STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: February 4, 2013)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**C.A. No. PM 06-6631**
	:	
LEWIS J. COUNNAS	:	

DECISION

GIBNEY, P.J. Before the Court is Petitioner Lewis Counnas' Motion to Stay, pending appeal, the entry of an order of a Magistrate of this Court, affirming a decision of the Sex Offender Board of Review that classified Mr. Counnas as a Level III sex offender. For the reasons discussed herein, the Court denies Mr. Counnas' motion.

I
Facts and Travel

A brief history of the somewhat unusual travel of this case is necessary. On January 30, 2004, Lewis Counnas pled nolo contendere to one count of first degree sexual assault for an incident occurring on February 6, 2003. (Tr. Nov. 30, 2012 at 5.) A justice of this Court imposed a fifteen year sentence, with three years to serve at the Adult Correctional Institution, twelve years suspended and twelve years probation, and required Mr. Counnas to register as a sex offender. Id. At the time of sentencing, Mr. Counnas had two prior, similar offenses on his record: On October 5, 2000, he had pled nolo contendere to one count of simple assault and battery and received one year probation. Id. at 7. On June 20, 2001, he had pled nolo contendere to simple assault and received one year suspended sentence and one year probation. Id. at 8. All three incidents involved assaults of an alleged sexual nature on women that Mr. Counnas came in

contact with through his work as a massage therapist and personal trainer. (Tr. Jan. 17, 2013 at 2-3.)

On November 16, 2006, approximately three months after Mr. Counnas' release from the A.C.I., the Sex Offender Board of Review ("Board") issued a decision classifying Mr. Counnas as a Level III risk to re-offend under G.L. 1956 §§ 11-37.1-1 et seq., the Sexual Offender Registration and Community Notification Act. (Tr. Nov. 30, 2012 at 2.) A Level III classification, the highest possible under the relevant guidelines, indicates that an individual presents a high risk of re-offending. See R.I. A.D.C. 49-2-1:1.0. Mr. Counnas timely filed a request with this Court on November 28, 2006 to review the Board's classification. Id. On or around August 28, 2007, Superior Court Magistrate Smith held a hearing on this matter. Id. at 3. Due to his illness and subsequent death, Magistrate Smith did not render a decision. Id. Thus, an order never entered, and Level III notification did not issue.[1]

Approximately five years later, in or about September 2012, this Court held a status conference in this matter and informed counsel for both parties that they could submit supplemental or updated information. (Tr. Nov. 30, 2012 at 4.) Mr. Counnas' counsel submitted updated information on Mr. Counnas' employment, treatment, and family life, as well as information indicating that Mr. Counnas had not had any issues with law enforcement or problems with the community since the previous hearing in 2007. Id. At a hearing on November 9, 2012, Superior Court Magistrate Flynn allowed Mr. Counnas to present further evidence and testimony. Id. at 5. After reviewing the record from the Board and considering the parties' various submissions and arguments, Magistrate Flynn affirmed the Board's classification of Mr.

[1] It appears that in absence of an order entering his Level III classification, Mr. Counnas has had Level I status for the past six years. See Tr. Jan. 17, 2013 at 12; Counnas Mot. For Stay Pending Appeal.

Counnas as a Level III offender in a decision rendered November 30, 2012. On December 14, 2012, Mr. Counnas moved to stay entry of Magistrate Flynn's order pending appeal, which motion Magistrate Flynn denied on January 15, 2013.

On January 15, 2013, pursuant to G.L. 1956 § 8-2-39.2(j), Mr. Counnas filed an appeal of the Magistrate's decision with this Court. This Court held a hearing on Mr. Counnas' Motion to Stay on January 17, 2013.

II
Law and Analysis

Mr. Counnas argues that he is entitled to a stay of entry of Magistrate Flynn's decision pending his appeal to this Court because he satisfies the four-factor standard that the Rhode Island Supreme Court articulated in Narragansett Elec. Co. v. Harsch, 117 R.I. 940, 367 A.2d 195 (1976).[2] In Harsch, our Supreme Court held that a stay pending appeal will not issue "unless the party seeking the stay makes a 'strong showing' that (1) [he or she] will prevail on the merits of [his or her] appeal; (2) [he or she] will suffer irreparable harm if the stay is not granted; (3) no

[2] The Supreme Court in Harsch looked to Federal Appellate Rule 8 to determine the criteria that it should apply in deciding whether to grant a stay pending appeal under Rule 8 of the Rhode Island Supreme Court Rules. See 117 R.I. at 942, 367 A.2d at 197. The Court noted that Rule 8 of the Rhode Island Supreme Court Rules is "patterned after Federal Appellate Rule 8." Id. Although neither party cites to it in this case, Rule 62 of the Rhode Island Superior Court Rules of Civil Procedure addresses stays pending appeals. See R.I. Super. R. Civ. P. 62; see also State v. Germane, 971 A.2d 555, 593 (R.I. 2009) (holding that sexual offender registration and notification is a civil process). Rule 62 does not, however, specifically set forth the grounds that this Court should consider in deciding whether to grant a stay.

Rule 62 of the Rhode Island Superior Court Rules of Civil Procedure is in conformance with Federal Rules of Civil Procedure 62. See R.I. Super. R. Civ. P. 62 Committee Notes. In instances "where the [f]ederal rule and our state rule are substantially similar, [this Court] will look to the [f]ederal courts for guidance or interpretation of our own rule." Heal v. Heal, 762 A.2d 463, 467-77 (R.I. 2000). Since the standard that federal courts employ to decide a motion for a stay pending appeal under F.R.C.P. 62 is nearly identical to the four-factor standard that the Rhode Island Supreme Court articulated in Harsch, and since both parties appear to have argued their respective cases under the four Harsch factors, this Court will consider Mr. Counnas' motion using the four factors laid out in Harsch. Compare Wright, Miller and Kane, 11 Federal Practice & Procedure § 2904 (3rd ed. 2012), with Harsch, 117 R.I. at 942, 367 A.2d at 197.

substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." 117 R.I. at 942, 367 A.2d at 197 (citations omitted). "Since [these] stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." Hilton v. Braunskill, 481 U.S. 770, 777 (1987)). A court must determine in each individual case whether the balance of equities favors granting a stay. See Wright, Miller and Kane, 11 Federal Practice & Procedure § 2904 (3rd ed. 2012). Accordingly, this Court will analyze the application of each of the four factors to Mr. Counnas' case in seriatim.

A
Likelihood of Success on the Merits

Mr. Counnas argues, in essence, that he should succeed on appeal because Magistrate Flynn failed to correct or adequately address three critical errors that the Board made when it classified him as a Level III offender. (Tr. Jan. 17, 2013 at 8.) First, he argues that the Board erred when it found that his crime involved the use of unnecessary violence. Id. at 10. Mr. Counnas suggests that the question of what constitutes "unnecessary violence" in the context of sexual assault is a legal question that this Court or a reviewing court needs to address on appeal. Id. Second, he maintains that the Board incorrectly found that he was not actively receiving treatment at the time of his release. Id. at 11. Third, Mr. Counnas asserts that the Board mistakenly concluded that his crime occurred in a public place. Id. at 7. In addition, Mr. Counnas generally suggests that the Magistrate failed to give sufficient weight to the fact that he has not had any problems with law enforcement during the previous six years. Id. at 10, 18. In response, the State maintains that the Magistrate issued a well-reasoned decision in which he specifically addressed Mr. Counnas' alleged bases of error. Id. at 15.

In order to assess Mr. Counnas' likelihood of success on appeal, a brief overview of the standard of review that will apply is necessary. A Magistrate's review of a classification

decision of the Sex Offender Board of Review is governed by § 11-37.1-16. That provision provides that the State has the initial "burden of going forward . . . which shall be satisfied by presentation of a prima facie case that justifies the proposed level of and manner of notification." Sec. 11-37.1-16(a). A prima facie case is defined as a showing that "(1) A validated risk assessment tool has been used to determine the risk of re-offense; [and] (2) Reasonable means have been used to collect the information used in the validated assessment tool." Sec. 11-37.1-16(b). After the State has made out a prima facie case, the Magistrate "shall affirm the determination [of the Board] unless it is persuaded by a preponderance of the evidence that the determination . . . is not in compliance with this chapter or the guidelines adopted pursuant to this chapter." Sec. 11-37.1-16(c).

In turn, this Court's review of the Magistrate's decision is governed by Administrative Order No. 94-12. Administrative Order No. 94-12 provides that this Court shall perform a de novo review of a magistrate's decision, based on the record developed before the magistrate, in order to determine whether the magistrate's decision is supported by competent evidence. This Court need not formally conduct a new hearing but it has the discretion to receive further evidence and recall witnesses. See Admin. Order No. 94-12; Paradis v. Heritage Loan and Inv. Co., 678 A.2d 440, 445 (R.I. 1996). This Court may "accept, reject or modify, in whole or in part, the judgment [or] order . . . of the [magistrate]." Id.

In the instant case, the Magistrate reviewed the record from the Board and noted that the Board used two risk assessment instruments, the Static-99 and the Stable 2000. (Tr. Nov. 30, 2012 at 10.) He indicated that the former assessment characterized Mr. Counnas as having a moderate to high risk to re-offend, while the latter characterized him as having a moderate risk to re-offend. Id. The Magistrate noted that the Board, as it is authorized to do under § 11-37.1-

6(b), also considered other documents, including Mr. Counnas' criminal record, various institutional reports and treatment information, and concluded that the Stable 2000 score under-represented Mr. Counnas' risk of re-offense. Id. at 10-12. The Magistrate concluded that the factors relied upon by the Board in classifying Mr. Counnas as a Level III offender were supported by facts in the record. He found that the State had made out a prima facie case under § 11-37.1-16(b). Id. at 12-13.

The Magistrate then ruled that Mr. Counnas had failed to show by a preponderance of the evidence that the Board's classification was not in compliance with the relevant statutes and regulations. Id. at 13. In particular, the Magistrate disagreed with Mr. Counnas' assertion that the Board erred in concluding that he used "unnecessary violence" in committing the crime. Id. at 14. In so doing, the Magistrate pointed out that in the police report, Mr. Counnas' victim had indicated that she had made several attempts to extricate herself from his restraint but was unable to do so. Id. The Magistrate specifically concluded that the Board could have reasonably considered this information in making its decision.[3] Id. In addition, the Magistrate disagreed with Mr. Counnas' assertion that the Board was clearly wrong in concluding that the crime

[3] In reference to Mr. Counnas' argument that his crime did not involve "unnecessary violence," the Magistrate concluded:

> "when considering the police report from Victim Number 3 . . . particularly where the victim tried to push him off her, asking him to stop, and he was lying on top of her, she tried to move her legs from side to side to get out, the Court believes that could be reasonably considered by the Board as, quote, 'Exertion of physical force so as to injure or abuse,' end of quote, which is how violence is defined in Webster's Dictionary as contained in [Mr. Counnas'] memo." (Tr. Nov. 30, 2012 at 14.)

The Court notes that the guidelines specifically allow the Board to consider the degree of violence. See R.I. Admin. Code 49-2-1 Appendix.

occurred in a "public place" because the record indicated that Mr. Counnas had advertised and distributed fliers in an effort to bring the public into his place of business. Id. at 14. Based on the record, the Magistrate concluded that the Board's determination in 2006 was not in error and was in compliance with all relevant statutes and regulations. Id. at 19.

The Magistrate did not end his review there, however. Instead, he went on to address the supplemental information that Mr. Counnas had submitted. Id. at 19. He emphasized Mr. Counnas' clean record during the six years since his release and acknowledged that this evidence made for "a much closer decision" than if the matter had been decided in 2007. Id. at 21. Nonetheless, the Magistrate noted that although Mr. Counnas had not re-offended in the past six years, the Static 99 assessment instrument had characterized Mr. Counnas as having a thirty-one percent chance of re-offending over a ten-year period and that period has yet to fully elapse. Id. at 21. The Magistrate also read into the record an updated letter from one of Mr. Counnas' treatment providers, chronicling Mr. Counnas' treatment history since his release in August 2006. Id. at 20. The letter clearly indicated that Mr. Counnas had actively participated in a treatment program from the time of his release through October 2008, and thereafter transferred to a different program. Id. The letter also stated, however, that as of 2012, Mr. Counnas was still in the early stages of treatment. Id. at 21. In upholding the Board's decision, the Magistrate reasoned that many of the original factors that the Board had cited in 2006 as tending to establish Mr. Counnas' high risk of re-offending had not diminished with the passage of time. Id. at 22.

From this brief review of the Magistrate's decision, it appears that the Magistrate completed the review required by § 11-37.1-16, based his decision on competent evidence, and carefully addressed each of the three alleged errors upon which Mr. Counnas bases his appeal. Of course, this Court cannot predict with certainty that Mr. Counnas' appeal will not be

sustained when he has had an opportunity to fully prepare and present his arguments. Nonetheless, based on this Court's precursory assessment of the strength of Mr. Counnas' appeal, it finds that Mr. Counnas has not made a "strong showing" that he is likely to succeed on the merits.[4] See Harsch, 117 R.I. at 943-44, 367 A.2d at 197-98.

