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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000518-MR

DENNIS GILBERT HALL — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 92-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Dennis Hall has appealed from an order of the Woodford Circuit Court that found him to be a high risk sex offender. In this appeal, he raises issues concerning the admissibility of certain evidence and the constitutionality of Kentucky's Sex Offender Registration Act.[1] Having concluded that Hall's rights to procedural due process were not violated and

[1]The act applies to those persons convicted of a "felony offense defined in KRS Chapter 510 [sex offenses], KRS 530.020 [incest], 530.064 [unlawful transaction with a minor in the first degree], or 531.310 [use of a minor in a sexual performance], a felony attempt to commit a sex crime, or similar offenses in another jurisdiction." Kentucky Revised Statutes (KRS) 17.500(4).

that the statutory scheme does not offend the constitutional prohibitions against double jeopardy, we affirm.

In 1992, Hall, then 22 years old, was indicted on one count of sexual abuse in the first degree and on one count of sodomy in the first degree. These charges stemmed from allegations that he unclothed, fondled and performed oral sex on a six-year old boy who attended a class Hall taught at his church. Hall was convicted of both offenses and sentenced to prison to serve four years on the conviction for sexual abuse and seven years on the sodomy conviction. The sentences were run concurrently for a total of seven years. In June 1996, Hall was paroled and, as a condition of that parole, he was required to attend a sex offender treatment program. In July 1997, Hall's parole was revoked after he was terminated from the treatment program. Also in that year, Hall was charged with violating the Child Pornography Prevention Act,[2] by having in his possession visual depictions, obtained from the Internet, of minors appearing to engage in sexually explicit conduct.

On November 25, 1998, prior to his anticipated release on the state convictions, the Woodford Circuit Court ordered that Hall undergo a sex offender risk assessment for the purpose of determining his status as either a high, moderate, or low risk sex offender pursuant to KRS 17.570.[3] Hall was transported to

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[2]18 U.S.C. §2252A.

[3]KRS 17.570(1) reads:

> Upon conviction of a "sex crime" as defined in KRS 17.500 and within sixty (60) calendar days prior to the discharge,

(continued...)

the Kentucky State Reformatory where the assessment was performed by a "certified provider," a psychologist, who, after interviewing Hall and conducting a battery of tests, concluded in the report that Hall exhibited a "**high risk** to reoffend sexually"[emphasis original].

On January 29, 1999, a hearing was conducted pursuant to KRS 17.570(4). Hall, who was represented by counsel, moved the trial court to dismiss the proceeding as being in violation of his constitutional protection against double jeopardy. He further argued that the sex offender risk assessment report could not be admitted as evidence since the author of the report was not present. The Commonwealth argued that the rules of evidence prohibiting the admission of hearsay were not applicable as the proceeding was similar to a preliminary hearing or parole revocation hearing. The trial court agreed with the Commonwealth and denied Hall's motion to dismiss the proceeding.

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[3](...continued)

> release, or parole of a sex offender, the sentencing court shall order a sex offender risk assessment by a certified provider for the following purposes:
>
> (a) To determine whether the offender should be classified as a high, moderate, or low risk sex offender;
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> (b) To designate the length of time a sex offender shall register pursuant to KRS 17.500 to 17.540; and
>
> (c) To designate the type of community notification that shall be provided upon the release of the sex offender pursuant to KRS 17.500 to 17.540.

The Commonwealth was allowed to introduce into evidence the sex offender risk assessment report. Hall testified to some minor inaccuracies in the report; however, he acknowledged the accuracy of most of the factual material in the report, including his version of the crime.

In the order entered on February 3, 1999, the trial court found that

> [Hall's] criminal history and the nature of these offenses combined with his psychiatric profile and his past inability to conform with the requirements of his sexual offender treatment program further substantiate the evaluation of the Certified Provider which the Court accepts.
>
> The Court further finds there is sufficient evidence to find that [Hall] does pose a high risk of recommitting a sex crime and is a threat to the public safety.

Hall was determined by the trial court to be a high risk sex offender, a designation which requires that he register for his lifetime "unless redesignated."[4] This appeal followed.

Hall first argues that he was deprived of a fair hearing by the trial court's admission into evidence of the sex offender risk assessment report without its preparer being present. He contends that he should have been afforded "the constitutional protections implicit in the rules of evidence (i.e., the prohibition against hearsay)," especially since the reliability of the assessment was suspect, the report having been prepared by "the social worker," whom he characterizes as "a

[4]KRS 17.572(3).

sexual offender's traditional opponent." He further contends, in this vein, that the assessment was inherently unreliable because

> social workers are the historical enemies of child abuse offenders, and as such are vulnerable to claims of falsifying evidence, not out of malice perhaps, but out of appropriate compassion, not with intent to do harm, but simply because social workers can in no way be considered dispassionate observers. If their opinions are to be given that special aura of reliability granted to experts, then the supposed scientific findings should be given at least the scrutiny given other scientific conclusions before they are accepted by the courts.[5]

We find no merit to Hall's due process concerns in the admission of the risk assessment report, or to his argument that the report was not trustworthy.

In order to ensure that sex offenders are afforded due process in determining the appropriate tier of sex offender status to be applied to them, the Legislature created a statutory scheme containing several important procedural requirements, including that the trial court "review the recommendations of the certified provider along with any statement by a victim or

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[5]This is apparently in reference to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.E.d 2d 469 (1993), which requires a trial court to inquire into the scientific reliability and the relevance of expert evidence prior to its admission at trial. The appellant's criticism of the trial court for failing to perform this inquiry with respect to the various psychological tests to which he was subjected, the results of which were used to support the recommendations contained in the risk assessment, is clearly not reviewable as he made no Daubert challenge to the admission of this evidence in the trial court. Clearly, if Hall believed the tests were not valid indicators of his propensity to reoffend, it was his duty to raise the issue in the trial court.

victims and any materials submitted by the sex offender;"[6] that the hearing be held "in accordance with the Rules of Criminal Procedure" and that the sex offender be allowed "to appear and be heard;"[7] that the sex offender have the right to counsel;[8] and, that the trial court make "findings of fact and conclusions of law" which are subject to judicial review.[9]

It is clear that the statutory scheme contemplates that an assessment will be prepared by a mental health professional and that it will be available for the trial court to review. There is no question that the procedure employed by the trial court complied with that mandated by KRS 17.570. Thus, Hall's complaint is not really with the trial court, but with the scheme as designed by the Legislature. Before we address Hall's claim that the scheme is defective and that he has been denied his rights to procedural due process, we will first comment on Hall's assertion that the trial court "blindly accepted as the truth" the conclusions reached by the author of the report. There was, as discussed by the trial court in its order, evidence other than the risk assessment report which supports the trial court's determination that upon his release from prison Hall would pose a high risk to male children. This other evidence included Hall's known history and conviction, the fact that his parole had been revoked for failure to remain in the sex offender treatment

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[6]KRS 17.570(3).

[7]KRS 17.570(4).

[8]KRS 17.570(5).

[9]KRS 17.570(6) and (7).

program, his possession of child pornography during his parole, his own admissions concerning the underlying crime, and the fact that he had been convicted in federal court on the 1997 pornography charges. Stated differently, in addition to the recommendation in the assessment by the certified provider, there was other evidence of substance upon which the trial court could reasonably rely to support its determination of the appropriate risk that Hall posed to the community.

It is settled, under both Kentucky law and federal law, that "the concept of procedural due process is flexible."[10]

> Not always does due process require a trial or the strict application of evidentiary rules and/or unlimited discovery. The court may construct, especially under special statutory proceedings, a more flexible procedure to account for the affected interest or potential deprivation. Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand.[11]

In our opinion, the statute is consistent with the Kentucky Rules of Evidence which provide that the rules pertaining to hearsay are not applicable in similar types of proceedings, including "[p]roceedings for extradition or rendition; preliminary hearing in criminal cases; sentencing by a judge; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings

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[10]Smith v. O'Dea, Ky.App., 939 S.W.2d 353, 357 (1997).

[11]Kentucky Central Life Insurance Co. v. Stephens, Ky., 897 S.W.2d 583, 590 (1995)(citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

with respect to release on bail or otherwise."[12] Although Hall contends that "[r]evocation hearings are qualitatively different from classification hearings," we do not believe that the difference inures to his benefit. Indeed, we are of the opinion that the liberty interest at stake in the classification hearing is not nearly as intrusive as the liberty interest at stake in a revocation hearing. It must be remembered that the hearing in the case sub judice was conducted merely to determine Hall's status as a potential re-offender, and to determine how long he would have to comply with the registration and notification provisions of the statute.

In addressing this identical issue and applying a evidentiary rule similar to our rule, KRE 1101(5), the Supreme Court of Ohio held that

> [a] sexual predator determination hearing is similar to sentencing or probation hearings where it is well settled that the Rules of Evidence do not strictly apply. A determination hearing does not occur until after the offender has been convicted of the underlying offense. Further, the determination hearing is intended to determine the offender's status, not to determine the guilt or innocence of the offender. Accordingly, we hold that the Ohio Rules of Evidence do not strictly apply to sexual predator determination hearings. Thus, reliable hearsay, such as a presentence investigation report, may be relied upon by the trial judge.[13]

Hall attempts to overcome the application of KRE 1101(5), which the trial court determined allowed it to admit the

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[12]KRE 1101(5).

