

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001973-MR

RICHARD G. RUSSELL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
INDICTMENT NO. 01-CR-002988

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * **

BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGES.

DYCHE, JUDGE. Richard Russell appeals the Jefferson Circuit Court's denial of his motion to dismiss the charge against him of failing to comply with the sex offender registration provisions of KRS 17.500-.540 (the "Sex Offender Registration Act"). Russell argues that the application to his case of KRS 17.510, as amended in 2000, violates the *ex post facto* provisions of the United States Constitution. He also contends

that the sex offender registration form he completed in 1996 constitutes a binding agreement with the Commonwealth that was violated when he was charged with a felony. We affirm.

On June 5, 1996, Russell was sentenced to one year in prison on a charge of first degree sexual abuse. On June 24, 1996, shortly before his release, Russell filled out a sex offender registration form as required by KRS 17.510. Under the terms of the statute at that time, the offense of failing to notify local probation and parole officers of an address change was classified as a Class A misdemeanor. The registration form stated:

I have been notified that the above information is being sent to the Kentucky State Police in order to place me on the sex offender register. I also understand that if I have a change of address, I am required to notify the local probation and parole office within 14 days. I further understand that my failure to comply with this law is a class A misdemeanor.

On April 11, 2000, the statute was amended to make the offense of failing to report an address change a Class D felony.

On December 5, 2001, the Louisville Police tried unsuccessfully to locate Russell at the address he had provided on the 1996 form. They subsequently discovered that he had never lived there, and that he had resided at two different addresses in 1999 and 2001. He had not registered any of these

changes of address with local probation and parole officials as required by KRS 17.510.

On December 20, 2001, the Jefferson County Grand Jury indicted Russell on two counts: 1) providing false, misleading, or incomplete information on a sex offender registration form; and 2) persistent felony offender, second degree. The indictment was subsequently amended to read as follows:

That on or about the 5th day of December, 2001, in Jefferson County, Kentucky, the above named defendant, Richard Russell, committed the offense of Providing False, Misleading, or Incomplete Information on a Sex Offender Registration Form, when being required to register as a sex offender pursuant to KRS 17.510, he (a) knowingly provided false, misleading or incomplete information on a sex offender registration form by providing a false address; or (b) having changed the address of his residence, failed to register that change of address with the local probation and parole in the county in which he resided, on or before the date of the change of such address.

After his indictment, Russell filed a motion to dismiss, on the grounds that KRS 17.510 was being applied to him in violation of the *ex post facto* provision of the United States Constitution. He argued that his case should be governed by the original terms of KRS 17.510, under which the failure to report an address change was classified as a misdemeanor rather than a felony. Furthermore, he maintained that the Commonwealth was barred from seeking to impose a felony punishment on him because

the Commonwealth was bound by the terms of the registration form.

The circuit court rejected these arguments at a hearing on July 2, 2002, and subsequently issued a written order denying the motion to dismiss. Russell entered a conditional guilty plea pursuant to RCr 8.09, thus preserving his right to appeal.

On August 19, 2001, Russell was sentenced to one year in the penitentiary on the charge of failure to comply with the sex offender registry. The persistent felony offender charge was dismissed. The trial court ordered the sentence probated and imposed a three-year term of supervision. This appeal followed.

In order to determine whether a law is *ex post facto*, Kentucky follows the two-pronged test set out in Weaver v. Graham, 450 U.S. 24, 29 (1981). The law "must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Id. Russell has not met the first prong of the test.

The aim of the Sex Offender Registration Act is to protect the safety of the public and to assist law enforcement efforts. See Hyatt v. Commonwealth, Ky., 72 S.W.3d 566, 572 (2002), cert denied, ___ U.S. ___ (2003). Russell's failure to comply with the registration provisions was not a single,

discrete offense but rather constituted an ongoing violation of this fundamental statutory purpose.

Russell does not dispute that he met the definition of a "registrant" under the statute both before and after the 2000 amendments. See KRS 17.500(4). He therefore had a continuing duty to register his correct address under both versions of the statute. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" Purvis v. Commonwealth, Ky., 14 S.W.3d 21, 23 (2000)(citation omitted). Russell's act of failing to comply was not "completed" prior to the 2000 amendments.

Russell's second argument, that the information form he filled out in 1996 constitutes a binding agreement with the Commonwealth, is not persuasive. The fact that the form notified Russell of the penalty for failing to register as it stood at that time does not transform it into some sort of "binding agreement" with the Commonwealth. The Commonwealth cannot enter into bargains forever guaranteeing the nature of the penalty should the defendant decide to break the law at some time in the future.

Russell attempts to liken his case to those of the defendants in Fraser v. Commonwealth, Ky., 59 S.W.3d 448 (2001); and Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), who relied to their detriment on agreements with the Commonwealth

regarding penalties or charges for their past criminal behavior. In Fraser, the defendant alleged that he had made a secret plea agreement with the Commonwealth, and that he had performed his part by testifying against his girlfriend regarding a murder charge, whereas the Commonwealth had reneged on its promise to recommend the minimum sentence for him. In Workman, the defendant agreed to submit to a polygraph on the understanding that if the test indicated that he had no involvement in the crime, the charge against him would be dismissed. The defendant passed the polygraph but the Commonwealth failed to dismiss the charges. In these cases, where there was detrimental reliance by a defendant regarding sentencing or charges for past offenses, and the Commonwealth benefited at the defendant's expense, the Kentucky Supreme Court held that the Commonwealth must honor its commitment. See Fraser, 59 S.W.3d at 458; Workman, 580 S.W.2d at 207.

Russell's case is clearly distinguishable. The Commonwealth derived no benefit when he completed the form since he had already served his sentence. The form merely informed Russell of the current penalty for violating the statute; it did not guarantee him a misdemeanor penalty for any future offenses. The registration requirement in itself is not a penalty. The Kentucky Supreme Court has held that the requirement of registration is a remedial, rather than a punitive, measure.

Hyatt v. Commonwealth, Ky., 72 S.W.3d 566, 572 (2002).

Furthermore, "[a]ny potential punishment arising from the violation of the Sex Offender's Registration Act is totally prospective and is not punishment for past criminal behavior."

Id.

Russell has also claimed that the terms of the form he filled out at the time of his release in 1996 were part of what induced him to accept the plea offer in the original case in 1995. There is nothing in the record to indicate that he had even been informed of this provision at that time, or that it played any part in his decision to plead guilty. It strains the bounds of credulity to believe that part of the inducement to make a guilty plea was the prospect that at some time in the future he would only be found guilty of a misdemeanor for failing to notify probation and parole of a change in his address.

Russell did not fill out the information sheet in exchange for any "promises" made to him by the Commonwealth. The registration form merely notified him of the registration requirements and of the penalties as they stood at that time. Thereafter he was subject to the legal maxim that "ignorance of the law excuses no one."

The order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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