

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002800-MR

CLARENCE D. DUNN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 93-CR-00687

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Clarence D. Dunn appeals from an order entered by the Fayette 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 KRS 17.500 et seq.

On September 14, 1993, Dunn was indicted by a Fayette County Grand Jury on two counts of first-degree rape, two counts of first-degree sexual abuse, and being a first-degree persistent felony offender. Pursuant to a plea agreement, on October 29,

1993, Dunn pled guilty to one count of second-degree rape. On November 23, 1993, Dunn was sentenced to 10 years' imprisonment with the remaining charges dismissed.

Dunn was recommended for release on parole. On March 15, 1999, the Fayette Circuit Court entered an order pursuant to KRS 17.570, directing that a sex offender risk assessment be prepared for Dunn. A risk determination hearing was held on November 5, 1999, and, on November 8, 1999, an order was entered finding Dunn to be a high risk sex offender. This appeal followed.

On appeal, Dunn first argues that the application of the sex offender statutes to him violates constitutional prohibitions against double jeopardy and ex post facto laws. Dunn concedes that these errors are not preserved for review. In Hyatt, our Supreme Court considered and rejected these arguments. The sex offender statutes are constitutional as applied to Dunn.

Dunn additionally argues that the court erred in increasing his risk level to "high" when the certified provider assessed him as a moderate risk and the tests did not show him to be a high risk for committing a future sexual offense. Dunn concedes that this error was unpreserved, but requests review per RCr 10.26. While KRS 17.570 requires the circuit court to review the recommendation of the certified provider, the statute does not require the trial court to assign a risk level based solely on this recommendation. Hence, it was not error for the circuit court to assign a risk level different from the recommendation of the certified provider. KRS 17.570(6) requires the circuit court to issue findings of fact and conclusions of law and an order designating the level of risk. In the present case, these

procedures were followed, with the court's findings of fact indicating that it believed a higher risk level was warranted for reasons including that this was Dunn's fourth incarceration, the serious nature of the crime, and the need to protect the community. No palpable error occurred. RCr 10.26.

For the foregoing reasons, the order of the Fayette Circuit Court classifying Dunn as a high risk sex offender is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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