

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2500-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.W.,

Defendant-Appellant.

Submitted June 7, 2023 – Decided July 3, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 10-01-0010.

Joseph E. Krakora, Public Defender, attorney for appellant (Adam W. Toraya, Designated Counsel, on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Leandra L. Cilindrello, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

The matter returns to us from a remand. The only issue remaining with respect to the trial court's denial of defendant B.W.'s petition for post-conviction relief (PCR) is whether the holding in State v. J.L.G., 234 N.J. 265 (2018), limiting the admissibility of expert testimony relating to Child Sexual Abuse Accommodation Syndrome (CSAAS), applies retroactively to his 2012 convictions of multiple counts relating to the sexual abuse of his daughter.¹ If so, defendant would have a claim that expert CSAAS testimony at his trial should have been excluded and that his convictions should be vacated. We remanded the matter to the trial court to make the determination in the first instance of whether the holding in J.L.G., issued while the appeal of the denial of defendant's PCR petition was pending, applied retroactively to B.W.'s convictions. The trial court concluded that J.L.G. did not apply retroactively to B.W. and denied his PCR petition.

While defendant's appeal from the trial court's remand decision was pending, the Supreme Court issued its opinion in State v. G.E.P., 243 N.J. 362 (2020), giving pipeline retroactivity to its holding in J.L.G. The holding in G.E.P. controls here. Because defendant's convictions were affirmed on direct

¹ We use initials to protect the identity of the victim of defendant's sexual assaults. R. 1:38-3(c)(9).

appeal years before the Court issued its decision in J.L.G., those convictions do not fall within the scope of its pipeline retroactivity. As a result, defendant does not enjoy the benefit of the holding in J.L.G. and is not entitled to PCR relief with respect to the admission of expert CSAAS testimony at his trial. We therefore affirm the trial court order denying defendant's PCR petition.

I.

In 2012, a jury convicted defendant of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1), second-degree sexual assault, N.J.S.A. 2C:14-2(b), and second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), for numerous sexual assaults on his daughter beginning when she was eight years old. The abuse stopped when the daughter moved out of State with her mother at age eleven. She first reported defendant's sexual abuse when she was thirteen.

At the time of trial, defendant's daughter was sixteen. She testified in detail with respect to three occasions on which defendant performed various acts of sexual penetration on her. She stated that she did not report the crimes at the times they occurred because defendant threatened to harm her mother if she revealed his abuse.

In addition to the victim's mother and two physicians, the State called a psychologist who testified as an expert on CSAAS. He identified the five characteristics of CSAAS: secrecy; helplessness; entrapment and accommodation; delayed, conflicted, unconvincing disclosure; and recantation. He testified that child victims often keep their sexual abuse secret out of fear and may feel no one will believe them.

After the jury reached its verdict, the trial court sentenced defendant to a life term, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. At a subsequent hearing, the court deemed the life sentence to be seventy-five years and calculated the statutory parole ineligibility period to be sixty-three years and nine months. In his direct appeal, defendant raised several arguments, including that the testimony regarding CSAAS was inadmissible under N.J.R.E. 702 because it was not based on reliable science.

We affirmed defendant's conviction and sentence. State v. B.W., No. A-4354-12 (App. Div. Apr. 22, 2015). We held, among other things, that the admissibility of CSAAS testimony was well settled by the holding in State v. J.Q., 130 N.J. 554 (1993). The Supreme Court denied defendant's petition for certification. State v. B.W., 223 N.J. 281 (2015).

On November 18, 2016, defendant filed a petition for PCR in the Law Division. He argued, among other things, that the CSAAS testimony should not have been admitted at his trial under N.J.R.E. 702 because it is based on "junk science." Although acknowledging that he raised this argument on direct appeal, defendant argued that the PCR court should consider it anew.

On July 12, 2017, the PCR judge, who presided at defendant's trial and sentencing, issued a comprehensive oral opinion denying his PCR petition without an evidentiary hearing. The judge concluded that the question of the admissibility of CSAAS testimony was addressed in defendant's direct appeal, precluding its consideration in a subsequent PCR petition. See R. 3:22-5.

On July 12, 2017, the judge entered an order denying defendant's PCR petition. Defendant subsequently filed an appeal.

