STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: July 14, 2014]

STATE OF RHODE ISLAND	:	
	:	
V.	:	**C.A. No. PM 12-4128**
	:	
LEROY ROBINSON	:	

DECISION

VOGEL, J. Leroy Robinson (Appellant) brings this appeal from a decision of the Drug Court Magistrate (the Magistrate), denying his request for appointed counsel in this sexual offender registration case. Jurisdiction is pursuant to G.L. 1956 § 8-2-39.2(j). For the reasons set forth herein, the Court affirms the decision of the Magistrate.

I

Facts and Travel

On February 10, 2006, a Providence County Superior Court jury found the Appellant guilty of two counts of first-degree child molestation sexual assault. A justice of the Superior Court sentenced Appellant to two concurrent sentences of twenty years imprisonment, with nine years to serve and the remainder suspended, with probation. (Judgment of Conviction and Commitment, May 23, 2006.) On March 12, 2010, the Rhode Island Supreme Court affirmed the conviction. See State v. Robinson, 989 A.2d 965 (R.I. 2010). The Appellant's sentences later were amended to reflect a reduction in the amount of years he was ordered to serve, with a concomitant increase in the remainder suspended, with probation. (Judgment of Conviction and Commitment, July 13, 2010). It is noteworthy, however, that the actual length of the

sentences—two concurrent twenty-year sentences of imprisonment—remained unchanged. See id.

As a result of his conviction, Appellant is required to register as a sexual offender in accordance with chapter 37.1 of title 11, the Sexual Offender Registration and Community Notification Act (the Registration Act). On March 12, 2008, while his appeal was pending before the Supreme Court (see Robinson, 989 A.2d at 965), the Sex Offender Board of Review (Board) issued a decision classifying Appellant as a Level III risk to reoffend. See Risk Assessment Report at 1.[1] On May 9, 2012, Appellant filed a request with this Court to review the Board's determination. See Appeal Request.[2] He also requested the appointment of counsel. See id. Thereafter, on August 28, 2012, Attorney Katherine Godin (Attorney Godin) entered her appearance as court-appointed counsel on behalf of Appellant. See Entry of Appearance.

On December 3, 2012, the Magistrate conducted a hearing on Appellant's appeal from the Board's decision classifying him as a Level III risk to reoffend. See Tr., Dec. 3, 2012 (Tr. I.) At the commencement of the hearing, the Magistrate noted that counsel for Appellant had "filed an eleven-page memo, with ten exhibits attached, to the Court in support of [Appellant's] motion to lower his classification." Id. at 3.[3] Attorney Godin also supplemented the record with two additional exhibits in open court. Id. at 4.[4]

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[1] A risk Level III classification is the highest classification that a sex offender may receive and is indicative of the individual's high risk of reoffense.

[2] According to the Appellant, his former counsel had informed him on April 25, 2012 that the Board had been unable to notify him of his sex offender classification and of his right to appeal. See Appeal Request. In support of this contention, Appellant attached a fax from the Rhode Island Department of Corrections Sex Offender Community Notification Unit which stated that the "original Level Notification from March 13, 2008 . . . was sent by certified mail but was returned to us at that time." See id., Ex. 1, Apr. 19, 2012.

[3] The exhibits attached to Appellant's memorandum consisted of the following: (1) Affidavit of the Pastor of Shiloh Gospel Temple Church, Pastor Eric Perry; (2) Affidavit of Appellant's former high school teacher, Paula A. Salvo; (3) Affidavit of Jacqueline A. Salvo; (4) Affidavit of

At the hearing, Appellant presented one witness, his mother, Pamela J. Nash, to testify on his behalf. See Tr. I at 4-10. The Appellant also testified at the hearing. Id. at 11-20. The State did not conduct any cross-examination or produce any witnesses. During her closing argument, Attorney Godin stated that in addition to the witness testimony, she also was "rely[ing] on the memo the Court has already noted that I submitted in this case as well as the exhibits attached to that, and the two I submitted today." Id. at 21. After reviewing the record, the Magistrate denied the appeal in a bench decision (Tr. at 1-15, Dec. 18, 2012 ((Tr. II)), and entered an order to that effect. (Order, Dec. 18, 2012.)