B
Irreparable Harm Mr. Counnas Will Suffer if the Stay Is Denied

A party "'need not show an absolute probability of success in order to be entitled to a stay [pending appeal]," if he or she can show that "'the denial of a stay will . . . destroy the status quo, irreparably harming [him or her], but the granting of a stay will cause relatively slight harm to [other interested parties.]'" Providence Journal Co. v. F.B.I., 595 F.2d 889, 890 (1st Cir. 1979) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977)). Thus, Mr. Counnas may overcome his relatively weak showing on the first factor if he can show that the balance of the equities on the remaining factors weighs heavily in his favor.

[4] The Court acknowledges that other courts have granted a stay pending appeal when the moving party has raised a "serious legal question" of first impression that needs to be resolved on appeal and when the balance of equities otherwise weighs heavily in that party's favor. See Golden Gate Rest. Assoc. v. City of San Francisco, 512 F.3d 1112 (9th Cir. 2008); Wildmon v. Berwick Universal Pictures, 983 F.2d 21 (5th Cir. 1992); Providence Journal Co. v. F.B.I., 595 F.2d 889, 890 (1st Cir. 1979). In attempting to discern what might constitute a "serious legal question" in the context of sexual offender classification, the Court observes that other jurisdictions have granted a stay of community notification where the constitutionality of the relevant classification or registration law was questioned. See State v. Hazlett, 994 N.E.2d 1220 (Ohio Ct. App. 2010) (noting that trial court had granted stay of notification where petitioner questioned validity of his reclassification in the wake of Ohio Supreme Court's recent pronouncement that portions of reclassification statute were unconstitutional); In re State of Alabama v. C.D.M. and S.D., 727 So.2d 897 (Ala. Crim. App. 1999) (noting that court had granted stay pending lower court's resolution of petitioner's constitutional challenges to community notification statute). Mr. Counnas' question about the Board's consideration of "unnecessary violence" will likely need to be addressed on appeal, but it does not challenge the legitimacy of Mr. Counnas' classification in the same manner as a constitutional challenge. In light of the Magistrate's carefully considered decision, the Court is not persuaded that Mr. Counnas' legal question is of such "seriousness" as to warrant a stay of notification. Moreover, as is discussed in the remainder of this decision, the balance of the equities on the remaining factors does not clearly tip in Mr. Counnas' favor. See Golden Gate, 512 F.3d at 1116.

Mr. Counnas asserts that immediately proceeding with community notification on the basis of his Level III classification will cause him great harm. Id. at 11-12. He emphasizes that for the past six years, he has been a law-abiding and productive member of society and urges that immediately proceeding with Level III notification may unnecessarily undermine his efforts to rebuild his life and relationships. In reply, the State argues that since Rhode Island's sexual offender notification requirements are meant to protect the public rather than punish the offender, Mr. Counnas will not suffer any harm if notification were to issue prior to the resolution of his appeal. (Tr. Jan. 17, 2013 at 13.)

In considering the harm that Mr. Counnas may suffer, this Court recalls the Supreme Court's admonition in State v. Germane, 971 A.2d 555 (R.I. 2009), that the official designation and public dissemination of a sexual offender's future dangerousness can subject the offender to significant harmful consequences. In Germane, the Court acknowledged that the primary objective of the notification requirements is to protect the public, but observed that transmitting an individual's status as a convicted sex-offender "together with information concerning his risk to reoffend may . . . potentially expos[e] the offender to such consequences as vigilantism, police surveillance, community ostracism, and the foreclosure of employment or associational opportunities." 971 A.2d at 578 (emphasis in original). Given the severity and possible immediacy of these consequences, the Court cannot agree with the State's assertion that the issuance of notification of Mr. Counnas' status as a Level III offender will be innocuous.

Most of the potential harm in this case, however, is not directly dependent on this Court's grant or denial of Mr. Counnas' request for a stay. Mr. Counnas' designation as a sex offender and requirement to register were already established in 2004 when he was convicted and sentenced. Thus, some level of notification will ultimately occur regardless of Mr. Counnas'

success on appeal or this Court's grant of a stay. Instead, what is at stake is the level of notification that will issue. Accordingly, the question of what harm Mr. Counnas will suffer if his request for a stay is denied can be more narrowly framed as a question of what harm Mr. Counnas will suffer from the immediate issuance of Level III notification that cannot later be remedied if he succeeds on appeal in having his classification downgraded.