[13]State v. Cook, 83 Ohio St.3d 404, 425, 700 N.E.2d 570, 587 (1998).

risk assessment report without the testimony of its preparer, by arguing that it is inherently unreliable as having been prepared by social workers. While Hall complains vehemently about the bias exhibited by social workers against sex offenders, the risk assessment report indicates that it was prepared by two trained psychologists.[14] Further, the statutory scheme does not support Hall's contention that any social worker can be "certified" to render the sex offender risk assessments. The Legislature created a Sex Offender Risk Assessment Board,[15] to certify providers who are required to be "mental health professional[s].[16] Thus, any social worker certified by the Board as competent to make these assessments would necessarily qualify as a mental health professional, that is, be licensed for the practice of clinical social work, or have experience as a psychiatric social worker.[17]

Despite Hall's contention that the assessment may represent only the "personal opinion," of the assessor, the Board has been additionally charged with establishing "a risk assessment procedure that shall be used by certified providers in assessing the risk of recommitting a sex crime by a sex offender

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[14]The "examiner" is identified on the first page of the assessment as Dawn H. Snyder, M.A., Psychological Associate Certified, Treatment Supervisor, Sex Offender Treatment Program, Luther Luckett Correctional Complex. The seven-page report was also signed by Dennis E. Wagner, Ed.D., Licensed Psychologist, Chief.

[15]KRS 17.554(1).

[16]KRS 17.550(8).

[17]See e.g., KRS 202A.011(12)(e).

and the threat posed to public safety."[18] Thus, the scheme has articulated appropriate guidelines which the certified provider, a mental health professional, must consider to avoid an inaccurate risk assessment. Thus, we hold that the trial court did not err in admitting the sex offender risk assessment report as evidence.

Hall's final argument is that the statutory scheme violated his right not to be subjected to double jeopardy. Hall has not cited a single authority in support of his argument that the statute under which the trial court proceeded violated either the state or federal constitutional provisions that prohibit multiple punishment for the same offense.[19] While it is inappropriate for a party to expect this Court to perform research to support his arguments,[20] nevertheless in an effort to afford Hall's arguments full consideration, we have examined several opinions from other state and federal jurisdictions. We agree with the Commonwealth's position that double jeopardy

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[18]KRS 17.554(2)(a)-(h). The factors the statute outlines include the offender's "[c]riminal history," the "[n]ature of [his] offense," the "[c]onditions of release that minimize risk," "[p]hysical conditions that minimize risk," "[p]sychological or psychiatric profiles," "[r]ecent behavior that indicates an increased risk of recommitting a sex crime," "[r]ecent threats or gestures against persons or expressions of an intent to commit additional offenses," and a "[r]eview of the victim impact statement."

[19]See Fifth Amendment to the United States Constitution (no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb") and a similar provision contained in Section 13 of the Kentucky Constitution.

[20]See Kentucky Rules of Civil Procedure 76.12(c)(ii) and (iv), which require appellant's brief to contain a "statement of points and authorities and an "argument" with "citations of authority pertinent to each issue of law."

protections are not implicated by the sex offender classification statute.

As many other court's have observed, the classification, registration and notification scheme is designed to reduce the threat to the public created by the release from incarceration of those sex offenders likely to recommit sex offenses and not to impose additional punishment on the offender.[21] Without the threshold showing that the sanctions contained in the scheme constitute "punishment," Hall cannot establish a double jeopardy violation. Further, it is apparent to this Court, as the Commonwealth has suggested, that if a scheme to involuntarily commit sex offenders upon release from prison can pass a double jeopardy challenge as being non-punitive, a registration/notification scheme which is far less onerous, would also pass constitutional muster.[22]

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[21]See e.g., E. B. v. Verniero, 119 F.3d 1077, 1105 (3rd Cir. 1997) (New Jersey's scheme for classification/notification of sex offenders did not constitute "punishment" for purposes of double jeopardy analysis); State v. Matthews, 159 Or.App. 580, 978 P.2d 423 (1999) ("intended purpose of the sex offender registration requirement was to assist law enforcement in protecting the community from future sex crimes"); Cutshall v. Sundquist, 193 F.3d 466 (6th Cir.1999) (After considering the factors for evaluating a double jeopardy claim set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), the Court concluded that the provisions of Tennessee's Sex Offender Registration and Monitoring Act did not offend the double jeopardy clause of the U.S. Constitution. The Court noted that it was "mindful of the burdens the Act imposes on convicted sex offenders," and of the "potential abuse of registry information by the public," but "[g]iven the gravity of the state's interest in protecting the public from recidivist sex offenders, and the small burdens imposed on registrants," could not "say that the requirements of the Act exceed its remedial purpose." Cutshall, supra 193 F.3d at 476.)

