

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	C.A. No. 09M-02-009 RBY
v.	:	
	:	
BARRY HIBBS,	:	
	:	
Defendant.	:	

Submitted: July 9, 2009
Decided: October 21, 2009

ORDER

Upon the State's Motion to Designate
Defendant as a Tier III Sex Offender.
Granted.

Jason Cohee, Esquire, Department of Justice, Dover, Delaware; attorneys for the State of Delaware.

Thomas D. Donovan, Esquire of Donovan & Hopkins, LLC, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

INTRODUCTION

The State filed a Motion to Designate Barry Hibbs (“Hibbs”) as a Tier III Sex Offender on February 13, 2009. On June 4, 2009, Hibbs filed a response requesting designation as a Tier II Sex Offender. Based upon the reasons set forth below, the State’s Motion to Designate Hibbs as a Tier III Sex Offender must be granted.

FACTS AND PROCEDURAL HISTORY

On March 11, 1991, Hibbs pled guilty to one count of Aggravated Sexual Assault First Degree in the New Jersey Superior Court for Camden County. Hibbs was indicted for committing “an act of sexual penetration upon a minor” after having an eight-year-old child perform fellatio upon him. He was twenty-years-old at the time. On September 24, 1991, Hibbs was sentenced to ten years incarceration.

Aggravated Sexual Assault First Degree was, in 1991, defined by the New Jersey Code of Criminal Justice as follows:

a. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The victim is less than 13 years old[.]¹

Hibbs moved to New York upon his release from prison in 1997. He is designated to risk Level II in New York. Hibbs currently, however, lives in Delaware. The State, pursuant to 11 *Del. C.* § 4121(n), filed this Motion to Designate Hibbs as a Tier III Sex Offender on February 13, 2009.

¹ N.J.S. 2C: 14-2.

The State's Arguments

The State contends that this Court only has discretion in determining which Delaware sex crime is equivalent to Hibbs's New Jersey conviction. The State notes, however, that once this determination is made, the Court must look to 11 *Del. C.* § 4121(d) for the statutorily defined tier designation. In the present case, the State avers that the equivalent Delaware sex crime is Unlawful Sexual Intercourse in the First Degree. Consequently, as per Section 4121(d), the State contends that Hibbs must be designated as a Tier III sex offender.

Defendant's Arguments

Hibbs contends that he cannot be considered a "sex offender" under 11 *Del. C.* § 4121(a)(4). That is, Hibbs avers that the applicable provision of subsection (a)(4) provides that a person is a sex offender if he is: [1] convicted before June 27, 1994; [2] is serving a sentence of probation or parole as of September 1, 1998; and [3] is therefore deemed to have violated the conditions of that probation and parole.² Hibbs was sentenced to a ten year term of imprisonment on September 1, 1998. He only served six of those ten years before being released without the condition of probation and parole. Hibbs, therefore, contends that he was not serving any sentence of probation or parole as of September 24, 1991. Consequently, Hibbs avers that he does not fall within the statutory definition of a sex offender.

In addition, Hibbs contends that this Court has discretion in assigning a Risk

² See former 11 *Del. C.* § 4121(a)(4) (note, however, that this language was removed in 2008).

Assessment Tier under subsection (d). Hibbs notes that his psychological evaluation does not indicate that he is at risk to re-offend. Consequently, given all of the relevant facts surrounding the offense and Hibbs's propensities, public safety would not be enhanced by assigning him to Tier III.

DISCUSSION

The New Jersey crime to which Hibbs pled guilty in 1991 is equivalent to former 11 *Del. C.* § 775, Unlawful Sexual Intercourse First Degree:

(a) A person is guilty of unlawful sexual intercourse in the first degree where the person intentionally engages in sexual intercourse with another person and any of the following circumstances exist:

...

(4) The victim is less than 16 years of age and the defendant is not the victim's voluntary social companion on the occasion of the crime.³

In 1991, 11 *Del. C.* § 761(e) defined "sexual intercourse" as including the physical union of the mouth of one person and the genitals of another.⁴ Hibbs meets this statutory definition of sexual intercourse because he pled guilty to having an eight-year-old child perform fellatio upon him.

In addition, Hibbs's victim was not his "voluntary social companion." Former

³ Former 11 *Del. C.* § 775 (effective September 9, 1998, this section was redesignated as § 773 and amended).

⁴ Former 11 *Del. C.* § 761(e); *see also* 11 *Del. C.* § 761(g) (the modern version of the statute includes the same definition of "sexual intercourse").

Section 761(h) provided, in relevant part, that “[a] victim who is less than 12 years of age is not the voluntary social companion of a defendant who is 18 years of age or older.”⁵ At the time of the crime, Hibbs was twenty-years-old and his victim was eight.

Unlawful Sexual Intercourse First Degree is a Tier III offense according to 11 *Del. C.* § 4121(d)(1)a.⁶ In Delaware, a Tier III Sex Offender is required to register for life, in accordance with 11 *Del. C.* § 4121(e)(1)a.

In January 2008, the law regarding the tiering of sex offenders convicted of sex crimes outside the State of Delaware was revised. The new law gives the Court the duty to assign tier levels to out of state offenders who move to Delaware. 11 *Del. C.* § 4121(n) provides:

Notwithstanding any provision of this section to the contrary, any sex offender convicted of any offense specified in paragraph (a)(4)c of this section shall be designated to a Risk Assessment Tier by the court. The designation shall be in accord with the provisions of subsection (d) of this section.

Section (a)(4)c defines a sex offender as a person who has been “convicted of any offense specified in the laws of another state . . . which is the same as, or equivalent to, any of the offenses set forth in paragraph (a)(4)a”⁷ Section (a)(4)a includes

⁵ Former 11 *Del. C.* § 761(h) (the modern version of the statute does not define “voluntary social companion”).

⁶ 11 *Del. C.* § 4121(d)(1)a.

⁷ 11 *Del. C.* § 4121(a)(4)c.

those “[c]onvicted of any of the offenses specified in §§ 765 through 780”⁸

Hibbs cites a prior version of 11 *Del. C.* § 4121(a)(4)f to support his request to be designated a Tier II sex offender. The current subsection reads, in pertinent part, as follows:

(4) “Sex offender” means any person who is or has been:

. . .
f. Convicted of any of the offenses set forth in paragraph (a)(4)a., (a)(4)b., (a)(4)c., or (a)(4)d. of this section, or any offense which is the same as or equivalent to such offenses as the same existed and were defined under the laws of this State existing at the time of such conviction⁹

This current version does not include the time limitations that Hibbs relies upon.¹⁰

Hibbs meets the definition of “sex offender” for purposes of the Delaware criminal statute because he was convicted of an offense in New Jersey which is the equivalent of former 11 *Del. C.* § 775. Therefore, this Court *shall* assign Hibbs to Tier III in accordance with § 4121(d).¹¹ As such, Hibbs is required under § 4121(e)(1)a to register for life.

⁸ 11 *Del. C.* § 4121(a)(4)a.

⁹ 11 *Del. C.* § 4121(a)(4)f.

¹⁰ See 11 *Del. C.* § 4122(a) (noting that “[s]ection 4121 of this title shall be retroactively applicable to any person convicted of a registering offense”).

¹¹ See generally, *Helman v. State*, 784 A.2d 1058, 1069 (Del. 2001) (noting that Delaware’s Sex Offender Registration Statute provides no discretion in tier level assignments).

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CONCLUSION

For the foregoing reasons, the State's Motion to Designate Hibbs as a Tier III sex offender is GRANTED. IT IS SO ORDERED.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution