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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1673-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ATOY A. SMITH,

Defendant-Appellant.

Argued September 12, 2023 – Decided October 3, 2023

Before Judges Rose and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 19-03-0731.

Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Scott M. Welfel, of counsel and on the briefs).

Lucille M. Rosano, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Caitlenn Raimo, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Atoy A. Smith appeals from an April 12, 2021, Law Division order denying his motion to dismiss his indictment for violating his parole. For the following reasons, we affirm.

I.

In January 1999, defendant was convicted of second-degree sexual assault, N.J.S.A. 2C:14-2(b), and his sentence included community supervision for life (CSL). In April 2002, defendant signed a document titled "General Conditions of Community Supervision for Life," which included a condition barring defendant from "the purchase, use, possession, distribution or administration of any narcotic or controlled dangerous substance, controlled dangerous substance analog, imitation controlled dangerous substance or any paraphernalia related to such substances except as prescribed by a physician."

On January 19, 2019, defendant's parole officer, Patricia Castelan, conducted defendant's periodic urine test, which was positive for oxycodone and morphine. A laboratory test of the sample also yielded positive results for oxycodone and oxymorphone. On January 24, defendant tested positive again for oxycodone. Defendant was arrested and released from jail the next day.

On February 1, defendant again tested positive for oxycodone. Because of the drug test results, Castelan referred defendant to the Greater Essex Counseling program for drug treatment, and he reported for intake on February 7. During his intake appointment, defendant told the counselor he also made an appointment with a different program which offered Medication Assisted Treatment (MAT).

One day later, on February 8, defendant told Castelan he would test positive again, and that he needed help with his addiction. He signed a Miranda¹ waiver and admitted to using thirty milligrams of oxycodone just two days earlier. In light of this development, as well as defendant's other recent positive tests, Castelan directed defendant be admitted to Delaney Hall, a secure rehabilitation facility.² Defendant remained there for ninety days until he successfully completed his rehabilitation program on May 9.

In March 2019, while he was undergoing treatment at Delaney Hall, a grand jury charged defendant with violating a condition of his CSL, N.J.S.A. 2C:43-

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² The record shows there were two treatment programs available at Delaney Hall. They were titled, Stages to Enhance Parolee Success Program (STEPS) and Re-entry Substance Abuse Program (RESAP).
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6.4(d), a fourth-degree crime. The State extended a plea offer, recommending a one-year prison sentence in exchange for defendant's guilty plea to violating CSL.

In September 2019, defendant moved to dismiss the indictment on various grounds.³ Among other things, defendant contended the State failed to present a prima facie case to the grand jury. Defendant also argued for a modified interpretation of the statutory phrase "without good cause." He contended the statute either should be found void for vagueness or the court should look to N.J.A.C. 10A:72-2.4 to define it. He further argued the "without good cause" language should be read to limit prosecution for N.J.S.A. 2C:43-6.4(d) offenses to "serious or persistent" violations of CSL. He posited that a parole violation "without good cause" should mean a violation which occurred "after and in spite of the efforts of [the Parole Board], where appropriate, to remediate the violations through interventions." On April 12, 2021, the trial court denied defendant's motion, but did not address the "without good cause" argument. The court also denied defendant's motion to clarify. We denied leave to appeal.

³ Also in September 2019, defendant enrolled in Organization for Recovery, another program which offered MAT. Defendant continued treatment at Organization for Recovery through the date of his sentencing, January 19, 2022. He secured full-time employment with S & N Total Cleanup shortly thereafter.

In January 2022, defendant pled guilty to an amended count one, using a prescription legend drug without a prescription, N.J.S.A. 2C:35-10.5(b), a disorderly persons offense. At sentencing, the court weighed the aggravating and mitigating factors, and ordered defendant to pay fines only.

Defendant argues the following points on appeal:

POINT I

BECAUSE THE STATE FAILED TO PRESENT A PRIMA FACIE CASE TO THE GRAND JURY, BECAUSE N.J.S.A. 2C:43-6.4(d) IS UNCONSTITUTIONALLY VAGUE, AND BECAUSE THE STATE'S PROSECUTION OF DEFENDANT FOR TESTING POSITIVE FOR OXYCODONE VIOLATED DOUBLE JEOPARDY, DUE PROCESS, THE NEW JERSEY LAW AGAINST DISCRIMINATION, AND THE FEDERAL AND STATE PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, THE MOTION COURT SHOULD HAVE DISMISSED THE INDICTMENT.