[22]See Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 (continued...)

Accordingly, the judgment of the Woodford Circuit Court is affirmed.

BARBER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING: The sex-offender registration system[23] seems to have a worthy purpose of providing notice to law enforcement agencies of the impending release of a person convicted of a sex crime and the intended residence or address for said person. The length of registration or period requested for registration depends upon the inmate's classification as a high-risk sex offender - which requires lifetime registration,[24] or as a low- or moderate-risk sex offender - which requires registration for ten years.[25] The legislative scheme is for persons convicted to serve their time, but within sixty days prior to their discharge, release, or parole, the sentencing court shall order a sex-offender risk assessment and conduct a hearing to determine whether the defendant is to be classified as a high-, moderate-, or low-risk

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[22](...continued)
L.Ed.2d 501 (1997), in which the Court upheld the state's involuntary commitment program against a constitutional challenge based on substantive due process, ex post facto and double jeopardy grounds. In rejecting all claims of unconstitutionality, the Court looked at the purpose of the statute and held that "[n]othing on the face of the statute suggest[ed] that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." Id. 138 L.Ed.2d at 515.

[23]KRS 17.510, et seq.

[24]KRS 17.520(1)

[25]KRS 17.520(2)

sex offender.[26] I have a problem with reopening a final judgment after the prison door has already closed on the defendant. Once the judgment becomes final, the defendant becomes a ward of the executive branch. For a court to reopen a case, would it not impinge upon the powers reserved for the executive branch by our Constitution?[27] Thus, the issue is whether it is constitutional for the General Assembly, through enactment of KRS 17.570, to mandate the actions of the judicial branch regarding the procedures related to the risk assessment of a sex offender awaiting release.

A statute that is subject to the scrutiny of the separation of powers doctrine "should be judged by a strict construction of those time-tested provisions."[28] Our Constitution empowers the Supreme Court "to prescribe . . . rules of practice and procedure for the Court of Justice."[29] If KRS 17.570 invades the rule-making authority of the Supreme Court, then it is in violation of the separation of powers doctrine.[30]

In Commonwealth v. Reneer,[31] the Supreme Court considered whether KRS 532.055 violated the separation of powers doctrine. KRS 532.055, commonly referred to as the "Truth-in-

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[26]KRS 17.570

[27]Sections 27 & 28 of our Constitution.

[28]Vaughn v. Webb, Ky. App., 911 S.W.2d 273, 276 (1995) (quoting Legislative Research Commission By and Through Prather v. Brown, Ky., 664 S.W.2d 907, 914 (1984)).

[29]Ky. Const. § 116.

[30]Ky., 734 S.W.2d 794, 796 (1987).

[31]Id.

Sentencing" statute, provided procedures by which a court would impose a sentence on a defendant after a jury verdict of guilty or guilty but mentally ill was returned.[32] The statute provided for a bifurcated trial where the jury would hear certain evidence concerning the defendant's prior record in the sentencing phase of the trial that they were not allowed to consider in the guilt phase.[33] The Supreme Court held that since the statute was procedural in nature, it violated the separation of powers doctrine because: (1) the provisions of the statute set forth the procedure to be followed by the courts in sentencing in felony trials; (2) the statute did not add or remove any elements necessary to convict the defendant of the crime; (3) the statute did not increase or decrease the penalty upon conviction; and (4) the statute did not address the guilt or innocence of the defendant.[34]

Likewise, KRS 17.570 is procedural in nature. KRS 17.570 directs the sentencing court to order a sex-offender risk assessment, to review the assessment provider's findings, to conduct a hearing on the assessment, to inform the sex offender of the right to have counsel, to issue findings of fact and conclusions of law, to enter an order designating the offender's risk level, to issue notice of the ruling to the county sheriff where the offender is released, and to grant the offender a right

[32] Id. at 795.

[33] Id.

[34] Id. at 796.

to appeal.[35] Thus, the Legislature has established the procedure and rules by which the courts of this state are to assess a sex offender's risk level and release that assessment to the public. As in Reneer, 734 S.W.2d at 794: (1) the assessment does not change the judgment already entered against the defendant; (2) the provisions of the statute set forth the procedure to be followed by the courts in making the assessment; (3) the assessment does not add or remove any element of the crime necessary to convict the defendant; (4) the assessment does not add or remove any penalty upon conviction; and (5) the assessment does not address the guilt or innocence of the defendant.

Accordingly, I would hold KRS 17.570 to be unconstitutional. In enacting this statute, the Legislature has abrogated the Supreme Court's authority in violation of the separation of powers doctrine.

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[35]KRS 17.570.