STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, V. KEVIN PATRICK DONOVAN, DEFENDANT-APPELLANT.

A-95-3211-T4

Superior Court, Appellate Division

Submitted May 8, 1995 -- Decided May 15, 1995.

Before Judges ABLE, BAKER and CHARLES.

Dewey, Cheatem & Howe, attorneys for appellant (*S.V. Cheatem*, of counsel and on the brief).

Deborah T. Poritz, Attorney General of New Jersey, attorney for respondent (*Ura Hogg II*, of counsel and on the brief).

BAKER, J.A.D.

Defendant Kevin Patrick Donovan entered a conditional plea of guilty pursuant to N.J. Court Rule 3:9-3(f) to a charge of aggravated sexual assault in violation of N.J.S. 2C:14-2a on February 23, 1995. He was sentenced on March 21, 1995 to a term of 20 years' imprisonment, with not less than 10 years to be served before release on parole. The trial court had denied a motion to suppress statements made to police in El Paso, Texas while in custody there on a different matter. Moreover, the court focused on that statement in finding that defendant was a compulsive and repetitive sex offender and thus both imposed an ATDC sentence under N.J.S. 2C:47-3 and included in the sentence a recommendation that defendant be characterized as a Tier III offender for purposes of post-release registration and community notification. In this appeal, defendant challenges both the admissibility of the Texas statements and the constitutionality of the registration and notice aspects of what has come to be known as "Megan's Law."

The facts developed before the trial court are troubling indeed. Just after 4 p.m. on October 29, 1994, eight-year-old Patricia C.[1] of the Stelton section of Edison Township asked her mother for permission to go to a store located less than one-half mile from her

1. Because of the age of the victim and the nature of the offense, the full name of the child will not be disclosed.

home to buy a comic book. The mother agreed and the third-grader promised to be home in 20 minutes. It was not until after dark on October 31 that search teams found the little girl, battered, sexually abused and fighting for her life, in a wooded area more than three miles from her home and the store she had started off towards.

When she had recovered sufficiently to speak with police investigators, Patricia provided a highly specific description of her assailant, an individual she had seen before in the neighborhood but whose name she did not know. By November 4, 1994, police had assembled sufficient facts to seek an arrest warrant for the defendant. By then, however, defendant had fled the jurisdiction.

A Middlesex County grand jury returned an indictment charging defendant with aggravated sexual assault, attempted murder and other offenses on November 12, 1994. However, because defendant was then considered to be a fugitive and because it was believed that knowledge of the indictment might cause defendant to be even more secretive in his movements, the Prosecutor applied to the assignment judge to seal the indictment. That application was granted. Data as to the existence of the indictment was entered in the computerized files of the National Crime Information Center (NCIC) and was available to law enforcement agencies only.

On December 3, 1994, defendant was arrested in El Paso, Texas, for possession of a small amount of a controlled substance. The hearing transcript indicates that Texas police conducted a motor vehicle stop and search which uncovered the unspecified substance. While few details are available from the hearing transcript with respect to this matter, it is clear that defendant was advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), and invoked his right to counsel and his right to remain silent.

As a result of this arrest, defendant was placed in the El Paso jail for processing. The desk officer assigned to such routine matters entered defendant's data into a computer linked to the NCIC and retrieved the information as to the outstanding New Jersey indictment and warrant. Noting the similarities of the facts of the assault to a homicide committed three days earlier in El Paso, the desk officer notified the detective assigned to the murder investigation.

Detective John Walker of the El Paso police department testified at the suppression hearing here that seven-year-old Caitlin Fleming had been found murdered in a wooded area several miles from her home on November 30, 1994. The facts underlying the Fleming murder were strikingly similar to the facts of the New Jersey attack as well as to the facts of two earlier homicides, one in Kansas in March 1994 and the second in Oklahoma in July 1994. In each of the four cases, a young grammar-school-aged girl disappeared in broad daylight during the hours just after school let out for the day. In each case, the child had been beaten, sexually assaulted and strangled. In each case, the child had been taken to a heavily wooded area far from the child's home. In each case the assailant had taken great pains to ensure that no physical evidence of any kind could link him to the crime. In particular, the assailant appeared aware of the evidentiary value of spermatozoa to a DNA analysis and had flushed each victim's vaginal cavity with a spermicide fluid of suf-

ficient strength and volume that no testworthy samples could be obtained from the victim's body. Credit card, motel and other records established that defendant had been present in each of the four communities prior to each of the attacks and had left each jurisdiction within 24 hours after each victim disappeared. The sole distinction among the four cases was that Patricia C. had somehow survived the attack and was able to describe and identify her assailant.

