IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE, :

I.D. No. 1206022223

v. :

:

DONTA K. PRESIDENT,

:

Defendant. :

Submitted: December 11, 2013 Decided: January 2, 2014

ORDER

Upon Defendant's Motion for Relief from Sex Offender Designation.

Denied.

Lindsay A. Taylor, Esquire, Department of Justice, Dover, Delaware; attorney for the State.

John R. Garey, Esquire of John R. Garey, P.A., Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

This is the Court's decision concerning Defendant's Motion for Relief from Sex Offender Designation.

BACKGROUND

Defendant Donta President (hereinafter "Defendant") has pled *nolo contendere* to four counts of Unlawful Sexual Contact in the Third Degree, which would normally result in a Tier I sex offender designation.¹ The victim in this case was 11 years old at the time of the offense. Defendant subsequently filed a Motion for Relief from Sex Offender Designation.

The Court held a hearing on November 15, 2013 to determine whether to grant The Court was presented with evidence including: a Defendant's motion. psychosexual evaluation completed by the Resources for Human Development, a psychological report completed by Dr. Stephen Eichel, and the results of Defendant's Counsel for Defendant noted that Defendant had polygraph examination. successfully completed his required sex offender counseling. Initially, the State raised no specific challenge to Defendant's motion and left the matter to the Court's discretion.

DISCUSSION

11 Del. C. § 4121(d)(6) provides defendants the opportunity to petition the Court for relief from sex offender designation, if certain prerequisites are met.² The statute provides in pertinent part:

¹ See 11 Del. C. § 4121(d)(3).

² 11 *Del. C.* § 4121(d)(6).

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Notwithstanding any provision in this section or in § 4120 of this title to the contrary, any person who would otherwise be designated as a sex offender pursuant to this section and to § 4120 of this title may petition the sentencing court for relief from such designation, and from all obligations imposed by this section and § 4120 of this title, if:

- a. The *Tier II or Tier III offense* for which the person was convicted was a misdemeanor and *the victim was not a child under 13 years of age*;
- Notwithstanding anything in this paragraph to the contrary, no person designated as a Tier II or Tier III sex offender shall be afforded relief from designation as a sex offender if the victim of any of the offenses for which the person was convicted were less than 12 years old at the time of the crime....³

The Court finds that the language of this provision creates two issues in this case. First, the provision makes no mention of Tier I offenses, and twice makes explicit reference only to Tier II and Tier III offenses. The Court is unaware of any case law on whether a defendant can petition for relief under this provision when the offense is a Tier I misdemeanor. Further, the Family Court, in two separate decisions, has noted that this provision is ambiguous as to whether relief can be granted for Tier I offenses.⁴

Thus, it is unclear from the face of the statute whether, as a presumptive Tier

³ *Id.* (emphasis added).

⁴ State v. E.A., 2010 WL 5692095, at *4-5 (Del. Fam. Ct. Feb. 4, 2010) ("it is not clear whether the 'Tier II or Tier III qualification' in the statute provides that a person may not seek relief for any Tier I offense or that any person designated to Tier I may seek relief. . . ."); Fletcher v. State, 2008 WL 2912048, at *27 (Del. Fam. Ct. June 16, 2008) ("there is no provision that permits a Tier I, the lowest level offender, from being relieved from designation.").

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I offender, Defendant can even petition for relief under this provision in the first place. The Court notes that, during the hearing on November 15, the Court stated that § 4121(d)(6) is the applicable standard in this case, and neither party raised an objection to this statement. Notwithstanding this, if the statute truly does not grant the sentencing judge the discretion to relieve Defendant from Tier I designation, the Court cannot do so, unless there is case law that indicates otherwise, or another statutory provision which grants the Court the authority to grant relief.

The second issue implicated in this case by the language of § 4121(d)(6) is the age of the victim. The victim in this case was 11 years old at the time of the offense. Subdivision (a) of the statute explicitly states that relief shall not be granted if the victim was less than 13 years of age, and later on states that relief will not be afforded if the victim was less than 12 years of age at the time of the crime. Thus, even if the statute does provide this Court the discretion to relieve Defendant from Tier I designation, these seemingly unambiguous age requirements appear to prevent the Court from exercising that discretion in the instant case based on the victim's age.

Based on the foregoing, this Court requested memoranda from Defendant and the State on: (1) whether § 4121(d)(6) grants the Court discretion in affording Defendant relief from sex offender designation for Tier I offenses; and (2) whether the Court, if it does have such discretion, can ignore the statutory language stating that relief shall not be granted when the victim is under 12 years of age at the time of the offense.

As to the first issue, the State points out that Unlawful Sexual Contact in the Third Degree used to be a Tier II offense, and was redesignated by the legislature as State v. Donta K. President

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a Tier I offense. The State also acknowledges that § 4121(d)(6) makes little sense as written regarding misdemeanor sex offenses. The State suggests that this Court redesignate Defendant's offense as a Tier II offense in order to "rectify the clear disharmony" of the statutory language and account for the legislature's "oversight" when it redesignated Unlawful Sexual Contact in the Third Degree as a Tier I offense. Defendant also argues that when Unlawful Sexual Contact in the Third Degree was redesignated, § 4121(d)(6) was not modified to reflect that change. Defendant also encourages the Court to assume an oversight on the part of the legislature and *sua sponte* redesignate Defendant's offense as a Tier II offense.

It appears that the parties may have misconstrued the Court's first question, which was simply whether § 4121(d)(6) can generally be applied to grant relief for Tier I offenses. Based on the parties' response, it seems that the answer is "no." The parties request that this Court make an assumption as to the intent of the legislature and attempt a *sua sponte* workaround of the language of § 4121(d)(6). The Court is not in a position to do that. As currently written, the statute does not allow the Court to grant relief.

As to the second issue, the State contends that the provisions of § 4121(d)(6) pertaining to the victim's age are clear on their face, and that the Court is prohibited from allowing relief in this case because the victim was 11 years old at the time of the offense. Defendant argues that these provisions are ambiguous given the separate references to 13 years of age and 12 years of age, and that in any event victim's age requirement is arbitrary and capricious in nature.

Assuming arguendo that § 4121(d)(6) allows this Court to grant relief to

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Defendant, the Court is prohibited from granting relief in this instance due to the

victim's age. Defendant is correct that the statute's reference to two separate ages can

create some modicum of confusion, but it is only slight. The statute unambiguously

provides that relief shall not be granted if the victim is under 12 years of age. Here,

the victim was 11 years old at the time of the offense. Thus, the Court is prohibited

from granting relief to Defendant based on the age of the victim.

CONCLUSION

This case represents why this statute should be revisited, as there is a need to

rectify the clear ambiguity that exists with regards to relief for Tier I offenses.

However, the statute's unambiguous provision that relief shall not be granted if the

victim is under 12 years of age at the time of the offense prevents this Court from

granting relief to Defendant. Accordingly, Defendant's Motion for Relief from Sex

Offender Designation is **DENIED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

Prothonotary oc:

Lindsay A. Taylor, Esquire xc:

John R. Garey, Esquire

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