

RENDERED: MAY 17, 2002; 2:00 p.m.
NOT TO BE PUBLISHED
MODIFIED: JUNE 7, 2002; 10:00 a.m.

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001562-MR

STEVEN JOHNSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00777

KENTUCKY STATE PAROLE BOARD

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * **

BEFORE: BUCKINGHAM, HUDDLESTON and GUIDUGLI, Judges.

HUDDLESTON, Judge: Steven Johnson appeals from an order denying and dismissing his petition for declaration of rights and a permanent injunction or, alternatively, petition for a writ of mandamus in which he sought an order requiring the Kentucky State Parole Board to treat him as eligible for parole consideration.

Johnson is an inmate at the Kentucky State Reformatory. In 1972, he was convicted of rape of a female over twelve years of

age,¹ sodomy,² and two counts of indecent moral practices with another,³ for events that occurred in 1971 and 1972, and was sentenced to concurrent terms of ten years for rape and five years for each of the other offenses. He was granted parole in 1974, but returned to prison in 1977 as a result of parole violations. Johnson was again granted parole in 1978, but his parole was revoked in 1982 following his conviction of robbery in the first degree in April 1982, for which he received a sentence of fifteen years to run consecutively to the ten-year sentence he received on the prior convictions. In 1987, Johnson was granted parole for the third time, but once again returned to prison in 1991 as a result of parole violations. In 1995, he again was granted parole, but his parole was revoked for violations in January 2000, and the Parole Board deferred further consideration of parole for six months.

In May 2000, the Department of Corrections classified Johnson as an eligible sex offender as defined in Kentucky Revised Statutes (KRS) 197.410, which made parole eligibility contingent on successful completion of the Sexual Offender Treatment Program (SOTP).⁴ In June 2000, the Parole Board notified Johnson that pursuant to his classification as an "eligible sex offender," he would not be considered for parole until he had satisfied the requirements associated with the SOTP.

¹ Ky. Rev. Stat. (KRS) 435.090 (repealed).

² KRS 436.050 (repealed).

³ KRS 435.105 (repealed).

⁴ See KRS 439.340 (11).

On June 29, 2000, Johnson filed a petition for declaration of rights pursuant to KRS 418.040 and requested a permanent injunction prohibiting the Parole Board from denying him parole consideration based on his classification as a sex offender. He maintained that application of KRS 197.400 et seq. to him violated the constitutional prohibition on ex post facto laws. In November 2000, Johnson filed a notice of submission seeking final adjudication on a "petition for writ of mandamus." The Parole Board filed a response and moved for dismissal of the petition for failure to state a claim under Kentucky Rules of Civil Procedure (CR) 12.02 and KRS 418.065. The circuit court dismissed the petition for declaration of rights and refused to issue a permanent injunction based on Garland v. Commonwealth;⁵ and, the court held that Johnson was not entitled to a writ of mandamus.

Johnson's primary argument is that application of the sex offender statutes to him constitutes a violation of the ex post facto provisions of the United States and Kentucky Constitutions.⁶ An ex post facto law is a law applied to events that occurred before its enactment and that disadvantages the offender by altering the definition of crimes or increases the punishment for criminal acts.⁷ The two major elements of ex post facto analysis in the criminal context require retroactive application that will

⁵ Ky. App., 997 S.W.2d 487 (1999).

⁶ See U.S. Const. Article 1, § 9, cl. 3 and § 10, cl. 1; Ky. Const. § 19.

⁷ Collins v. Youngblood, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30 (1990).

disadvantage the offender.⁸ Recent case law has reformulated the second element to involve whether retroactive application of the new law created "a sufficient risk of increasing the measure of punishment attached to the covered crimes."⁹ In Garland v. Commonwealth,¹⁰ this Court held that application of KRS 197.410(2) and KRS 439.340(11), which require an "eligible sexual offender" to successfully complete the SOTP before being granted parole, did not violate the constitutional prohibition on ex post facto laws. We held that given the fact that parole is a privilege subject to the discretion of the Parole Board and is not a recognized constitutional right, mandatory participation in the SOTP prior to parole eligibility does not increase an inmate's punishment or underlying sentence.

