SJC-12790

ERNEST E., a juvenile vs. COMMONWEALTH.

Suffolk. February 11, 2020. - November 6, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Sex Offender. Sex Offender Registration and Community Notification Act. Evidence, Sex offender, Juvenile delinquency, Expert opinion, Hearsay. Juvenile Court, Delinquent child.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on May 28, 2019.

The case was reported by Budd, J.

Elizabeth Caddick (Michael F. Kilkelly also present) for the juvenile.

Elizabeth F. Silverman, Assistant District Attorney, for the Commonwealth.

The following submitted briefs for amici curiae:

Michael Caldwell, Elizabeth Letourneau, Kim Dawkins, Kevin Creeden, Maia Christopher, Robert Kinscherff, Raymond Knight, Ryan Shields, Kerry Nelligan, Frank DiCataldo, Tom Leversee, & Phil Rich, pro se.

J.P. Christian Milde & Erin K. Higgins for Children's Law Center of Massachusetts.

[1] Chief Justice Gants participated in the deliberation on this case prior to his death.

Ryan M. Schiff for youth advocacy division of the Committee for Public Counsel Services & others.

CYPHER, J. This is an appeal by a juvenile challenging the denial of his motion seeking relief from sex offender registration. The juvenile appeals on two grounds. First, he argues that he should be relieved of his obligation to register because his risk of reoffense is "less than low" as dictated by L.L. v. Commonwealth, 470 Mass. 169 (2014). Second, he argues that requiring any juvenile to register as a sex offender violates due process and constitutes cruel and unusual punishment.

We consider the juvenile's petition for relief pursuant to G. L. c. 211, § 3. After admitting to sufficient facts, the juvenile filed a motion for relief from sex offender registration. At the hearing on this motion, the constitutionality of juvenile registration was not argued. Following the denial of the juvenile's motion, he filed a petition pursuant to G. L. c. 211, § 3, arguing that juvenile registration is unconstitutional based on advances in our understanding of adolescent brains. A single justice reserved and reported this question. After reviewing the record in detail, it is apparent that these constitutional arguments were not presented at the juvenile's hearing below, and as a result, the evidence necessary to determine the constitutional question

is not in the record before us. Therefore, we decline to answer the constitutional question, and we affirm the order denying the juvenile's motion for relief from registration.[2]

Background. In 2017, the juvenile was charged with one count of rape of a child, G. L. c. 265, § 23, and one count of indecent assault and battery on a child under fourteen, G. L. c. 265, § 13B. The charges stem from the accusation that the fifteen year old juvenile licked and tickled the vaginal area of his seven year old cousin. In 2019, after a full colloquy, the juvenile admitted to sufficient facts to warrant findings of guilty on both counts. That same day, the juvenile filed a motion to be relieved from his obligation to register as a sex offender under G. L. c. 6, § 178E (f).

On March 1, 2019, the juvenile was adjudicated delinquent on both charges, and he was sentenced to Department of Youth Services commitment until the juvenile's eighteenth birthday, but the sentence was suspended. Following this sentence, an evidentiary hearing was conducted on the juvenile's motion to be relieved of his obligation to register as a sex offender.

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[2] We acknowledge the amicus briefs submitted in support of the juvenile by Michael Caldwell, Elizabeth Letourneau, Kim Dawkins, Kevin Creeden, Maia Christopher, Kelly Nelligan, Robert Kinscherff, Frank DiCataldo, Raymond Knight, Tom Leversee, Ryan Shields, and Phil Rich; by the youth advocacy division of the Committee for Public Counsel Services, Juvenile Law Center, Citizens for Juvenile Justice, and Massachusetts Association of Criminal Defense Lawyers; and by the Children's Law Center.

