COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1671

P.F., SEX OFFENDER REGISTRY BOARD NO. 283404

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, P.F., Sex Offender Registry Board No. 283404 (P.F.), appeals from a judgment of the Superior Court affirming the Sex Offender Registry Board's (board) final classification of P.F. as a level three (high risk) sex offender.[1] On appeal, P.F. claims that the hearing examiner erred in considering prior conduct for which P.F. was not convicted as a basis for applying multiple regulatory risk factors. P.F. also claims that his hearing counsel was ineffective. Finally, P.F. contends that the hearing examiner erred by not making explicit findings regarding the need to make P.F.'s personal information publicly available. We affirm.

[1] P.F. also appeals from an order denying P.F.'s postjudgment motion to remand.

Background. The relevant facts found by the hearing examiner may be summarized as follows. In 2005, P.F. was charged with one count of indecent assault and battery on a child under the age of fourteen, but was found not guilty of that charge following a bench trial. The charge arose from an incident that took place in 2004 in which the six year old daughter of P.F.'s step sister reported that P.F. touched her inappropriately while in the living room of P.F.'s father's home. The hearing examiner, finding the girl's allegations credible and reliable, found "as fact that [P.F.] committed this indecent assault." In 2008, P.F. committed the governing offense in which he repeatedly sexually assaulted his biological daughter, who was six years old at the time. The daughter reported that P.F. rubbed or touched her vaginal area with his hand on multiple occasions.[2] P.F. was convicted of indecent assault and battery on a child under the age of fourteen and sentenced to five to seven years in prison. P.F. denies committing the sex offenses and failed to complete sex offender treatment while in prison. P.F. has a history of substance abuse, criminal charges, probation violations, and disciplinary reports while incarcerated.

[2] During this time, P.F. and his daughter's mother were divorced and the mother had an active restraining order preventing P.F. from coming to her home. The mother chose to allow P.F. to visit with the daughter unsupervised.

On the basis of these circumstances, the hearing examiner determined that P.F. presents a high risk of reoffense and a high degree of dangerousness such that public access to P.F.'s personal and sex offender information is in the interest of public safety. She accordingly ordered P.F. to register as a level three sex offender. On cross motions for judgment on the pleadings on review under G. L. c. 30A, § 14, a Superior Court judge denied P.F.'s motion and allowed the board's motion. P.F. appealed.

Discussion. 1. Regulatory risk factors. P.F. first argues that the hearing examiner erred by applying regulatory risk factors sixteen (public place), twenty-two (number of victims), and thirty-seven (other useful information) based on the 2004 incident involving his step sister's daughter. He contends that a hearing examiner's authority to apply those factors is limited to the language of G. L. c. 6, § 178K (1) (b) (iii), which, he argues, does not permit a hearing examiner to "take a non-conviction into consideration for the factor[s] which look at the dates, number and nature of prior offenses" when determining an offender's risk of reoffense. Since the 2004 incident did not result in a conviction, P.F. claims, it cannot constitute a "prior offense[]" and thus falls outside the scope of G. L. c. 6, § 178K (1) (b) (iii), and its regulations.

It is not clear from the regulations, however, that those factors are derived specifically from G. L. c. 6, § 178K (1) (b) (iii). See 803 Code Mass. Regs. § 1.33(16), (22), (37) (2016). Moreover, "the board has considerable leeway in interpreting the [governing] statute and its regulations." Smith v. Sex Offender Registry Bd., 65 Mass. App. Ct. 803, 813 (2006). See G. L. c. 6, § 178K (1) ("Factors relevant to the risk of reoffense shall include, but not be limited to, the following" [emphasis added]). Here, the hearing examiner found sufficient indicia of reliability in P.F.'s step niece's allegations to determine that P.F. did, in fact, commit the sexual assault. See Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 638 (2011). Based on this finding, the hearing examiner appropriately applied factor sixteen because P.F.'s 2004 "sexual misconduct" occurred in a public place, 803 Code Mass. Regs. § 1.33(16), factor twenty-two because P.F.'s "sexual misconduct" involved two victims, 803 Code Mass. Regs. § 1.33(22), and factor thirty-seven because the nature of P.F.'s "[s]exual [b]ehavior" had escalated over time, 803 Code Mass. Regs. § 1.33(37). Since the hearing examiner's use of the 2004 incident as a basis for the application of these factors was within her discretion and consonant with the regulations, we discern no error.

