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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002118-MR

ANTHONY NASH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CR-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: Anthony Nash entered a conditional guilty plea to a class D felony of failure to register as a sex offender and to being a persistent felony offender in the second-degree. His sentence was ten years, probated for five years by the trial court. Nash reserved the right to appeal the trial court's denial of his

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

motion to amend the indictment to a misdemeanor charge of failure to register as a sex offender. That is the question he presents on appeal.

Nash was originally indicted in January of 2007 on a charge of failure to register as a sex offender in October of 2006. Because he had previously been convicted of failing to register as a sex offender in 2005 and 2006, he was accused of being a subsequent offender and subject to punishment as a Class C felony. He was additionally charged with being a second-degree persistent felony offender.

Nash had been originally convicted of a sex offense in 1993 and became subject to the registration requirements in 1995. His prior failure to register offenses were both misdemeanors. Nash argued before the trial court that misdemeanor offenses should not have been used to enhance his current charge to a Class C felony. As part of a guilty plea agreement, the charge was reduced to the first offense charge, which is not enhanced by the misdemeanor convictions and thus, he was subject only to the Class D felony.

On appeal, as in the court below, Nash argues that *Peterson v. Shake*, 120 S.W. 3d 707(Ky. 2003), controls and that application of the 2006 version of KRS 17.510(11) would be a violation of the prohibition of the application of law e*x post facto*. Ky. Const., Sec 19; U.S. Const. Art. 1, Sec. 10.

The United States Constitution and the Kentucky Constitution, through their *ex post facto* clauses, forbid the "enactment of any law that imposes or increases the punishment for criminal acts committed prior to the law's enactment." *Commonwealth v. Baker*, 295 S.W. 3d 437, 442 (Ky. 2009). For a law

to be *ex post facto*, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Hyatt v. Commonwealth*, 72 S.W.3d 566, 571 (Ky. 2002)(quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981)). The Kentucky Supreme Court has also framed the second prong in terms of whether the change in the law results in an additional or increased punishment. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003).

Appellant has met this two-prong threshold. First, he was convicted and sentenced for his sex offense in 1993, long before KRS 17.510 was amended to change the penalty for non-compliance from a misdemeanor to a felony. The version of the statute (2006) under which Appellant was convicted, was clearly not the same version of the statue he was required to register under when he was sentenced for his crime; so it is retrospective.

Second, when Appellant was sentenced for his sex offense and was required to register, he was subject only to a possible misdemeanor charge in the event of non-compliance. Under the newer versions of the statute, he would be subject to a possible felony charge with longer jail time. Because a felony holds a greater penalty than a misdemeanor, the change in law amounts to an increase in Appellant's initial punishment for his sex offense. Consequently, it is a disadvantage to Appellant to be subject to the newer versions of KRS 17.510 where there is a risk of being charged with an offence that holds a greater penalty.

According to the Kentucky Supreme Court, for a law to violate the *ex post facto* clause, there is a third requirement, which ties in to whether there is an increased punishment: The law must be punitive. *Baker* at 442 (citing *Martin*, 122 S.W.3d at 547). The United States Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed. 2d 164 (2003), applied a two-part test that was set forth in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (2003), to determine whether a law is punitive. First, did the legislature intend to establish a civil, nonpunitive, regulatory scheme, or did it intend to impose punishment. *Smith* at 92. It has been well established that sex offender registration statutes are meant to provide a regulatory scheme rather than a punishment to sex offenders. *Hyatt* at 571.

Because the legislature intended to create a regulatory scheme, the second part of the test is to determine if the statute is "so punitive either in purpose or effect as to negate the state's intention to deem it 'civil.'" *Smith* at 92 (quoting *Hendricks*, 521 U.S. at 361). There are five relevant factors used to make this determination: whether in its necessary operation, the regulatory scheme "(1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational connection to a nonpunitive purpose, or (5) is excessive with respect to the nonpunitive purpose." *Baker* at 443-444 (citing *Smith*, 538 U.S. at 97). If a balancing of these five factors shows that the 2006 version of KRS

17.510 is punitive in effect, then its application to Appellant is a violation of the *ex post facto* clauses of the U.S. and Kentucky Constitutions.

(1) Historically regarded as punishment

The U.S. Supreme Court has held that the requirement of convicted sex offenders to register does not resemble historical punishments such as public shaming, humiliation, and banishment because those involve more than the dissemination of information. *Smith* at 101. However, KRS 17.510, by imposing the possibility of a felony charge for noncompliance, goes beyond simple dissemination of information. The law actually imposes a significant punishment for noncompliance on those required to register. While it is difficult to categorize this particular law with historical punishments such as public shaming or banishment, it is clear that the aims of the punishments are the same.

(2) Promotion of the Traditional Aims of Punishment

KRS 17.510 does promote the traditional aims of punishment: retribution or deterrence. Requiring *all* sex offenders to register and subjecting *all* sex offenders to being charged with a felony regardless of the actual crime committed, appears to be retribution. The absence of any individual risk assessment in determining *which* sex offenders must register has steered the U.S. Supreme Court to consider that there is a retributive aspect to sex offender registration statutes. *Smith* at 109. Specifically, the punishment incorporated into KRS 17.510 through subsection 11, whether a misdemeanor or felony, is retributive. It is imposing the possibility of being charged with a crime that *only*

those people convicted of a sex offence can be charged with. Deterrence is also promoted because having to register and being subject to a felony charge by failing to do so will prevent some people from committing sex crimes in the first place.

(3) Affirmative Disability or Restraint

The Court in *Smith* held that having to register and continually update your registration status is not an affirmative disability or restraint because those required to register are "free to move where they wish and to live and work as other citizens with no supervision." *Id*. at 101. However, the penalty for noncompliance could be viewed as a disability because of the risk involved. If a sex offender doesn't register he is subject to being charged with another crime. The risk of penalty, whether misdemeanor or felony, is a disability that only sex offenders face. Those required to register will be motivated to do so and will be deterred from not complying because of the fear of being charged with a felony. The more sex offenders that are motivated to actually register, the more informed, and therefore safe, the public will be.

(5) Excessive with Respect to a Nonpunitive Purpose

While there is a rational connection, the punishment for noncompliance is excessive in light of the goal of protecting public safety. Being charged with a felony and having to serve more than a year in jail for failing to update an address, as Appellant did here, seems excessive. A simple mistake or forgetfulness on the part of a sex offender could possibly land him in jail for more than a year with another felony on his record. This could potentially stall his

integration back into society after detainment for the original sex offense, cause him to lose his job and make it more difficult to get another one when he is released. Balancing these five factors is a close call. Having a separate punishment for violation of a separate law is not historically a punishment. However, the law does serve the traditional aims of punishment: retribution and deterrence. The law also places some disability or restraint on sex offenders because of the risk of being charged with another crime. There is a rational connection between the law and protecting public safety, but the law is excessive in light of this nonpunitive purpose.

The 2006 version of the statute provides that any person required to register "who knowingly violates any of the provisions of this section *or prior law* is guilty of a Class D felony . . ." KRS 17.510(11)(emphasis added). It doesn't make sense that simply including the language, "or prior law" will negate an *ex post facto* violation. If this were the case, the legislature could in effect "violate" the *ex post facto* clause by amending statutes to increase punishments and simply say that they apply to previously convicted people. It should not be that easy to get around a constitutional guarantee.

For the reasons set forth herein, this matter is reversed and remanded to the Fayette Circuit Court for action consistent with this opinion.

ALL CONCUR.

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