While defendant's appeal was pending, but prior to its submission to this court for decision, the Supreme Court issued its opinion in State v. J.L.G., 234 N.J. 265 (2018). In that case, the Court partially overturned its holding in State v. J.Q. The Court held:

[b]ased on what is known today, it is no longer possible to conclude that CSAAS has a sufficiently reliable basis in science to be the subject of expert testimony. We find continued scientific support for only one aspect of the theory – delayed disclosure – because scientists

generally accept that a significant percentage of children delay reporting sexual abuse.

We therefore hold that expert testimony about CSAAS in general, and its component behaviors other than delayed disclosure, may no longer be admitted at criminal trials. Evidence about delayed disclosure can be presented if it satisfies all parts of the applicable evidence rule. See N.J.R.E. 702. In particular, the State must show that the evidence is beyond the understanding of the average juror.

[Id. at 272.]

The Court noted that admissibility of CSAAS expert testimony on this limited aspect of the syndrome "will turn on the facts of each case." Ibid. When a victim gives "straightforward reasons about why she delayed reporting abuse, the jury [does] not need help from an expert to evaluate her explanation. However, if a child cannot offer a rational explanation, expert testimony may help the jury understand the witness's behavior." Ibid. The Court, however, concluded that the improper admission of CSAAS testimony may be harmless "in light of the overwhelming evidence of defendant's guilt." Id. at 306. The Court did not opine on whether its holding will be applied retroactively.

After defendant's appeal was submitted to this court, but before we issued an opinion, a different panel of this court issued its opinion in State v. G.E.P., 458 N.J. Super. 436 (App. Div. 2019). In that case, the court concluded that the

holding in J.L.G. "should be given at least pipeline retroactivity," id. at 448, rendering it applicable "to pending cases where the parties ha[d] not yet exhausted all avenues of direct review," id. at 445, when the opinion in J.L.G. was issued. Because all four cases pending before the court in G.E.P. were on direct appeal when the opinion in J.L.G. was issued, the court decided "only whether pipeline retroactively is appropriate." Id. at 446. The court offered no opinion with respect to whether the holding in J.L.G. should be given complete retroactive effect, rendering it applicable to all prior convictions. See State v. Burstein, 85 N.J. 394, 402-403 (1981).

We subsequently affirmed the denial of defendant's PCR petition on all grounds except his challenge to the admission of expert CSAAS testimony. State v. B.W., No. A-0077-17 (App. Div. May 28, 2019). We held that:

if it is determined that the holding in J.L.G. is applied with complete retroactivity then application of the holding to defendant would be a "ground for relief not previously asserted [that] could not reasonably have been raised in any prior proceeding" and, as a result, permitted in a PCR petition. See R. 3:22-4(a)(1); State v. Reyes, 140 N.J. 344 (1995) (allowing defendant to seek PCR relief based on retroactive application of appellate decision issued after direct appeal); State v. Lark, 229 N.J. Super. 586, 592-93 (App. Div.) (same), rev'd on other grounds, 117 N.J. 331 (1989).

[(slip op. at 11).]

Because of the timing of the release of the decision in J.L.G. and our decision in G.E.P., the parties did not address in their briefs in the initial appeal of the denial of defendant's PCR petition whether the Court's holding in J.L.G. should be applied with complete retroactivity. As a result, we remanded the matter to the trial court to analyze in the first instance whether the holding in J.L.G. applies with complete retroactivity. We did not retain jurisdiction.

On remand, the trial court issued a written opinion concluding that the holding in J.L.G. should not be accorded complete retroactivity. The court, therefore, denied B.W. relief, given that his direct appeals had concluded years before the Court issued its opinion in J.L.G.² A May 13, 2020 order memorialized the trial court's decision on remand. At the time the trial court issued its decision on remand, the Supreme Court had granted a petition for certification in G.E.P. State v. G.E.P., 239 N.J. 598 (2019).

This appeal followed. Before the parties filed their briefs, the Supreme Court issued its opinion in G.E.P. The Court affirmed our decision that the Court's "ruling in J.L.G. should be accorded "pipeline retroactivity" – it should

² For the sake of completeness, the trial court also concluded that if the holding in J.L.G. applied retroactively to defendant's convictions, he still would not be entitled to relief. This is so, the trial court concluded, because the expert CSAAS testimony was unnecessary for the jury to understand and fairly evaluate the direct and circumstantial evidence of defendant's guilt.

apply not only in all new trials, but also in any cases that were on direct appeal at the time J.L.G. was decided" 243 N.J. at 370.

Defendant thereafter filed a brief raising the following arguments.

POINT I

STATE V. J.L.G., 234 N.J. 265 (2018)[,] IS APPLICABLE TO DEFENDANT BECAUSE THE PIPELINE RETROACTIVITY ANNOUNCED IN STATE V. G.E.P., 243 N.J. 362 (2020)[,] INCLUDES HIS CASE.

POINT II

GIVEN THE CLEAR PREJUDICE TO DEFENDANT, THE INTRODUCTION OF CSAAS TESTIMONY DURING THE TRIAL CANNOT BE DEEMED HARMLESS.

II.

The extent to which the holding in J.L.G. is to be applied retroactively was unequivocally decided by the Supreme Court in G.E.P. The Court held that J.L.G. applies "not only in all new trials, but also in any cases that were on direct appeal at the time J.L.G. was decided" Ibid. It is undisputed that defendant's direct appeal was completed in 2015 when the Supreme Court denied his petition for certification after we affirmed his convictions and sentence. Thus, defendant's case was not "on direct appeal" when the Court issued its decision in J.L.G. in 2018.

Despite the unequivocal holding in G.E.P., defendant argues that its pipeline retroactivity encompasses more than cases on direct appeal at the time that J.L.G. was issued. He relies on a description of pipeline retroactivity set forth in State v. Natale, 184 N.J. 458 (2005). In Natale, the Court determined the scope of the retroactive application of new sentencing rules established in that case to comply with the holding in Blakely v. Washington, 542 U.S. 296 (2004), issued a year earlier. Id. at 492-93. The Court held that "'[p]ipeline retroactivity' – applying our holding to defendants with cases on direct appeal as of the date of this decision and to those defendants who raised Blakely claims at trial or on direct appeal – best balances principles of fairness and repose." Id. at 494. According to defendant, in light of Natale's description of pipeline retroactivity, he is entitled to the benefit of the holding in J.L.G. because, although his direct appeal had concluded when the Court issued its holding in J.L.G., he had raised the issue of the admissibility of CSAAS testimony at trial and on direct appeal.

The flaw in defendant's argument is that it relies on a description of pipeline retroactivity announced in Natale, in which the Court considered the retroactive effect of a federal sentencing decision inapplicable to defendant, that differs from the unequivocal description of pipeline retroactivity announced in

G.E.P., in which the Court considered the precise issue before us – the retroactivity of the holding in J.L.G. The holding in Natale, and the standard of retroactivity adopted by the Court in that case, are simply inapplicable here.

While there may well be sound analytical reasons for the varying descriptions of pipeline retroactivity in Natale and G.E.P., we need not determine why the Court may have defined the scope of pipeline retroactivity differently in those cases. The holding in G.E.P. is unequivocal – J.L.G. applies "in any cases that were on direct appeal at the time J.L.G. was decided" 243 N.J. at 370. We are bound by that clear holding, regardless of what the Court held in Natale. Absent contrary direction from the Supreme Court, because defendant's direct appeal was completed long before J.L.G. was decided, he is not entitled to the benefit of the holding in that case.

The trial court, therefore, correctly determined that defendant's CSAAS claim, which was raised and rejected in his direct appeal, was barred from consideration in his PCR petition. R. 3:22-5. We are not persuaded by defendant's arguments that fundamental fairness, basic fair play, and the interest of justice require relaxation of Rule 3:22-5 to permit consideration of his CSAAS claim even if J.L.G.'s retroactivity does not reach his convictions. To the contrary, we are convinced that relaxation of Rule 3:22-5 to consider the

CSAAS claim of a defendant whose direct appeal concluded years before J.L.G. was issued would be contrary to the Court's express rejection in G.E.P. of complete retroactive application of J.L.G. We are not at liberty to contravene that holding.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION