SJC-12762

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 234076 vs. SEX OFFENDER REGISTRY BOARD.

Essex. January 6, 2020. - May 14, 2020.

Present: Gants, C.J., Gaziano, Lowy, Budd, & Kafker, JJ.

Sex Offender. Sex Offender Registration and Community Notification Act. Evidence, Sex offender, Expert opinion, Relevancy and materiality. Due Process of Law, Sex offender, Hearing. Administrative Law, Evidence, Hearing.

Civil action commenced in the Superior Court Department on October 18, 2016.

The case was heard by Salim Rodriguez Tabit, J., on motions for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

Kate A. Frame for the plaintiff.
Christopher M. Bova for the defendant.
Matthew J. Koes, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

LOWY, J. The plaintiff, John Doe, challenges his classification before the Sex Offender Registry Board (board) as

a level three sex offender. In this case we decide whether a hearing examiner may restrict the scope of an expert's testimony at a sex offender classification hearing once the hearing examiner has exercised discretion to grant funds for that expert. We conclude that, once the hearing examiner has allowed a motion for expert funds to a sex offender seeking a review hearing on his classification, whether indigent or otherwise, expert testimony in a board hearing is admissible unless it is "irrelevant, unreliable, [or] repetitive." 803 Code Mass. Regs. § 1.18(1) (2016). Further, testimony in board hearings is reliable if it is "the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs." Id.

1. Background. On May 26, 2010, a jury in the Superior Court convicted Doe on three indictments charging rape and abuse of a child, in violation of G. L. c. 265, § 23, and on two indictments charging indecent assault and battery on a person fourteen or over, in violation of G. L. c. 265, § 13H.[1] Doe was a former girls' gymnastic coach who owned a training facility in

[1] The judge sentenced Doe to from eight to ten years on one count of rape and abuse of a child, and to a concurrent sentence of from four to five years on two counts of indecent assault and battery on a person fourteen or over. On the other two counts of rape and abuse of a child, Doe received five years of supervised probation from and after his committed sentence. The jury acquitted Doe on one count of rape.

Connecticut and who operated a summer camp for gymnasts, and Doe's victims were both his former trainees. Doe began preying on and abusing the first victim when she was thirteen years old and the second victim when she was sixteen years old. The abuse occurred repeatedly during the early 1990s in Massachusetts and Connecticut.

In September 2013, during Doe's incarceration, the board notified him of his duty to register as a level three sex offender pursuant to G. L. c. 6, § 178K (2) (c).[2] Doe thereafter requested his statutory right to a de novo review of his classification by one of the board's hearing examiners. See G. L. c. 6, § 178L (2); 803 Code Mass. Regs. § 1.03 (2013).

The hearing examiner presided at a two-day evidentiary hearing,[3] conducted via video conference, to assess Doe's assigned classification based on the board's enumerated risk factors, including the victims' ages and whether Doe repeatedly offended. See 803 Code Mass. Regs. § 1.40(2), (3) (2013). Doe and his attorney participated from prison while the board's counsel and the hearing examiner were at the board's Salem

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[2] The board determined that Doe's "risk of reoffense [was] high and the degree of dangerousness posed to the public" was substantial enough to require "active dissemination" of his "registration information." See G. L. c. 6, § 178K (2) (c).

[3] The hearing commenced on December 3, 2014, and adjourned until its second day on April 13, 2015.

office. Before the hearing, Doe, who was indigent, moved for expert funds to hire Dr. Paul D. Zeizel, an expert in forensic psychology and assessing sex offenders' risk of reoffense. See G. L. c. 6, § 178L (1) (a). In his motion, Doe requested funding so that Dr. Zeizel could provide expert testimony about Doe's risk of reoffense, specifically by focusing on several factors not considered by the board's regulations, including age and time spent in the community between Doe's last recorded incident in the mid-1990s[4] and his 2007 arrest ("offense-free time prior to incarceration").[5]

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[4] Dr. Zeizel testified that Doe's offensive behavior ended "roughly" in 1997, but there is no precise end date reflected in the record. Doe claims that he stopped assaulting the victims in 1994, and that he maintained a "relationship" with his first victim for roughly seven years after he initially assaulted her in 1991, when she was fourteen. Although the first victim was of consenting age towards the end of their "relationship," we cannot blithely agree with Doe's characterization of his behavior as "offense-free" starting sometime around 1994, as soon as the first victim reached the legal age of consent. In many instances, the victim of child sexual abuse suffers psychological trauma that affects her beyond the legal age of consent so that while a "relationship" may be viewed under the criminal law as consensual, and thus not constituting an ongoing crime of statutory rape or child sexual abuse, it may still be coercive and manipulative. When deciding upon dangerousness, the hearing examiner could therefore consider the entirety of Doe's sexual conduct towards the victim, including any continued grooming, manipulation, and coercion, beyond her reaching the legal age of consent.

[5] Doe attached research to his motion for expert funds that supported the position that his age and the offense-free time prior to incarceration reduced his risk of reoffense.

During the first hearing day, the hearing examiner orally granted the motion. He "bas[ed his] decision on the age [factor]," but stated, "I [am] pretty sure [that the expert is] going to do some other inquiries about some other things." The hearing examiner's subsequent written order granting Doe's motion did not restrict the subject matter of the expert's report or testimony. Between the first and second hearing date, the expert prepared a risk assessment, which considered Doe's age, as well as his offense-free time prior to incarceration. Upon the board's objection during the second hearing day, the hearing examiner limited Dr. Zeizel's testimony to the effects of advanced age on reoffense rates generally and as applied to Doe.[6] Notwithstanding Dr. Zeizel's protestation that he could not ethically provide a risk assessment based only on age sealed off from other variables, the hearing examiner affirmed Doe's level three classification.[7]

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[6] Dr. Zeizel testified that "the important aspect [of his risk assessment] is how old [the offenders] are and how long they've been in the community." However, the hearing examiner restricted Dr. Zeizel's testimony to his opinion based on Doe's age and asked him to move on from "elements other than age."

[7] Between the hearing's completion and the date the hearing examiner issued his written decision, we changed the standard by which the board must prove its classifications from preponderance of the evidence to clear and convincing evidence. See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 298 (2015). Doe waived his right to a new hearing based on that decision and the new standard, and asked that the hearing examiner make his decision on the

Doe challenged this classification in the Superior Court. The judge affirmed, concluding that the hearing examiner did not abuse his discretion either in limiting Dr. Zeizel's testimony or in finding the evidence sufficient to classify Doe as a level three sex offender. The judge also determined that the board's practice of conducting such hearings over video conference did not violate Doe's constitutional rights.

We allowed Doe's application for direct appellate review. On appeal, Doe claims that the hearing examiner's decision to limit the scope of the expert's testimony (1) violated G. L. c. 6, § 178L, and its implementing regulations; (2) violated Doe's due process rights; and (3) violated the equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights. Doe further contends that conducting the hearings via video conference violated his due process rights. Because we hold that the hearing examiner improperly limited the scope of Doe's expert's testimony, we remand to the board for a new hearing.[8] We moreover conclude that the board did not violate

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evidence presented under the clear and convincing standard. The hearing examiner followed the clear and convincing standard in his written decision.

[8] Doe also claimed that the hearing examiner abused his discretion in not classifying Doe as a level one sex offender. Because we remand for a new hearing, we need not reach that issue.

Doe's due process rights by administering the hearing via video conference.[9]

2. Discussion. a. Standard of review. "A reviewing court may set aside or modify [the board's] classification decision where it determines that the decision is in excess of [the board's] statutory authority or jurisdiction, violates constitutional provisions, is based on an error of law, or is not supported by substantial evidence. See G. L. c. 30A, § 14 (7) (listing these and other reasons for vacating decision of agency). In reviewing [the board's] decisions, we 'give due weight to the experience, technical competence, and specialized knowledge of the agency.'" Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 649 (2019), quoting Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 602 (2013) (Doe No. 205614).

b. Expert funds for indigent sex offenders. When moving for expert funds, indigent sex offenders must "identify and articulate the reason or reasons, connected to a condition or circumstance special to [them]," and, separately, "general motion[s] for funds to retain an expert to provide an opinion on

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[9] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

the sex offender's risk of reoffense, without more, would . . . be insufficient." Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 775 (2008) (Doe No. 89230). See 803 Code Mass. Regs. § 1.16(4)(a) (2016).[10] The hearing examiner accordingly has discretion to deny expert funds to indigent sex offenders who offer expert opinion on factors that the board's regulations already require the hearing examiner to consider. See Doe No. 89230, supra at 775 n.17.

The record indicates that Doe precisely "identif[ied] and articulat[ed]" requested expert funds to present evidence that his age, as well as his offense-free time prior to incarceration, lowered his risk of reoffense. Doe No. 89230, 452 Mass. at 775. Neither age[11] nor time spent in the community

[10] The board's 2013 regulations offered two ways for a hearing examiner to prohibit expert testimony or to exclude the expert report once the hearing examiner decided to grant expert funds, neither of which applied to Dr. Zeizel: (1) if the sex offender failed to comply with the discovery obligations to provide the expert report to the other side at least ten days prior to the hearing; or (2) if the sex offender failed to call the expert witness to testify. 803 Code Mass. Regs. § 1.18(5), (6) (2013).

[11] The board's 2013 regulatory factors did not provide guidance for how hearing examiners should consider the offender's age at the time of classification, see 803 Code Mass. Regs. § 1.40 (2013), despite our ruling that the hearing examiner must accept expert testimony on that topic. See Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 620-621 (2010). Therefore, Doe's motion for expert funds on that factor satisfied the necessary requirements.

prior to incarceration are included in the board's promulgated risk factors. See 803 Code Mass. Regs. § 1.40 (2013) (factors 19 and 20 only discuss time in prison community and time in community following probation); 803 Code Mass. Regs. § 1.33 (2016) (factor 29 expressly ties offense-free time in community to time postconviction or postincarceration). Doe therefore identified and articulated particular issues that would help the hearing examiner beyond the enumerated risk factors -- something the hearing examiner recognized by granting the motion for expert funds and by acknowledging that the expert's testimony would address "some other inquiries about some other things" beyond age. In other words, the expert testimony would not have been repetitive. See 803 Code Mass. Regs. § 1.18 (2016).

c. Hearing examiners' power to limit scope of expert testimony. We start with the statute. Where the Legislature's intent is evident in a statute's plain language, that meaning controls. See Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 604 (2019). The board argues that the statute provides the hearing examiner with the discretion to limit expert testimony, while Doe claims the opposite.

General Laws c. 6, § 178L (1) (a), permits sex offenders to challenge their classification in a de novo hearing and, if indigent, to apply for funds to hire an expert witness for that

hearing. The hearing examiner "may grant payment of fees for an expert witness in any case," but the statute does not expressly provide the hearing examiner with the authority to limit the scope of an indigent sex offender's expert's testimony once granting those expert funds. Id. The statute does empower a hearing examiner "to consider 'any information useful'" beyond the enumerated risk factors. Doe No. 205614, 466 Mass. at 604, quoting G. L. c. 6, § 178L (1). The regulations in effect at the time of the hearing also do not resolve the issue, although they grant the hearing examiner broad discretion to rule on evidentiary matters. See 803 Code Mass. Regs. §§ 1.09(2), 1.21(1)(e) (2013); 803 Code Mass. Regs. § 1.19(1)(f) (2016).[12] Specifically, the hearing examiner "may exclude irrelevant, unreliable, and repetitive evidence." 803 Code Mass. Regs. § 1.18(1) (2016). See 803 Code. Mass. Regs. § 1.19(1) (2013). Because, as noted supra, the hearing examiner granted expert funds to Doe, implicitly finding the proffered evidence not repetitive, we analyze only whether the expert testimony would have been irrelevant or unreliable.

[12] Between the hearing's completion in 2015 and the date on which the hearing examiner issued his written decision in 2016, the board promulgated revised regulations. The hearing examiner issued the decision based on the new 2016 regulations. There is no difference relevant to the question presented here.

The board's regulations nevertheless speak to the importance of relevant and reliable expert testimony. They defined an "expert witness" as a "mental health professional" who prepared "testimony and [a] report offering an opinion as to a sex offender's risk of reoffense and degree of dangerousness" for a board hearing. 803 Code Mass. Regs. § 1.03 (2013). See 803 Code Mass. Regs. § 1.03 (2016) (same but adding limitation that expert reports "prepared for any other purpose will not qualify as Expert Witness opinions"). Sex offenders also "shall be permitted to introduce into evidence an Expert Witness's written report, including [the witness's] opinion as to the offender's risk of reoffense and/or dangerousness." 803 Code Mass. Regs. § 1.18(6) (2013). See 803 Code Mass. Regs. § 1.17(5)(c) (2016) (same). Hearing examiners retain discretion "[t]o receive, rule on, exclude, or limit evidence," 803 Code Mass. Regs. § 1.21(1)(e) (2013), but the "duties of the [hearing examiner also] shall include . . . assist[ing] all persons in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved," 803 Code Mass. Regs. § 1.21(1)(b) (2013). See 803 Code Mass. Regs. § 1.19(1)(c), (f) (2016) (same).

This language suggests that the hearing examiner should allow the experts to testify because they provide reliable and relevant evidence that will assist the hearing examiner to

interpret evidence that lies outside common experience. This standard is consistent with the primary purpose of G. L. c. 6, § 178L: to classify sex offenders accurately and fairly so as to inform and to protect the public. See Doe No. 205614, 466 Mass. at 596; Doe No. 89230, 452 Mass. at 772-773.[13]

The board must rely on available scientific literature, admitted through expert testimony or submissions, in determining its classifications because "the development of evolving research is among the reasons that a hearing examiner is empowered to consider 'any information useful' beyond the [board's] enumerated risk factors." Doe No. 205614, 466 Mass. at 605, quoting G. L. c. 6, § 178L (1). In order to satisfy its statutory purpose, the board may consider any "growing scientific consensus," Doe No. 205614, supra at 608, in the form of expert testimony, especially when that expert opinion is not "specifically contemplated by the guidelines," id. at 604. See Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 621, 624 (2010) (new science on effects of age on risk of reoffense sufficient for expert funds).

[13] For a thorough statutory history of G. L. c. 6, § 178L, see Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 133-134 (2019); Doe No. 205614, 466 Mass. at 595-597.

As offense-free time prior to incarceration does not fall within the board's promulgated factors, see 803 Code Mass. Regs. § 1.40 (2013); 803 Code Mass. Regs. § 1.33 (2016), Dr. Zeizel's expert testimony was not repetitive, it was clearly relevant to the classification determination, and it would have aided the hearing examiner in accurately classifying Doe as required by G. L. c. 6, § 178L. See Doe No. 89230, 452 Mass. at 773 (experts aid board's classification). See also Commonwealth v. Wardsworth, 482 Mass. 454, 466 (2019). Moreover, requiring Dr. Zeizel to testify as to Doe's risk of reoffense based on one factor divorced from other risk factors detracted from the usefulness of his opinion to the hearing examiner. Generally, once the hearing examiner determines that a sex offender deserved expert funds, the expert's future testimony and submissions may be considered reliable, so long as the conclusions are not based on rumor or unreliable hearsay. To the extent the hearing examiner does not credit the testimony or questions the underlying science or methodology, the expert may discount that testimony in rendering the classification decision.

Hearing examiners must admit evidence unless it is "irrelevant, unreliable, [or] repetitive." 803 Code Mass. Regs. § 1.18(1) (2016). See 803 Code Mass. Regs. § 1.19(1) (2013) (same except not mentioning "unreliable"). Expert evidence is

relevant to a board hearing, and therefore admissible, when it would assist the hearing examiner in interpreting evidence that lies outside common experience. Expert evidence is reliable for the purposes of admissibility based not on the hearing examiner's view of the credibility of a particular expert, but on whether it is "the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs." 803 Code Mass. Regs. § 1.19(1) (2013). See 803 Code Mass. Regs. § 1.18(1) (2016) (same). Because board hearings involve no jury and the hearing examiner is the finder of fact, the hearing examiner need not be a gatekeeper, because there is no reason to protect the fact finder from undue influence due to unreliable expert testimony. Expert testimony for a board classification hearing will therefore almost always fall within the regulatory definition of reliable.[14]

Here, Dr. Zeizel's testimony satisfied the standard for the admissibility of his more comprehensive opinion as to Doe's risk of reoffense because it was relevant, reliable, and not repetitive of the promulgated board factors. The hearing examiner therefore abused his discretion in limiting the scope

[14] Where the relevancy, reliability, and nonrepetitiveness of the evidence is a close call, hearing examiners should err on the side of admissibility and then give the evidence the weight that they believe it is fairly entitled to receive.

