

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000723-MR

OWEN RAY GADD

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 92-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
** ** * * * * *

BEFORE: COMBS, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Owen Ray Gadd appeals from an order entered by the Madison Circuit Court designating him as a high risk sex offender pursuant to KRS 17.570. This appeal was held in abeyance pending a decision by the Kentucky Supreme Court resolving the issue of the constitutionality of the Sexual Offender Registration Act, KRS 17.500 et seq., commonly known as "Megan's Law." In Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), the Kentucky Supreme Court upheld the constitutionality of the statutory scheme but reversed and remanded for a new risk assessment hearing based on procedural due process grounds.

On May 22, 1992, Gadd was indicted by the Madison County Grand Jury on one count of first-degree rape and one count of first-degree sodomy, as a result of acts committed in March 1992. On October 1, 1992, Gadd pled guilty to one count of attempted rape in the first degree and one count of attempted sodomy in the first degree. On October 30, 1992, Gadd was sentenced in accordance with the plea agreement to 10 years on each count, with the sentences to run concurrently for a total of 10 years' imprisonment.

Gadd was scheduled for release on February 1, 1999. On January 4, 1999, the Madison Circuit Court entered an order pursuant to KRS 17.570, directing that a risk assessment be prepared for Gadd. A risk determination hearing was held on March 19, 1999, and on April 16, 1999, an order was entered finding Gadd to be a high risk sex offender. This appeal followed.

Gadd first contends that the retroactive application of the sex offender risk assessment to him is unconstitutional as an ex post facto law. The Kentucky Supreme Court specifically considered and rejected this argument in Hyatt, holding that the sex offender registration and notification statutes do not impose additional punishment and are not ex post facto laws under either the United States Constitution or Kentucky Constitution. Hyatt, 72 S.W.3d at 573. Per Hyatt, the application of the sex offender statutes to Gadd is constitutional.

Gadd next argues that the retroactive application of the sex offender risk assessment to him is unconstitutional as it

impairs the contract he made with the Commonwealth by virtue of his plea agreement. Gadd contends that his plea agreement, as entered in 1992, is a binding contract, that he has fully performed under the contract, and that the Commonwealth cannot now unilaterally impose additional burdens upon his plea agreement. This argument was not raised in the trial court and as such was not preserved for our review. Gadd does not request review per RCr 10.26. While Hyatt did not specifically address this issue, we note that Hyatt indicates that two of the three cases consolidated for review therein involved convictions pursuant to guilty pleas.

Gadd next argues that he was denied his right to due process as he was not able to cross-examine the person who prepared the risk assessment report. Both in Hyatt and in the companion case of Hall v. Commonwealth, decided in the same opinion, the Court determined that a remand was necessary for failure of the author of the risk assessment report to attend the risk assessment hearing. Hyatt, 72 S.W.3d at 573, 577. Thus, Hyatt mandates that we vacate and remand on this ground for a new risk assessment hearing.

Gadd finally argues that his due process rights were violated because he was indigent and the court denied his motion to appoint an expert witness to assist in rebutting the risk assessment. The record indicates that the trial court denied Gadd's motion for funds to hire his own expert. A trial court's failure to allocate funds for an independent expert is reviewed under an abuse of discretion standard. McKinney v. Commonwealth,

Ky., 60 S.W.3d 499, 505 (2001). The issue of allocation of funds for an expert was not directly considered in Hyatt. 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. Hyatt, 72 S.W.3d at 573, 577.

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. We therefore hold that the trial court abused its discretion in denying Gadd's motion for funds to hire an expert.

For the aforementioned reasons, the order of the Madison Circuit Court determining Gadd to be a high risk sex offender is vacated, and the matter is remanded for a new risk assessment hearing consistent with this opinion.

ALL CONCUR.

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