

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000506-MR

MARVIN GARDNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH McDONALD-BURKMAN, JUDGE  
ACTION NO. 82-CR-000565

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

\*\*\* \*\*

BEFORE: BARBER, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Marvin Gardner has appealed to this Court from the order of sex offender risk determination entered by the Jefferson Circuit Court on January 27, 1999, finding Gardner to be a high risk sex offender. This appeal was abated by this Court pending resolution by the Supreme Court of Kentucky of a constitutional challenge to the sex offender registration and notification statutes.<sup>1</sup> On February 21, 2002, the Supreme Court rendered its opinion in Hyatt v. Commonwealth,<sup>2</sup> upholding the constitutional validity of those statutes. We affirm the circuit

---

<sup>1</sup>Kentucky Revised Statutes (KRS) 17.500 et seq.

<sup>2</sup>Ky., 72 S.W.3d 566 (2002).

court judgment as to the constitutionality of the statute and its application to Gardner. However, under the guidelines of Hyatt and the statute, we hold that Gardner was not provided a proper hearing in circuit court and that the order improperly imposed certain conditions. Therefore, we must reverse the risk determination made by the circuit court, and remand this matter for a new hearing.

On January 13, 1983, pursuant to Gardner's guilty pleas, the Jefferson Circuit Court convicted him under indictment number 82-CR-001234 of rape, sodomy, sexual abuse, robbery and terroristic threatening. Gardner received concurrent prison sentences totaling 20 years. On March 29, 1983, pursuant to Gardner's guilty pleas, a different division of the Jefferson Circuit Court convicted him under indictment number 82-CR-000565 of sexual abuse in the first degree,<sup>3</sup> unlawful imprisonment in the first degree,<sup>4</sup> and wanton endangerment in the first degree.<sup>5</sup> Gardner received two-year prison sentences for each of these three convictions with the three two-year sentences to run concurrently with each other, but consecutively with the previous 20-year sentence for a total of 22 years.

As the date for Gardner's release from prison approached, a hearing was conducted in the Jefferson Circuit Court on January 25, 1999. Gardner was present and represented by counsel. Gardner sought a continuance so that he and his

---

<sup>3</sup>KRS 510.110.

<sup>4</sup>KRS 509.020.

<sup>5</sup>KRS 508.060.

counsel could prepare. The continuance was denied and the circuit court found Gardner to be a high risk sex offender. This appeal followed.

After the Supreme Court's opinion in Hyatt became final, this Court entered an order directing the Commonwealth to show cause why the circuit court's order should not be reversed and the matter remanded for a new hearing. In response to that show cause order, the Commonwealth stated its objection to the summary reversal arguing that the reversals for new hearings in the Hyatt opinion were fact specific and did not have any application to Gardner's appeal. However, we note that when the Supreme Court in Hyatt addressed the appeal of the companion case involving Dennis Hall, it stated:

#### B. Provider's Report

The procedural due process rights of Hall were violated at the risk assessment hearing because the author of the report failed to attend. Consequently, this case is remanded to the circuit court to conduct an evidentiary hearing in accordance with the pre-2000 amendments. Such a hearing would require the attendance of the author of the report as well as the right of Hall to call expert witnesses to rebut the same. The trial judge has the authority to accept the results of the risk assessment evaluation without qualifying the tests pursuant to Daubert<sup>6</sup> or Kumho.<sup>7 8</sup>

---

<sup>6</sup>Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

<sup>7</sup>Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

<sup>8</sup> Supra at 577.

In the case sub judice, Gardner specifically sought a continuance so he and his counsel could prepare for the hearing. Gardner had only received notice of the hearing 11 days before, and his appointed counsel was notified of his appointment on January 21, 1999. No one except the circuit judge had had an opportunity to review the 10-page report before the day of the hearing. We believe Gardner has been denied his right to due process as recognized in Hyatt. Certainly, providing the inmate and his counsel the opportunity to review the sex offender assessment report, to prepare to cross-examine the author of the report, and to obtain an expert to rebut the report is required by Hyatt. Therefore, pursuant to Hyatt, we are required to reverse the order and to remand this matter for a new evidentiary hearing.

We also note an issue raised by Gardner which is not specifically addressed in Hyatt. He challenges the application of the 1998 amendments to him since he was convicted prior to the effective date of the amendments. In Hyatt, the Supreme Court found the 1998 amendments to be applicable to three inmates who had been incarcerated before the effective date of the amendments, and remained incarcerated on the effective date of the amendments. Section 199 of 1998 Kentucky Acts Chapter 606 reads as follows:

The provisions of Sections 138 through 155 of this Act shall apply to persons individually sentenced or incarcerated after the effective date of this Act.<sup>9</sup>

---

<sup>9</sup>The effective date was July 15, 1998.

The statute does not use the words "began incarceration" or "entered into incarceration". The Legislature has directed that the amendments apply to persons "incarcerated after the effective date of the Act." If the Legislature had intended to apply the 1998 amendments only to individuals who received sentences after the effective date of July 15, 1998, there would have been no need to add the phrase "or incarcerated". We believe the use of this additional phrase clearly shows the Legislature's intent to also include inmates who had been sentenced before July 15, 1998, and remained incarcerated on July 15, 1998. Since Gardner was incarcerated at the time the Act became effective, the Act does apply to him and it was proper for the circuit court to make the Sex Offender Risk Determination.

Finally, Gardner contends that the trial court erred in including in its order "further conditions upon release." In response, the Commonwealth argues that since no objection was made to the court's imposition of those conditions during the course of the hearing, that any error is unpreserved. However, we must note that the hearing before the trial court was solely for the purpose of determining Gardner's classification as sex offender. As the trial court pointed out several times during the hearing, such a classification was the sole purpose of the hearing. There is simply no provision in the statutes which would allow the circuit court to impose additional conditions. However laudable the efforts of the circuit judge may be in this area, in this case she exceeded her authority.

Accordingly, to the extent the circuit court's order upheld the constitutionality of the statutes and found the 1998

amendments applicable to Gardner, we affirm. However, the order of sex offender risk determination is reversed based on the circuit court's denial of the continuance and the imposition of additional conditions. This matter is remanded to the Jefferson Circuit Court for a new evidentiary hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. David Niehaus  
Daniel T. Goyette  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General  
  
Anitria M. Franklin  
Assistant Attorney General  
Frankfort, Kentucky