A. BECAUSE DEFENDANT WAS ALREADY PUNISHED FOR THE PRESENT OFFENSE WITH NINETY DAYS OF INCARCERATION, PROSECUTION IS BARRED BY DOUBLE JEOPARDY.

B. THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE THE TERM "WITHOUT GOOD CAUSE" IS UNCONSTITUTIONALLY VAGUE FACIALLY AND AS APPLIED TO DEFENDANT.

C. PROSECUTING DEFENDANT FOR VIOLATING A CSL CONDITION WHERE THE LESS RESTRICTIVE RESPONSES UNDER N.J.A.C. 10A:72-2.4 WERE APPROPRIATE VIOLATED DUE PROCESS AND FUNDAMENTAL FAIRNESS.

D. BECAUSE THE STATE FAILED TO PRESENT EVIDENCE TO THE GRAND JURY THAT PAROLE COMPLIED WITH N.J.A.C. 10A:72-2.4 BEFORE FILING A CRIMINAL CHARGE UNDER N.J.S.A. 2C:43-6.4(D), THE STATE FAILED TO PRESENT "SOME EVIDENCE" THAT [DEFENDANT'S] VIOLATION WAS "WITHOUT GOOD CAUSE."

E. PROSECUTING A PERSON SUFFERING FROM OPIOID USE DISORDER WITH A PAROLE VIOLATION FOR TESTING POSITIVE FOR OPIOIDS WITHOUT FIRST GIVING THE PERSON A MEANINGFUL OPPORTUNITY TO STEM HIS USE OF OPIOIDS THROUGH THE REASONABLE ACCOMMODATION OF SUBSTANCE ABUSE TREATMENT VIOLATES THE NEW JERSEY LAW AGAINST DISCRIMINATION.

F. PROSECUTING A PERSON SUFFERING FROM OPIOID USE DISORDER FOR TESTING POSITIVE WITHOUT FIRST GIVING THE

PERSON A MEANINGFUL
OPPORTUNITY TO STEM HIS USE OF
OPIOIDS THROUGH SUBSTANCE
ABUSE TREATMENT VIOLATES THE
STATE AND FEDERAL
CONSTITUTIONAL PROHIBITIONS
AGAINST CRUEL AND UNUSUAL
PUNISHMENT.

II.

A.

"A trial court's denial of a motion to dismiss an indictment is reviewed for an abuse of discretion." State v. Bell, 241 N.J. 552, 561 (2020) (quoting State v. Twiggs, 233 N.J. 513, 544 (2018)). Accordingly, "the trial court's 'decision should be reversed on appeal only [if] it clearly appears that the exercise of discretion was mistaken." Id. (quoting State v. Abbati, 99 N.J. 436 (1985) (alteration in original)). "An indictment should be disturbed only on the 'clearest and plainest ground[s],' and 'only when the indictment is manifestly deficient or palpably defective.'" State v. Shaw, 241 N.J. 223, 239 (2020) (first quoting State v. Perry, 124 N.J. 128, 168 (1991); then quoting State v. Hogan, 144 N.J. 216, 229 (1996)); see also State v. Saavedra, 222 N.J. 39, 55 (2015) (recognizing appellate courts review a trial judge's decision deciding the sufficiency of a grand jury indictment for abuse of discretion).

B.

N.J.S.A. 2C:43-6.4(d) states in pertinent part:

A person who violates a condition of a special sentence of community supervision for life or parole supervision for life imposed pursuant to this section without good cause is guilty of a crime of the third degree. Notwithstanding any other law to the contrary, a person sentenced pursuant to this subsection shall be sentenced to a term of imprisonment, unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice.

N.J.A.C. 10A:72-2.4(b) states in pertinent part:

The response to a violation of a condition of parole shall be proportional to the risk to the community posed by the parolee, the severity of the violation, and the potential for long-term positive outcomes. Responses may include, but not be limited to, the following:

1. An adjustment to the parolee's reporting status;
2. The imposition of any special condition(s) that will reduce the likelihood of recurrence of criminal behavior; or
3. The imposition of a special condition requiring:
 - i. Assignment to and successful completion of an out-patient substance abuse treatment program or any other recommended treatment program;

ii. Assignment to and successful completion of the electronic monitoring program or Global Positioning System (GPS) monitoring program, wherein electronic monitoring or GPS monitoring serves to address violations of conditions of supervision;

iii. Assignment to, and successful completion of, a community program that provides reentry services; or

iv. Assignment to and successful completion of a residential community-based treatment program.

