

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001195-MR
AND
NO. 1999-CA-002158-MR

JAMES RAY ARMOUR

APPELLANT

v. CONSOLIDATED APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 98-CR-00846

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING IN PART IN 1999-CA-002158-MR;
VACATING AND REMANDING IN 1999-CA-001195-MR

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BEFORE: COMBS, HUDDLESTON, and SCHRODER, Judges.

COMBS, JUDGE: These are consolidated appeals in which James Armour challenges the use of KRS¹ 532.043 by the trial court in sentencing him on a plea of guilty to sexual abuse in the first degree. He also appeals the trial court's order classifying him as a high risk sex offender. The appeals were abated pending a decision by the Kentucky Supreme Court resolving the issue of the constitutionality of KRS 17.500, *et seq.*, the Sexual Offender Registration Act, commonly known as "Megan's law." In Hyatt v. Commonwealth, Ky., ___ S.W.3d ___ (2002), the Court upheld the constitutionality of the statutory scheme but reversed and remanded for a new risk assessment hearing based on procedural

¹Kentucky Revised Statutes.

due process grounds. Hyatt is now final, and Armour's appeals are ripe for our review.

On August 24, 1998, Armour was indicted on two counts of sexual abuse in the first degree arising from charges that he engaged in the inappropriate sexual touching of an eleven-year-old child on May 4, 1998. On September 25, 1998, Armour pled guilty to one count in the indictment in exchange for the Commonwealth's recommendation that he serve one year in prison and that the second count of the indictment be dismissed. Sentencing was postponed pending the preparation of a pre-sentence investigation report.

On October 23, 1998, pursuant to the Commonwealth's recommendation, the trial court sentenced Armour to serve one year in the state penitentiary. Additionally, pursuant to KRS 532.043, the trial court ordered that Armour serve a three-year sentence of conditional discharge upon completion of his prison term. The trial court further ordered that Armour undergo testing for HIV and DNA. It also ordered that within sixty days of his release from prison, Armour be assessed for purposes of being classified under the sex offender registration act.

Armour moved the trial court to reconsider its sentence. He argued that both KRS 532.043 (mandating the imposition of an additional three-year period of conditional discharge for persons convicted of certain sex offenses) and KRS 17.500, *et seq.*, became effective after the date of criminal offense for which he was sentenced. Therefore, he contended that the trial court's retrospective application of those statutes to

his case violated both state and federal protections against *ex post facto* laws. The trial court took the matter under advisement.

On January 4, 1999, with the motion to reconsider still pending, the trial court ordered that a risk assessment be performed and set a hearing date for the sex offender risk determination on February 26, 1999. Armour's counsel did not receive the risk assessment report until the day before the hearing. For that reason and because the expert who had performed the risk assessment was not present in court, the matter was continued on Armour's motion to allow Armour time to subpoena the expert. Armour also moved the trial court to authorize the release of funds to allow him to obtain his own expert to evaluate the likelihood of his re-offending and to assist him in cross-examining the Commonwealth's expert. That motion was denied.

At the risk assessment hearing on April 30, 1999, the trial court overruled the motion to reconsider Armour's sentence with respect to the application of the sex offender registration act. The hearing proceeded with the testimony of the author of the report, Katherine Peterson, a psychologist employed by the Department of Corrections. No other testimony or evidence was offered. The trial court concluded that Armour was a high risk sex offender and found that he had "intellectual difficulties," "antisocial tendencies," "suicidal tendencies," and a "likelihood of acting out against others" - all of which findings were based on the testimony and/or report of Katherine Peterson, the

Commonwealth's expert. On August 10, 1999, the trial court denied Armour's motion to reconsider the three-year conditional discharge imposed after his period of incarceration.

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Armour argues that he was denied due process in the risk assessment proceeding because the trial court denied his request for funds to obtain a medical expert or another qualified expert in order to prepare his own risk assessment and to testify for him at the hearing. In determining whether the trial court erred in failing to allocate funds for an independent expert, our inquiry is focused on whether the trial court abused its discretion. McKinney v. Commonwealth, Ky., 60 S.W.3d 499 (2001).

The issue of allocation of funds for an expert was not directly considered in Hyatt, supra. However, the Supreme Court acknowledged and emphasized the need for procedural protections in sexual predator proceedings. Although the Court held that the registration scheme was not penal in nature, it nevertheless held that it was imperative: that counsel have time to adequately prepare for the hearing, that the author of the risk assessment report be in attendance at the hearing, and that the sex offender be afforded the opportunity to present expert testimony to rebut the opinions expressed by the author of the risk assessment report. Id. Slip op. at 18.

We agree with Armour's contention that the rights articulated in Hyatt are meaningless to an indigent unless funds are made available to allow him to obtain his own expert in the

field of psychology or psychiatry. The trial court gave considerable weight to Peterson's testimony in making its findings concerning Armour's potential to re-offend. Therefore, we are compelled to hold that the trial court abused its discretion in refusing to grant Armour's motion for funds to employ his own expert. Thus, we vacate the order of April 30, 1999, and remand for a new hearing consistent with this opinion.

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In this appeal, Armour challenges that portion of his sentence imposing a three-year period of conditional discharge. This sentence was not included in his plea agreement with the Commonwealth but was imposed by the trial court *sua sponte* and over Armour's objection that KRS 532.043 did not apply to him.

Armour continues to argue that KRS 532.043 is an unconstitutional *ex post facto* law as applied to him. During the period while this case was abated pending a decision on the constitutionality of our version of "Megan's law," the Kentucky Supreme Court also resolved this issue. In Purvis v. Commonwealth, Ky., 14 S.W.3d 21, 24 (2000), a case involving a situation identical to the case now before us, the Court held:

As both elements of the *ex post facto* law tests are satisfied, KRS 532.043 is unconstitutional as applied to offenses committed before the effective date of the act.

There is no dispute that Armour committed the offense of sexual abuse in the first degree in May 1998 – well before the effective

date of KRS 532.043. Consequently, the trial court erred in applying the statute to enhance Armour's sentence.

The judgment of the Fayette Circuit Court sentencing Armour to a three-year period of conditional discharge is vacated. The order of the Fayette Circuit Court determining Armour to be a high risk sexual offender is vacated, and the matter is remanded for a new hearing.

ALL CONCUR.

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