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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000439-MR

RONALD KEITH SALYER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 05-CR-000457

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * * * *

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, Ronald Keith Salyer, appeals the February 19, 2009, opinion and order of the Jefferson Circuit Court, wherein the court determined that Salyer was required to register as a sex offender for the remainder of his lifetime pursuant to the version of KRS 17.510 in effect at the time of his

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

release. Following a review of the record, the arguments of the parties, and the applicable law, we affirm in part and reverse in part.

On February 10, 2005, Salyer was indicted by the Jefferson County Grand Jury for twenty-nine counts of possession of matter portraying a sexual performance by a minor, second offense, each count a Class D felony. The indictment alleged that between July 5, 2002, and December 1, 2004, Salyer committed these offenses when he knowingly had in his possession or control matter visually depicting an actual sexual performance by a minor. These images, all of which were severely disturbing, were found on Salyer's personal computer.²

The indictment also charged a second or subsequent offense because Salyer had previously pled guilty to the same offense,³ for which he received a sentence of twelve months conditionally discharged for two years, and for which he was ordered to complete a sex offender program. At the time of the indictment in the matter *sub judice*, Salyer had still not completed that treatment.

During the months leading up to trial, despite the overwhelming evidence against Salyer, his counsel was able to negotiate a plea agreement with the Commonwealth. On April 28, 2005, two pleadings were filed with the trial

² According to the Commonwealth, the indictment stemmed from 29 images on Salyer's computer, although the computer forensics and analysis report indicated that there would have been more images recovered had there not been a deletion of a computer folder including 1,767 images from the hard drive by an Internet Washer Pro program installed specifically for the purpose of eliminating and encrypting files. Further, additional investigation into the instant case revealed a total of more than 226 image files depicting child pornography with victims ranging from infants through young teenagers.

³ Jefferson Circuit Court Case No. 02-CR-000467. At the time he pled guilty to that offense, it was considered a misdemeanor. KRS 531.335 was amended in 2006, and it is now a Class D felony in all cases.

court, including the Commonwealth's Offer on Plea of Guilty, and Salyer's Motion to Enter Guilty Plea. Both were signed by Salyer and his counsel. In exchange for Salyer's plea, the Commonwealth agreed to dismiss fourteen of the twenty-nine counts, and recommended that Salyer receive a sentence of five years on each charge, all recommended to run concurrently for a total of five years. That recommendation stated that the Commonwealth would take no stand on probation.

On that same date, Salyer appeared before the court, withdrew his previous plea of not guilty, and pled guilty to the charges. In accepting the plea, the court found that Salyer understood the nature of the charges, including possible penalties, and that he knowingly and voluntarily waived his rights to plead innocent and proceed to trial. Following his guilty plea, Salyer also filed a pleading styled, "Waiver of Preparation of Presentence Report Prior to Sentencing" at the hearing on the entry of his guilty plea. The court entered an order at the conclusion of the hearing indicating that Salyer was already serving twelve months from his previous conviction in district court, and that there would be five years to serve from the current case. The court nevertheless ordered a Pre-Sentence Investigation (PSI) to be produced at a hearing to be held on June 23, 2005, wherein the court would hear a motion for shock probation. The court entered an order on the guilty plea/waiver of PSI and judgment of conviction and sentence on April 28, 2005.

Thereafter, Salyer filed a motion for shock probation on June 16, 2005. The court held a hearing on that motion on June 23, 2005. At the

conclusion of the presentation of all evidence, the trial court denied the motion for shock probation, and sentenced Salyer in accordance with the accepted plea agreement. Salyer requested that the court amend his final judgment so that any reference to the requirement to register as a sex offender was removed. The Commonwealth responded that a review of KRS 17.510 (as it existed in 2005) indicated that Salyer was not required to register as a sex offender. That statute was subsequently amended in 2006. Under those amendments, the offense to which Salyer pled guilty did qualify as a registry offense.

The final Amended Judgment on Guilty Plea, Waiver of PSI and Judgment of Conviction and Sentence was signed on July 19, 2005, sentencing Salyer pursuant to the plea agreement for a total of five years' imprisonment. That order included no mention of sex offender registration or accompanying requirements in the amended judgment.

Salyer was discharged from custody on February 12, 2008. Based on KRS 17.510 in effect at the time of his release, the Department of Corrections required Salyer to register as a sex offender prior to his release. Salyer questioned whether or not he was actually required to register, and on April 16, 2008, Salyer received a letter from the Justice and Public Safety Cabinet. Therein, the Cabinet explained that pursuant to KRS 17.520(1), the duty to register as a sex offender is determined at the time of release, and that the offense of which he was convicted was included in the registration requirement at the time he was released in 2008.

The letter also explained that Salyer was required to register for a lifetime since he had been convicted of two qualifying offenses against victims who were minors.

Thereafter, on June 19, 2008, Salyer wrote a letter to the Jefferson Circuit Court requesting that the court “comply” with the judgment previously entered in his case and order the state police to “comply” with the statutes in effect at the time of his offense, and remove him from the sex offender registry. A letter was thereafter sent from the court to the Department of Corrections (DOC) on July 21, 2008, forwarding a copy of the amended judgment⁴ and requesting that Salyer be removed from the registry. The court sent another letter on August 13, 2008, giving the DOC ten days to show why it had not complied with the court’s request.

Subsequently, on September 30, 2008, after hearing from the DOC that it was not in control of the registry, the court entered a show cause order for the Commonwealth to show why there had been no compliance with its previous orders. The Commonwealth responded by submitting a memorandum of law regarding Salyer’s sex offender status and explaining that the application of the registration statutes, including the fact that the duty to register is determined at the time of release from incarceration and not at the time of judgment. Salyer’s counsel responded to that memorandum by arguing that the court should “honor” the 2005 judgment, and that statutory construction should lead to a finding that the amendments to the registration requirements were punitive and ex post facto violations.

⁴ The letter did not indicate that it was to be forwarded to the registration department.

On February 19, 2009, the trial court entered an opinion and order sustaining the Commonwealth's response to the show cause order, and finding that Salyer was subject to the registration statutes applicable at the time of his release. Further, the court held that the judgment did not in any way state that Salyer would never be subject to registration. Salyer now appeals to this Court. In addressing the issues raised on appeal, we remind the parties that statutory construction is a matter of law, which we review *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

As his first basis for appeal, Salyer argues that the trial court erred in ruling that he was subject to the sex offender registration law set forth in KRS 17.520(1). Salyer asserts that sex offender registration is, in effect, an additional punishment for specified offenses and that, accordingly, it cannot be applied retroactively. In making this argument, Salyer draws this Court's attention to the fact that the 2006 amendment to the Sex Offender Registration Act ("SORA") was titled "An act relating to sex offenses and the punishment thereof."

Salyer asserts that pursuant to Section 51 of the Kentucky Constitution,⁵ every section of a legislative act must relate to the subject announced in the title of the act. He thus argues that it is no longer proper to classify sex offender registration as a civil regulatory scheme. Instead, Salyer asserts that sex

⁵ Section 51 of the Kentucky Constitution provides that: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length."

offender registration must be characterized as a criminal punishment. He argues that as a criminal punishment, the 2006 amendment could not be imposed upon him without violating state and federal constitutional guarantees against ex post facto laws and double jeopardy.

In making this argument, Salyer acknowledges the holding of our Kentucky Supreme Court in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), wherein the Court found that Kentucky sex offender registration statutes are remedial, non-punitive statutes, which it found to be constitutional as applied to persons convicted prior to the enactment of the registration requirements. Salyer nevertheless asserts that *Hyatt* construed the law as it existed in 2002, and that it was no longer applicable at the time the legislature amended the SORA in 2006. Alternatively, Salyer argues that even if this Court finds the 2006 amendments to be a continuation of the civil regulatory scheme, we must declare them void as violations of Section 51 of the Kentucky Constitution.

Salyer argues that that long-standing interpretation of Section 51⁶ by our courts requires close correlation between the title of an act and its substantive content. In the matter *sub judice*, Salyer asserts that the title of the act is unambiguous in its reference to punishment and that, accordingly, there is no reason to engage in further construction or interpretation thereof. He thus asserts that we are compelled to either declare the act to be criminal in nature, or to find it void as a violation of Section 51.

⁶ See, e.g., *Phillips v. Covington and Cincinnati Bridge Co.*, 59 Ky. 219 (Ky. App. 1859), and *Commonwealth v. Barney*, 115 Ky. 475, 74 S.W. 181 (Ky. App. 1903).

The Commonwealth asserts that this argument is one which places form over substance, and that the versions of KRS 17.520 and 17.510 in place at the time of Salyer's release were properly applied. Having reviewed the statutory provisions themselves, and applicable law, we are compelled to agree.

In so finding, we note that KRS 17.510(2) states clearly that a sex offender "shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside." Further, the amendments to KRS 17.500(2)(a)(4) clearly establish that any offense involving a minor or depiction of a minor as set forth in KRS 531 is an offense requiring registration upon release from incarceration after being convicted. Clearly, Salyer meets the criteria set forth in both of these provisions.

As our Supreme Court held in *Hyatt*, "Registration and Notification Statutes across the nation have consistently been held to be remedial measures, not punitive, and therefore do not amount to punishment or increased punishment." *Hyatt* at 571. While Salyer attempts to argue that *Hyatt* is outdated, and that the provisions at issue cannot be construed as a continuation of the civil regulatory scheme without violating Section 51 of our Kentucky Constitution, we simply cannot agree.

While we agree that the title of the act alone, if viewed in isolation from the remainder of its provisions, might imply punishment, we note that the essence of statutory construction is to ascertain and give effect to the intent of the

legislature. *Hale v. Combs*, 30 S.W.3d 146, 151 (Ky. 2000). Thus, this Court is not required to act in a vacuum when determining the purpose of legislation, and may take judicial notice of the historical settings and conditions out of which the legislation was enacted. *Commonwealth v. Howard*, 969 S.W.2d 700 (Ky. 1998). While it is clear that the legislature used the word “punishment” in the title of the amended act, we simply cannot find that this alone should be determinative of our construction of the statutory scheme as a whole.

This is particularly so in a situation such as the matter *sub judice*, where sex offense convictions are predicates for registration, and where a failure to comply with registration leads to a new charge, ultimately accompanied by a “punishment.” Thus, it is clear that the term “punishment” refers not to an ex post facto punishment for the crime of which an individual was convicted in the past, but is instead a punishment for a choice consciously made by the offender who decides not to comply with the registration requirements of the statute.

More importantly, however, we note that our Kentucky Supreme Court recently addressed the very issue raised in this appeal in *Buck v.*

Commonwealth, 308 S.W.3d 661 (Ky. 2010). Therein, the Court stated:

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*. Buck has demonstrated nothing in the 2006 amendments to SORA drastic enough to render SORA punitive.

Buck points to the fact that the 2006 bill amending SORA was entitled “AN ACT relating to sex offenses and the punishment thereof.” In *Baker*, which dealt with another provision of the same 2006 bill, this Court rejected the argument that this title alone rendered the entire bill punitive. 295 S.W.3d at 443. Buck points to the increased length of registration (10 years increased to 20 years for non-lifetime registrants), but has not demonstrated that this increased registration period is being applied retroactively.

Buck also attempts to distinguish *Hyatt* and *Doe* based on the fact that the registrants in those cases were challenging the registration *system*, but had not yet been subject to *criminal liability*. This only underscores our holding in *Hyatt* that criminal liability for failure to register is prospective and not a punishment for past crimes. The fact that Buck, unlike the registrants in *Hyatt* and *Doe*, has actually been convicted of failing to register does not change the fact that that criminal prosecution is the result of a new crime, separate from the original sex offense. We find nothing in the 2006 amendments that requires us to depart from *Hyatt*.

Buck, 308 S.W.3d at 667-68. Clearly, the Kentucky Supreme Court has already addressed the very issues raised by Salyer, namely whether the act, as amended, is a violation of ex post facto, and whether the title of the act renders it punitive. We are thus bound by those determinations, and decline to hold otherwise.

We now turn to Salyer’s second basis for appeal, namely, that if we find he is required to register as a sex offender, he is not subject to lifetime registration under KRS 17.520. As noted, the Commonwealth argued below that Salyer was under a lifetime duty to register because he had been twice convicted for crimes against a minor. Salyer asserts that this was an incorrect argument, and notes that while he was convicted of a felony in the current case, he was only

convicted of a misdemeanor in the previous case. Salyer notes that the current version of KRS 17.520(2)(a)(4) prescribes lifetime registration for any person convicted of two or more felony offenses against a victim who is a minor. Salyer asserts that as he does not meet those qualifications, he is only required to register as a sex offender for twenty years. He asks this Court for a declaration in that regard. The Commonwealth does not dispute that Salyer has been convicted once for a misdemeanor sexual offense, and once for a felony.

Having reviewed the provision at issue, we note that it provides as follows:

(2) (a) Lifetime registration is required for:

(4) Any person who has been convicted of two (2) or more felony criminal offenses against a victim who is a minor;

Certainly, the statute is very clear as to who qualifies for lifetime registration. It is equally clear from a review of the record that Salyer was charged with distribution of child pornography in 2003, which was amended down to a misdemeanor conviction for possession, as well as the fifteen counts of possession, a felony of which he was convicted in 2005. Thus it is clear that Salyer does not qualify for lifetime registration pursuant to KRS 17.520(2)(a)(4), and is instead subject to the twenty-year registration requirement set forth in KRS 17.520(3). This Court thus declares that his registration term be amended accordingly.

Wherefore, for the foregoing reasons, we hereby affirm the portion of the February 19, 2009, order of the Jefferson Circuit Court requiring Salyer to

register as a sex offender, reverse the portion of the order requiring lifetime registration and instead order that Salyer qualifies for twenty-year registration pursuant to KRS 17.520(3).

ALL CONCUR.

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