III.

A.

Defendant maintains his prosecution under N.J.S.A. 2C:43-6.4(d) is barred by double jeopardy, because he already was punished for the present offense by his ninety-day confinement at Delaney Hall. He argues this confinement constituted a "sanction" because it was a criminal penalty. Defendant cites State v. Schubert, 212 N.J. 295 (2012), for the proposition that the Legislature "viewed community supervision for life as an integral part of a defendant's sentence" and that "N.J.S.A. 2C:43-6.4 is punitive rather than remedial." Defendant contends that the trial court's characterization of his

confinement at Delaney Hall as remedial was error, and his stay was more properly characterized as punitive. Defendant submits that at least one of the treatment programs he attended at Delaney Hall, the RESAP program, is punitive under the factor test outlined in Hudson v. United States, 522 U.S. 93, 99-100 (1997). We are not persuaded.

The Fifth Amendment states in relevant part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" U.S. Const. amend. V. The New Jersey Constitution similarly states: "no person shall, after acquittal, be tried for the same offense." N.J. Const. art. 1 ¶ 11. "The Double Jeopardy Clause contains three protections. It protects against (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" State v. Miles, 229 N.J. 83, 92 (2017) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

When it rejected defendant's motion to dismiss the indictment, the trial court made the following findings:

[Defendant] was made to participate in the Stages to Enhance Parolee Success Program/ Re-entry Substance Abuse Program, which was run out of Delaney Hall. The purpose was 'to provide a more intense level of counseling to address [his drug] issue while in a secured program . . . [and] provide a graduated sanction while

promoting a more positive reintegration back into the community.' Notwithstanding the word 'sanction,' it is clear [defendant] was made to participate in an intense drug rehabilitation program Thus, the [c]ourt finds no merit in [defendant's] double jeopardy argument.

N.J.A.C. 10A:72-2.4(b) supports the trial court's finding that defendant's stay was rehabilitative. Its regulatory language reveals a broad range of less restrictive rehabilitative options available to the Parole Board in order to achieve "long-term positive outcomes" for a parolee. Castelan chose from a continuum of "special condition" options, specifically, assignment to and successful completion of a residential community-based treatment program. We cannot conclude that the regulatory scheme which facilitated defendant's rehabilitative stay at Delaney Hall was "so punitive either in purpose or effect as to transform [it] into a criminal penalty." Hudson, 522 U.S. at 99 (citation omitted). For these reasons, we discern no error in the trial court's conclusion. The record shows the treatment program at Delaney Hall was rehabilitative, not punitive, and we discern no violation of double jeopardy principles.

B.

"To prevail on a facial vagueness challenge, the law must be shown to be impermissibly vague in all its applications. When, however, the law is challenged as applied, it must be proven that the law is unclear in the context of

the particular case." Jenkins v. N.J. Dept. of Corr., 412 N.J. Super. 243, 250 (2010) (citing State v. Cameron, 100 N.J. 586, 594 (1985)).

Defendant first argues the indictment should have been dismissed because the term "without good cause" is unconstitutionally vague. Defendant emphasizes that the phrase "without good cause" is undefined in N.J.S.A. 2C:43-6.4, and it is not an element of any other criminal offense. Defendant further argues that absence of a definition for this phrase renders the statute impermissibly vague as it applies to him.

We addressed a different constitutional vagueness argument in State v. Bond, 365 N.J. Super. 430 (App. Div. 2003). We concluded that a "precise definition" within a criminal statute was not required for constitutionality, and that "N.J.S.A. 2C:43-6.4, when read in conjunction with the Parole Act, N.J.S.A. 30:4-123.59b, and the CSL regulations, N.J.S.A. 10A:71-6.11, provides adequate notice that use of . . . CDS by a person subject to CSL is prohibited." Id. at 437. Applying Bond's holding to the present facts, N.J.S.A. 2C:43-6.4 clearly placed defendant on notice of the proscribed conduct, namely, his illegal opioid use while on parole. Unlike the present matter, in Bond we considered whether the challenged statute "provide[ed] notice of illegality" to a person

sentenced to CSL. Id. at 438. Here, however, we consider specific language set forth in N.J.S.A. 2C:43-6.4, i.e., the phrase, "without good cause."