At the conclusion of the Magistrate's bench decision, Attorney Godin informed the Court that she intended to file a notice of appeal. See id. at 16. She stated:

> "I'll also be requesting that he be allowed to proceed in forma pauperis and that he be allowed forthwith to provide an affidavit of indigency. I understand the Court believes that my client may not have the right to proceed as an indigent client with a court appointed counsel, and I will take the matter up with Presiding Justice Gibney." Id.

The Magistrate responded: "Because it's a civil proceeding, that determination can be made upstairs whether you're entitled to represent him, counsel, on a civil appeal beyond that." Id.

Later that day, Attorney Godin filed an appeal from the Magistrate's ruling. See Notice of Appeal, Dec. 18, 2012. She also filed "an ex parte motion to proceed in forma pauperis, a

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Donna J. Salvo; (5) Judgment of Conviction and Commitment, Mar. 25, 2006 (amended sentence); (6) Criminal Docket Sheet Report; (7) Character references from Appellant's fiancée, Lauren C. Brown, Paula Salvo, Jacqueline A. Salvo, Donna J. Salvo; and proof of residence from Paula Salvo; (8) R. Karl Hanson & Kelly E. Morton-Bourgon, The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies, Journal of Consulting and Clinical Psychology, Vol. 73(6), 1154-1163 (Dec. 2005); (9) Levenson, Letourneau, Armstrong & Zgoba, Failure to Register: An Empirical Analysis of Sex Offense Recidivism, (Apr. 2009); (10) Grant Duwe, William Donnay, The Effects of Failure to Register on Sex Offender Recidivism, Criminal Justice and Behavior, Vol. 37(5) (May 2010).

[4] The supplemental exhibits consist of a May 2009 Certificate of "Therapeutic Massage & Bodywork Technology" issued by the Lincoln Technical Institute, and a copy of a photograph containing Appellant, Bishop Farrow and Governor Donald Carcieri.

supporting Affidavit of Indigency and a request for a court-appointed counsel . . . ." See Letter to Magistrate Flynn, Mar. 18, 2013.[5] On September 17, 2013, Presiding Justice Gibney issued a written decision remanding the matter to the Magistrate after "finding that the Magistrate should decide in the first instance whether Mr. Robinson is entitled to proceed in forma pauperis and receive the assistance of appointed counsel on appeal . . . ." State of Rhode Island v. Leroy Robinson, No. PM-12-4128, at 6, Sept. 17, 2013, Gibney, P.J.

On October 8, 2013, the Magistrate conducted a hearing on remand. See Tr., Oct. 8, 2013 (Tr. III). During the hearing, the Magistrate indicated that "[o]n the indigent matter, if it's a matter of you know not paying appeal cost or transcripts, I will grant that part of the motion where they don't have to pay for a transcript." Id. at 5.[6] After reviewing the facts and circumstances of this case, the Magistrate issued a bench decision on December 17, 2013, denying the request for appointed counsel and entered an order to that effect. (Tr. at 7, Dec. 17, 2013) (Tr. IV); Order, Dec. 17, 2013.

The Appellant takes his appeal from the Magistrate's decision denying his request for court-appointed counsel. The Court will provide additional facts as necessary for the Analysis portion of this Decision.

II

Analysis

The issue before the Court is whether Appellant is entitled to appointed counsel for purposes of appealing the Magistrate's decision to the Superior Court. Pursuant to G.L. 1956 §§ 11-37.1-13 and 11-37.1-14, Level II and Level III adult sexual offenders are entitled to

[5] The Court has been unable to locate the Affidavit of Indigency in the record.
[6] The Court entered an Order on January 7, 2014, decreeing "[t]hat all fees and costs associated with the aforementioned transcription, as well as any applicable filing fees in this matter, be waived." (Order, Jan. 7, 2014).

Superior Court review of the Board's classification of their risk levels. See §§ 11-37.1-13 and 11-37.1-14. The Magistrate is charged with conducting Superior Court review of such risk levels. See § 8-2-39.2(f) ("The Drug Court Magistrate shall be empowered to hear and decide as a superior court justice all matters that may come before the superior court pursuant to chapter 37.1 of title 11 "Sexual Offender Registration and Community Notification."). Level II and Level III adult sexual offenders who seek review of the Board's decision have a statutory right to appointed counsel to represent their interests during the Magistrate's review. See §§ 11-37.1-13(3) and 11-37.1-14(3).[7]

Parties aggrieved by the Magistrate's review are entitled to seek further review by a justice of the Superior Court. See § 8-2-39.2(j) ("A party aggrieved by an order entered by the Drug Court Magistrate shall be entitled to a review of the order by a justice of the superior court."). Although litigants have the right to appeal from a decision of the Magistrate, both § 8-2-39.2 and the Registration Act are silent with respect to whether said litigants are entitled to court-appointed counsel when appealing such decisions.

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[7] Section 11-37.1-13 provides in pertinent part:

> "If after review of the evidence pertaining to a person required to register according to the criteria set forth in § 11-37.1-12, the board is satisfied that risk of re-offense by the person required to register is either moderate or high, the sex offender community notification unit of the parole board shall notify the person, in writing, by letter or other documentation:
> ". . .
> "(3) That the person has a right to be represented by counsel of their own choosing or by an attorney appointed by the court, if the court determines that he or she cannot afford counsel[.]" Sec. 11-37.1-13.

Section 11-37.1-14 provides in pertinent part: "Upon receipt of a request from a person subject to community notification under § 11-37.1-12(b), the superior court . . . shall: . . . (3) Appoint counsel for the applicant if he or she cannot afford one[.]" Sec. 11-37.1-14.

Our Supreme Court has recognized that "[a]lthough it follows as a consequence of a criminal conviction, sexual offender registration and notification is a civil regulatory process." State v. Germane, 971 A.2d 555, 593 (R.I. 2009) (emphasis in original). The reason for this is that "the purpose of the Registration Act is not to punish the offending [individual], but rather to protect the safety and general welfare of the public." Id. (quoting In re Richard A., 946 A.2d 204, 213 (R.I. 2008)). Thus, "[p]roviding limited process at the board of review level and then an opportunity for notice and a hearing for purposes of judicial review before the Superior Court strikes an appropriate balance between the liberty interests of those required to register as sex offenders and the legitimate social, administrative, and financial interests of the state." Germane, 971 A.2d at 582.

Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the right to appointed counsel for indigent civil litigants differs from that of criminal litigants in that the right is neither categorical nor automatic. See Robinson, No. PM-12-4128 at 3 (citing Halbert v. Michigan, 545 U.S. 605, 610-11 (2005); Lassiter v. Dep't of Social Services, 452 U.S. 18, 31-32 (1981)); see also Campbell v. State, 56 A.3d 448, 454 (R.I. 2012) (declaring in the context of a postconviction relief proceeding that "the right to counsel . . . is a matter of legislative grace, not constitutional right. Because the postconviction remedy amounts to a collateral attack on a conviction, the action is civil in nature, for which there is no constitutional right to counsel."); cf. Shatney v. State, 755 A.2d 130 (R.I. 2000) (establishing procedure permitting appointed counsel to withdraw from representation in postconviction relief proceedings under circumstances that are limited and specific). In Lassiter, a termination of parental rights case, the United States Supreme Court left "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in

the first instance by the trial court, subject, of course, to appellate review." Lassiter, 452 U.S. at 32.

In State of Rhode Island v. Evan Leon, No. PM-12-1859, Mar. 12, 2013, Gibney, P.J., the court addressed the issue of the appointment of counsel for parties appealing from a decision of the Drug Court Magistrate in sexual offender registration cases. In that case, the Magistrate sua sponte increased Mr. Leon's risk level classification from a Level II to a Level III. Id. at 3. Mr. Leon, who had been a juvenile at the time of his adjudication, and who had been diagnosed with ADHD and Asperger's Disease, appealed the ruling and sought court-appointed counsel to pursue said appeal. Id. at 1. The court stated "that when the Legislature affords a litigant both a specific right to be heard and a general right to counsel, the litigant should receive the assistance of counsel if forcing him or her to proceed pro se would render the opportunity to be heard meaningless." Leon, No. PM-12-1859 at 20 (citing Campbell, 56 A.3d at 458) ("[T]he appointment of counsel before an applicant's claims are dismissed . . . ensures that the applicant is provided with a meaningful opportunity to reply . . . ."); see also Harris v. State, 973 A.2d 618, 619 (R.I. 2009) (stating that "an indigent applicant for postconviction relief has the right to appointed counsel for his or her first application for postconviction relief").

The court in Leon declared:

> "In the final analysis, the Rhode Island Legislature has given [petitioner] a right to counsel below and a right to an appeal; our Supreme Court has held that sexual offender notification burdens a protected liberty interest for the purposes of due process. See Secs. 11-37.1-13 and 8-2-39.2(j); Germane, 971 A.2d at 578. Once a state provides a right to an appeal, due process and equal protection prohibit it from creating arbitrary or unreasoned distinctions that may effectively deprive indigents of that right when a protected liberty interest is at stake." Leon, No. PM-12-1859 at 20.

The court then concluded that under the particular facts and circumstances of that case, the appellant was entitled to the appointment of counsel for purposes of appealing his classification to the Superior Court. Id. at 21. In reaching this conclusion, the Court took into account the following facts: Mr. Leon had been a juvenile at the time he had been adjudicated delinquent by the Family Court, id. at 1; he had been diagnosed with ADHD and Asperger's Disease, id. at 18; and, crucially, "his legal claim that the Magistrate exceeded his authority . . . ha[d] neither been briefed by a lawyer nor passed upon by an appellate court[;] [t]hus the task of researching, briefing, and arguing this claim on appeal will be left up to Mr. Leon." Id. (internal citation omitted).

When the same issue—the appointment of counsel in the context of an appeal from the Magistrate—arose again in the instant matter, the Court stated that "whether an indigent civil litigant is entitled to counsel on appeal requires a careful analysis of the nature of the interest at stake, the nature of the appellate proceedings, the risk of erroneous deprivation, and any countervailing interest of the State." Robinson, No. PM-12-4128 at 3 (citing M.L.B. v. S.L.J., 519 U.S. 102, 120-21 (1996); Lassiter, 452 U.S. at 28). The Court further concluded that any attempt to balance the relevant factors "will necessarily vary depending on the individual facts and circumstances of each case[,]" and that "'the decision whether due process calls for the appointment of counsel' [for indigent litigants] should be answered on a case-by-case basis 'in the first instance by the trial court, subject . . . to appellate review.'" Robinson, No. PM-12-4128 at 3 (quoting Lassiter, 452 U.S. at 31-32) ("[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements, since here, as in [another] case, [t]he facts and circumstances . . . are susceptible of almost infinite variation . . .

. ") (internal quotations omitted). Thereafter, rather than analyzing whether Appellant in this case was entitled to counsel, the Court stated that the Magistrate was the one who was "most familiar with the facts and circumstances of [the] case[.]" Consequently, the Court remanded the matter to the Magistrate to determine "whether due process and equal protection require[d] [Appellant] to continue to receive the assistance of counsel on appeal to the Superior Court." Robinson, No. PM-12-4128 at 5-6.

At the hearing on remand, Attorney Godin asserted that the basis for appealing from the Magistrate's decision was that "there was sufficient evidence to find him a Level 2 [sexual offender], given that this was his only criminal conviction." (Tr. III at 8.) In support of this assertion, she observed that Appellant had been granted bail pending his appeal to the Supreme Court; his subsequent motion to reduce sentence was granted; he has significant social support; and "he has made quite an impact on his church as an organist." Id. Attorney Godin then stated:

> "I don't believe that we are arguing that my client was deprived of a meaningful hearing. I believe it's just the constitutional elements as to whether he is afforded equal protection if others are entitled to an appeal to a Superior Court justice from your decision, where as he cannot without the assistance of counsel." (Tr. III at 9.)

The Magistrate immediately pointed out that there is no dispute about Appellant's entitlement to appeal the decision to the Superior Court. Id. at 10. He then stated the following:

> "To me it might be helpful if there is an issue that's so technical in nature if there's a, you know, takes it out of the regular thing where a justice of this court is not capable of looking at the transcript of the hearing and the transcript of the decision and not being able to make a decision of whether or not there's an error." Id.

Attorney Godin responded: "Certainly, and I think it would probably depend on whether the justice would decide just based off that record or request legal memorandum, because I do believe my client might have some difficulty filing legal memorandum on his own." Id.

On December 17, 2013, the Magistrate issued a bench decision denying Appellant's request for court-appointed counsel for purposes of his appeal to the Superior Court. (Tr. IV at 1-9.) He found that "no previously or unargued or no legal issue was present here." Id. at 4. Instead, he characterized the appeal as "appear[ing] to be a case where Petitioner disagrees with the Magistrate's decision as he disagreed with the Board's decision." Id. He further found that:

> "the petitioner was afforded the opportunity to present exhibits and testimony to ensure he was granted a meaningful hearing, and . . . that both petitioner and his mother testified at the December [2012] hearing. The Court finds here . . . that there is no particular or unique issue that would necessitate the further appointment of counsel on appeal in this matter." Id. at 5.

The Magistrate then concluded:

> "The fact that he had a full hearing with exhibits, testimony and witnesses before the Court I believe satisfied the statutory requirement of a judicial appeal, and also that he did in fact receive due process and equal protection under the law. Is there anything else for the record?" Id. at 7.

The Appellant timely appealed the denial of his request for court-appointed counsel. (Notice of Appeal, Dec. 17, 2013.)

At the October 8, 2013 hearing on the instant request for counsel, the Magistrate asked: "Why does this [case] require – why does it cry out for counsel being appointed?" (Tr. III at 8.) In response, Attorney Godin contended that there was sufficient evidence in the record to find Appellant a Level II sexual offender and that "[i]f the court would allow, I suppose I could confer with my client and perhaps submit additional arguments as to what makes my client's particular appeal unique enough to necessitate counsel." Id. at 8-9. The Magistrate agreed that additional arguments "might be helpful because again, if the Supreme Court says you're entitled to a meaningful hearing . . . does he not think he got a meaningful hearing the last time where he had the opportunity to testify, had the opportunity to call witnesses, had the opportunity to

present exhibits. Is there something that separates this case?" Id. at 9. In response, Attorney Godin essentially conceded that Appellant had been granted a meaningful hearing on his appeal from the Board. See Tr. III at 9 ("I don't believe we are arguing that my client was deprived of a meaningful hearing."). Instead, it would appear that she was asserting that Appellant would be denied equal protection by having to proceed without the assistance of court-appointed counsel. See id.

In view of the foregoing, the Court finds that the Magistrate did not err in finding that Appellant had been given a meaningful hearing in his appeal from the Board. See Tr. III at 9 (wherein Attorney Godin acknowledges that Appellant received a meaningful hearing on his appeal from the Board). Indeed, Appellant is not contending that he was deprived of a meaningful hearing before the Magistrate. The Magistrate did not err when he found that Appellant failed to demonstrate that his appeal would involve issues so complex or unique to require the Court to conduct an evidentiary hearing at Appellant's second-tier of review to receive further evidence or recall witnesses. See Halbert, 545 U.S. at 611 (stating that first-tier review "entails adjudication on the merits" as opposed to "subsequent appellate stages" involving claims that already have been presented by counsel and "passed upon by an appellate court") (internal quotations omitted); see also Robinson, No. PM-12-4128 at 4-5 n.3 (noting that because "the complexity and depth of the appellate proceeding is likely to vary based on the merits of each appeal[,] [i]t is left to the discretion of the Superior Court Justice whether to conduct a second hearing, receive further evidence, or recall witnesses") (citing Administrative Order No. 94-12(h)). Consequently, the Court concludes that the denial of Appellant's request for court-appointed counsel would neither render his appeal meaningless nor violate his equal protection rights.

IV

Conclusion

In light of the foregoing, the Court finds that the Magistrate did not err in denying Appellant's request for court-appointed counsel to pursue his Superior Court appeal. Consequently, the Court concludes that Appellant is not entitled to court-appointed counsel to represent him with respect to his appeal to the Superior Court.

The parties shall prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **State of Rhode Island v. Leroy Robinson**

CASE NO: **PM 12-4128**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **July 14, 2014**

JUSTICE/MAGISTRATE: **Vogel, J.**

ATTORNEYS:

For Plaintiff: **Alison DeCosta, Esq.**

For Defendant: **Katherine Godin, Esq.**