Detective Walker, accompanied by Detective Robert DeBellis, decided to interrogate defendant with respect to the Fleming homicide. They removed him from his cell at the city jail to an interview room at the adjacent police headquarters. They advised him that they wished to question him with regard to the Fleming homicide. While the evidence is contested, the trial court found and we accept that defendant was given his Miranda warnings and chose to waive his rights. Lengthy detailed questioning failed to uncover a single fact that would aid in a Texas homicide prosecution.

The detectives briefly withdrew from the room and decided jointly to expand their inquiries to include the earlier cases. They first called Kansas authorities, obtained as many details as they could of the little girl's death there. Then they returned to the room and told defendant that they had a few additional questions with respect to other matters in other jurisdictions. Again a lengthy and detailed set of questions failed to elicit information linking defendant further to that offense.

The officers took another longer break allowing defendant to rest and eat and allowing themselves time to make contact with the appropriate officers in Oklahoma with respect to that homicide. Questioning resumed after defendant was again advised of his Miranda rights. This time the officers focused on the Oklahoma case. This third set of intense questioning still produced nothing of value to the officers.

Finally, the detectives took yet another break and spoke by telephone to Middlesex County Prosecutor's Office detectives. The New Jersey officers noted their intent to fly at once to El Paso to begin proceedings to bring defendant back to New Jersey. While the New Jersey officers argued that they should be allowed to proceed first since they had the strongest case, the Texas officers stated that they could conduct an investigation as well as any group of policemen. Thus, the Texas detectives told them to wait until they had concluded the Texas end of the investigation and stated they would notify the New Jersey officers of the results of their probe.They then returned to the interview room and began questioning defendant about the New Jersey case.

At no time before or during the course of this fourth and final set of questions was defendant told that he was under indictment in New Jersey nor that the child victim there had survived and could identify her assailant. None of defendant's responses suggested in any way that he knew that the child had survived, much less that charges were pending against him.The detectives instead kept pressing defendant to make some sort of statement that would implicate him in all of the cases, particularly the Fleming case. Finally, they began to taunt defendant, stating that sooner or later he would make a mistake, that there was no such thing as "the perfect crime" and that eventually he would be executed

for the murders. At that point, according to Detective Walker, defendant made the statements at issue here. In sum, defendant said that even if he were to confess to the crimes and provide details, the lack of physical evidence would forever bar police from prosecuting him:

"I'm not stupid. I know what the law is.Even if I said I knew what that little girl looked like, that she was blond and wore glasses and had red sneakers, even if I said I knew what kind of woods her body was in, in a bunch of pine trees, no matter what I said, you still couldn't get me. Anybody could know those things."

Defendant was incorrect in that final statement. At no time had any of the publicity with respect to the New Jersey case disclosed that Patricia C. wore glasses or that the area in which she had been found was a pine forest. Thus, the statement was directly inculpatory with respect to the New Jersey case. But defendant did not stop there. He continued: "Maybe I really like little girls. Maybe I like them so much I have to have them. Maybe I don't know how to stop myself from having them. Maybe I'm going to go on having little girls for the rest of my life. And there's nothing at all you can do about it." It was this portion of the statement that led to the trial court's conclusion that defendant was a repetitive compulsive sex offender and should be classified Tier III.

As noted earlier, the single distinction in the four cases of which Texas police were aware is the fact that only one victim had survived and could identify her assailant. That distinction proves central to our analysis, for it is clear that there was never sufficient independent evidence to prosecute defendant for the El Paso homicide. Indeed, the only jurisdiction which had sufficient evidence to proceed was New Jersey. Although the Texas officers, led by Detective Walker, hoped to obtain information through questioning defendant that would change that balance, the fact remains that defendant had only been formally charged in one jurisdiction.

