THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NH Supreme Court
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No. 2017-0381

Edward White

v.

The State of New Hampshire

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Dianne Martin, Bar ID No. 15350
Assistant Attorney General
Transportation & Construction Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3675

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

Did the trial court reasonably conclude that Appellant failed to meet his burden to establish that he is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration?

COUNTERSTATEMENT OF THE FACTS

Appellant was tried before a jury and found guilty as charged on an indictment of indecent assault and battery on a child in 1986.[1] AAP 97. The indictment charged that on more than one occasion Appellant indecently assaulted and beat a child under the age of 14. AAP 95 ("on divers dates" Appellant "did indecently assault and beat a child under the age of 14."). The victim of Appellant's crimes was his daughter, who was only 8 or 9 at the time. TR 71-72. Appellant testified that he was emotional at the time and his response was to sexually assault his young daughter. TR 82.

Appellant was also found guilty on a separate indictment charging rape of a child, "to so much of the indictment as charged Indecent Assault and battery on a child under the age of 14 years." AAP 90, 92. Appellant was sentenced to two consecutive prison sentences of two and a half years. AAP 92, 98. While Appellant testified that he only assaulted his daughter twice, the indictments and convictions in this case contradict that claim. TR 65; AAP 90, 95. Appellant's expert relied on Appellant's incorrect representations in her report. AAP 60.

The sex offender registry was enacted in 1992. *State v. Costello,* 138 N.H. 587, 588 (1994). Appellant's crimes on a victim, who was a child, constitute "offenses against

[1] References to Appellant's Brief shall be "AB," to Appellant's Addendum shall be "AAD," to Appellant's Appendix shall be AAP, and to the transcript shall be "TR."

a child." RSA 651-B:1, VII(a). Because he committed offenses against a child, Appellant is considered an "offender against children," and is required to register. RSA 651-B:1, VI. Appellant is a Tier III offender. RSA 651-B:1, X(a). Tier III offenders must register for life. RSA 651-B:6, I, III. Appellant was required to register as an offender against children when he relocated to New Hampshire. RSA 651-B:4.

Because Appellant is a Tier III offender, and his convictions occurred prior to the establishment of the registry, he was entitled to petition the court to be relieved from the registration requirements after having met certain statutory criteria. RSA 651-B:6, V. Appellant submitted a Petition for Relief From Registration Requirements. AA 7-10. For purposes of his Petition, Appellant had a risk assessment performed by Carol J. Ball, PhD. As part of that assessment, Appellant's expert administered two psychological tests. TR 11-12. The tests revealed that Appellant *currently* "has some deviant interests in children." TR 13. Worse yet, he currently shows an interest in pre-pubescent females, the very same age group and gender of his victim. TR 45.

On April 25, 2017, the Hillsborough County Superior Court held a hearing on the Petition. On May 31, 2017, after considering the evidence and the parties' arguments, the trial court (*Abramson*, J.) denied the Petition, finding Appellant had failed to meet his burden under RSA 651-B:6. AAD 4. This appeal followed.

SUMMARY OF THE ARGUMENT

Appellant did not meet his burden of establishing that he is not a risk to the public and no longer poses a sufficient risk to warrant registration. The evidence presented by Appellant showed that he continues to have a sexual interest in prepubescent girls, currently has some deviant interests in children, and scored a 12 percent on a test that measures beliefs of men who justify their sexual behavior with underage children. On this evidence, it can hardly be said that the trial court committed an unsustainable exercise of discretion in denying Appellant's petition. Instead, the trial court's conclusion was reasonable. Because a reasonable person could have come to the same conclusion, Appellant's claims should be rejected and the trial court's Order affirmed.

ARGUMENT

I. STANDARD OF REVIEW

In a petition for relief from registration requirements, in addition to meeting a number of requirements, RSA 651-B:6, V provides that the petitioner bears the burden of demonstrating that he "is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration." RSA 651-B:6, V(c). If, after hearing, all of the requirements of RSA 651-B:6, V are satisfied, and the petitioner meets the high burden of demonstrating that he is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration, the trial court "*may* grant the petition..." *Id.* (emphasis added). In reviewing the trial court's decision, this Court determines only "whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *State v. Lambert*, 147 N.H. 295, 296 (2001). The Court's task is not to determine whether it would have found differently, but only "to determine whether a reasonable person could have reached the same decision as the trial court on the basis of the evidence before it." *Benoit v. Cerasaro*, 169 N.H. 10, 21 (2016) (quotation omitted).

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S PETITION WAS PROPER.

In New Hampshire, an individual convicted of certain offenses is required to register. *See* chapter RSA 651-B. RSA 651-B:6, entitled "Duration of Registration," provides that Tier III offenders like the Appellant "shall be registered for life." However, RSA 651-B:6, V permits a Tier III offender who was convicted prior to the establishment of the registry to petition the court to be relieved from the registration requirements.

RSA 651-B:6, V. The statute sets forth the requirements for a petition for relief from registration requirements. *Id.* Pursuant to the statute, the court may only grant a petition for relief from registration requirements if the offender establishes that he or she has not been convicted of any subsequent offense requiring registration, has successfully completed any period of supervised release, probation, or parole, and has successfully completed an appropriate sex offender treatment program as determined by the court. *Id.* In addition, pursuant to RSA 651-B:6, V(c) the offender has the burden of demonstrating that he or she is no longer a danger to the public *and* no longer poses a risk sufficient to justify continued registration. *Id.*

Here, the trial court properly denied Appellant's Petition for Relief from Registration Requirements because Appellant failed to meet his burden.

A. The Trial Court Was Not Required to Accept Appellant's Evidence.

The crux of Appellant's argument is that, in the context of a petition for removal from registration requirements, when faced with expert or uncontroverted evidence, a trial court has no choice but to accept it. Appellant's position ignores both the plain language of the statute and existing case law and is undermined by the significance of the decision to be made by the trial court.

1. The Plain Language of the Statute Contemplates the Trial Court Weighing the Evidence.

Appellant's argument is undermined by the plain language of the statute. The hearing requirement established in RSA 651-B:6, V(b) contemplates the trial court hearing testimony and assessing credibility. If Appellant's proposition were accepted, the hearing requirement in RSA 651-B:6, V(b) would be rendered meaningless.

Petitioner could simply submit documentation from an expert asserting that he no longer poses a risk sufficient to justify registration and the court would be required to accept that assertion. A hearing would be pointless because the outcome would be predetermined by the expert's opinion. A statute may not be interpreted in a manner that would render its plain language meaningless. *See Appeal of Soucy*, 139 N.H. 110, 116 (1994). Contrary to Appellant's position, that is not what the plain language of RSA 651-B:6, V(b) requires. Instead, RSA 651-B:6, V(b) mandates a hearing before the trial court and grants the court broad discretion in deciding whether to grant the petition after hearing the evidence.

2. *The Trial Court Was Not Required to Accept Appellant's Expert's Conclusion.*

Appellant claims that the trial court erred because it substituted its unqualified opinion for that of an expert. AB 22. In support of his claim, Appellant takes the position that the trial court was bound to accept the conclusion of Appellant's expert. *Id.* Appellant's position is legally incorrect.

Contrary to Appellant's assertion, a trial court is not required to accept the conclusion of an expert witness, even if it is uncontroverted, particularly in these types of cases where the expert's opinion is invariably based in large part upon self-reporting by the offender. *State v. Perrin*, 122 N.H. 88, 94 (1982). Here, the expert's opinion was based upon a self-report interview with the Appellant and psychological testing. AB 11. By establishing the hearing requirement, the legislature provided an opportunity for the trial court to hear the information reported to the expert by the offender, review the tests administered, and assess the credibility of both the expert and the offender. RSA 651-

B:6, V(b). Appellant's position would eliminate the trial court's role as fact finder and improperly place the expert in the role of the trial court contrary to RSA 651-B:6,V.

The trial court was faced with an expert report and testimony that were ambiguous and contradictory. Appellant's expert, Carol J. Ball, PhD, chose which psychological tests to administer to the Appellant as part of her risk assessment, and chose to administer only two psychological tests. TR 11-12. When the tests revealed concerning information relevant to Appellant's risk, the expert opined that one of these same tests she chose to administer was not actually valid. TR 13. As a preliminary matter, this would reasonably raise concerns about the expert's conclusions. In addition, the specific results of the two tests support the conclusion that he continues to pose a risk sufficient to warrant registration. AAP 23-25; TR 45-46.

The two psychological tests administered were the Millon Clinical Multiaxial Inventory-III (MCMI-III) and the Abel Assessment of Sexual Interest. TR 11-12. On the MCMI-III it was determined that Appellant feels that he is being cheated, misunderstood and unappreciated. AAP 61. In addition, he demonstrated some self-defeating personality traits, and Obsessive Compulsive and Avoidant Personality Features. *Id.*

The second test, the Abel assessment, is a test that measures sexual interest patterns and social desirability. TR 13, 45. The test includes a visual reaction test, a cognitive distortion scale, and a social desirability scale. *Id.* On the cognitive distortion scale, "a scale that measures beliefs and attitudes often held by men who justify their sexual behavior with underage males or females," Appellant received "a score of 12 percent with respect to the scale that he justifies sexual behavior with underage females."

TR 46. A score of 40 percent is "highly problematic." AA 62. In her report, Appellant's expert opined that Mr. White's score of 12% was not problematic. *Id.*

On the Social Desirability Scale, a scale that measures a person's unwillingness to admit any violation of common social mores, Appellant had a high score. AA 62. Appellant's expert discounted this result, saying "Everyone who takes that test scores high..." TR 45. Despite this, the expert conceded that, "It's the best thing we have, and so we consistently use it." TR 46.

The visual reaction portion of the Abel assessment differed from other parts of the expert's assessment in that it did not rely on self-reporting by the offender. TR 14. Instead, without the Appellant's knowledge, the test measured Appellant's visual reaction time to various pictures of people of different ages in bathing suits. *Id.* The test indicated that Appellant showed a sexual interest in pre-pubescent females. AA 61; TR 45. The expert testified further that the Abel assessment indicated Appellant had "some deviant interests in children." TR 13.

Despite choosing to administer the test, the expert discounted these negative results, saying she "questioned whether the test is actually valid." *Id.* The expert's later testimony was also contradictory, conceding that this same test was "technically valid." TR 14. Yet, when the test rendered results indicating that Appellant continues to have an interest in pre-pubescent females, the "technically valid" test somehow became questionable. The expert chose not to re-administer the test or administer another test. TR 14. On this record, the trial court was well within its discretion when it gave little weight to this expert's testimony. It is well established that the trial "court could have disbelieved any part of the testimony even if no evidence was introduced to rebut it."

State v. Perrin, 122 N.H. at 94. "The fact that some testimony was that of an expert did not compel a different conclusion." *Id.* In light of the record, Appellant's suggestion that the trial court was required to accept the conclusion of his expert is absurd.

Appellant's argument that the trial court's order was based on a mistake of fact is also meritless.[2] AB 20. The trial court accurately pointed out in its order that the expert "did not testify what range of scores would lead to an individual being labeled as 'problematic' or 'somewhat problematic.'" AAD 4. Appellant does not point to anywhere in the record that the expert testified as to the range of problematic or somewhat problematic scores. The fact that the expert's report indicates that the expert concluded that Appellant's score of twelve percent was not problematic does not render the trial court's accurate statement a mistake of fact. Appellant also makes much of the trial court's statement in its order that Appellant's twelve percent score on the cognitive distortion scale was, at a minimum, "somewhat problematic," when the expert indicated in her report that his score was not problematic. AB 19-21. However, Appellant omits from his argument that the trial court qualified its conclusion, finding the score at least somewhat problematic only "when considered in combination with the Able Assessment result..." AAD 5. Appellant's position also presumes the truthfulness of Appellant in answering the questions on the Cognitive Distortion Scale, which the trial court is not

[2] Appellant's assertion that the trial court also had a fundamental misunderstanding of the statutory criteria is similarly meritless. AB 18. During the hearing the court inquired of the parties as to whether the requested relief was available to the Petitioner as a Tier III offender. TR 60-62. The parties advised the trial court of the recent statutory amendment permitting such offenders to petition for relief. *Id.* There is nothing unusual about the parties informing the court about the applicable law, particularly when it is a recent change. In fact, memoranda of law are routinely provided to courts. Appellant's argument that the trial court failed to understand the statutory relief available and failed to apply the appropriate statutory criteria is directly undermined by the trial courts' recitation both the plain language of the statute and existing case law of the proper standard and inclusion of the appropriate statute in its order. AAD 3.

required to do. In light of Appellant's objective responses on the visual reaction test, it was appropriate, and well within the trial court's discretion, to weigh the subjective results of the Cognitive Distortion Scale in combination with the other test results, in light of all of the evidence before it, and in light of its assessment of Appellant's credibility.

3. The Trial Court Was Not Required to Accept Appellant's Other Uncontroverted Evidence.

Appellant similarly asserts that the trial court was required to conclude that he met his burden because his other evidence, including evidence regarding Appellant's health, was uncontroverted. However, Appellant and his expert testified before the trial court. The State cross-examined both witnesses. Both testified that Appellant had health issues, including high blood pressure, and is required to carry nitroglycerin with him. TR 13; AB 24. During cross-examination, it was established that Appellant's expert had not reviewed any medical records related to the Appellant. TR 29. Therefore, the expert's testimony was solely based upon the representations of the Appellant, a witness whose credibility the trial court was in the best position to assess. TR 34. "The weight to be given testimony ... is for the trial court to determine." *State v. Gourlay,* 148 N.H. 75, 78 (2002). Given that the expert relied upon Appellant's representations regarding his health in her risk assessment, including in determining which tests to administer, it was appropriate for the trial court to weigh the evidence and make its own observations of the Appellant. TR 34. Contrary to Appellant's assertion, the trial court's observations of Appellant during his testimony are appropriate. It is the fact-finder who "observes the

witnesses, judges their credibility and hears their testimony, accepting or rejecting it in whole or in part." *State v. Gubitosi*, 152 N.H. 673, 682 (2005) (quotation omitted).

Moreover, Appellant's claim that the trial court was required to accept the expert's opinion as to Appellant's health because she is an expert who "worked extensively" with him, is misleading. AB 24. The expert in this case was not a medical doctor and had never even seen the Appellant's medical records. AAD 56; TR 29. On cross-examination it was revealed that the alleged "extensive work" consisted of a single four hour meeting with Appellant during which only a portion of the time was spent interviewing him. TR 28. This is not significantly different from the trial court's exposure to Appellant. "As the fact finder, the trial court was entitled to accept or reject, in whole or in part, the testimony of any witness..." *In the Matter of Henry & Henry*, 163 N.H. 175, 181 (2012). Contrary to Appellant's assertion, a trial court is "not required to believe even uncontroverted evidence." *Id.*

Finally, Appellant's claim that the trial court improperly considered his inability to provide records to corroborate his testimony is a stretch. AB 27. The claim is based entirely upon the trial court's inquiry into what efforts were made to locate the records and its statement in the Order that "because of the passage of time, there are no probation records available to corroborate Petitioner's representation." *Id.* This statement is merely an accurate statement of fact. The trial court did not indicate in any way that it held the unavailability of records against Appellant. AAD 2. In support of his argument, Appellant claims that he had testified to the information that would arguably have been in the records, including completion of the terms of his sentence and sex offender treatment records, and provided a sworn affidavit indicating the same. AB 28. Appellant asserts

that the trial court erred because his "testimony had to have been accurate in light of his criminal history." *Id.* Again, as set forth herein above, it is the role of the trial court to assess credibility and weigh the evidence. The trial court is not merely required to accept an individual's testimony as Appellant asserts.

B. The Trial Court Did Not Abuse its Discretion by Denying Appellant's Petition.

Appellant argues that the trial court abused its discretion when it found that he did not meet his burden of proving that he is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. AB 17-18. Appellant claims that the court's finding was against the weight of the evidence presented by the Appellant concerning his risk and health condition.[3] *Id.* As set forth herein, Appellant's position is inconsistent with the record and the law, and should be rejected.