of Dr. Zeizel's testimony. We remand to the hearing examiner for a new hearing consistent with our conclusions of law.[15]

d. Video conferencing. Doe argues that the board also violated his due process rights by conducting the hearing via video conference. When considering due process challenges to the board's procedures, we apply the three-part test articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See Noe, Sex Offender Registry Bd. No. 5340 v. Sex Offender Registry Bd., 480 Mass. 195, 202 (2018). We balance (1) the individual's liberty or property interest and (2) the risk of an erroneous deprivation of that liberty or property by the established government procedures and the probable value of additional or substitute safeguards, against (3) the interest the government seeks to achieve in using those procedures. See id.

First, as we have reiterated on numerous occasions, the petitioner in a sex offender classification hearing has a "sufficient liberty and privacy interest[] constitutionally protected by art. 12" of the Massachusetts Declaration of Rights, entitling him to receive due process before the board requires him to register and before it publishes or disseminates

[15] Because we reach our conclusion based on the statutory language, and by analogy to the common law, we need not reach Doe's constitutional claims. However, we are hard pressed to understand how the rules of admissibility would differ for appointed experts and hired experts.

that information online. Doe v. Attorney Gen., 426 Mass. 136, 143 (1997). See Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 303-308 (2015) (describing harsh penalties of registration and resulting constraints on one's liberty).

The risk of erroneous deprivation, however, is dampened by the presence of other protections the board provided during the hearing. See, e.g., 803 Code Mass. Regs. § 1.14 (2013) (right of representation at classification hearing); 803 Code Mass. Regs. § 1.15 (2016) (right to subpoena witnesses). See also Gillespie v. Northampton, 460 Mass. 148, 157 (2011) (risk of erroneous deprivation lowered by protections of administrative hearing). Doe had counsel present with him who could (and did) raise motions, object, introduce evidence, including witnesses and expert testimony, make arguments on Doe's behalf, and otherwise vigorously advocate for Doe. See Doe, Sex Offender Registry Bd. No. 1 v. Sex Offender Registry Bd., 79 Mass. App. Ct. 683, 693 (2011) (Doe No. 1). See also 803 Code Mass. Regs. §§ 1.08, 1.09, 1.14, 1.15 (2013). Moreover, board hearings focus mostly on documents and expert testimony, for which credibility determinations are not usually the central issue. See Doe No. 1, supra at 694. The potential for prejudice due to video conferencing is therefore far less in the board hearings than in it may be in other contexts. See id. See also Shellman

v. Commonwealth, 284 Va. 711, 721-722 (2012). Despite a few technological and communication hitches,[16] conducting the hearing via video conference sufficiently safeguarded against the risk of an erroneous classification.

Third, according to the board, the government's interest in holding hearings via video conference is substantial. See Doe No. 1, 79 Mass. App. Ct. at 695; G. L. c. 30A, § 14 (7) (giving due weight to expertise of agency during judicial review). Unlike when the hearing examiner limited the scope of Dr. Zeizel's testimony, there are legitimate government interests undergirding the use of video conferencing technology because doing so saves significant cost and boosts efficiency, not only for the board's matters.[17] See Doe No. 1, supra; Shellman, 284 Va. at 721-722. The board conducts many hearings with many sex offenders in far-flung parts of Massachusetts, with only a few hearing examiners. Doe No. 1, supra. Video conferencing enables the board to conduct more hearings more promptly, by

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[16] During hearings conducted by video conferencing, as in other contexts, it is important that the attorneys not talk over each other, if for no other reason than that there be a pristine record of the proceedings.

[17] Our judicial system routinely relies on video conferencing for bail hearings precisely for its cost savings and efficiency. See Mass. Law Weekly, vol. 21, no. 42, at 1, 32 (July 5, 1993) (video bail program in Superior Court created to alleviate overcrowding at pretrial detentions and to reduce transportation costs in bringing prisoners back and forth).

liberating time otherwise wasted traveling. Id. We therefore hold that, in the context of Doe's classification hearing in front of the board, conducting the hearing via video conference did not violate due process.

3. Conclusion. For the reasons stated, we remand to the Superior Court for entry of an order remanding the matter to the board to hold another hearing at which Doe's expert may testify as to any relevant, reliable, and nonrepetitive evidence.

So ordered.