of the evidence that it does not conform to the laws and Guidelines[,]'" based upon the court's independent review of the case and its merits. Id. at 84 (quoting Doe, 142 N.J. at 32).

In addressing a registrant's classification, a judge is free to consider reliable evidence besides the RRAS score, even if such evidence would not be

admissible under our Rules of Evidence, because the "hearing process . . . is not governed by the [R]ules of [E]vidence." Id. at 83 (internal citation omitted). Thus, a reviewing judge "may take into account any [credible] information available." Id. at 87 (quoting Registrant Risk Assessment Scale Manual, p. 5 (Sept. 14, 1995)). "This may include, but is not limited to, criminal complaints not the subject of a conviction but which are supported by credible evidence, victim statements[,] admissions by the registrant, police reports, medical, psychological or psychiatric reports, pre-sentencing reports, and Department of Corrections discharge summaries." In re C.A., 285 N.J. Super. 343, 348 (App. Div. 1995) (citation omitted).

It is evident, then, that "[j]udicial determinations regarding tier classification and community notification are within the judge's discretion and based on all of the available evidence, not simply the 'numerical calculation provided by the [RRAS].'" A.A., 461 N.J. Super. at 402 (second alteration in original) (quoting G.B., 147 N.J. at 78-79). Our Supreme Court also has recognized that the RRAS is merely a tool utilized to evaluate a sex offender's risk of re-offense. See C.A., 146 N.J. at 109.

Further, it is evident that the scope of notification does not necessarily align with the tier assigned to an offender, and in fact, the Court has held that

"in the unusual case, facts may exist that warrant a narrowing of the notification (or perhaps, even the expansion of notification)." G.B., 147 N.J. at 84; see also T.T., 188 N.J. at 334 ("It is well established that a Tier Two offender may, under certain circumstances, receive Tier One notification.").

We also recognize that in a challenge to a registrant's RRAS score or the scope of community notification, "expert testimony will be neither necessary nor helpful." G.B., 147 N.J. at 85. However, "in limited circumstances, expert testimony may be introduced . . . to establish the existence of unique aspects of a registrant's offense or character that render the [RRAS] score suspect." Id. at 69. The trial court has "the ultimate authority to decide what weight to attach to the [RRAS] and what weight to attach to expert testimony." Id. at 85. That is because "[t]he final determination of dangerousness lies with the courts, not the expertise of psychiatrists and psychologists." Id. at 86 (quoting In re D.C., 146 N.J. 31, 59 (1996)).

Applying these standards, we are persuaded that following his thorough review of the evidence and arguments presented, Judge Nocella acted well within his discretion in both adjusting J.S.'s RRAS score to the Tier Two range and finding J.S. should be subject to a Tier Three level of notification. Therefore, we discern no basis to disturb the October 31, 2022 order.

Affirmed.

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

A handwritten signature in black ink, appearing to be 'S. J. ...', written over the printed text.

CLERK OF THE APPELLATE DIVISION