Moreover, Detective Walker testified that, from the outset of his investigation of defendant, he was aware of the existence of the New Jersey charges yet did not inform defendant. While he wanted to obtain statements sufficient to proceed with criminal charges in the Fleming case, he further testified that he "would have been satisfied if the [expletive deleted] had been sent away anywhere -- Kansas, Oklahoma, New Jersey, it didn't matter."

After defendant was informed of the New Jersey charges, he waived extradition and was returned to New Jersey. The trial court held a hearing on February 23, 1995, concluding that the statements made in Texas were admissible. Sentencing went forward on March 21, 1995 and this appeal followed.

First of all, in our view, the admissibility of defendant's statements to the Texas police is governed entirely by State v. Sanchez, 129 N.J. 261 (1992). Under the Sanchez standard, there is no possible basis for the admissibility of the statements as they were both post-indictment and uncounselled. The statements therefore cannot be used as evidence against defendant and he must be permitted to withdraw his guilty plea, if he chooses, and

proceed to a trial without such statements. Moreover, the statements cannot be relied upon in any way for purposes of sentencing.

Secondly, we must deal with those legislative enactments known as “Megan's Law.” N.J.S.A. 2C:11-3, as amended by L. 1994, c. 132, Sec. 1; N.J.S.A. 2C:25-29, as amended by L. 1994, c.137, Sec. 2; N.J.S.A. 2C:43-7, as amended by L. 1994, c. 127, Sec. 1 and c. 130, Sec. 3; N.J.S.A. 2C:44-3, as amended by L. 1994, c. 127, Sec. 2 and c. 130, Sec. 4; N.J.S.A. 2C:47-1, as amended by L. 1994, c. 130, Sec. 5; N.J.S.A. 2C:47-3, as amended by L. 1994, c. 130, Sec. 6 and c. 134, Sec. 2; N.J.S.A. 2C:47-5, as amended by L. 1994, c. 134, Sec. 3; N.J.S.A. 2C:52-2, as amended by L. 1994, c. 133, Sec. 6; N.J.S.A. 30:4-27.2, as amended by L. 1994, c. 134, Sec. 5; N.J.S.A. 30:4-27.10, as amended by L. 1994, c. 134, Sec. 6; N.J.S.A. 30:4-27.12, as amended by L. 1994, c. 134, Sec. 7; N.J.S.A. 30:4-27.13, as amended by L. 1994, c. 134, Sec. 8; N.J.S.A. 30:4-27.15, as amended by L. 1994, c. 134, Sec. 9; N.J.S.A. 30:4-27.17, as amended by L. 1994, c. 134, Sec. 10; N.J.S.A. 45:14B-28, as amended by L. 1994, c. 134, Sec. 11; N.J.S.A. 52:4B-44, as amended by L. 1994, c. 134, Sec. 5; and L. 1994, c. 127 to 137 (amendments collectively referred to as “Megan's Law”).

Our concern with Megan’s Law and its applicability to this defendant begins with the fact that the law did not take effect until after the assault on Patricia C. As we find that its fundamental purpose is punitive, we thus conclude that it cannot withstand ex post facto analysis under Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

There is simply no restriction on the use to which such information can be put that would bring it within the concept of a regulatory as opposed to a punitive scheme. We are unable to distinguish between the registration and notification elements of this statutory enactment so as to save either from constitutional defect. We agree fully with the California court in In re Reed, 33 Cal. 3d 914, 920-922 (1983), that registration itself is punitive. To go further than that and not merely allow but compel public disclosure of a defendant’s past is clearly punitive and unwarranted. See Artway v. Attorney General, 876 F.Supp. 666, 688-692 (D.N.J. 1995). That the public notice elements will be misused is clear from the attack on an innocent individual mistaken for a parolee as to whom notice had been given. See New Jersey Law Journal, “Attack Sparks Call To Revamp Megan's Law,” Jan. 16, 1995.

Despite the seemingly hysterical denunciations of our dissenting colleague, we are not insensitive to the horrific facts of this case. But neither can we be insensitive to the truism that hard facts can make bad law, and we have no choice but to conclude that it is bad law to admit statements obtained unlawfully, bad law to impose additional punishment on an ex post facto basis and bad law to require registration and community notification on offenders who have paid their debt to society.