P.F. also argues that factor sixteen was inapplicable because the 2004 incident did not take place in a "public place." P.F. cites to a paper describing the development and performance of the so-called MnSOST-R risk assessment tool,[3] on which 803 Code Mass. Regs. § 1.33 relies in including the public place factor among the risk-elevating factors, and he quotes from a different risk assessment tool, applicable to juvenile offenders,[4] to point out that the authors of these tools do not list a "living room" as an example of a "public place." There is no indication, however, that the examples listed in these tools are intended to serve as an exhaustive list. And since the hearing examiner could have found that the offense was committed in a "place that is open to the scrutiny of others or where there is no expectation of privacy," 803 Code Mass. Regs. § 1.33(16)(a), we see no error in the application of this factor to P.F.'s case. See Doe, Sex Offender Registry Bd. No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 789 (2006).

2. Ineffective assistance of counsel. P.F. claims that his hearing counsel was ineffective for submitting the summary

[3] See Epperson, Kaul & Hesselton, Minnesota Sex Offender Screening Tool - Revised (MnSOST-R): Development, Performance, and Recommended Risk Level Cut Scores (Minnesota Dept. of Corrections, March 1999).

[4] Epperson, Ralston, Flowers & DeWitt, Scoring Guidelines for the Juvenile Sexual Offense Recidivism Risk Assessment Tool - II (JSORRAT-II), at 11 (rev. Oct. 22, 2009).

of a research article, rather than the full article, that stated in part that incest offenders who deny their offenses are three times more likely to reoffend than incest offenders who took responsibility for their offenses. Based on the summary, the hearing examiner found P.F.'s "denial concerning and risk elevating."[5] P.F. argues that the full article contains qualifying language that diminishes the gravity of the language in the summary, and that the hearing examiner's analysis would have been different had she had the benefit of the full article. The language from the article that P.F. quotes, however, does little to counteract the damaging nature of the summary. Furthermore, the summary was not the only basis on which the hearing examiner found P.F.'s denials to be concerning. She also stated that P.F. "denies or has inconsistently reported numerous other facts in the record; I find his testimony at hearing and other reports to investigators and evaluators to be of questionable credibility." We are unconvinced, therefore, that "there was a reasonable probability that [P.F.'s] classification would have been lower" if the full article had

[5] P.F. contends that the hearing examiner also relied on the summary in attributing risk-elevating weight to P.F.'s less than satisfactory participation in sex offender treatment. The hearing examiner, however, did not mention the summary when considering that factor.

been provided. Poe v. Sex Offender Registry Bd., 456 Mass. 801, 815 (2010).

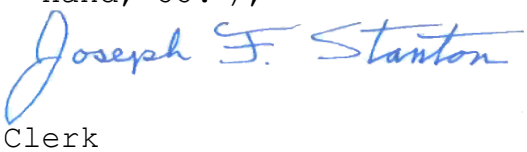
3. Internet dissemination. After P.F.'s brief was filed in this appeal, the Supreme Judicial Court released Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643 (2019) (Doe No. 496501). In response, P.F. filed a motion to remand to the board for a finding on the appropriateness of Internet dissemination. Here, the hearing examiner did not make an explicit finding that Internet dissemination served a public safety interest. Cf. Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., 483 Mass. 131, 144-145 (2019) (level two offender); Doe No. 496501, supra at 662 & n.6 (level two offender). However, where "the underlying facts of the case . . . so clearly dictate the appropriate classification level," we do not exercise our discretion to remand for further findings on the three underlying elements. Doe No. 496501, supra at 657-658 n.4. Given P.F.'s history and having determined P.F.'s reoffense risk and degree of dangerousness to be high, it follows that public access to P.F.'s information is in the interest of public safety. Cf. id. at 655 ("Where a sexually violent offender presents a moderate risk to reoffend and a moderate degree of

dangerousness, Internet publication will almost invariably serve a public safety interest").

Judgment affirmed.

Order entered November 14, 2018, denying motion to remand affirmed.

By the Court (Rubin, Lemire & Hand, JJ.[6]),



Clerk

Entered: February 14, 2020.

[6] The panelists are listed in order of seniority.