

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001870-MR

ROBIN GILLISPIE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CR-00425

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Robin Gillispie appeals from the Fayette Circuit Court's denial of his motion to dismiss the indictment. Gillispie was indicted for failure to comply with sex offender registration requirements by failing to notify authorities of a change in address pursuant to Kentucky Revised Statute(s) ("KRS") 17.510. On appeal, Gillispie contends that his motion to dismiss should have been granted on

the grounds that KRS 17.510 is unconstitutionally vague and that KRS 17.545 violates the *ex post facto* clauses of the United States and Kentucky Constitutions. For the reasons set forth below, we affirm.

History

In 1991, Gillispie was convicted of first-degree sodomy with a six-year-old victim. When Gillispie was released from prison in 2004, he was required to register with the Kentucky Sex Offender Registry.¹ Upon his release, Gillispie registered to his mother's address in Woodford County. At some point in 2006, however, Gillispie left his mother's home in Woodford County.

On February 9, 2007, a Fayette County grand jury found that Gillispie had been convicted of an offense requiring registration as a sex offender and had failed to comply with registry requirements of KRS 17.510 when he failed to notify law enforcement of his change of address.

Gillispie alleges that he failed to comply with the registry requirements of KRS 17.510 because the restrictions in KRS 17.545 rendered him homeless. From 2004 to 2006 Gillispie registered and legally lived at his mother's home. After the amendment, however, he contends that initially the only place he could live was in Woodford County and that ultimately he was forced to return to

¹ While Gillispie was still imprisoned, Kentucky adopted its first version of "Megan's Law" in 1994 (KRS 17.500, *et. seq.*), which established the sex offender registry system. When Gillispie was released from prison in 2004, Megan's law and its subsequent amendments (in 1998 and 2000) had been enacted, requiring him to register his home address with authorities upon release.

Fayette County to sleep in a tent under a railroad bridge near Henry Clay Boulevard and Delaware Avenue in Lexington, Kentucky.²

Gillispie contends that he did not believe he had to inform authorities that he had moved from his residence in Woodford County to the railroad bridge in Fayette County. He argued before the trial court that KRS 17.510 is unconstitutionally vague as applied to persons who are homeless or do not otherwise maintain a proper residence to register with authorities. He further argued that the provisions of KRS 17.545 violate the *ex post facto* clauses of the United States and Kentucky Constitutions, averring that he had a residence to register before the new provisions in KRS 17.545 were enacted. Gillispie moved to dismiss the indictment on these grounds; however, the trial court denied the motion. Thereafter, Gillispie entered a conditional guilty plea, reserving his right under Kentucky Rules of Criminal Procedure (“RCr”) 8.09 to appeal the trial court’s denial of this motion to dismiss.

This appeal followed.

² Although a residency restriction statute was enacted by the 2000 amendments to KRS 17.500, *et. seq.*, “the original residency restriction statute applied only to those on probation, parole, or other form of supervised release.” *Commonwealth v. Baker*, 295 S.W.3d 437, 441 (Ky. 2009). However the current statute, enacted in 2006, “applies to all registrants regardless of probation or parole status.” *Id.*

Analysis

Gillispie contends on appeal, as was argued before the trial court, that KRS 17.500, *et. seq.*, Kentucky's Sexual Offender Registration Act, is void for vagueness and violates the *ex post facto* clauses of the United States and Kentucky Constitutions. As these issues turn on the constitutionality of Kentucky statutes, we review *de novo*. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91(Ky. App. 2004).

KRS 17.510 is not void for vagueness.

We first address Gillispie's argument that KRS 17.510 is void for vagueness. There is no need for a protracted discussion on this issue as the Kentucky Supreme Court addressed this very issue mere months after the present appeal was filed.

In May of 2009, the Kentucky Supreme Court decided the case of *Tobar v. Commonwealth*, 284 S.W.3d 133 (Ky. 2009), in which it answered the question of whether the statute was unconstitutionally vague as applied to homeless persons.³ In *Tobar*, the Court stated:

A review of KRS 17.510(10)(a) indicates that it is not void for vagueness as applied to Appellant. KRS 17.510 is designed to fulfill a public purpose by tracking where sex offenders live. The key to fulfilling this purpose is making sure that registered sex offenders report to the proper authorities whenever they change their residence address. We agree with the Court of Appeals that the

³ The *Tobar* Court addressed KRS 17.510(10)(a) instead of KRS 17.510(b); however the difference is irrelevant, as it only affects *to whom* the offender must report. There is no discernible difference between the two subsections concerning the offender's general obligation to report.

focus of KRS 17.510(10)(a) is not that the sex offender have an address, but that any *change* in address be reported to the proper authorities. The clear language of the statute supports such a conclusion. KRS 17.510(10)(a) clearly provides “[i]f the residence address of any registrant *changes*, but the registrant remains in the same county, the person *shall* register” Nowhere in the plain language of the statute does it require that the registrant must have an actual place he is moving to.

Id. at 135. Although the Court was analyzing the older statute which lacked a formal definition of “residence” (KRS 17.510(10)(a)), we find their analysis to be directly applicable to the present case. Further, as KRS 17.500(7) now defines residence to mean “any place where a person sleeps,” it appears to this Court to be *even more clear* than in *Tobar, supra*, that it applies to persons who are homeless or do not otherwise maintain a permanent residence.

As such, we do not find KRS 17.500 to be void for vagueness.

KRS 17.545 is not an ex post facto punishment.

Gillispie also claims that KRS 17.545 violates the *ex post facto* clauses of the United States and Kentucky Constitutions. He notes that upon his release in 2004, the law only required that he register as a sex offender. Thus, he registered to his mother’s address and lawfully resided with his mother at that time. However, the 2006 amendments to KRS 17.545 changed the law to prohibit all registered sex offenders from living within 1,000 feet of a school. As his mother’s residence was within 108 feet of a school, he was no longer legally able to reside

and register at that address. Gillispie argues that amendment inflicted greater punishment upon him for the crime he committed in 1991.

The Commonwealth urges this Court not to consider the constitutionality of KRS 17.545 because Gillispie was not charged with violation of KRS 17.545 (for living in a prohibited area), but rather with violation of KRS 17.510 (for failing to register a change in address). Gillispie argues that he was only charged with violation of KRS 17.510 because the restrictions contained in KRS 17.545 forced him to leave his mother's home and become homeless.

We agree with the Commonwealth that the issue of the constitutionality of KRS 17.545 is not directly before us. Gillispie was charged with failure to register a change in address under KRS 17.510. He was *not*, however, charged with living in a prohibited area under KRS 17.545.⁴ As per the holding in *Tobar, supra*, Gillispie would have been required to notify authorities of a change in address regardless of whether he were living in his mother's house or beneath a bridge in Fayette County.

As we do not reach Gillispie's second argument, we affirm the trial court's denial of the motion to dismiss on the ground that KRS 17.510 is not unconstitutionally vague.

ALL CONCUR.

⁴ Nonetheless, we are aware that the Kentucky Supreme Court recently rendered *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), holding that KRS 17.545 is an *ex post facto* punishment as applied to sex offenders who committed their offenses prior to July 12, 2006. In the present case, the fact that KRS 17.545 has been declared unconstitutional is not relevant to the disposition of Gillispie's case. Gillispie was required to register, whether or not he was homeless, and the factors leading to his homelessness are not the subject of this appeal.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky