

NEW YORK COURT OF APPEALS

People v. Pettigrew

14 N.Y.3d 406, 927 N.E.2d 1053, 901 N.Y.S.2d 569 (2010) · No. No. 51 · Decided April 6, 2010

OPINION

JONES, J.

14 N.Y.3d 406 (2010) 927 N.E.2d 1053 901 N.Y.S.2d 569 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. AVERY PETTIGREW, Appellant. No. 51 Court of Appeals of New York. Argued February 18, 2010. Decided April 6, 2010. *407 Legal Aid Society, Criminal Appeals Bureau, New York City (Nancy E. Little and Steven Banks of counsel), for appellant. Cyrus R. Vance, Jr., District Attorney, New York City (Mary C. Farrington and Patrick J. Hynes of counsel), for respondent.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, SMITH and PIGOTT concur. OPINION OF THE COURT JONES, J. The issue before this Court is whether the People proved by clear and convincing evidence that defendant was armed with a dangerous instrument for the purposes of classifying him a level three sex offender under the Sex Offender Registration Act (SORA).

We hold that defendant's display of a gun to the victim and its threatened use constitute clear and convincing evidence that he was armed with a dangerous instrument during the commission of the crime in the context of a SORA hearing.

In 2003, defendant Avery Pettigrew pleaded guilty to rape in the first degree based on an incident earlier that year in which he forcibly raped a 16-year-old girl, and was sentenced to a term *408 of five years' incarceration followed by five years' postrelease supervision.

In April 2007, prior to defendant's conditional release, a SORA proceeding was conducted for the purpose of determining his risk level. The Risk Assessment Instrument (RAI) prepared for the hearing assessed defendant 120 points, designating him a presumptive level three sex offender.

The Board of Examiners also prepared a case summary prior to the SORA hearing. According to this case summary, while in pursuit of the victim, defendant said to her "[i]f I can't have you, no one will." He followed her into the stairwell of her apartment building and choked her. Then, defendant showed the victim a gun sticking out of his waistband, tore her pants down and raped her.

Afterwards, defendant informed the victim that he would shoot her if she told anyone. At the SORA hearing, defendant disputed the 30 points the Board of Examiners of Sex Offenders

assessed under factor 1 for having been armed with a dangerous instrument. Defendant specifically argued that the People failed to prove by clear and convincing evidence that the gun he possessed during the rape was loaded and operable, proof that some appellate courts have required in first degree robbery cases based on a "use or the threatened use of a dangerous instrument" theory.

Supreme Court rejected defendant's argument, adopted the Board's findings, and adjudicated defendant a level three offender. The Appellate Division unanimously affirmed (*People v Pettigrew*, 59 AD3d 276 [2009]). We now affirm. A SORA proceeding, which is civil in nature, determines the risk of reoffense by a person convicted of a qualifying sex offense and requires that individual to register with law enforcement officials according to that risk level (see *People v Mingo*, 12 NY3d 563, 570-571 [2009]).

The People "bear the burden of proving the facts supporting the determinations" by clear and convincing evidence (Correction Law § 168-n [3]). According to the Board of Examiners of Sex Offenders, points in the RAI "should not be assessed for a factor... unless there is clear and convincing evidence of the existence of that factor" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, ¶ 7, at 5 [2006]).^[1] Indeed, we held that the RAI case summaries, such as the one prepared by the Board of Examiners of Sex Offenders in this case, "meet the 'reliable hearsay' *409 standard for admissibility at SORA proceedings" (*Mingo*, 12 NY3d at 573).

The risk level suggested by the RAI, however, is merely presumptive, and the assigning of a risk level is within the sound discretion of the SORA court (see Correction Law § 168-n [3]). Here, the People proved by clear and convincing evidence that defendant was armed with a dangerous instrument during the commission of the offense. A "[d]angerous instrument means 'any instrument, article or substance, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury'" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 8 [2006], quoting Penal Law § 10.00 [13]).

Defendant's display of the gun to the victim and threat to shoot her constitute clear and convincing evidence that the gun was a dangerous instrument (see *People v Dodt*, 61 NY2d 408, 415 [1984] ["a threat to use a gun... can only be understood as a threat that the weapon is operable"]; see also *People v Walker*, 15 AD3d 692, 692 [3d Dept 2005] [pulling out a gun and placing it to the victim's head was clear and convincing evidence under the RAI and SORA Guidelines that the defendant was armed with a dangerous instrument]).

We therefore reject defendant's assertion that points should not be assessed under this SORA factor absent evidence that the gun was loaded and operable.^[2] Thus, viewing the record as a whole, the People have met their burden that defendant was armed with a dangerous instrument.

Accordingly, the order should be affirmed, without costs. Order affirmed, without costs. NOTES
[1] "This evidence can be derived from the sex offender's admissions; the victim's statements;... or from any other reliable source" (id.).

[2] Indeed, if defendant "used, threatened to use or attempted to use" the gun as a bludgeon, it clearly would qualify as a dangerous instrument (see *McLaughlin v United States*, 476 U.S. 16, 18 [1986]; see also *People v Colavito*, 126 AD2d 554 [2d Dept 1987]).