Under the Parole Board's Sex Offender Community Notification Guidelines, there is substantial overlap between who receives notification of Level II "Moderate Risk" sexual offenders and who receives notification of Level III "High Risk" sexual offenders: For both categories, an "Offender Fact Sheet" containing identifying information is made available to law enforcement agencies; victims and witnesses to the offense; schools; organizations the offender is likely to encounter, such as day care facilities, and other social and religious groups in the area where the offender will be living or working; and individual members of the public who the offender is likely to encounter, including providing the public with computerized-access to the information.[5] See R.I. Admin. Codes 49-2-1:7.0 and 49-2-1:9.1. For Level III offenders, however, the Guidelines indicate that notification may also be provided using any two or more of the following: new releases, fliers, advertisements in local newspapers, public access to hard copies at the law enforcement agency, public computerized access at the local library or at the law enforcement agency, or any other effective, appropriate and available methods of distribution. See R.I. Admin. Code 49-2-1:9.5.

It appears from the Guidelines that Level III notification encompasses a broader reach of the community than Level II notification. The exact breadth of that reach, however, is

[5] To determine what establishments and organizations will receive notice, consideration is given to the offender's employment history; recreational, social and religious interests; the characteristics of his or her offense; and the characteristics of likely victims. See R.I. Admin. Code 49-2-1:7.6.3.

determined by the law enforcement agency having primary jurisdiction over the location where the offender resides. See R.I. Admin. Code 49-2-1:1.3.1. It is therefore difficult for this Court to discern with any reasonable degree of precision what harm may result from denying a stay of notification. See Harsch, 117 R.I. at 944, 367 A.2d at 198 (stay denied where irreparable harm was speculative); see also Cuomo v. U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, (D.C. Cir. 1985) (for stay pending appeal, irreparable injury claimed must be "both certain and great.") (internal quotation omitted). The Court is mindful of the fact that once Level III notification is issued, it cannot be erased from the minds of those to whom it was sent, should Mr. Counnas later succeed in having his classification reduced. Nonetheless, the nature and extent of the harm in this case are inherently difficult to concretize. Accordingly, this factor weighs in Mr. Counnas' favor, but only slightly.

C

Substantial Harm to Other Interested Parties and Public Interest

In the instant case, the analysis of the third factor—the harm to other interested parties from granting a stay of notification—is largely subsumed by the analysis of the fourth factor, the public interest. Thus, the Court will perform one analysis of both factors. See Harsch, 117 R.I. at 944, 367 A.2d at 198 (combining analysis of third and fourth factors where "harm to the interested people and the public interest criteria dovetail into one another.")

According to Mr. Counnas, issuing notification before he has exhausted his challenge to his Level III status would unnecessarily alarm the community and would have no benefit to the public. (Tr. Jan. 17, 2013 at 18.) In taking this position, Mr. Counnas relies heavily upon his clean record over the past six years. He suggests that since no harm has come to the public in the six years since his release, withholding notification for the additional time that it takes for his appeal to run its course presents little risk. Id. at 19.

In response, the State asserts that members of the public have already suffered harm during the past six years by being left in ignorance of Mr. Counnas' risk to re-offend. Id. at 14. According to the State, the failure to proceed immediately with notification will continue to deprive the public of the ability to make an informed decision about whether they wish to associate with Mr. Counnas. Id.

The Rhode Island Supreme Court has clearly stated that the purpose of the sex offender registration and notification requirements under §§ 11-37.1-1 et seq. is "'to protect the safety and general welfare of the public.'" Germane, 971 A.2d at 593 (quoting In re Richard A., 946 A.2d 204, 213 (R.I. 2008)). In particular, the Court has declared that the State has an interest in expediting the classification process to limit the duration of time during which "a sex offender may be at large without there being the community notification that the General Assembly has deemed desirable." Id. at 582. In essence, each day that elapses without the relevant members of the public receiving the information that the Legislature believes they need to make informed choices about their safety, is a day in which the public is suffering some species of harm. This Court does not wish to undervalue the significance of Mr. Counnas' clean record over the past six years. Nevertheless, how predictive this record is of his continued likelihood to refrain from harming a member of the public in the near future is something that will be more appropriately, and more comprehensively, considered on the merits of his appeal than during this Court's ruling on the instant motion. Accordingly, this Court finds that the interest in protecting the public weighs heavily in favor of denying Mr. Counnas' request for stay of notification.

III
Conclusion

For all of the aforementioned reasons, the Court finds that Mr. Counnas has failed to make the requisite strong showing that the four factors weigh in favor of granting a stay pending appeal. Accordingly, Mr. Counnas' motion to stay the entry of the Magistrate's Order affirming his Level III classification pending his appeal to this Court is denied. Counsel shall submit an appropriate Order for entry consistent with this Decision.