

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2842-21

IN THE MATTER OF
REGISTRANT E.B.

Argued May 9, 2023 – Decided July 11, 2023

Before Judges Messano, Gilson and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. M-022-21.

Allison C. Broad, Assistant Deputy Public Defender, argued the cause for appellant E.B. (Joseph E. Krakora, Public Defender, attorney; Allison C. Broad, of counsel and on the brief).

Timothy P. Kerrigan, Jr., Assistant Prosecutor, argued the cause for respondent State of New Jersey (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Appellant E.B. is a convicted sex offender and a registrant under Megan's Law, N.J.S.A. 2C:7-1 to -23. On September 26, 2018, the Law Division in Middlesex County entered an order that classified E.B. as a Tier 2, moderate-

risk, offender but found that he fell under an exception that excluded him from being listed on the central registry of sex offenders that is available to the public on the internet (the Sex Offender Internet Registry).

In 2021, E.B. moved to Passaic County. He appeals from an April 6, 2022 order, issued by the Law Division in Passaic County, that also classified him as a Tier 2 offender, but required his personal information to be listed on the Sex Offender Internet Registry.¹ E.B. argues that the change in his public notification was made in violation of principles of res judicata. He also contends that he is exempt from being placed on the Sex Offender Internet Registry as a "sole sex offen[der]" who was related to his victim. N.J.S.A. 2C:7-13(d)(2).

Given the incomplete record presented on this appeal, we cannot determine whether there was a valid basis to reopen the September 26, 2018 order and change the provision of that order excluding information about E.B. from the Sex Offender Internet Registry. What is clear from the record is that the court that entered the April 6, 2022 order did not have the record that would allow it to change the September 26, 2018 order. Consequently, we vacate the

¹ The court announced its ruling on the record on April 6, 2022. The parties, however, did not provide us with a copy of the court's order. Indeed, it is not clear to us that the court has memorialized its ruling in a written order. What the record does contain is an order, dated April 27, 2022, that stayed the placement of E.B.'s information on the Sex Offender Internet Registry.

provision of the April 6, 2022 order that requires putting information about E.B. on the Sex Offender Internet Registry. We also remand for the entry of a new order.

I.

The record presented to us on this appeal is limited and incomplete. We have some information concerning E.B.'s conviction, but we were not provided with all the relevant orders and transcripts of proceedings concerning E.B.'s Megan's Law classification and the scope and manner of the notifications of his sex offense under Megan's Law. Consequently, we will summarize what we can discern from the record.

E.B. has one conviction for a sex offense: in 1994, he pled guilty to third-degree aggravated criminal sexual contact in violation of N.J.S.A. 2C:14-3(a). That conviction was based on a report made by the victim, E.B.'s younger female cousin. The victim made the report in 1989, when she was twelve years old. She disclosed that E.B. had sexually abused her for several years, beginning when she was approximately three years old until she was about ten years old. At those times, E.B. had been between the ages of fifteen and twenty-two years old. He was charged for the assaults he committed between 1983-1987, when E.B. was between eighteen and twenty-two years old.

Following his guilty plea, E.B. was evaluated by a psychologist at the Adult Diagnostic and Treatment Center at Avenel. The psychologist found insufficient evidence to conclude that E.B. was a repetitive and compulsive sex offender and, therefore, found that E.B. was not eligible to be sentenced under the New Jersey Sex Offender Act, N.J.S.A. 2C:47-1 to -10. Thereafter, E.B. was sentenced to five years in prison.

It appears that E.B. first registered under Megan's Law in 2000 in Middlesex County. He was classified as a Tier 2 registrant. The record does not contain the order classifying E.B. in 2000. Instead, there is a May 1, 2003 letter from the Middlesex County Prosecutor's Office notifying the New Brunswick Police Department that E.B. had been classified as a Tier 2 registrant under Megan's Law. That letter did not state the scope or manner of E.B.'s notifications under Megan's Law.

On September 26, 2018, a court in Middlesex County conducted a review of E.B.'s Megan's Law classification and notifications. The preamble in that court's order states that E.B. had previously been classified as a "Tier 2" registrant. The preamble then explains that the Middlesex County Prosecutor's Office had applied to the court "for an order setting forth Tier Designation, Scope of Notification, and Limitation on Dissemination." The order also notes

that E.B. had been served with notice of the hearing, but he had not appeared or objected to "the Prosecutor's proposed scope and manner of notification."

The September 26, 2018 order further determined E.B.'s Megan's Law classification to be "Tier 2, moderate level of risk of re-offense[,] based upon the final Registrant Risk Assessment Scale (RRAS) score of 73." Regarding the scope and manner of public notification, the order states:

2. The scope and manner of notification shall occur within an approximate radius of [one] mile of Registrant's residence and shall be made to those schools, [daycare] centers, and other community organizations set forth on the attached list.
3. Due to the fact that this registrant falls within one of the exceptions to being listed on the Sex Offender Internet Registry, information regarding this registrant will not be included on the Sex Offender Internet Registry (Web Site).
4. Any findings by this [c]ourt, set forth on the record on September 26, 2018, are incorporated by reference in this order.
5. Notification may be provided to law enforcement agencies within the discretion of the Prosecutor.
6. Notification is to proceed any time after two full business days from the date of the entry of this order.
7. Notification shall be conducted by appropriate law enforcement agencies and in accordance with procedures set forth in the Attorney General Guidelines for Law Enforcement for the Implementation of Sex

Offender Registration and Community Notification
Laws.

Paragraph 3 is the most relevant provision to this appeal. Nevertheless, the record on this appeal does not contain a copy of the transcript of the court's findings set forth on the record on September 26, 2018.

In 2021, E.B. moved to Passaic County. In September 2021, E.B. was sent a package of information and a letter notifying him that the Passaic County Prosecutor's Office would seek to classify him as Tier 2 registrant under Megan's Law and determine the scope of his Megan's Law notifications. The notice stated that there would be a court hearing on that application on September 30, 2021.

E.B. responded and informed the Passaic County Prosecutor's Office that he would object to and dispute the classification. The hearing was repeatedly adjourned and was finally conducted on April 6, 2022. At the hearing, the State requested that E.B. be subject to Tier 2 scope of notifications, which would include listing information about E.B. on the Sex Offender Internet Registry and sending notice of E.B.'s sexual offense to local police departments, fifteen schools or daycares, and two community organizations that were located near "[E.B.'s] home address and any employment addresses (radius depending on

location)." In support of that application, the State presented the court with a RRAS that had a total score of 59.

The State also argued that E.B. should not be exempt from internet notification as a sole sex offender, whose victim was a relation. See N.J.S.A. 2C:7-13(d)(2). E.B. was represented by counsel at the hearing and his counsel argued that he should be qualified for the exemption because he had been convicted of one sex offense against a victim who was his cousin.

The court accepted the State's position that E.B. should be classified as a Tier 2 registrant and found that E.B. had an RRAS score of 59. The court also determined that the scope and manner of the notifications should include notifications to local police, schools, and daycare centers near E.B.'s residence and place of work, as requested by the State. In addition, the court directed that E.B.'s information be listed on the Sex Offender Internet Registry. In making that ruling, the court acknowledged that another court had previously found that E.B. was exempt from the Sex Offender Internet Registry. Nevertheless, the court found that E.B. did not qualify for an exemption under N.J.S.A. 2C:7-13(d)(2) because he had not been living in the same household with the victim when the sex offense occurred.

II.

E.B. now appeals from the April 6, 2022 order, and presents two arguments for our consideration:

POINT I – THE TRIAL COURT ERRED WHEN IT RULED THAT A REGISTRANT COULD BE PLACED ON THE INTERNET REGISTRY AFTER ANOTHER COURT HAD FOUND THAT HE QUALIFIED FOR AN EXCEPTION BECAUSE RES JUDICATA SHOULD HAVE BEEN APPLIED.

POINT II – THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT A REGISTRANT NEEDS TO HAVE RESIDED IN THE SAME HOUSE AS THE VICTIM OR VICTIMS IN ORDER TO QUALIFY FOR THE HOUSEHOLD EXCEPTION TO INTERNET NOTIFICATION.

"The burden is on the State to prove by clear and convincing evidence both a [Megan's Law] registrant's risk to the community and the scope of notification necessary to protect the community." In re Registrant B.B., 472 N.J. Super. 612, 619 (App. Div. 2022). The evidence presented "must be 'so clear, direct and weighty and convincing as to enable . . . a judge . . . to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" Ibid. (quoting In re Registrant J.G., 169 N.J. 304, 331 (2001)).