We review matters of statutory interpretation de novo, and any analysis to determine legislative intent begins with the statute's plain language. Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017). Our authority is bound by clearly defined statutory terms. Febbi v. Bd. of Review, 35 N.J. 601, 606 (1961). Where a specific definition is absent, "[w]e must presume that the Legislature intended the words it chose, and the plain and ordinary meaning ascribed to those words." Paff v. Galloway Twp., 229 N.J. 340, 353 (2017) (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

The plain language of the challenged phrase operates as a defense in that it can excuse a parolee's alleged violative actions. Moreover, it appears that the Legislature, in using this simple phrase, intended to give potential violators some latitude in presenting facts so as to avoid criminal sanction. In our view, defendant's attempt to define the phrase "without good cause" with more specificity has the adverse effect of narrowing plausible explanations persons accused under the statute could proffer. We do not perceive defendant's definition to be the outcome intended by the Legislature. Reducing the scope of

possible explanations is not in the interest of persons who find themselves charged in such unfortunate circumstances.

When we assess the constitutionality of N.J.S.A. 2C:43-6.4 as applied to defendant, we reach the same result. Defendant had the benefit of presenting facts related to his addiction in full detail, in an attempt to show that there was good cause to avoid indictment. His defense, proffered during his motion to dismiss, was unfettered by any limitations or qualifications that a narrower definition of "without good cause" under N.J.S.A. 2C:43-6.4 could have imposed. Unfortunately, the record shows defendant repeatedly failed drug tests for oxycodone over an extremely short period of time before he was remanded to Delaney Hall by his parole officer. There is sufficient credible evidence in the record to support a finding that he did not show good cause under the statute. We therefore conclude N.J.S.A. 2C:43-6.4 is not vague as applied to defendant on this record, and we find no error.

C.

Defendant next argues that the State violated his due process rights and principles of fundamental fairness. Defendant argues Castelan's decision to seek criminal charges against him for such a violation is equivalent to her initiating a revocation proceeding. Defendant contends that starting revocation without

first attempting to remedy defendant's opioid abuse problem through less restrictive measures violates N.J.A.C. 10A:72-2.4. In the alternative, defendant argues the resulting parole penalty and criminal charges violated fundamental fairness. Defendant argues his participation in the treatment program was the "less restrictive response" under the regulation and that there was no indication he posed a danger to public safety or was a flight risk. Therefore, referral for criminal charges violates principles of fundamental fairness.

N.J.A.C. 10A:72-2.4(d) states:

The parole officer shall initiate revocation procedures pursuant to N.J.A.C. 10A:71-7.1 and 7.2 when it has been determined in consultation with the appropriate supervisor that probable cause exists that a parolee has seriously or persistently violated a condition(s) of parole and that the evidence indicates that the parolee poses a danger to public safety or poses a flight risk.

The Supreme Court has addressed the issue presented here, drawing a clear distinction between parole supervision for life (PSL) and CSL. "[A] PSL violation could be prosecuted as a fourth-degree offense, N.J.S.A. 2C:43-6.4(d), or treated as a parole violation, N.J.S.A. 2C:43.6.4(b). In contrast, under CSL, in the event of a violation of a term of supervised release, the Parole Board's only option is referral to the appropriate prosecuting authority, which then decides whether to present the case to a grand jury." State v. Hester, 233 N.J.

381, 388 (2018) (emphasis added). A parolee sentenced to CSL has two opportunities to avoid conviction when the Parole Board refers the matter to a prosecutor. The grand jury could choose not to indict, or the parolee could be acquitted after a trial. By contrast, a parolee who violates PSL can be returned to prison without the protections afforded to CSL parolees. State v. Perez, 220 N.J. 423 (2015).

The doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary government action, and specifically against governmental procedures that tend to operate arbitrarily." State v. P.Z., 152 N.J. 86, 117 (1997). The record shows Castelan followed the course of action mandated by regulation, no more no less. Her decision to assign defendant to Delaney Hall and also refer him to the prosecuting authority were triggered by defendant's persistent violations. We discern nothing in the record which would violate notions of fundamental fairness.

D.

Defendant argues the State failed to make a prima facie showing to the grand jury, contending the State could not prove the third element under the N.J.S.A. 2C:43-6.4(d): that defendant violated his CSL condition to stay drug-free "without good cause." "At the grand jury stage, the State is not required to

present enough evidence to sustain a conviction. As long as the State presents 'some evidence establishing each element of the crime to make out a prima facie case,' a trial court should not dismiss an indictment." State v. Feliciano, 224 N.J. 351, 380 (2016) (internal citations omitted) (quoting State v. Saavedra, 222 N.J. 39, 57 (2015)).

Challenging the third element, defendant contends the definition of "without good cause" should be: "where a violation occurred despite the parole officer's compliance with N.J.A.C. 10A:72-2.4 or where the violation did not warrant remedial efforts because the violation was serious or persistent and the parolee posed a danger to public safety or posed a flight risk." Applying this definition, defendant argues the State failed to show defendant violated CSL "without good cause." For the same reason, we found N.J.S.A. 2C:43-6.4(d) not unconstitutionally vague, we decline to adopt such a definition.

Considering the elements of the crime charged, it is undisputed that defendant was subject to the conditions of CSL, conditions he expressly agreed to. The State presented some evidence that defendant knowingly violated CSL by testing positive for ingesting illegal drugs and that he had obtained those drugs by using an expired prescription. As stated, the record contains no evidence to justify or excuse defendant's conduct in repeatedly testing positive

for oxycodone while using an expired prescription in the course of a few weeks. We therefore discern no error in the trial court's conclusion that the State met its burden before the grand jury.

E.

Defendant next argues that prosecution for his opioid use disorder without first affording him the opportunity to cease his drug use is violates the NJLAD. He contends that when a parolee appears with a substance abuse disorder, parole must offer "reasonable accommodation" of a treatment program before revoking parole. Defendant argues drug addiction is a qualifying disability under the NJLAD. Defendant relies on In re Cahill, where we found "[a]ddiction, habituation or dependency which results from use of one drug or another . . . renders a person [disabled]." 245 N.J. Super. 397, 400 (App. Div. 1991). Defendant argues the trial court erred by finding: the only applies to workplace discrimination; defendant was not disabled; and that permitting defendant to complete treatment before charging him would not be a reasonable accommodation but would instead amount to an abrogation of the Parole Board and State's duties.

The NJLAD states: "All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and

privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of . . . disability." N.J.S.A. 10:5-4. Under the LAD:

"Disability" means physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

[N.J.S.A. 10:5-5(q).]

Cahill involved a city firefighter's appeal from an order of the Merit System Board dismissing him from the fire department because of his substance addiction. 245 N.J. at 399. We affirmed, accepting that the firefighter's combined drug and alcohol addiction "fell within the protection of the [NJLAD]," but also finding sufficient credible evidence in the record to affirm the Board's order upholding the firefighter's dismissal. Id. at 400-01. Given the

comprehensive statutory and regulatory scheme already in place to address persons, like defendant, who are convicted of sex crimes, then become addicted to drugs while serving community supervision for life while under Department of Corrections supervision, we discern no reason to apply the Court's holding in Cahill to the facts presented in this matter.

F.

Finally, defendant argues that the State's act of charging him with a CSL violation before he had a meaningful opportunity to complete his treatment amounts to cruel and unusual punishment. Defendant argues prosecuting him does not conform to contemporary standards of decency because New Jersey has shifted from favoring incarceration to favoring treatment for non-violent drug offenses.

The Eighth Amendment of the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The New Jersey Constitution similarly bars cruel and unusual punishment. N.J. Const. art. I, ¶12.

We employ a three-part test to determine whether a criminal penalty constitutes unconstitutional cruel and unusual punishment. State v. Maldonado,

137 N.J. 536, 556 (1994). "We consider, first, whether the punishment conforms with contemporary standards of decency; second, whether the punishment is grossly disproportionate to the offense; and third, whether the punishment goes beyond what is necessary to accomplish any legitimate penological objective." State v. Pimentel, 461 N.J. Super. 468, 481-82 (2019) (quoting State v. Johnson, 166 N.J. 523, 548 (2001)).

Defendant has not demonstrated that his prosecution was cruel and unusual. First, defendant's prosecution was the result of his CSL violation. Criminal sanction of persons who are proven to have violated their parole is a practice in line with contemporary standards of decency. Second, defendant's sentence consisted of paying fines and fees. Such an outcome can hardly be described as grossly disproportionate to his repeated CSL violations.

Finally, the State pursues a legitimate penological objective, prevention of adult recidivism, when it seeks to prevent illegal drug use by persons convicted of sex crimes and sentenced to CSL. The State has properly furthered that objective within the boundaries set by our federal and state prohibitions against cruel and unusual punishment by adopting a range of legislative and regulatory schemes, from imposing additional parole conditions to prosecution. We discern no constitutional violation on these grounds.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION