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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-387

No. COA19-1155

Filed 20 July 2021

Randolph County, No. 19CRS 17

STATE OF NORTH CAROLINA

v.

TIMOTHY R. LEDBETTER, SR., Petitioner.

Appeal by petitioner from order entered on or about 17 July 2019 by Judge James P. Hill, Jr. in Superior Court, Randolph County. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill and Assistant Attorney General Bryan Nichols, for the State.

Mark Hayes, for petitioner-appellant.

STROUD, Chief Judge.

¶ 1

Petitioner appeals from an order denying his petition to terminate his sex offender registration requirement. Because petitioner failed to meet his burden of providing the trial court with the out-of-state statute under which he was convicted, we affirm.

I. Background

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¶ 2

In 1997, petitioner, then in his late 20s, was convicted in Michigan of criminal sexual conduct in the second degree involving a child under 13; the incident also occurred in 1997. Petitioner eventually relocated to North Carolina and avers he complied with registry requirements here. On 17 January 2019, under North Carolina General Statute § 14-208.12A, petitioner filed a petition to terminate the requirement of registration as a sex offender after having been on the North Carolina registry for 10 years, and after his “Psychological Evaluation/Sexual Behavior Risk Assessment” deemed him to be a low to moderate risk. Petitioner noted at his hearing that he had not “violated any laws” in North Carolina, and “[t]he only subsequent legal issue that he has had since the ’97 conviction, was DWI in Michigan 12 years ago in 2007.” Before the trial court, petitioner argued he should be considered a Tier I offender, and the State noted he was “probably right[.]” Nonetheless, without making any findings of fact regarding its analysis of the tier level of the conviction, the trial court determined petitioner was a Tier II offender and denied his petition. Petitioner appeals.

II. Offender Tiers

¶ 3

We are unable to review petitioner’s issue on appeal because he failed before this Court, and the trial court, to meet his burden of compliance with the requirements of North Carolina General Statute § 14-208.12A. *See generally Matter of Bethea*, 255 N.C. App. 749, 755, 806 S.E.2d 677, 681 (2017) (noting it is “Petitioner’s

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burden to show compliance with all requirements” of North Carolina General Statute § 14-208.12A), *motion to dismiss allowed and disc. review denied*, 371 N.C. 118, 813 S.E.2d 241 (2018), *writ of cert. denied*, 139 S.Ct. 793, 202 L. Ed. 2d 570 (2019).

¶ 4

North Carolina General Statute § 14-208.12A(a), “Request for termination of registration requirement[,]” provides that “[t]en years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.” N.C. Gen. Stat. § 14-208.12A(a) (2019).

The court may grant the relief if:

- (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
- (2) *The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement* or required to be met as a condition for the receipt of federal funds by the State, and
- (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a1) (emphasis added).

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The Jacob Wetterling Act, 42 U.S.C. § 14071, was repealed upon the adoption of 42 U.S.C. § 16901 *et seq.*, the Adam Walsh Child Protection and Safety Act of 2006 (“the Adam Walsh Act”). The Adam Walsh Act now provides the federal standards applicable to the termination of a registration requirement and covers substantially the same subject matter as the Jacob Wetterling Act.

The Adam Walsh Act sets the duration of the registration requirement for sex offenders based upon what tier to which an offender belongs. *See* 42 U.S.C. § 16915 (2011) (titled “Duration of registration requirement”). The Act defines three tiers of sex offenders[.]

In re Hamilton, 220 N.C. App. 350, 356, 725 S.E.2d 393, 398 (2012) (quotation marks omitted).¹

¶ 5

The analysis of the correct tier level for an offender under 34 U.S.C.A. § 20911 requires a comparison between petitioner’s Michigan conviction and specifically enumerated federal crimes. *See generally* 34 U.S.C.A. § 20911 (West 2017). 34 U.S.C.A. § 20911 provides,

(1) Sex offender

The term “sex offender” means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

¹ The Adam Walsh Act has been since amended, but the amendments are not relevant to the analysis on appeal. *See generally* 34 U.S.C.A. § 20915 (West 2017).

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The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

- (A) **is comparable to or more severe than** the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
 - (i) sex trafficking (as described in section 1591 of Title 18);
 - (ii) coercion and enticement (as described in section 2422(b) of Title 18);
 - (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)1 of Title 18);
 - (iv) abusive sexual contact (as described in section 2244 of Title 18),

.....

(4) **Tier III sex offender**

The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

- (A) **is comparable to or more severe than** the following offenses, or an attempt or conspiracy to commit such an offense:
 - (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
 - (ii) abusive sexual contact (as described in section 2244 of Title 18) against a

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minor who has not attained the age of
13 years;

- (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
- (C) occurs after the offender becomes a tier II sex offender.

34 U.S.C.A. § 20911 (emphasis added).

¶ 6

Here, petitioner offered as exhibits Michigan statutes, Mich. Comp. Laws Ann. § 750.520c entitled “Criminal sexual conduct in second degree” and Mich. Comp. Laws Ann. § 750.520a entitled, “Definitions[;]” but the statutes have effective dates of 2013 and 2014, respectively. Petitioner’s “incident” and conviction date were in 1997. The crime of “[c]riminal sexual conduct in the second degree” remained the same between 1997 and 2013, with both versions of the statute providing that “[a] person is guilty of criminal sexual conduct in the second degree if the person engages in *sexual contact* with another person and if any of the following circumstances exists: (a) That other person is under 13 years of age[;]” *compare* Mich. Comp. Laws Ann. § 750.520c(1)(a) (West 1991) *with* Mich. Comp. Laws Ann. § 750.520c(1)(a) (West 2013) (emphasis added). But the definition of “[s]exual contact” changed between 1997 and 2014 with the latter adding the language bolded below:

the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as

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being for the purpose of sexual arousal or gratification
done for a sexual purpose, or in a sexual manner, for:

- (i) Revenge.**
- (ii) To inflict humiliation.**
- (iii) Out of anger.**

Compare Mich. Comp. Laws Ann. § 750.520c(1)(c) (West 1991) *with* Mich. Comp. Laws Ann. § 750.520c(1)(c) (West 2014).

¶ 7

Because petitioner provided the trial court with a Michigan statute which had elemental differences in the definition of the offense of which he was convicted, the trial court could not properly determine whether petitioner’s offense was “comparable to or more severe than” the offenses enumerated in 34 U.S.C.A. § 20911; and therefore petitioner failed to carry his burden, *see Bethea*, 255 N.C. App. at 755, 806 S.E.2d at 681, of demonstrating “compli[ance] with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement[.]” N.C. Gen. Stat. § 14-208.12A(a1). We therefore affirm the trial court’s order.

¶ 8

Although we affirm the trial court’s denial of the petition, we also note that North Carolina General Statute § 14-208.12A(a3) provides, “If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the

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registration requirement[,]” and as more than a year has passed since the denial of his petition, petitioner is free to file a new petition without prejudice based upon this opinion. If petitioner files a new petition, the trial court should consider it in accord with the applicable law, including *State v. Moir*, 369 N.C. 370, 794 S.E.2d 685 (2016), and the evidence presented at the hearing. This opinion has not made any legal conclusion regarding whether petitioner’s 1997 Michigan conviction “is comparable to or more severe than” the offenses enumerated in 34 U.S.C.A. § 20911.

III. Conclusion

¶ 9

Because petitioner failed to meet his burden of providing the trial court with the out-of-state statute under which he was convicted, we affirm.

AFFIRMED.

Judge COLLINS concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).