

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001923-MR

NATHANIEL SIMS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES SHAKE, JUDGE
ACTION NO. 78-CR-000226

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND VACATING
** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI, AND McANULTY, JUDGES.
McANULTY, JUDGE: Nathaniel Sims (hereinafter appellant) appeals the Order of Sex Offender Risk Determination by the Jefferson Circuit Court which set forth its determination that appellant is a "High Risk Sex Offender" pursuant to the Sex Offender Registration Act. Appellant challenges the trial court's application of the Act to him on numerous grounds: (1) violation of the United States and Kentucky Constitutions' prohibitions against double jeopardy, bill of attainder, arbitrariness and ex post facto laws, and the right of privacy; (2) violation of the Kentucky Constitution's doctrine of separation of powers; (3) lack of jurisdiction over his person; (4) res judicata; (5) lack

of jurisdiction by the sentencing court to reopen a criminal conviction; (6) retrospective application of the statute; and (7) reliance on hearsay information.¹ We conclude that appellant has correctly identified error in the procedure involved in the Sex Offender Registration Act. Therefore, we vacate the trial court's order.

In 1978, appellant pled guilty to one count of sodomy in the first degree and was sentenced to twenty years imprisonment. When it was determined that appellant's projected release date from prison was July 1999, proceedings for determining sex offender risk assessment pursuant to the Sex Offender Registration Act, KRS 17.500 et seq., were begun in June 1999. A risk determination hearing was held on June 30, 1999, and July 14, 1999. Following the hearing, the court entered an Order of Sex Offender Risk Determination on July 16, 1999, which stated that "[b]ased on prior criminal record, psychological evaluation, and sex offender test results and violence risk appraisal," the court determined appellant to be a high risk sex offender.

The Sex Offender Registration Act governs registration of sex offenders after service of sentence and release from a penal institution. Pursuant to KRS 17.570, within 60 days prior to discharge, release or parole of someone designated a sex offender by KRS 17.550, the sentencing court shall order a "sex

¹ Appellant raised additional claims of error which were unpreserved and so were not considered in this appeal. Brown v. Commonwealth, Ky., 780 S.W.2d 627, 630 (1989).

offender risk assessment" conducted by a certified provider.² The sentencing court makes the actual determination of the level of risk by reviewing the recommendations of the certified provider, victim statements, materials submitted by the sex offender, and by conducting a hearing at which the offender shall appear and be heard. KRS 17.570(3) and (4). The sentencing court is required to issue findings of fact and conclusions of law and enter an order designating the level of risk. KRS 17.570(6).

Appellant challenges the provisions of 17.570 which require the sentencing court to conduct the sex offender risk assessment. He disputes the basic power of the court to act in these circumstances. We are persuaded by appellant's arguments that the sentencing court has no power to reopen the final judgment, and that the court's action in making the assessment violates the separation of powers doctrine.

As stated above, the statute designates the sentencing court to perform the sex offender risk assessment when the offender is within 60 days of release, discharge or parole. This entails a reopening of the prisoner's earlier criminal judgment of conviction. In this case, the risk assessment was done by the court which sentenced appellant. In fact, this action carries the same action number from appellant's indictment 22 years ago.

²A certified provider is defined in KRS 17.550 as a mental health professional certified by the Sex Offender Risk Assessment Advisory Board to conduct sexual offender risk assessments, or presentence assessments, or assessments related to probation or conditional discharge.

Thus, his case has been reopened. Appellant's contention is that the General Assembly has no authority, and thus no jurisdiction, to direct a circuit court to reopen a criminal case. We agree. We have found no authority for the sentencing court to reopen a judgment to perform additional tasks after the defendant has been committed to the executive branch to serve his sentence.

A judgment becomes final 10 days after its entry, at which point the court loses jurisdiction over the case. Bowling v. Commonwealth, Ky., 964 S.W.2d 803 (1998); Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996); Commonwealth v. Marcum, Ky., 873 S.W.2d 207 (1994); Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979). A court may be reinvested with jurisdiction when the prisoner files a motion under RCr 11.42 or CR 60.02. Bowling, 964 S.W.2d at 804. Also, a circuit court in the county in which a prisoner is detained will obtain jurisdiction to adjudicate a petition for a writ of habeas corpus under KRS 419.020 *et seq.* to determine the legality of the restraint. Id.; Walters v. Smith, Ky., 599 S.W.2d 164 (1980). In these instances, the validity or effect of the judgment itself is being challenged. In addition, the sentencing court is reinvested with limited jurisdiction to consider a motion for shock probation under KRS 439.265 to suspend a sentence which the prisoner has begun to serve. Gross, 936 S.W.2d at 87. The shock probation statute grants a court a window of time in which to grant probation after the prisoner has served thirty but no more than 180 days of the sentence. Gross, 936 S.W.2d at 87. Notably, the court obtains jurisdiction in each of the foregoing actions after

the defendant makes a petition or motion to the court asking for review of some aspect of the case.

