

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: July 23, 2018]

STATE OF RHODE ISLAND

VS.

JOSE FIGUEROA

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C.A. No. PM-2016-5328

DECISION

GALLO, J. Before the Court is the Defendant Jose Figueroa’s appeal from a decision of the Magistrate upholding the determination of the Sex Offender Treatment Board (Board) classifying the Defendant as a Level III offender for community notification purposes. Jurisdiction is pursuant to G.L. 1956 §§ 11-37.1-16 and 8-2-39.2(j).

The Defendant contends that the Magistrate erred when he concluded that the Defendant failed to prove that his classification by the Board as Risk Level III was not in compliance with law.

I

Facts and Travel

The offense for which the Defendant stands convicted initially came to light in November 2008 when the twelve-year-old daughter of a friend of the Defendant reported at school that she and her eight-year-old brother had been sexually molested by the Defendant. In an interview with the Child Advocacy Center, the eight-year-old reported that the Defendant, known to him as Angel, had penetrated his anus with his penis approximately thirteen times. The eight-year-old confirmed that the Defendant had similarly sexually molested his twelve-year-old sister. He also offered that the Defendant had shown pornographic movies to him, his sister, and a younger

brother. Notwithstanding the foregoing, the Defendant was charged with molesting the eight-year-old victim only. He pleaded *nolo contendere* to the offense and was sentenced to a twenty-year prison term with eleven years to serve and the balance suspended.

Prior to his release, and as required by law, the Defendant was referred to the Board for assessment of the Defendant's risk of reoffense. The Board, after completing the assessment, which included consideration of the Defendant's scores from three validated risk assessment instruments¹, found the Defendant's risk to reoffend to be high and thus classified him at Level III for community notification purposes. The Defendant expressed his disagreement with the Board's determination by submitting a timely request for review. The requested review was referred to a Magistrate² of this Court who, after hearing, based on the record compiled by the Board, supplemented by Defendant's counseling records, and oral and written argument, concluded that the Defendant had not carried his burden of establishing that the Board's determination of his risk level was erroneous, and therefore, the Board's determination that the Defendant be classified as Risk Level III was affirmed.

II

Standard of Review

The statute empowering the Drug Court Magistrate to hear sex offender classification and notification disputes also affords an aggrieved party such as the Defendant a review of the order of the Magistrate by a Justice of the Superior Court. Sec. 8-2-39.2(j). This statute specifies that a review be "on the record and appellate in nature." *Id.* In accordance with the statute, the Superior Court Rules of Practice dictate that the review by the Superior Court Justice be limited

¹ Static-99R, Static-2002R, and Stable 2007.

² The Drug Court Magistrate is empowered to hear and decide Sex Offender Registration and Community Notification disputes. Sec. 8-2-39.2(f).

to a determination based on the record below whether the Magistrate's decision is supported by competent evidence. R.P. 2.9.

The interplay between § 8-2-39.2 and Rule 2.9 of the Rules of Practice has generated some confusion as to the scope of the Superior Court Justice's review of a Magistrate's decision in sex offender risk level determinations. *See DiCarlo v. State*, No. PM-13-5062, 2014 WL 11264685 (R.I. Super. Mar. 4, 2014). This Court is convinced, however, that read together, the statute and the rule of practice contemplate an appellate review deferential in nature, more akin to the scope and standard of review which governs Superior Court reviews of decisions of administrative agencies under G.L. 1956 § 42-35-15; *Town of Burrillville v. R.I. State Labor Relations Bd.*, 921 A.2d 113 (R.I. 2007).

III

Analysis

The Defendant contends that the Magistrate erred in affirming the Board's classification of him as a Risk Level III offender. He argues here, as he did before the Magistrate, that the Board's determination is not indicated by his scores on the risk assessment instruments utilized by the Board, which estimated his risk category to be in the low to moderate range. The Defendant faults the Board for considering in its assessment evidence of criminal conduct of the Defendant other than that for which he stood convicted. In that regard, the record reflects that there was evidence before the Board that the Defendant had also molested the twelve-year-old sister of his eight-year-old victim and, additionally, that he had showed the siblings "nasty movies of boys putting wieners in girls (sic) butt." The Defendant further complains that the

Board also considered in its assessment that in 1998 in Florida the Defendant was charged with unlawful sexual conduct with a fourteen-year-old, a charge that was later dismissed.³

The State argues that the risk assessment tools utilized by the Board are not designed to encompass all factors bearing on an individual's risk of reoffense and that the Board probably may and, in fact, is required to consider other case specific factors in making its determination of the level of risk posed by the Defendant. Therefore, the State asserts, that the Board properly took into account the circumstances surrounding the offense for which the Defendant stands convicted, such as the reported contemporaneous molestation of the eight-year-old victim's twelve-year-old sister. Likewise, posits the State, the Board properly considered evidence of the Defendant's involvement in the 1998 Florida case charging unlawful sexual conduct with a fourteen-year-old.

Our Supreme Court has acknowledged that “[r]isk assessment is not an exact science,” and that those entrusted with such tasks must be allowed to exercise a measure of judgment and discretion. *State v. Germane*, 971 A.2d 555, 589 (R.I. 2009). The statutory scheme established for determining a sex offender's risk to reoffend and corresponding level of community notification expressly authorizes the Board in making such determinations to utilize both a validated risk assessment instrument and “other material [that may be helpful to the] board . . .”

See § 11-37.1-6(1)(b); *see also Germane*, 971 A.2d at 572. The Board

“shall have access to all relevant records and information in the possession of any state official or agency . . . including, but not limited to, police reports; prosecutor's statements of probable cause, presentence investigations and reports, . . . adult criminal history records . . .” Sec. 11-37.1-6(4); *see also* § 11-37.1-12(b)(5).

³ The information in the record reflects that the Florida charges were dismissed after the Defendant married his alleged victim.

The Sex Offender Community Notification (SOCN) guidelines promulgated by the Parole Board pursuant to statute set forth a number of factors to be considered by the Board. The guidelines and the statutes pursuant to which they were promulgated “suggests that a sexual offender assessment should not take place in a vacuum or solely rest on the results of the risk assessment tools.” *State v. Dennis*, 29 A.3d 445, 451 (R.I. 2011). As the Court in *Dennis* observed, “[t]he classification of an individual’s future risk of sexual recidivism is not a one-size-fits-all application.” *Id.* The Board in *Dennis*, relying on other “external factors,” determined defendant’s risk to reoffend to be high notwithstanding the results of risk assessment tools placing his risk in the moderate to low moderate range. The Court acknowledged the imprecision inherent in risk assessment and the need for the Board to exercise “a certain amount of judgment and even intuition . . .” *Id.* at 450 (quoting *Germane supra*).

In the case at bar, it is clear from the Board’s risk assessment report that, in making its risk level determination, the Board considered the factors which the SOCN guidelines require be taken into account. Notably, a defendant’s actuarial risk score on the several risk assessment tools is but one of the factors to be employed by the Board. *See* SOCN guidelines, addendum 1.

With regard to the offense for which the Defendant stood convicted, the Board notes in its assessment report that the Defendant “anally penetrated his 8 year old male victim with his penis on multiple occasions” and that, while the Defendant was charged with molestation of his eight-year-old victim only, the investigation revealed that the Defendant similarly victimized the eight-year-old victim’s siblings. The Board found it significant to its assessment that the Defendant had a relationship with the victim’s mother who entrusted her children to the Defendant’s care for overnight visits. *See* Board’s Risk Assessment Report 2.

Focusing on the Defendant's prior history, the Board noted his 1998 Florida charges of sexual battery involving a fourteen-year-old, charges which the Defendant denies. *See id.* at 3. Apparently those charges were dismissed when the Defendant married his victim. *See* Palm Beach County Florida offense report; Hr'g Tr. 23, Oct. 24, 2017. The Defendant's history of mental health treatment for depression, anxiety, and anger management issues as reported by him was also taken into account. *See* Board's Risk Assessment Report 3.

The Board also observed that the Defendant had not participated in sex offender treatment for any period of time sufficient to benefit him. Commenting on an interview of the Defendant, the Board noted that the Defendant denied his offense. The Board found him to lack insight into his offending behavior. *Id.* at 4.

The Magistrate permitted the Defendant to supplement the record with his more recent counseling records. The Defendant submitted records of participation in group sessions at The Counseling and Psychotherapy Center for the four-month period ending September 2017. As it turns out, those records were of no assistance to the Defendant, and they plainly supported the Magistrate's conclusion that he has failed to progress in counseling. Decision Tr. 15, Nov. 21, 2017.

In sum, examination of the record reveals that the Board's risk level determination was a product of the utilization of valid risk assessment tools, reference to other materials and consideration of other factors as contemplated by statute. The Magistrate, after review of the evidence and the Board's risk assessment report detailing the factors considered in arriving at its risk level determination, concluded that the State had made out a *prima facie* case justifying its classification of the Defendant as Level III for purposes of risk of reoffense and community notification, and that the Defendant did not persuade him that the Board had erred or that its

determination was otherwise not in compliance with the statute. Sec. 11-37.1-16; Decision Tr. 15, Nov. 21, 2017.

IV

Conclusion

It is abundantly clear to this Court that the decision of the Magistrate is well supported by competent evidence and therefore ought to be and is affirmed. Counsel shall present the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: State of Rhode Island v. Jose Figueroa

CASE NO: PM-2016-5328

COURT: Providence County Superior Court

DATE DECISION FILED: July 23, 2018

JUSTICE/MAGISTRATE: Gallo, J.

ATTORNEYS:

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For Defendant: Glenn S. Sparr, Esq.