During the hearing, the judge heard testimony from the juvenile's expert psychologist and argument from both parties and from the probation department. The only issue argued was whether the juvenile showed a risk of reoffense that warranted referral to the Sex Offender Registry Board (SORB). The juvenile's expert testified that the juvenile presented a low to moderate risk of reoffending when compared with other juveniles. There was no oral argument and almost no testimony about juvenile registration generally or its constitutionality.[3]

On April 26, 2019, the judge made extensive oral findings of fact regarding the juvenile's risk of reoffense and denied the juvenile's motion to be relieved from his obligation to register with SORB. The juvenile filed a petition in the county court seeking extraordinary relief under G. L. c. 211, § 3.[4] The

[3] There was limited testimony concerning juveniles generally. During the hearing, the juvenile's attorney asked the expert to explain why she was not recommending that this juvenile be required to register with SORB. The expert testified that "based on [her] understanding of the literature" registration limits pro-social activities, education, and employment. The expert was asked if there were specific research concerning the effect of the sex offender registry on juveniles, and she responded that juvenile registrants demonstrate more "emotional dysfunction, suicidality and behavioral difficulties."

[4] We previously have held that, "[a]lthough a sex offender may not appeal from a judge's decision not to waive the registration requirement, . . . either party may petition a single justice of this court, pursuant to G. L. c. 211, § 3, which grants this court 'general superintendence . . . to correct and prevent errors and abuses' for the furtherance of

single justice reserved and reported to the full court the question whether "requiring juveniles to register violates due process and constitutes cruel and unusual punishment based on advances in our understanding of the adolescent brain." The juvenile filed a motion to stay his sex offender registration requirement pending this appeal, and the motion was allowed. As a result of the reservation and report, the Juvenile Court judge filed findings of fact, rulings of law, and an order on the juvenile's motion for relief from sex offender registration.

Discussion. 1. Juvenile's motion for relief. The juvenile argues that he should be relieved of his obligation to register because his risk of reoffense is less than low -- placing him within the threshold articulated in L.L., 470 Mass. at 179 ("to qualify for exemption from registration under § 178E [f], a juvenile sex offender's risk of reoffense should be less than this 'low' registration-triggering risk").

At the hearing, the juvenile's expert stated that, although she was "reticent to offer certain language" regarding the juvenile's risk of future reoffense, she had noted in her report that this juvenile fell into the "low to moderate range of risk for a variety of reasons," and clarified that this was as "compared to other juveniles." The expert detailed a number of

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justice. G. L. c. 211, § 3." Commonwealth v. Ronald R., 450 Mass. 262, 266–267 (2007).

factors that lowered the juvenile's risk -- the number of adjudicated offenses, the fact that the victim was a family member, the juvenile's intellectual ability, and his willingness to engage in treatment -- as well as a number of factors that heightened his risk -- his history of impulsivity, poor judgment, trauma, depression, and lack of family support, among others.

The judge denied the juvenile's motion for relief from registration. The judge's oral findings referred to a variety of factors that would heighten the juvenile's risk of reoffense: "social isolation;" the juvenile's lack of contact with his father and the suicide of his mother; the juvenile's experience in foster care, including abuse, neglect, and possible shaken baby syndrome; the juvenile's disturbing comments to a teacher;[5] and the assessment of the juvenile as "a sexually aggressive adolescent with emotional difficulties."

The judge's written findings credited the expert's testimony that the juvenile was a low to moderate risk to reoffend among juveniles,[6] and expanded upon the various factors

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[5] The juvenile admitted to asking a teacher what she would do if she were raped. He also held a metal ruler while asking a teacher if she thought he could rape someone with it.

