

STATE OF RHODE ISLAND

KENT, SC.

SUPERIOR COURT

[Filed: May 26, 2021]

LEE POLLOCK

:

v.

:

KM-2019-0561

:

(K2-2012-0605A)

:

STATE OF RHODE ISLAND

:

DECISION

LANPHEAR, J. Before this Court for decision is Lee Pollock’s appeal of Superior Court Magistrate John J. Flynn’s decision denying Mr. Pollock’s application for post-conviction relief, ultimately ordering that Mr. Pollock must continue registering as a sex offender. Jurisdiction is pursuant to G.L. 1956 § 8-2-11.1(d). For the reasons set forth herein, this Court affirms the decision of the magistrate.

I

Facts and Travel

On March 13, 2013, Mr. Pollock entered a plea of *nolo contendere* for one count of possession of child pornography before the Kent County Superior Court. Sentencing was deferred. Pet’r’s Mem. at 1. Mr. Pollock entered into a Deferred Sentencing Agreement with the Department of Attorney General, with approval of the Court. *Id.* Pursuant to this agreement, Mr. Pollock’s case was to be dismissed and sealed upon successful completion of the deferred sentencing period. *Id.* Mr. Pollock successfully complied with the conditions of the Deferred Sentencing Agreement, his case has been dismissed and sealed, and was subsequently expunged. *Id.* His conviction was later sealed.

The basis of Mr. Pollock's application for post-conviction relief was his position that pursuant to G.L. 1956 § 12-19-19 he was not under a duty to register as a sex offender once he successfully completed the terms of the deferred sentence. Appl. Postconviction Relief at 2. Claiming his case technically and legally no longer existed due to having been expunged, Mr. Pollock sought a determination that he did not have to register as a sex offender in the State of Rhode Island. *Id.* at 3.

On December 17, 2019, Mr. Pollock's application for post-conviction relief was heard before the magistrate. The magistrate denied Mr. Pollock's application, leaving Mr. Pollock with a continuing duty to register. *See* Order, Dec. 17, 2019. On January 3, 2020, Mr. Pollock filed a notice of appeal of the magistrate's December 17, 2019 order denying his application for post-conviction relief. The parties waived oral argument and the submission of further evidence.

II

Standard of Review

Section 8-2-11.1(d) governs this Court's review of a decision rendered by a magistrate. *State v. Knight*, No. K2-2017-0453A, 2018 WL 2986461, at *2 (R.I. Super. June 8, 2018); *State v. Munoz*, No. P2-2015-2425A, 2017 WL 3923145, at *4 (R.I. Super. Aug. 30, 2017). Section 8-2-11.1(d) provides that:

“A party aggrieved by an order entered by the administrator/magistrate shall be entitled to a review of the order by a justice of the superior court. Unless otherwise provided in the rules of procedure of the court, the review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by the administrator/magistrate, and for enforcement of contempt adjudications of the administrator/magistrate.” Section 8-2-11.1(d).

Pursuant to § 8-2-11.1(d), Rule 2.9(h) of the Superior Court Rules of Practice establishes the standard of review this Court must apply when reviewing decisions rendered by a magistrate.

Specifically, Rule 2.9(h) states that:

“The Superior Court justice shall make a *de novo* determination of those portions to which the appeal is directed and may accept, reject, or modify, in whole or in part, the judgment, order, or decree of the magistrate. The justice, however, need not formally conduct a new hearing and may consider the record developed before the magistrate, making his or her own determination based on that record whether there is competent evidence upon which the magistrate's judgment, order, or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter with instructions.” Superior Court R.P. 2.9(h).

Thus, the Superior Court justice conducts a *de novo* review of the portions of the record appealed. *Knight*, 2018 WL 2986461, at *2 (citing *Paradis v. Heritage Loan and Investment Co.*, 678 A.2d 440, 445 (R.I. 1996)). The record on appeal includes “[t]he original papers and exhibits filed with the Superior Court, the transcript of the proceedings, and the docket entries.” Superior Court R.P. 2.9(f). *Id.*

III

Analysis

The basis of Mr. Pollock’s appeal is that his duty to register as a sex offender ceased when his deferred sentence was complete. Pet’r’s Mem. at 2. Mr. Pollock’s argument on appeal is that the expungement of his deferred sentence pursuant to § 12-19-19 results in him never having been convicted, and therefore he is not subject to the registration obligation. *Id.* The State of Rhode Island, by and through its attorneys, respectfully requests this Court deny Mr. Pollock’s post-conviction relief and verify his continuing duty to register. The State posits that the duty to register continues after a deferred sentence has ended, unless the case was “overturned, reversed or otherwise vacated” pursuant to G.L. 1956 §§ 11-37.1-2 and 11-37.1-3. State’s Mem. at 1. After

reviewing the memoranda submitted by Mr. Pollock and the State, this Court has determined that Magistrate Flynn’s ruling of December 17, 2019 should be affirmed, and Mr. Pollock is required by statute to follow the registration statute of § 11-37.1-3.

Section 11-37.1-1 of the Rhode Island General Laws is known as the Sexual Offender Registration and Community Notification Act (the Act). Chapter 11-37.1-1. “Sex-offender registration is a civil regulatory process for those convicted of sexual offenses.” *DiCarlo v. State*, 212 A.3d 1191, 1198 (R.I. 2019). The Rhode Island Supreme Court has further explained that “sex-offender registration does not constitute criminal punishment.” *Id.* The purpose of the Act is not to punish individuals but to protect the community. *State v. Germane*, 971 A.2d 555, 593 (R.I. 2009) (citing *In Re Richard A.*, 946 A.2d 204, 213 (R.I. 2008)). Registration is a consequence of the conviction, as defined by the Act, regardless of any later change in the status of that conviction. *See id.*

In *Smith v. Doe*, 538 U.S. 84 (2003) the United States Supreme Court considered whether Alaska could impose its sex offender registration requirements retroactively—to offenses occurring prior to the act’s passage. Reasoning that sex offender registration requirements were civil remedies rather than punishment, the retroactive provisions were deemed enforceable. Referencing *Kansas v. Hendricks*, 521 U.S. 346 (1997) the Smith Court held:

“Whether a statutory scheme is civil or criminal ‘is first of all a question of statutory construction.’” *Smith*, 538 U.S. at 92.

“As we observed in *Hendricks* . . . an imposition of restrictive measures on sex offenders adjudged to be dangerous is ‘a legitimate nonpunitive governmental objective and has been historically so regarded.’” *Id.* at 93.

“In this case, as in *Hendricks*, ‘[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.’” *Id.*

Section 11-37.1-3(a) provides that:

“[a]ny person who, in this or any other jurisdiction: (1) has been convicted of a criminal offense against a victim who is a minor . . . shall be required to register his or her current address with the local law enforcement agency having jurisdiction over the city or town in which the person having the duty to register resides for the time period specified in § 11-37.1-4.” Section 11-37.1-3.

Pursuant to § 11-37.1-2(d)(1)(iii), “‘conviction’ or ‘convicted’ means, and includes, any instances where . . . [t]here has been a plea of guilty or nolo contendere for any offense specified in subsection (f) or (v), or a federal offense, a foreign offense, or a military offense, regardless of whether an appeal is pending.” Section 11-37.1-2(d)(1)(iii). Additionally, § 11-37.1-2(d)(2) provides that “in the event that a conviction . . . has been overturned, reversed, or otherwise vacated, the person who was the subject of the conviction shall no longer be required to register as required by this chapter and any records of a registration shall be destroyed.” Section 11-37.1-2(d)(2).

Mr. Pollock entered a plea of *nolo contendere* and entered into a Deferred Sentencing Agreement for one count of possession of child pornography. Pet’r’s App. C at 5. It is undisputed that Mr. Pollock successfully completed his deferred sentence, and his case was subsequently dismissed and sealed. However, pursuant to the Act, Mr. Pollack stands as convicted. Section 11-37.1-2(d)(1)(iii). The statutory definition specifically provides that a conviction includes an instance where a plea of nolo contendere has been entered. Further, Mr. Pollock executed an agreement in connection with his plea agreeing to be subject to the registration law. Pet’r’s App. A. Specifically, the Special Conditions of Sentence and Probation form states “Defendant shall register as a Sex Offender as required under Rhode Island General Law § 11-37.1-1 *et seq.*, otherwise known as the ‘Sexual Offender Registration and Community Notification Act.’” *Id.*

Mr. Pollock signed this form on March 13, 2013. Therefore, although Mr. Pollock's deferred sentence was later expunged, his duty to register pursuant to § 11-37.1-3 remains intact.

Mr. Pollock contends that because his case was sealed, he no longer is obligated to register as a sex offender. Pet'r's Mem. at 3. However, the sealing or expungement was not part of Mr. Pollock's sentencing agreement. Pet'r's App. A. The agreement entered on March 13, 2013 was a deferred sentence with special conditions, including his registration as a sex offender. Appendix C. The act of having his record sealed was a subsequent action taken by the Court on Mr. Pollock's request on his own pursuant to § 12-19-19(c). Therefore, since the 2013 agreement with the Court included the requirement to register, in accordance with the Act, his record being expunged after the deferred period does not obviate the requirement that he register pursuant to § 11-37.1-3(a).¹

For these reasons, this Court finds Mr. Pollock is still subject to the Act and is required to register and notify pursuant to the Act.

IV

Conclusion

The Decision of Magistrate Flynn is affirmed. Mr. Pollock remains subject to the Sexual Offender Registration and Community Notification Act.

¹ This is consistent with the Rhode Island Supreme Court's finding that, where the General Assembly has established an explicit statutory scheme, this Court should be guarded in modifying records based on its inherent powers. See *State v. Briggs*, 934 A.2d 811, 815-16 (R.I. 2007).



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

For Plaintiff: Glenn S. Sparr, Esq.

For Defendant: Laura N. Nicholson, Esq.