RSA 651-B:6 establishes the procedure for removal of registration requirements of lifetime registrants. Lifetime registrants are individuals convicted of the most serious criminal offenses against children. Accordingly, removal of the registration requirements for a lifetime registrant is a very serious matter. The New Hampshire legislature has specifically charged the trial court with hearing petitions for removal of registration requirements. RSA 651-B:6, V. RSA 651-B:6, V(c) grants the trial court broad

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[3] Appellant's argument that the trial court improperly considered acquitted conduct is without merit. AB 25. First, the Appellant was actually convicted on an indictment charging rape of a child, to so much of the indictment as charged indecent assault and battery on a child under 14. AAP 90, 92. For that reason, testimony regarding that indictment was appropriate. In addition, Appellant's expert testified that if there were additional charges for some kind of sexual misconduct even if they were dismissed, that would be relevant to the risk assessment. TR 41. As a result, testimony clarifying charges of sexual misconduct was relevant. Finally, the trial court clearly stated on the record that she could not consider the charges Appellant was not convicted of as direct evidence and would only consider the testimony for purposes of impeachment. TR 89. Accordingly, Appellant's suggestion that the trial court improperly considered acquitted conduct is baseless.

discretion in deciding whether to grant the petition after hearing the evidence. This discretion is consistent with the stated purpose of the registry to protect of the most vulnerable members of the public, our children. *See, e.g.*, testimony of Rep. Sytek, Sponsor of HB 1543 (Public Hearing on HB 1543, Jan. 10, 1996). In New Hampshire, the law is well settled that sex offenders are a serious threat and the public interest in protecting vulnerable members of the community from sexual predators is a compelling one. *State v. Ploof*, 162 N.H. 609, 627-28 (2011) (citation omitted). In light of that background, the broad discretion granted the trial court in determining whether an offender remains a risk is appropriate. Given the evidence before it, the trial court's exercise of discretion in denying Appellant's petition in this case was very reasonable.

This Court must determine whether a reasonable fact finder could have concluded as the trial court did. *Benoit v. Cerasaro*, 169 N.H. at 21. The record compels that conclusion. Appellant's crime was perpetrated on a young girl of eight or nine years old. As a result, Appellant's current visual reaction and sexual interest in prepubescent girls raise grave concerns about his continued risk. The trial court found that this test result is especially troubling because Appellant's convictions arose from sexual assaults on a prepubescent female. AAD 4.

Given all of the evidence regarding Appellant's responses to pre-pubescent girls, his score on the cognitive distortion test, the inconsistencies in the witness testimony and the exhibits, and the trial court's observations of Appellant's health and his own testimony about his activity level, the trial court's conclusion was eminently reasonable and well within its discretion. Because a reasonable person could have come to the same

conclusion, this Court must defer to the trial court. *State v. Hardy*, 120 N.H. 552, 554 (1980).

CONCLUSION

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court affirm the trial court's decision. Given the limited issues and the well-established law, the State believes oral argument in this case is unnecessary. In the event the Court determines otherwise, Dianne Martin, Esquire will present oral argument for the State.

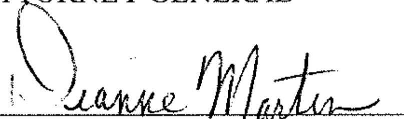
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

March 1, 2018



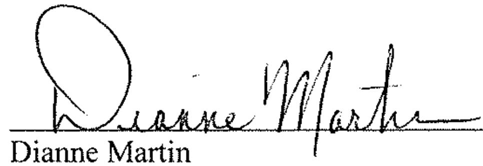
Dianne Martin, Bar No. 15350
Assistant Attorney General
Transportation & Construction Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3675

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were sent via U.S. mail, postage prepaid, to:

Michael J. Iacopino, Esquire
Jenna Bergeron, Esquire
Brennan, Caron, Lenehan & Iacopino, PA
85 Brook Street
Manchester, NH 03104-3605

Counsel for the Appellant



Dianne Martin