[6] The judge noted that although the expert opined at trial that the juvenile was a low to moderate risk among juveniles, her written report did not contain that "critical qualifying language."

addressing risk of reoffense in G. L. c. 6, § 178K (1) (a)-(l).[7] The judge noted in the findings the juvenile's "many psychiatric

[7] "Factors relevant to the risk of reoffense shall include, but not be limited to, the following: (a) criminal history factors indicative of a high risk of reoffense and degree of dangerousness posed to the public, including: (i) whether the sex offender has a mental abnormality; (ii) whether the sex offender's conduct is characterized by repetitive and compulsive behavior; (iii) whether the sex offender was an adult who committed a sex offense on a child; (iv) the age of the sex offender at the time of the commission of the first sex offense; (v) whether the sex offender has been adjudicated to be a sexually dangerous person pursuant to [G. L. c. 123A, § 14,] or is a person released from civil commitment pursuant to [G. L. c. 123A, § 9]; and (vi) whether the sex offender served the maximum term of incarceration; (b) other criminal history factors to be considered in determining risk and degree of dangerousness, including: (i) the relationship between the sex offender and the victim; (ii) whether the offense involved the use of a weapon, violence or infliction of bodily injury; (iii) the number, date and nature of prior offenses; (c) conditions of release that minimize risk of reoffense and degree of dangerousness posed to the public, including whether the sex offender is under probation or parole supervision, whether such sex offender is receiving counseling, therapy or treatment and whether such sex offender is residing in a home situation that provides guidance and supervision, including sex offender-specific treatment in a community-based residential program; (d) physical conditions that minimize risk of reoffense including, but not limited to, debilitating illness; (e) whether the sex offender was a juvenile when he committed the offense, his response to treatment and subsequent criminal history; (f) whether psychological or psychiatric profiles indicate a risk of recidivism; (g) the sex offender's history of alcohol or substance abuse; (h) the sex offender's participation in sex offender treatment and counseling while incarcerated or while on probation or parole and his response to such treatment or counseling; (i) recent behavior, including behavior while incarcerated or while supervised on probation or parole; (j) recent threats against persons or expressions of intent to commit additional offenses; (k) review of any victim impact statement; and (l) review of any materials submitted by the sex offender, his attorney or others on behalf of such offender." G. L. c. 6, § 178K (1).

diagnoses;" the age difference between the victim, who was seven years old at the time of the offense, and the juvenile, who was fifteen years old; and the juvenile's consistent participation in sex offender treatment. After reviewing each factor, the judge determined that the juvenile "poses a continued risk of reoffense and danger to the community," and denied the motion.[8]

However, the written findings also demonstrated that the judge had difficulty reconciling the expert's low to moderate risk assessment with her recommendation that the juvenile not be required to register. The "less than low" level of risk proscribed by L.L. refers to the general population, not juveniles. Because we also articulated that "there seems to be a consensus that juvenile sex offenders have a relatively low rate of recidivism" when compared to the general population, L.L., 470 Mass. at 180 n.19, when the juvenile's expert classified him as "low to moderate among juveniles," the judge could have interpreted that classification as meeting the "less

[8] When reading the judge's findings as a whole, it is apparent that the judge implicitly found the juvenile to present a low to moderate risk of reoffence when compared to the general population. In both his written and oral findings, the judge emphasized the holding of L.L. v. Commonwealth, 470 Mass. 169 (2014), as a factor prohibiting the juvenile from being exempt from registration; so, he did not assess the juvenile's risk level as being "less than low." While the judge credited the expert's "ultimate opinion that [the juvenile] present[ed] a low to moderate risk of offense," he also noted that "as compared to other juveniles" was "critical qualifying language" that was left out of her written report altogether.

than low" requirement of L.L. However, while the judge is obligated to give expert testimony "serious, reasoned consideration," it is the judge who must "ultimately determin[e] whether to exempt the juvenile from registration." Id. at 181.

Considering the judge's findings in light of the standard for assessing the risk of reoffense set out in G. L. c. 6, § 178K, and in L.L., we cannot say that the findings do not support the judge's assessment of that risk. In sum, "we conclude that based on the record before [him], the judge's ultimate determination that the juvenile should not be relieved of the obligation to register as a sex offender did not lie outside the bounds of reasonable alternatives" (quotation and citation omitted). L.L., 470 Mass. at 184. The judge did not abuse his discretion.

2. Constitutional issue. The juvenile also argues that requiring him, or any juvenile, to register as a sex offender violates due process and constitutes cruel and unusual punishment based on what we know about juvenile brain development, the low sexual reoffense risk of juveniles, the failure of sex offender registration to prevent sexual reoffenses, and the harms of sex offender registration.

The Commonwealth argues that SORB registration is a regulatory scheme to promote public safety and does not constitute punishment, that the Massachusetts sex offender

registry act (act) recognizes differences between juvenile and adult sex offenders, that the act does not violate substantive or procedural due process by allowing the registration of juvenile offenders, and that no other jurisdiction has ruled that a sex offender registry statutory scheme similar to the Commonwealth's is unconstitutional as it applies to juvenile offenders.

The Commonwealth also argues that the constitutionality of juvenile sex offender registration was not argued at the motion hearing. According to the Commonwealth, the scientific studies claiming the inefficacy of juvenile sex offender registration and the negative effects of registration on juvenile sex offenders were not properly established in the record below. Further, although a few studies were mentioned in the juvenile's written motion or listed at the end of the juvenile's expert's report, none was specifically referred to by the expert in her testimony. Although the judge's written findings contain various scientific studies, the Commonwealth asserts that it did not have an opportunity to cross-examine a witness about the studies, and did not have an opportunity to request a hearing pursuant to Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994).[9]

[9] In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-595 (1993), "the [United States Supreme] Court, emphasizing the need for a flexible inquiry, provided a nonexhaustive list of factors to consider in evaluating the reliability of the

After reviewing the evidence, we agree that the record below is inadequate for this court to decide the constitutional issue. While the juvenile's memorandum in support of his motion appears to argue that juvenile registration is unconstitutional,[10] the judge's oral findings do not reference

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expert's testimony, including testing, peer review and publication, error rates, and general acceptance in the relevant scientific community." Palandjian v. Foster, 446 Mass. 100, 106–107 (2006). The progeny of Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994), "make clear that general acceptance in the relevant community of the theory and process on which an expert's testimony is based, on its own, continues to be sufficient to establish the requisite reliability for admission in Massachusetts courts regardless of other Daubert factors." Commonwealth v. Patterson, 445 Mass. 626, 640 (2005). "Where general acceptance is not established by the party offering the expert testimony, a full Daubert analysis provides an alternate method of establishing reliability." Id. at 641.

[10] The juvenile's memorandum filed in the Juvenile Court argued that requiring juveniles to register violates the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment and juveniles' due process rights. The juvenile made a similar argument based on the prohibition against cruel or unusual punishment in art. 26 of the Massachusetts Declaration of Rights and due process rights under the Massachusetts Constitution. First, it is well settled that sex offender registration is a civil regulatory scheme, not punishment; thus, we need not address the argument that registration is cruel or unusual punishment. See Smith v. Doe, 538 U.S. 84, 105-106 (2003); Opinion of the Justices, 423 Mass. 1201, 1237-1239 (1996); Doe v. Weld, 954 F. Supp. 425, 431-433 (D. Mass. 1996) (registration not punishment as applied to juveniles). Second, as the juvenile articulates in his brief, an offender's due process rights require that SORB base its classification on an offender's "current risk to the community." See Doe, Sex Offender Registry Bd. No. 7083 v. Sex Offender Registry Bd., 472 Mass. 475, 483 (2015). Because the juvenile has not yet been required to register, and therefore has not been classified as a level one, two, or three sex offender, the

this argument because it was not pressed at the hearing in front of the judge. There was no oral argument on this issue. The only related testimony came from the juvenile's expert, and it was extremely limited.[11] While the expert may have been qualified to proffer testimony on the specific juvenile at issue, it is unclear whether this expertise extended to juvenile registrants generally.[12]

In order to determine the constitutional issue, the record below must contain evidence -- usually in the form of expert testimony -- that would allow this court to explore the complicated question of juvenile brain development and its impact on risk of reoffense. The admission of scientific testimony is governed by what has come to be known as the

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juvenile's due process argument is best assessed in the context of an appeal from a final classification decision.

[11] As described earlier, the juvenile's expert testified that, "based on [her] understanding of the literature, there is -- there can be an iatrogenic effect or a negative effect of [registration] on juveniles who have engaged in sexual offending behavior, as in, it limits their prospects to engage in pro-social activities, education, employment, have normal peer interactions which can actually isolate and unfortunately raise risk as opposed to lower risk." She also testified that "there is some limited research that's very recent that suggests that juveniles that have had to register demonstrate more emotional dysfunction, suicidality and behavioral difficulties."

[12] On cross-examination, the Commonwealth elicited testimony that the juvenile's expert had done from twenty to forty sex offender evaluations since 2010. In only two of those cases, including the present case, had the expert opined on an individual's risk of reoffense.

Daubert-Lanigan standard. See Commonwealth v. Senior, 433 Mass. 453, 458 (2001), citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 585-595 (1993), and Lanigan, 419 Mass. at 25-26. See Mass. G. Evid. § 702 & comments (2020). The judge, acting as gatekeeper, is responsible for "mak[ing] a preliminary assessment whether the theory or methodology underlying the proposed testimony is sufficiently reliable to reach the trier of fact." Commonwealth v. Shanley, 455 Mass. 752, 761 (2010). See Commonwealth v. Camblin, 478 Mass. 469, 475 (2017).

"Soft sciences" similarly are scrutinized. Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 327 (2010) ("The defendant, therefore, is correct that a so-called 'soft science,' such as psychiatry, in which expert opinions are often based on the personal observations and clinical experience of the psychiatrist, fall within Lanigan's reach"). See Shanley, 455 Mass. at 763 n.15 ("the evolving nature of scientific and clinical studies of the brain and memory and the controversy surrounding those studies made it prudent for the judge to proceed with a Lanigan hearing in this case"). See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("We conclude that Daubert's general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge").

While the foundational studies of the expert's opinion themselves may or may not be subject to evaluation under the Daubert-Lanigan test, the reliability of the expert's opinion is dependent upon the reliability of her foundational material. See Daubert, 509 U.S. at 594-595 ("The inquiry envisioned by [Fed. R. Evid.] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate"). Contrast Commonwealth v. Bradway, 62 Mass. App. Ct. 280, 283-287 (2004) (rejecting argument that testimony of qualified examiners must meet Lanigan standard, because G. L. c. 123A, § 14 [c], expressly provides for admission of qualified examiner's report).

Finally, the judge's written findings contained a number of references to scientific studies. However, it appears that the majority of this research was done sua sponte, and after the record essentially was frozen by the single justice's decision to reserve and report the case to the full court.[13] Although the

[13] These written findings also confirm that the "oral arguments made during the hearing on relief from registration focused on risk assessment, but did not address the larger question of whether registration constitutes cruel and unusual punishment and should be abolished."

judge exerted considerable effort to provide this court with a sufficient record to decide this issue, the studies are unreviewable for two reasons. First, "[t]he articles were never established as reliable or authoritative, contain nothing but inadmissible hearsay, and do not satisfy any of the exceptions to the hearsay rule." Commonwealth v. Reese, 438 Mass. 519, 527 (2003). Second, because this research was done by the judge rather than by one of the advocates and was not offered as part of the adversarial process, the Commonwealth did not have the opportunity to challenge the information or to present any evidence or testimony disputing this research.[14] Because of the absence of expert testimony and the failure to introduce properly the scientific studies cited in the judge's written findings, we do not have the necessary record to reach this issue.

Judgment affirmed.

[14] The Commonwealth filed a motion requesting that the judge redact these findings precisely for this reason, but the motion was denied.