Notwithstanding the above provisions for shock probation, collateral attack, or review of a judgment for error, there is no precedent for reopening a judgment in the manner called for in the Sex Offender Registration Act. The Act presents no challenge to the judgment or sentence necessitating that it be reopened.

However, the Sex Offender Registration Act dictates that the sentencing court retain jurisdiction over a sex offender after the prisoner has been committed to the executive branch and thereafter until just prior to the end of his or her sentence. Moreover, jurisdiction does not end there. If the person is designated a high risk sex offender and required to register for their lifetime pursuant to KRS 17.520(1), "the designation shall continue until the sentencing court determines that the individual is no longer a high risk sex offender." KRS 17.572(2). A high risk sex offender required to register for life may petition the sentencing court for relief ten years after the date of discharge from probation, parole or release from incarceration, and, if denied, every five years thereafter. KRS 17.578(1). The sentencing court is required to request a new report from a certified provider and conduct a second hearing. KRS 17.578(2) and (3). Thus the jurisdiction of the court over a sex offender's case may continue for the lifetime of the offender.

Bowling, Gross, Marcum and Silverburg clearly state that there is no authority for such power over the criminal defendant after he has been committed to the authority of the executive branch. The sentencing court loses its jurisdiction over the case, and the court has no authority of its own to reopen a final judgment at the endpoint of a prisoner's sentence. The Commonwealth argues that the General Assembly has the express power to determine the original jurisdiction of the courts, pursuant to Kentucky Constitution Sections 112(5) and 113(6). However, this issue concerns whether courts may have continuing jurisdiction over cases once properly before them. We find no authority for the General Assembly to assign the courts continuing jurisdiction over a criminal case.

In finding the shock probation statute constitutional, the Supreme Court adjudged it to be a limited exception which "may be considered as *establishing a period, not unreasonably long*, during which the court retains a *limited control over its judgments* in criminal cases." Commonwealth v. Williamson, Ky., 492 S.W.2d 874, 875 (1973) (emphasis supplied). The Supreme Court concluded this did not encroach or invade the executive branch power of clemency. Id. On the contrary, we believe that what is required of judges under KRS 17.570 does encroach upon and invade the power of the executive branch.

We agree with appellant that the statutory scheme at issue violates the separation of powers doctrine by requiring judges to perform determinations of sex offender risk. The

sections of the Kentucky Constitution concerning the doctrine of Separation of Powers, §§ 27 and 28, provide as follows:

Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 28. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Appellant alleges that the statutes violate the above constitutional dictates because the job of classification of prisoners and others subject to governmental supervision is one that is entrusted to the executive branch of government. He adds that the executive branch is also "better situated and equipped" to make the risk determination than the court of justice.

The statutes at issue violate the separation of powers doctrine. Making a determination as to the risk of reoffending for a sex offender is not a function that a court is empowered to do. Rather, we are constrained by the fact that the judicial branch is only empowered by the constitution to carry out judicial functions.

In Akers v. Baldwin, Ky., 736 S.W.2d 294, 309 (1987), the Supreme Court stated that although it is not easy to apply the separation of powers doctrine, "it is crystal clear that courts are the proper forums to determine the issues presented in the interpretation of *past* transactions." The court cited Rohde

v. City of Newport, 246 Ky. 476, 55 S.W.2d 368 (1932), which explains that the distinctive nature of judicial power is to determine rights and obligations with reference to past transactions or current conditions. Id. at 370. A case must present a justiciable issue in such form that the judicial power is capable of acting upon it. Id.

The assessment of the offender's risk to society is not related to the earlier judgment of conviction. Nor is there an issue for judicial review. Rather, the statutes herein require the sentencing court to perform additional *administrative* tasks related to law enforcement and the classification of prisoners pending release. These are tasks traditionally performed by the executive branch which is charged with implementing the laws created by the legislative branch concerning law enforcement, incarceration and release. The Commonwealth argues that if the determination of risk was performed by an executive branch agency, it would be subject to judicial review by the appellate courts anyway, and so the General Assembly "cut out one of the levels of the process." This begs the question whether the sentencing court has the power to take on all of the levels of the process. We find no basis to conclude that it does.

For all the foregoing reasons, we conclude that the enactment of the Sex Offender Registration Act both offends the constitution and cannot be administered by sentencing courts who have lost jurisdiction over these cases. Furthermore, we conclude that the portions of the statutes which are unconstitutional so pervade the Act that they cannot be merely

severed from the rest of the Act. In light of the fact that we find that the Act cannot be implemented, we find it unnecessary to review appellant's additional claims of error.³ We therefore reverse and vacate appellant's Order of Sex Offender Risk Determination.

ALL CONCUR.

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³ Since we reverse, we do not address all of the issues raised by appellant, but we note that this Court has rejected challenges to the Act based on double jeopardy, ex post facto, and privacy rights in Hyatt v. Commonwealth, No. 1999-CA-000703-MR (rendered July 7, 2000), and double jeopardy, procedural due process, and hearsay in Hall v. Commonwealth, 1999-CA-000518-MR (rendered July 7, 2000).