RENDERED: APRIL 23, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2001-CA-001890-MR

DONALD LEE RILEY — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
APPEAL NO. 2002-SC-0742-D

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 01-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

## OPINION

## REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, KNOPF AND VANMETER, JUDGES.

BARBER, JUDGE: Donald Lee Riley ("Riley") appeals from a judgment of the Meade Circuit Court wherein he was convicted of failing to register as a sex offender after entering a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (CR) 8.09. In an opinion rendered August 9, 2002, this Court affirmed the trial court's judgment. The Supreme Court of

Kentucky granted discretionary review, vacated our prior opinion and remanded this matter 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.

In 1995, Riley was convicted of sexual abuse in the first degree in Owen Circuit Court. After his release from prison in 1997, Riley registered in Jefferson County as a sex offender pursuant to Kentucky's sex offender registry statute, Kentucky Revised Statutes (KRS) 17.510.

According to information obtained by the Kentucky State Police, Riley moved to and was issued a driver's license in Meade County on January 24, 2001[1]. Riley failed to register as a sex offender in Meade County or notify probation and parole of his address change. Subsequently, Riley was arrested and indicted for failing to register as a sex offender and for being a persistent felony offender in the second degree.

Riley moved the trial court to remand his case to Meade District Court and dismiss the persistent felony offender indictment. Riley argued that since he was convicted in 1994 and

[1] The Kentucky State Police's "Sex/Criminal Offender Registry Notification of Non-Compliance" form incorrectly lists "1/24/1901" as the date Riley's driver's license was issued.

released from prison in 1997, he should be prosecuted for failing to register under the 1994 version of this statute as it was in effect at the time of his conviction and release. The 1994 version of KRS 17.510 punished the offense of failing to register as a Class A misdemeanor. Riley further argued that prosecuting him under the 2000 version of KRS 17.510, which made failing to register a Class D felony, constituted an ex post facto law in violation of the United States and Kentucky constitutions. The trial court refused to remand the case to district court or dismiss the persistent felony offender charge because the ex post facto clause was not violated. Specifically, the trial court found that Riley was being punished for an offense committed after April 11, 2000, the effective date of the 2000 version of KRS 17.510. The trial court, however, ensured that Riley would not be prosecuted for any violations prior to April 11, 2000 by amending the indictment to cover Riley's failure to register from April 11, 2000 to April 17, 2001.

Pursuant to a plea agreement wherein the Commonwealth dismissed the persistent felony offender charge, Riley entered his conditional plea of guilty to the charge of failing to register as a sex offender. The trial court sentenced him to one year in prison. This appeal follows.

On appeal, Riley contends that he should have been subject only to misdemeanor penalties pursuant to the 1994 version of KRS 17.510. His argument is premised on the fact that, upon being released from prison on October 1, 1997, the

maximum penalty for a violation of KRS 17.510(8), as it existed under the 1994 version, was twelve (12) months in jail as a Class A misdemeanor. He further contends that the 2000 version of this statute, which increased the penalty to a Class D felony, does not apply to him.

According to the record, upon being released from prison, Riley completed and signed a sex offender register entry form which listed his address as 10109 Merioneth Drive, Louisville, KY 40299. 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 October 1, 1997, the legislature amended KRS 17.510, 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." Riley argues that the legislature did not intend to bind persons in his position with this amendment. Accordingly, Riley submits that the Meade Circuit Court did not possess subject matter jurisdiction to sentence him because the penalty for failing to register as a sex offender, under the 1994 version of KRS 17.510 that was in effect at the time of his release from prison, was a misdemeanor.

In Peterson, supra, a case factually similar to the matter currently 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 KRS 17.510 was applicable to Appellant, and thus, Appellant was subject to prosecution for a Class D felony instead of a Class A misdemeanor.
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> 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 of right. CR 76.36(7)(a).
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> 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.
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> 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 Wallbaum, supra, 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.
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> * * * *
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> 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.

Pursuant to the Supreme Court's opinion in Peterson, it appears that Riley correctly asserts that the trial court did not possess subject matter jurisdiction over this matter. KRS

23A.010(1) and KRS 24A.110(1) grant the circuit court jurisdiction over crimes designated as felonies. However, since the 2000 version of Kentucky's sex-offender registry statute does not apply herein, the circuit court erred in exerting jurisdiction over this matter. Peterson makes it clear that Riley can only be subject to the version of KRS 17.510 that was in effect at the time he was released from prison and registered as a sex offender, which in this case is the 1994 version. Thus, if Riley is to be prosecuted for his alleged violation of KRS 17.510, then he must be prosecuted under the 1994 version. Under the 1994 version of KRS 17.510(8), the penalty for failing to provide a change of address was a Class A misdemeanor. Accordingly, we hold that Riley is subject only to the misdemeanor penalty as prescribed by the 1994 version of KRS 17.510. As such, if the Commonwealth continues to pursue this matter, the proper court of jurisdiction would be the Meade District Court. KRS 24A.110(2).

For the foregoing reasons and in accordance with the mandate set forth by the Supreme Court of Kentucky in Peterson, supra, the judgment of the Meade Circuit Court is reversed and this matter remanded to permit Riley to withdraw his guilty plea and for other proceedings consistent with this opinion.

ALL CONCUR.

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