While it is clear that the statutes at issue in this case are being applied to events occurring prior to their enactment, it is equally clear that the appellant has not been disadvantaged. Nothing about the Sexual Offender Treatment Program makes this punishment more onerous. He must serve a maximum of five years and even though the treatment program may affect the time frame in which he

⁸ Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000).

⁹ California Dep't of Corrections v. Morales, 514 U.S. 499, 509, 915 S. Ct. 1597, 1603, 131 L. Ed. 2d 588 (1995); Garner v. Jones, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

¹⁰ See supra, n. 5.

becomes eligible for parole, the appellant will not be heard to say that he has been disadvantaged.¹¹

In addition, scheduling of parole eligibility hearings is discretionary with the Parole Board,¹² so deferral of a hearing does not deprive an inmate of a constitutional right, and the requirement that the SOTP be completed did not increase the risk of punishment.¹³ Garland is directly on point. The circuit court correctly rejected Johnson's ex post facto argument. Johnson's criticism of Garland as a violative of the supremacy clause is without merit and better addressed to the Kentucky Supreme Court.¹⁴

Johnson also challenges the application of the sexual offender statutes to his situation. He notes that the sex offenses for which he was convicted occurred in 1971 and 1972 pursuant to statutory provisions that were later repealed and replaced in 1975 by provisions in the new Penal Code.¹⁵ He asserts that by the time the Corrections Department classified him as a sexual offender for purpose of parole eligibility in 2000, he had completed service of his original ten year sentence on the sex offenses and he was

¹¹ Id. at 490.

¹² 501 Kentucky Administrative Regulations (KAR) 1:030(2)(d).

¹³ See Chambers v. Colorado Dep't of Corrections, 205 F.3d 1237, 1241-42 (10th Cir.), cert. denied, 531 U.S. 962, 121 S. Ct. 391, 148 L. Ed. 2d 301 (2000); Neal v. Shimoda, 131 F.3d 818, 827 (9th Cir. 1997).

¹⁴ The Supreme Court referred to but distinguished the decision in Garland from the situation involving post-release conditional discharge. See Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000).

¹⁵ See supra, notes 1-3.

serving the fifteen years sentence on his 1982 conviction for robbery. The circuit court stated that "Johnson must attend the Sex Offender Treatment Program if he falls within the definition of a sex offender as that term is defined in KRS 197.410," but then held that Garland sanctioned application of the SOTP to a sex offender who was convicted of sex crimes prior to the effective date of the sexual offender statute. The circuit court's reliance on Garland on this issue was misplaced.

We begin with a few basic tenets of statutory construction. The guiding principle of statutory interpretation is that courts are to construe statutes so as to give effect to the intent of the General Assembly.¹⁶ In determining legislative intent, courts must refer to the language of the statute and are not free to add or subtract from the statute or interpret it at variance from the language.¹⁷ "To determine legislative intent, a court must refer to 'the words used in enacting the statute rather than surmising what may have been intended but was not expressed.'"¹⁸ All statutes should be interpreted to give meaning to each provision in accord with the statute as a whole.¹⁹ Courts

¹⁶ Commonwealth v. Harrelson, Ky., 14 S.W.3d 541, 546 (2000); Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000).

¹⁷ Hale, *supra*, n. 6, at 151 (quoting Beckham v. Board of Educ. of Jefferson Co., Ky., 873 S.W.2d 575, 577 (1994)); Stogner v. Commonwealth, Ky. App., 35 S.W.3d 831, 834 (2000).

¹⁸ Commonwealth v. Allen, Ky., 980 2d 278, 280 (1998) (quoting Flying J. Travel Plaza v. Transportation Cabinet, Dep't of Highways, Ky., 928 S.W.2d 344, 347 (1996)). See also Estes v. Commonwealth, Ky., 952 S.W.2d 701, 703 (1997); Stogner v. Commonwealth, Ky. App., 35 S.W.3d 831, 835 (2000).

¹⁹ Aubrey v. Office of Attorney General, Ky. App., 994 (continued...)

have a duty to accord the words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.²⁰ "Where the words of a statute 'are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written.'"²¹ Statutory interpretation is a question of law subject to de novo review.²²

The relevant version of KRS 197.410(1) provides that: "A person is considered to be a 'sexual offender' as used in this chapter when he or she has been adjudicated guilty of a sex crime, as defined in KRS 17.500, or any similar offense in another jurisdiction."²³ "Sex crime" is defined in KRS 17.500(6) as follows:

- (a) A felony offense defined in KRS Chapter 510, KRS 530.020, 530.064, 531.310, or 531.320;

¹⁹ (...continued)
S.W.2d 516, 520 (1998); DeStock No. 14, Inc. v. Logsdon, Ky., 993 S.W.2d 952, 957 (1999).

²⁰ McElroy v. Taylor, Ky., 977 S.W.2d 929, 931 (1998); Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984); Worldwide Equipment, Inc. v. Mullins, Ky. App., 11 S.W.3d 50, 59 (1999).

²¹ White v. Check Holders, Inc., Ky., 996 S.W.2d 496, 497 (1999) (quoting McCracken County Fiscal Court v. Graves, Ky., 885 S.W.2d 307, 309 (1994)). See also Commonwealth v. W.E.B., Ky., 985 S.W.2d 344, 345 (1998); Ware v. Commonwealth, Ky. App., 34 S.W.3d 383, 386 (2000).

²² Revenue Cabinet v. Hubbard, Ky., 37 S.W.3d 717, 719 (2000); Marks v. Bean, Ky. App., 57 S.W.3d 303, 306 (2001).

²³ See 2000 Ky. Acts Ch. 401, § 31, effective April 11, 2000. Johnson was classified as a sex offender by the Corrections Department in May 2000 and was notified of the classification in June 2000.

- (b) A felony attempt to commit a felony offense specified in paragraph (a) of this subsection;
or
- (c) A federal felony offense, a felony offense subject to a court-martial of the United States Armed Forces, or a felony offense from another state or a territory where the felony offense is similar to a felony offense specified in paragraph (a) of this subsection.

Johnson's convictions for rape, sodomy and indecent moral practices with another pre-date the enactment of the Kentucky Penal Code. While those offenses have counterparts in the Penal Code, the language of KRS 197.410 and KRS 17.500 refer specifically to offenses defined in particular provisions of the Code. They do not contain language incorporating convictions for pre-Penal Code offenses.

In addition, KRS 500.040 provides that the Penal Code "shall not apply to any offense committed prior to January 1, 1975" If the General Assembly had wanted to include pre-Penal Code Offenses it could have done so as evidenced by language in KRS 197.410 and KRS 17.500(6) including "similar offenses" from other states or jurisdictions. Consequently, we conclude that Johnson is not a "sexual offender" for purposes of applying the parole eligibility requirements. The Corrections Department and Parole Board erred in classifying him as an "eligible sex offender" as defined by KRS 197.410 and requiring him to complete, be denied

entrance into, or be terminated from the SOTP before becoming eligible for parole consideration.²⁴

Garland does not compel a different result. It dealt solely with the ex post facto issue. While retroactive application of the sexual offender statutes was a component of the analysis, the defendant in Garland was convicted in 1998 of sexual abuse under the Penal Code. Therefore, Garland is distinguishable.

Our opinion only concerns Johnson's parole eligibility and not the granting of parole. The Parole Board has discretion to determine whether or not to grant parole. We merely hold that the Parole Board erroneously denied Johnson consideration for parole based on the sexual offender statutes. Concomitantly, the circuit court erred in dismissing Johnson's declaration of rights petition.

For the foregoing reasons, we reverse the order from which this appeal is prosecuted and remand this case to Franklin Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven Johnson, pro se
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Karen Quinn
JUSTICE CABINET
Office of General Counsel
Frankfort, Kentucky

²⁴ The Parole Board also cited 501 KAR 1:030(2)(1)(a), (b) and (c) as authority for its action. That regulation only applies to eligible sex offenders as defined in KRS 197.400-.440 convicted after July 15, 1986. Neither Johnson's sexual convictions nor the robbery conviction occurred after July 1986.