We review a trial court's conclusions regarding a registrant's tier designation and scope of notification for an abuse of discretion. Ibid. "[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)).

We have previously held that res judicata principles apply to Megan's Law orders. See In re R.A., 395 N.J. Super. 565, 568-69 (App. Div. 2007); In re Registrant R.D., 384 N.J. Super. 61, 65-66 (App. Div. 2006). We have also recognized that courts have authority under Rule 4:50-1 to reopen an order or judgment in a Megan's Law proceeding where relief is necessary to achieve a fair and just result mandated by public policy. R.D., 384 N.J. Super. at 66. Although Megan's Law tiering hearings may sometimes involve "an on-going process," we have recognized that res judicata principles apply and Rule 4:50 controls a change in a prior classification and scope of notification decision. R.A., 395 N.J. Super. at 568-70; see also R.D., 384 N.J. Super. at 66-67.

In making those rulings, we also recognized "that there are extreme limitations" on modifying a prior order. R.A., 395 N.J. Super. at 568. In that regard, we pointed out that there is a difference between the discovery of facts not previously known, "and reassessment by a second judge of the same facts considered by an earlier judge." Ibid. Accordingly, we have held that "res

judicata bars the reassessment made of the static criteri[a]" involved in a Megan's Law classification determination. Id. at 569. We have also stated that a motion to reopen a judgment under Rule 4:50-1 "must ordinarily be made to the judge who entered the initial judgment." Id. at 568 (citing R.D., 384 N.J. Super. at 66).

There is no dispute that the Law Division in Passaic County changed a substantive provision of the September 26, 2018 order entered by the Law Division in Middlesex County. What is not clear is whether the second court had a legitimate and appropriate basis to change the prior court order. E.B.'s status as an offender exempt from the Sex Offender Internet Registry is a static factor. In other words, he would have to qualify as a "sole sex offen[der]" convicted of a violation of N.J.S.A. 2C:14-2 or N.J.S.A. 2C:14-3 "under circumstances in which [he] was related to the victim by blood or affinity to the third degree or was a resource family parent, a guardian, or stood in loco parentis within the household." N.J.S.A. 2C:7-13(d)(2).

The current record does not inform us why the court in September 2018 found that E.B. was exempt from having his information listed on the Sex Offender Internet Registry. It may be logical to assume that the court found the exemption under N.J.S.A. 2C:7-13(d)(2) applied. Nevertheless, we do not know

on what facts the court made the finding in 2018. The order suggests that the finding was made based on a request by the Middlesex County Prosecutor's Office. If the State, from a different county prosecutor's office, now wants to change that finding, it is incumbent on the State to explain what facts have changed and why the State is now taking a new position. In other words, we cannot be left to speculate why the State is changing its position and what facts have changed.

We also point out that there was a procedural deficiency leading to the April 6, 2022 order. Although the State now argues that it is relying on Rule 4:50-1, it never made a motion under that Rule. Consequently, there was no consideration of the passage of time. See R. 4:50-2. Given that over a year had passed, the State probably could only rely on subsection (f) of Rule 4:50-1. Relief under that Rule, however, is granted sparingly and normally requires a showing that the relief is necessary to achieve a fair and just result mandated by public policy. See R.D., 384 N.J. Super. at 66 (citing Manning Eng'g, Inc. v. Hudson Cnty. Park Comm., 74 N.J. 113, 122 (1977)).

In short, the State has failed to establish that there was a legitimate and lawful basis to change the provision of the September 26, 2018 order excluding E.B.'s information from being listed on the Sex Offender Internet Registry. We,

therefore, vacate the provision of the April 6, 2022 order authorizing the listing of E.B.'s information on the Sex Offender Internet Registry. We remand this matter for the entry of a new order. On remand, or in any future Megan's Law proceeding involving E.B., if the State seeks to reopen and change the exemption from the Sex Offender Internet Registry, it must file an appropriate motion under Rule 4:50-1 and support that motion with a complete record, including a copy of the transcript of the findings made by the court on September 26, 2018.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION