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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002268-MR

THOMAS CARDONA, JR.

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2010-SC-000104-DG

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-01613

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: This case is on remand to us from the Kentucky Supreme Court for reconsideration in light of the recent case of *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010). In the case at hand, Thomas Cardona, Jr., entered a conditional guilty plea to a class D felony for failure to register as a sex offender. After our review, we determine that the statute which establishes the penalty for

failing to register as a sex offender is not an *ex post facto* application of the law as he suggests, and we affirm the determination of the trial court.

Cardona was found to be an offender requiring registration in New York. He first registered there on April 29, 2002. He was allegedly advised at that time that failure to register was a class A misdemeanor offense. It also appears he maintained his registration while a resident of New York. He first registered in Kentucky in November 2004, and maintained a current registration until September 21, 2006. He was then indicted for the class D felony offense of failing to register as a sex offender. He moved to dismiss the indictment as an *ex post facto* law, arguing that at the time of his original conviction for a sex offense and all subsequent registration periods, failure to register was a class A misdemeanor. The trial court overruled the motion but accepted his conditional guilty plea allowing him to reserve the question of whether the application of a felony charge is an *ex post facto* law. Pursuant to that plea, he was sentenced to serve one year with that sentence probated for a period of five years. This appeal followed.

Cardona relies on the holding in *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003), wherein the Supreme Court of Kentucky ordered a similar indictment reduced to a misdemeanor. He argues that he did not know that a conviction for his failure to register would be a felony. The trial court rejected his argument and relied on the law in effect in October 2006, when the offense was committed.

We must examine the registration laws as they exist within the constitutional framework and the prohibition of *ex post facto* laws. A law

increasing punishment for a criminal act committed prior to the law's enactment is prohibited. U.S. Const., Article 1, § 10; Kentucky Constitution § 19(1). Statutes that require convicted sex offenders to register, even when applied retroactively, do not necessarily violate the *ex post facto* clause. *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). In *Smith*, the United States Supreme Court created a two-part process to determine if a statute violates the *ex post facto* clause.

We must first decide whether the Legislature intended the statutes to establish a civil, nonpunitive, regulatory plan. In Kentucky, the statutory plan for dealing with the registration of convicted sex offenders is “directly related to the nonpunitive goals of protecting the safety of the public.” *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (Ky. 2002). Our review of the act does not lead us to the conclusion that the regulatory plan has become significantly more punitive. We find no reason to ignore the holding of *Hyatt*.

The second step is to determine whether the purpose or effect of the statute is so punitive that it negates the Legislature's intent to create a regulatory plan. The Supreme Court held in *Hyatt* that any punishment is “prospective and is not punishment for past criminal behavior.” *Id.* We determine that the regulatory scheme is therefore within the bounds of the Legislature's intent and is not so punitive that it does damage to that intent. We conclude that Kentucky's registration requirements for convicted sex offenders are not violations of the *ex post facto* clauses of either the United States or Kentucky Constitutions.

The recent case of *Buck v. Commonwealth, supra*, further reiterates this point. The case is similar to the case at hand in that the defendant, William Buck, was indicted for failure to register as a sex offender under the Sex Offender Registration Act (SORA). In *Buck*, when the defendant was incarcerated for a sex crime, failure to register under the SORA was only a class A misdemeanor. However, when he was charged for violating the SORA for failing to register as a sexual offender, the punishment had been increased to a class D felony. Buck argued that this violated the *ex post facto* clauses of the Kentucky and United States Constitutions.

The Kentucky Supreme Court disagreed with Buck's argument and held:

“Any potential punishment arising from the violation of [SORA] is totally prospective and is not punishment for past criminal behavior.” *Hyatt*, 72 S.W.3d at 572. *See also Doe*, 538 U.S. at 101-02, 123 S.Ct. 1140 (“A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.”). While a sex offender's past conduct is the reason he or she is required to register, the failure to register occurs in the present. An increase in the degree of the offense for failing to register would only present an *ex post facto* issue if the *act of failing to register* occurred prior to the effective date of the amendment.

...

Analyzing SORA and its 2006 amendments in light of what it requires from the registrant, we continue to believe that SORA is a remedial measure with a rational connection to the nonpunitive goal of protection

of public safety, and we see no reason to depart from our holding in *Hyatt*. (Emphasis in original).

Buck at 667-668.

The act being punished is Cardona's failure to register, not his past sex crime. When he failed to register, he violated the current version of SORA, which classified the crime as a class D felony.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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