

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000526-DG

B.J.A., A CHILD

APPELLANT

ON DISCRETIONARY REVIEW FROM KENTON CIRCUIT COURT  
v. HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 01-XX-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This case is before this Court on a grant of discretionary review of a decision of the Kenton Circuit Court affirming a decision of the Kenton District Court - Juvenile Division, which interpreted KRS 635.510(1). The lower court held the statute refers to the defendant's age at the time of adjudication, not his age at the time the offense was committed. We agree because the statute is one providing for treatment. Thus, we affirm.

On February 19, 2001, B.J.A., who was twelve years old at the time, admitted to subjecting several young children to sexual and anal intercourse. He was placed in the Children's Home of Northern Kentucky as a dependent and was receiving sexual offender treatment. On June 20, 2001, charges were filed against B.J.A., who had since turned thirteen, in the Kenton District Court - Juvenile Division. On July 20, 2001, B.J.A. pled guilty to seven counts of sodomy, first degree,<sup>1</sup> and two counts of rape, first degree,<sup>2</sup> in exchange for the Commonwealth dropping the remaining charges. The psychologist at the Children's Home reported B.J.A.'s treatment was going well and recommended completing the treatment at the Children's Home. The predisposition report prepared by the Department of Juvenile Justice agreed and requested the court to order B.J.A. to complete the sexual offender treatment at the Children's Home.

At the August 13, 2001, disposition hearing, the Department of Juvenile Justice sought to have thirteen year old B.J.A. declared a "juvenile sexual offender" under KRS 635.510, and have him committed to an approved sexual offender treatment facility. B.J.A. wanted to continue his placement at the Children's Home on the dependency commitment. If B.J.A. was under thirteen, the juvenile judge had this option. If B.J.A. was thirteen or older, the juvenile judge had no discretion and

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<sup>1</sup> KRS 510.070.

<sup>2</sup> KRS 510.040.

had to declare B.J.A. a "juvenile sexual offender", and he would be taken out of the Children's Home and sent to an approved sexual offender treatment facility. At this point, the interpretation of KRS 635.510 became crucial. Did the statute refer to the juvenile offender's age at the time of the offense (twelve) or at the time of adjudication<sup>3</sup> (thirteen)? The juvenile judge ruled that the statute referred to B.J.A.'s age at the time of adjudication (thirteen) and the circuit court affirmed. We granted discretionary review on this one issue.

KRS 635.510 provides in part:

- (1) A child, thirteen (13) years of age or older shall be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2)(a), (b), (c), (d), (e), or (f).
- (2) (a) A child, less than thirteen (13) years of age, may be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2).  
  
(b) Any child, thirteen (13) years of age or older, may be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2)(g).  
(emphasis added.)

Statutory interpretation is a purely legal issue. Therefore, our review is de novo. J.D.K. v. Commonwealth, Ky. App., 54

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<sup>3</sup> The appellant's brief points out a third possible interpretation, "at the time of disposition". However, that is not the argument here and our decision in this case will be dispositive of the third possible interpretation.

S.W.3d 174, 175 (2001); Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921, 925 (1997); Keeton v. City of Ashland, Ky. App., 883 S.W.2d 894, 896 (1994). Our duty is to construe the statute "so as to effectuate the plain meaning and unambiguous intent expressed in the law." Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky, Transportation Cabinet, Ky., 983 S.W.2d 488, 492 (1998). A court must construe a statute so as to carry out the intent of the Legislature. Hardin County Fiscal Court v. Hardin County Board of Health, Ky. App., 899 S.W.2d 859, 861 (1995). When the statute is read by itself, and given the facts in B.J.A.'s case, the first impression could be that there is a latent ambiguity in the statute. To determine whether or not there is an ambiguity, we need to review the context or statutory scheme from which the individual statute was taken.

KRS 635.500 is the enabling legislation for providing a "program" in the Department of Juvenile Justice for the "treatment" of juvenile sexual offenders.<sup>4</sup> The legislative intent as to the purpose of the treatment program is clearly expressed in KRS 635.500(2) as "early intervention and treatment of the juvenile sexual offender in an effort to affect the progression to adult criminal activity." KRS 635.515 provides that a child declared a "juvenile sexual offender" be committed

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<sup>4</sup> This assumes the juvenile is already to be committed so he is now receiving treatment, not punishment.

to the Department of Juvenile Justice and receive treatment for a minimum of two but not more than three years.

KRS 635.505(2) states:

A "juvenile sexual offender" as used in this chapter means an individual who was at the time of commission of the offense under the age of eighteen (18) years who is not actively psychotic or mentally retarded and who has been adjudicated guilty of or has been convicted of or pled guilty to:

- (a) A felony under KRS Chapter 510;
- (b) Any other felony committed in conjunction with a misdemeanor described in KRS Chapter 510;
- (c) Any felony under KRS 506.010 when the crime attempted is a felony or misdemeanor described in KRS Chapter 510;
- (d) An offense under KRS 530.020;
- (e) An offense under KRS 530.064;
- (f) An offense under KRS 531.310; or
- (g) A misdemeanor offense under KRS Chapter 510.  
(emphasis added.)

As defined in KRS 635.505, a "juvenile sexual offender" includes any juvenile who has been adjudicated guilty of an offense specified therein. The only age factor is "under the age of eighteen". Thus, a 10, or 12, or 13 year old can be declared a "juvenile sexual offender". However, KRS 635.510 clarifies that not all juveniles who are adjudicated guilty of the specified crimes must be declared "juvenile sexual

offender", and provides that the court with discretion to not designate as such certain juveniles based on age or crime. In review, KRS 635.510 states, in pertinent part:

(1) A child, thirteen (13) years of age or older, shall be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2)(a), (b), (c), (d), (e), or (f).

(2) (a) A child, less than thirteen (13) years of age, may be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2).

(b) Any child thirteen (13) years of age or older, may be declared a juvenile sexual offender if the child has been adjudicated guilty of an offense listed in KRS 635.505(2)(g).

KRS 635.510 appears to be a statute pertaining to evaluation and treatment. Its language presumes and even requires a prior adjudication, without any reference to the juvenile's age at the time of the offense. Assuming a prior adjudication shortly before a treatment plan is proposed, we believe KRS 635.510(1) and (2) speak in terms of the juvenile's age at the time he is adjudicated and evaluated for disposition. In this case, B.J.A.'s adjudication and post-adjudication evaluation occurred after his thirteenth birthday, which, under the statute, mandates his designation as a "juvenile sexual offender". Having concluded the statute is speaking about treatment after

an adjudication, the age at the time of the offense was committed becomes irrelevant.

B.J.A.'s argument that age at the time of adjudication, and not at the time of offense, would constitute an ex post facto punishment in violation of both the United States and the Kentucky Constitutions, must fail. An ex post facto law is one "which imposes a punishment for an act which was not punishable at the time it was committed". Weaver v. Graham, 450 U.S. 24, 28, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981), (citation omitted). In B.J.A.'s case, the statute does not become "retroactive" but prescribes different dispositions depending on age. This is not ex post facto legislation. See generally, Canter v. Commonwealth, Ky., 843 S.W.2d 330 (1992); Ex parte Garland, 71 U.S. 333, 32 How. Pr. 241, 18 L. Ed. 366, 4 Wall. 333 (1866); Gourley v. Comm., Ky. App., 37 S.W.3d 792 (2001).

Additionally, KRS 635.510(1) does not punish, but treats the juvenile offender. A similar "sexual offender treatment program" for adults was discussed by this Court in Garland v. Commonwealth, Ky. App., 997 S.W.2d 487 (1999), wherein we dismissed the ex post facto argument as to statutes requiring sex offenders to complete a sex offender treatment program as a condition precedent to parole. Although this requirement delayed the appellant's eligibility for parole, it

did not increase his underlying sentence, nor make the punishment more onerous. Id. at 489-490. Similarly, B.J.A.'s commitment is not increased. The fact that one commitment has a more strenuous treatment plan than another is justified by the type of crime. We conclude the rationale as applied to adult sexual offenders can be applied to juvenile sexual offenders. See Commonwealth v. Jeffries, Ky., 95 S.W.3d 60 (2002); Commonwealth v. Taylor, Ky., 945 S.W.2d 420 (1997).

For the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Timothy G. Arnold  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III  
Attorney General  
  
Gregory C. Fuchs  
Assistant Attorney General  
Frankfort, Kentucky