

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000582-MR

DAMON McCORMICK

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
APPEAL NO. 2003-SC-0222-D

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 01-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Damon McCormick (hereinafter "McCormick")

appeals the trial order and jury verdict entered by the

Henderson Circuit Court on February 7, 2002, adjudicating him

guilty of the offense of failure to register as a sex offender

(KRS 17.510) and enhancing his sentence of one year to fifteen

years based upon a finding that he is a persistent felony offender, first degree (KRS 532.070). In an opinion rendered on March 7, 2003, this Court affirmed the trial court's order. The Supreme Court of Kentucky granted discretionary review, vacated our prior opinion and remanded the case for reconsideration in light of its opinion in Peterson v. Shake, Ky., 120 S.W.3d 707 (2003). In accordance with the principles set forth in Peterson, we reverse and remand.

On May 3, 2001, McCormick was indicted by the Henderson County Grand Jury for failure to register as a sex offender and second-degree persistent felony offender (PFO). Subsequently, the PFO charge was amended to PFO first degree, based upon his extensive criminal history. The original indictment was based upon information received by Jennifer Keiser, a Department of Probation and Parole Officer, indicating that McCormick was a sex offender required by law to register, that upon release from prison he registered that he would be residing at 14 Center Circle, Henderson, Kentucky, and that on February 14, 2001, McCormick moved into the Henderson Hotel, resided there for at least three (3) weeks and failed to report the change in his physical address as required by KRS 17.510. Following a trial by jury, McCormick was convicted of both charges. His one year sentence for failure to register as a sex

offender was enhanced to fifteen years due to the PFO first degree finding. This appeal followed.

On appeal, McCormick contends that he should have been subject to misdemeanor penalties only and not a felony conviction. He bases his argument on the fact that at the time he was released from prison (January 8, 1997), the maximum penalty for violation of KRS 17.510 was twelve (12) months as a Class A misdemeanor offense. He further contends that the amendment to the statute effective April 11, 2000, increasing the penalty to a Class D felony does not apply to him. Upon his release from prison, McCormick signed a sex offender register entry form which listed his address as 14 Center Circle, Henderson, KY 42420. That form stated, in relevant part, the following:

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 should have a change of address, I am required to notify the local probation and parole officer within 14 days. I further understand that my failure to comply with this law is a Class A misdemeanor.

Subsequent to his release on January 8, 1997, KRS 17.520 was amended, effective April 11, 2000, to reflect that "any person required to register under this section who violates any of the provisions of this section is guilty of a Class D felony." McCormick argues "that the Legislature did not intend

to bind persons in his position with this amendment" or in the alternative, that the Rule of Lenity should apply in that "the language of the 2000 amendment is ambiguous."

In Peterson, supra, a case factually similar to the one before us, the Supreme Court of Kentucky held:

Appellant challenged the application of the 2000 version of the statute in the Jefferson Circuit Court. Judge James Shake determined that the 2000 version of RKS 17.510 was applicable to Appellant, and thus, Appellant was subject to prosecution for a Class D felony instead of a Class A misdemeanor.

Appellant petitioned the Court of Appeals for a writ prohibiting further prosecution of the indictment. In an order entered on August 15, 2002, the Court of Appeals denied Appellant's petition. He appeals as a matter right. CR 76.36(7)(a).

It is clear that Appellant is subject to the 1998 version of the Kentucky Sex Offender Registration Act, as he was released from confinement following its enactment. However, the Commonwealth wishes to prosecute Appellant under the 2000 version. As a result, the primary question with which we are concerned is whether Appellant is subject to prosecution for a Class D felony, under the current version of KRS 17.510, for failing to provide a valid home address to the sex offender registry. After considering all of the pertinent facts, we conclude that Appellant is not.

* * * *

It is quite apparent that the 2000 amendments were only intended to apply to persons who were required to *become* registrants following April 11, 2000.

Merriam-Webster defines the word "become" as "to come to exist or occur" or "to emerge as an entity." *Webster's Third New International Dictionary of the English Language, Unabridged* 195 (1993).

Here Appellant was released from state custody and registered with the sex offender registry in June of 1999. It necessarily follows that Appellant could not have been required to "become" a registrant after April 11, 2000, since he was included in the database of registered sex offenders before that date. In other words, Appellant could not have "become" a registrant, as he already was one. In [*Gateway Construction Co. v. Wallbaum, Ky., 356 S.W.2d 247* (1962)], our predecessor Court stated that "legislative intent is at best a nebulous will-o'-the-wisp. Far better it is to be guided by the old adage, 'Plain words are easiest understood.'" *Id.* at 249. If it was the intent of the General Assembly to include individuals such as Appellant under the amended 2000 version of KRS 17.510, then it could have exactly said just that. However, such was not expressed. We will not add words to language we deem to be unambiguous. Thus, we hold that Appellant was not among the individuals the General Assembly intended to be subject to the 2000 version of KRS 17.510.

* * * *

We observe that Appellant has no other adequate remedy available at his disposal. If a writ were not issued, Appellant would experience great injustice in that he would have to endure a trial and possibly face conviction of a Class D felony, when the maximum charge he should face is a Class A misdemeanor. Considering we have determined that Appellant could not be indicted under the 2000 version of KRS 17.510, the felony indictment charged against him must be dismissed. If Appellant is to be prosecuted

regarding an alleged violation of KRS 17.510, then he may be prosecuted under the 1998 version. If the Commonwealth continues to pursue this matter, the proper court of jurisdiction would be the Jefferson District Court.

Peterson, supra, at 708-10.

For the foregoing reasons and in accordance with the mandate set forth by the Supreme Court of Kentucky in Peterson, supra, we reverse the judgment and order of the Henderson Circuit Court and remand this matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas D. Collins
Assistant Public Advocate
Frankfort, KY

BRIEF FOR APPELLEE:

A. B. Chandler
Attorney General

Tami Allen Stetler
Assistant Attorney General
Frankfort, KY