19 N.Y.3d 271

The PEOPLE of the State of New York, Respondent,

v.

Scott LIDEN, Appellant.

Court of Appeals of New York.

May 3, 2012.

Background: After the Board of Examiners of Sex Offenders determined that offender was required to register under the Sex Offender Registration Act (SORA) because of an offense he committed in Washington, the Supreme Court, New York County, John Cataldo, J., adjudicated offender a level three sex offender, but determined that it lacked jurisdiction to review the Board's determination. Offender appealed. The Supreme Court, Appellate Division, 79 A.D.3d 598, 913 N.Y.S.2d 200, affirmed, and leave to appeal was granted.

Holding: The Court of Appeals, Smith, J., held that Board's determination that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level, abrogating *Matter of Mandel*, 293 A.D.2d 750, 742 N.Y.S.2d 321, *People v. Carabello*, 309 A.D.2d 1227, 765 N.Y.S.2d 724, and *People v. Williams*, 24 A.D.3d 894, 805 N.Y.S.2d 191.

Reversed.

1. Mental Health ⚿469(4)

A determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level; abrogating *Matter of Mandel*, 293 A.D.2d 750, 742 N.Y.S.2d 321, *People v. Carabello*, 309 A.D.2d 1227, 765 N.Y.S.2d 724, and *People v. Williams*, 24 A.D.3d 894, 805 N.Y.S.2d 191. McKinney's Correction Law § 168–k(2).

2. Mental Health ⚿469(4)

Offender was not required to bring article 78 proceeding challenging determination of the Board of Examiners of Sex Offenders that his Washington unlawful imprisonment offense required him to register under New York's Sex Offender Registration Act (SORA), but could instead seek review of that determination in the proceeding to determine his risk level. McKinney's Correction Law § 168–k(2); McKinney's CPLR 7801 et seq.

3. Administrative Law and Procedure ⚿657.1

The usual way to obtain judicial review of the action of an administrative agency is a proceeding under article 78. McKinney's CPLR 7801 et seq.

Legal Aid Society, New York City (Robert C. Newman, Steven Banks and William D. Gibney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York City (Malancha Chanda and Eleanor J. Ostrow of counsel), for respondent.

Eric T. Schneiderman, Attorney General, New York City (Claude Platton, Barbara D. Underwood and Richard Dearing of counsel), for Board of Examiners of Sex Offenders, amicus curiae.

OPINION OF THE COURT

SMITH, J.

[1] Rulings of administrative agencies can ordinarily be reviewed only in proceedings under CPLR article 78. We hold, however, that the usual features of New York's sex offender registration system

justify an exception to that rule: A determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level.

I

[274] Defendant was charged in the State of Washington with raping and kidnapping two teenaged girls. In 1996, he resolved those charges by pleading guilty to two counts of unlawful imprisonment. He later moved to New York, where he was convicted of a nonsexual crime. This conviction apparently brought his previous record to the attention of the Board of Examiners of Sex Offenders, which determined in 2007 that, because of his Washington conviction, he was required to register under New York's Sex Offender Registration Act (SORA). Defendant did not seek article 78 review of that determination before the time to seek such relief expired.

Having determined that defendant must register, the Board, as SORA requires, made a recommendation to Supreme Court in the county of defendant's residence as to the risk level that should be assigned to him (*see* Correction Law § 168–k [2]). The Board recommended risk level three, which reflects a high risk of a repeat offense (*see* Correction Law § 168–*l* [6][c]).

In submissions to the court considering his risk level, defendant argued that he should not have been required to register as a sex offender at all. Defendant pointed out that unlawful imprisonment in the second degree—the New York crime corresponding to the Washington crime of which defendant was convicted—is a misdemeanor (*see* Penal Law § 135.05). Until 2002, a crime committed in another state was defined as a "sex offense" in New York only if it included "all of the essential elements" of a New York "felony" (*see* former Correction Law § 168–a [2][b] [amended by L. 2002, ch. 11, § 1]). The 2002 amendment, which replaced the word "felony" with the word "crime" (Correction Law § 168–a [2][d]), applied only to offenses committed on or after its effective date (L. 2002, ch. 11, § 24). The People now concede that defendant's argument was well-founded, and that the Board's determination requiring him to register was an error.

Supreme Court held, however, that it did not "have jurisdiction to review" the Board's determination. Supreme Court believed itself bound by several Appellate Division decisions holding that a determination of registrability may be challenged only in an article 78 proceeding (*see Matter of Mandel,* 293 A.D.2d 750, 742 N.Y.S.2d 321 [2d Dept.2002]; *People v. Carabello,* 309 A.D.2d 1227, 765 N.Y.S.2d 724 [4th Dept.2003]; *People v. Williams,* 24 A.D.3d 894, 805 N.Y.S.2d 191 [3d Dept. 2005]). In a later order, Supreme Court adjudicated defendant a level three [275] sex offender. The Appellate Division affirmed, agreeing with the other Appellate Division departments that "a person seeking review of the Board's determination that he or she is obligated to register in the first place is required to bring an article 78 proceeding against the Board" (*People v. Liden,* 79 A.D.3d 598, 913 N.Y.S.2d 200 [1st Dept.2010]). We granted leave to appeal (16 N.Y.3d 872, 923 N.Y.S.2d 408, 947 N.E.2d 1186 [2011]), and now reverse.

II

[2] The procedure for registration of sex offenders who move to New York from other states is set out in Correction Law § 168–k. Section 168–k (2) says, in relevant part:

"The [Board of Examiners of Sex Offenders] shall determine whether the sex offender is required to register with the [Division of Criminal Justice Services]. If it is determined that the sex offender is required to register ... the board shall ... make a recommendation regarding the level of notification ... This recommendation ... shall be submitted by the board to the county court or supreme court and to the district attorney in the county of residence of the sex offender and to the sex offender. It shall be the duty of the county court or supreme court in the county of residence of the sex offender ... to determine the level of notification."

Thus the statute assigns the registrability determination to the Board, and the risk level ("level of notification") determination to the court: The Board "shall determine" whether the out-of-state sex offender is required to register, but shall only make a recommendation as to the risk level; it is "the duty of the court" to determine the risk level. (By contrast, when a sex offense is committed in New York, both registrability and risk level are decided by a court [*see* Correction Law § 168–d (1)(a); § 168–n (2)].) The statute does not address the question of how an alleged sex offender from another state who thinks the Board has erred in determining that he is required to register may seek judicial review.

[3] The usual way to obtain judicial review of the action of an administrative agency is a proceeding under CPLR article 78 ("Proceeding Against Body or Officer"). Article 78 proceedings are subject to a four-month statute of limitations, running from the time when "the determination to be reviewed becomes final [276] and binding" (CPLR 217[1]). We have held that a person challenging an agency determination cannot circumvent the time limitation, or other limitations on article 78 review, by asserting his or her arguments in a different kind of proceeding (*see Solnick v. Whalen*, 49 N.Y.2d 224, 229–230, 425 N.Y.S.2d 68, 401 N.E.2d 190 [1980]; *New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 201, 616 N.Y.S.2d 1, 639 N.E.2d 740 [1994]; *Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194, 831 N.Y.S.2d 749, 863 N.E.2d 1001 [2007]; *cf. Sohn v. Calderon*, 78 N.Y.2d 755, 767, 579 N.Y.S.2d 940, 587 N.E.2d 807 [1991]). Article 78 normally provides what is in effect an exclusive remedy. We are persuaded, however, that this case calls for an exception to that rule of exclusivity.

An unusual, perhaps unique, feature of a Board determination under Correction Law § 168–k (2) is that, when the determination is adverse to the person affected, a judicial proceeding automatically follows. In every such case, the Board must make a recommendation to a court in the county of the offender's residence, and the court then must determine the alleged sex offender's risk level. Where the initial determination that the person must register is disputed, plainly the most efficient course is for the risk level court to resolve the dispute; to have two separate courts examine essentially the same facts—one to decide registrability in an article 78 proceeding, and the other to decide risk level—serves no purpose. Recognizing this, a number of trial level courts have held—in contrast to the Appellate Division holdings we cited above—that registrability can be considered in the risk level proceeding (*Matter of Nadel*, 188 Misc.2d 427, 724 N.Y.S.2d 262 [Sup. Ct., N.Y. County 2001, Richter, J.]; *People v. Godbolt*, 2002 N.Y. Slip Op. 40201[U] [Sup. Ct., Queens County 2002]; *People v. Gundel*, 2002 N.Y. Slip Op. 40012[U] [Dutchess County Ct. 2002]).

To allow the risk level court to decide the registrability issue is not just a more efficient way to proceed; it is good policy in other ways. At the time the Board makes its registrability determination, the person alleged to be a sex offender will often be without a lawyer; a lawyer will be appointed for him in the risk level proceeding, but the article 78 statute of limitations might run before the lawyer is appointed, or has had a chance to focus on the registrability issue. And to bar the risk level court from examining registrability may put that court in the uncomfortable position of deciding the risk level of someone who, the court is convinced, is not a sex offender within the meaning of the statute at all.

Policy reasons like these would not, in the ordinary case, justify an exception to the rule that limits litigants to article 78 [277] review. In all but rare cases, the need for orderly and efficient procedure will require adherence to that rule. An exception is justified here, however, where orderliness and efficiency, as well as other goals, are served by it.

Accordingly the order of the Appellate Division should be reversed, without costs, and the Board's determination that defendant is required to register as a sex offender annulled.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, PIGOTT and JONES concur.

Order reversed, etc.

19 N.Y.3d 196

Daniel Marks COHEN et al., Appellants,

v.

Andrew M. CUOMO, as Governor of the State of New York, et al., Respondents.

Court of Appeals of New York.

May 3, 2012.

Background: Petitioners commenced special proceeding seeking a declaration that statute expanding the size of the New York State Senate from 62 to 63 districts was unconstitutional. The Supreme Court, New York County, Richard F. Braun, J., denied the petition, and petitioners appealed as of right.

Holding: The Court of Appeals held that the statute satisfied constitutional provision establishing method of determining whether to increase the number of Senate seats based on population shifts or increases as indicated by the census.

Affirmed.

1. Constitutional Law ⚿990

Acts of the Legislature are entitled to a strong presumption of constitutionality.

2. Constitutional Law ⚿1480
States ⚿27(10)

Court of Appeals will upset the balance struck by the Legislature and declare a redistricting plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld. McKinney's Const. Art. 3, § 4.