

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001280-MR

KENNETH NOLL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE REBECCA WESTERFIELD, JUDGE
ACTION NO. 89-CR-001617

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Kenneth Noll appeals from an order entered by the Jefferson Circuit Court designating him as a moderate risk sex offender. 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 KRS 17.500 *et seq.*

Noll was indicted on August 17, 1989, by the Jefferson County Grand Jury on nine counts of first-degree sodomy. On

January 23, 1990, Noll pled guilty to eight counts of attempted first-degree sodomy and one count of fourth-degree sodomy. Noll was sentenced to 15 years on each count of first-degree sodomy and 12 months on the count of fourth-degree sodomy, with the sentences to run concurrently, for a total of 15 years' imprisonment.

Noll was scheduled for release on May 1, 1999. On March 16, 1999, the Jefferson Circuit Court entered an order pursuant to KRS 17.570, directing that a risk assessment be prepared for Noll. A risk determination hearing was held on April 29, 1999, and on April 30, 1999, an order was entered finding Noll to be a moderate risk sex offender. This appeal followed.

Noll presents numerous arguments on appeal, both preserved and unpreserved, which include: 1) the circuit court did not have jurisdiction to perform the assessment hearing; 2) the General Assembly did not intend retroactive application of KRS 17.570; 3) *res judicata* prevents the circuit court from conducting the assessment hearing; 4) applying KRS 17.500 *et seq.* to Noll violates constitutional prohibitions against double jeopardy, bills of attainder, arbitrariness, *ex post facto* laws, and right to privacy, and 6) KRS 17.570 violates the doctrine of separation of powers.

With the exception of *res judicata* and arbitrariness, all of the above issues raised by Noll were specifically considered and rejected by the Supreme Court in Hyatt. In light of Hyatt's holding that the sex offender registration and

notification requirements are not punitive, but merely designate a status, we reject appellant's argument that he is entitled to relief pursuant to the principles of *res judicata*. Noll's argument that the sex offender statutes violate constitutional prohibitions against arbitrariness was unpreserved. Noll does not request review per RCr 10.26.

Noll additionally contends that he was denied his constitutional right to be free from arbitrary power, as well as his right to due process and equal protection, because he was required to "choose" between his liberty or continuing the risk assessment hearing in order to obtain an expert witness. Noll moved the court to appoint an expert, but later withdrew the motion. Noll contends on appeal that the motion was withdrawn in order to avoid postponing the risk assessment hearing, which would have delayed his release. Noll did not raise this issue with the trial court, and hence it is not preserved for our review. Further, we conclude Noll's argument to be without merit. The record contradicts Noll's assertion that he had "served out" his sentence, and the trial court indicated at the risk assessment hearing that Noll was being released on parole. In light of the fact that Noll withdrew his motion requesting an expert witness, and because there is no constitutional right to parole, see White v. Commonwealth, Ky. App., 611 S.W.2d 529, 531 (1980), we reject Noll's contention that his constitutional rights were violated by having to choose between release or a continuance of the risk assessment hearing in order to obtain the services of an expert.

For the aforementioned reasons, the order of the Jefferson Circuit Court designating Noll as a moderate risk sex offender is affirmed.

ALL CONCUR.

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