

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-0003002-MR

DARRELL W. KANATZER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 95-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING  
\*\* \*\*

BEFORE: GUIDUGLI, HUDDLESTON AND KNOFF, JUDGES.

GUIDUGLI, JUDGE. Darrell Kanatzer (Kanatzer) appeals from an order of the Fayette Circuit Court classifying him as a high risk sex offender pursuant to Kentucky Revised Statutes (KRS) 17.570. Based upon the trial court's failure to provide Kanatzer with a meaningful opportunity to hire an expert witness to do an evaluation prior to the hearing, we are compelled to vacate and remand.

Kanatzer was indicted on January 4, 1995, on one count of rape first degree, one count of unlawful imprisonment first degree, and of being a persistent felony offender second degree.

On March 3, 1995, he plead guilty to an amended charge of rape third degree and was sentenced to five years imprisonment.

On August 18, 1999, Kanatzer filed a motion for a sex offender risk assessment hearing pursuant to KRS 17.570 in that he was to be released from prison on December 1, 1999. On that same day, he filed a motion for appointment of counsel and a separate motion for funds "to retain the assistance of necessary experts" to provide "expert assistance in support of a defense in this case in support of his right to present evidence and defend against the findings of the risk assessment." An affidavit of indigency accompanied these motions.

On October 4, 1999, the Department of Corrections notified the court of Kanatzer's December 1, 1999, release date and requested an order for a sex offender risk assessment. Thereafter, a hearing to determine Kanatzer's sex offender risk level was scheduled for November 19, 1999. At the November 19, 1999, hearing Kanatzer, through appointed counsel, presented several arguments concerning the constitutionality of the sex offender risk assessment and again requested funds for an expert witness to contest the state's assessment as to risk of re-offending. The trial court denied all motions except as to the funds to provide Kanatzer's an expert witness, but then denied his motion for a continuance and proceeded with the sex offender risk assessment hearing. Based upon the evidence presented at the hearing, including the recommendation of Mr. James J. Van Nort, a licensed psychologist certified by the Department of

Corrections, Kanatzer was determined to be a high risk offender by order entered on November 19, 1999. This appeal followed.

On appeal, Kanatzer argues that the sex offender risk assessment statutes (KRS 17.590, et seq.) that require him to register with authorities constitutes additional punishment in violation of the doctrine of res judicata, the prohibition against expost facto laws, and the constitutional provision concerning double jeopardy. Kanatzer also contends that the evidence presented does not justify an assessment of high risk for a future sexual offense and that the trial court erred in denying his motion for funds to hire an expert prior to the hearing.

In Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), the Court upheld the constitutionality of the statutory scheme but reversed and remanded for a new risk assessment hearing based on procedural due process grounds. Consistent with that opinion, we find that the statute was properly applied to Kanatzer and his first arguments are without merit. However, we find merit in his contention that he was denied due process in the risk assessment proceeding because the trial court, in effect, denied his request for funds to obtain a qualified expert in order to prepare his own risk assessment and to testify for him at the hearing. Although the trial court indicated at the hearing it would give him funds for an expert, the court denied a motion for a continuance and immediately proceeded with the risk assessment hearing. In effect, the trial court denied Kanatzer a meaningful hearing in which to present his position and the ability to

contest the Commonwealth's expert witness, upon which the trial court primarily based its ruling that Kanatzer was a high risk sexual offender.

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. at 573.

We agree that Kanatzer'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 Van Nort's testimony in making its findings concerning Kanatzer's potential to re-offend. Therefore, we hold that the trial court abused its discretion in refusing to give Kanatzer necessary funds to employ his own expert prior to a hearing and sufficient time to prepare and present his evidence.

The order of the Fayette Circuit Court determining Kanatzer to be a high risk sexual offender is vacated, and the

matter is remanded for a new hearing consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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