REVERSED AND REMANDED.

CHARLES, J.A.D., dissenting:

Three little girls are dead. A fourth barely escaped with her life. And the self-confessed repetitive, compulsive sex offender responsible asks this Court to set aside his guilty plea and protect him from having to register as a sex offender on his release from prison and from having communities into which he moves notified of his criminal record. All this, defendant asks, because out-of-state police officers acting lawfully by out-of-state standards technically violated a rule imposed in New Jersey on New Jersey law enforcement officials. The majority agrees; I do not and thus I must dissent.

First and foremost, I cannot agree that a standard of New Jersey constitutional law should be applied to the actions of police officers in another jurisdiction acting lawfully under the strictures of their own jurisdiction absent clear and compelling evidence that those out-of-state officers were acting as agents of their New Jersey counterparts. Like the trial court, I do not find such clear and compelling evidence in the record of this case. Thus, like the trial court, I would reject defendant's challenge to the admissibility of statements made to the El Paso police.

It is crystal clear that New Jersey law imposes substantial safeguards in the area of post-indictment statements and the waivers sufficient to forego the right to counsel. State v. Sanchez, 129 N.J. 261 (1992). But the applicability of New Jersey law to the conduct of officers from another jurisdiction depends on more than the mere fortuity that the evidence ultimately aids a New Jersey prosecution. An actual agency relationship between and among the officers of the two jurisdictions is required before the conduct of one will affect the admissibility of the evidence on behalf of the other. State v. Mollica, 114 N.J. 329 (1989).

Although the El Paso officers clearly used the information entered into the NCIC database by New Jersey authorities in their questioning of defendant, it is equally clear that their primary focus and purpose was, in the words of El Paso Homicide Detective John Walker, to "hang Donovan for the murder of Caitlin Fleming." The officers did not intend to develop evidence for use in a New Jersey prosecution; their intent was to develop a prosecutable case in Texas. The simple fact that the defendant's words ultimately proved insufficient to support a Texas prosecution does not render them inadmissible in New Jersey. This analysis should not change merely because the Texas officers realized that anything defendant said might be useful to New Jersey authorities.

Moreover, regardless of the admissibility of the statements for trial purposes, they are clearly admissible for purposes of sentencing, since the rules of evidence do not apply to sentencing proceedings. N.J.R.E. 101(a)(2)(C).

Secondly, I see no constitutional infirmity in New Jersey's so-called "Megan's Law" and its application to this defendant under these circumstances. In my view, "Megan's Law" is not primarily punitive in its intent and therefore its ex post facto application in this case does not violate constitutional restraints against imposing additional punishment.

Registration of sex offenders is neither new to American jurisprudence, nor cruel and unusual in any constitutional sense. Indeed in the four times other than this case wherein this law has been tested in New Jersey, all of the judges have found registration to be wholly unobjectionable. See Artway v. Attorney General, 876 F.Supp. 666, 688 (D.N.J. 1995) (Politan, J.);Doe v. Attorney General, BUR-L-1595 (Law Div. 1995) (Wells, J.); State v. Choy, 94-08-566A (Law Div. 1995) (Subryan, J.); Diaz v. Whitman, 94-CV-6376 (D.N.J. 1995) (Bissell, J.). The Reed case on which the majority applies is inapposite since it was based on the applicability of registration requirements to non-felons.

Finally, community notification as provided for by the law does little more than centralize and make proactive the disclosure of information already in the public record. Since there has already been a judicial determination here that this defendant is a repetitive, compulsive sex offender, there is no basis for rejecting the community notice provisions here.

I would affirm.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-95-522

STATE OF NEW JERSEY :

vs. : ORDER

KEVIN. P. DONOVAN, :

Defendant. :

_____

The appeal of this matter by the State of New Jersey is on this 23rd day of May, 1995, docketed as to all issues raised in the dissent. Simultaneous briefing is directed and both appellant and respondent are to file briefs with this Court on or before July 6, 1995.

STEPHEN W. TOWNSEND, Clerk
For the Court