

RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002037-MR

WENDELL BONNER

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
INDICTMENT NO. 00-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

* * * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Wendell Bonner appeals from a judgment and sentence on a plea of guilty that adjudged him guilty of sodomy in the second degree and incest. Bonner challenges the trial court's designation of him as an "eligible sexual offender" under Kentucky Revised Statutes (KRS) 197.410, and refusal to conduct an evidentiary hearing on the issue of whether he was mentally retarded, and thereby not subject to classification as an eligible sexual offender. We affirm.

On December 1, 2000, the Lewis County grand jury indicted Bonner on one felony count of sodomy in the first degree (KRS 510.070) and one felony count of incest (KRS 430.020) involving alleged deviate sexual intercourse with his four-year-old son. In February 2001, Bonner's attorney filed a motion for a mental evaluation pursuant to KRS 504.100 for purposes of determining Bonner's competency to stand trial. On October 19, 2001, the trial court conducted an evidentiary competency hearing with Dr. Barbara Johnson and Bonner's mother as witnesses.¹ On October 31, 2001, the trial court entered an order finding Bonner competent to stand trial within the meaning of KRS 504.060(4).²

On June 7, 2002, Bonner entered a guilty plea to the one count of incest and an amended count of sodomy in the second

¹ See KRS Chapter 504. While the record on appeal includes a transcript of several pretrial hearings, it does not contain a transcript of the competency hearing. Prior to the competency hearing, Dr. Johnson, a licensed psychologist, performed an evaluation of Bonner. In her report dated April 3, 2001, Dr. Johnson stated a Wechsler Abbreviated Scale of Intelligence (WASI) test resulted in an intelligence quotient (I.Q.) score of 55, which was at the low end of the mild mental retardation range. Dr. Johnson indicated that Bonner may not have given maximum effort, so the WASI score may have been an underestimate of his I.Q., but it likely still fell within the range of mild mental retardation. During the evaluation interview, Bonner told Dr. Johnson that he was enrolled in special education classes throughout most of his school years. Dr. Johnson opined that Bonner was competent to stand trial. A copy of the report was provided to defense counsel, the Commonwealth, and the trial court.

² The trial court, in its October 31, 2000 order, found that "[Bonner's] intelligence lies within the mildly retarded range and that his actual intelligence is higher than the WASI score would indicate based on his vocabulary which is broader than one would expect from a person scoring only fifty-five as a full scale IQ score. . . ." The court also found that Bonner may not have given his maximum effort and that fifty-five was probably an underestimate of his intellectual ability.

degree (KRS 510.080) pursuant to a plea agreement with the Commonwealth, which recommended concurrent sentences of ten years on each count. On July 22, 2002, the trial court ordered the Department of Corrections, Division of Mental Health, to conduct an evaluation of Bonner and to submit a comprehensive sex offender presentence evaluation to the court pursuant to KRS 532.050(4).

On August 16, 2002, Bonner filed a motion for probation wherein he maintained that he should not be subject to the prohibition to probation for sexual offenders under KRS 532.045 because of his mental retardation. The same day, the trial court conducted a sentencing hearing and considered the probation motion. At the hearing, defense counsel questioned a statement in the sexual offender pre-sentence evaluation report indicating that Bonner had an I.Q. of 71. Defense counsel noted the prior report of Dr. Johnson stating Bonner's I.Q. was 55. He cited the recent case of *Hyatt v. Commonwealth, Ky.*, 72 S.W.3d 566 (2002), *cert. denied*, 538 U.S. 909, 123 S.Ct. 1481, 155 L.Ed.2d 230 (2003), and requested an opportunity for a hearing to cross-examine the author of the sex offender evaluation report. The trial court expressed its belief that counsel was entitled to a copy of the report but doubted whether he had a right to challenge the presentence evaluation report. The court postponed final sentencing pending review of the

recent case law. Bonner subsequently filed a memorandum reiterating potential areas of inquiry concerning the sexual offender evaluation report, the need for reliable sentencing information, and the need for an adversarial hearing to controvert the results of the psychosexual report.

On September 6, 2002, the trial court conducted a final sentencing hearing. Defense counsel argued that he was entitled to present evidence challenging the sexual offender evaluation under KRS 532.050(6) and Bonner's classification as a sexual offender. The trial court denied the motion for probation and request to cross-examine the author of the sexual offender pre-sentence evaluation. The trial court indicated that the Department of Corrections psychologists were authorized to determine sex offender eligibility and that it did not have to hold an adversarial hearing on that issue. The record however is confusing in that the trial court appears to defer to the Department of Corrections to make the determination of whether the appellant was an "eligible sex offender," but upon defense counsel seeking clarification, the trial court states "[h]e is an eligible sex offender." The court entered a Judgment and Sentence on a plea of guilty sentencing Bonner to a total of 10 years on two concurrent 10-year sentences for sodomy in the second degree and incest consistent with the plea agreement. In addition, the court entered a Judgment of

Registration Designation finding Bonner guilty of a sex crime under the sexual offender statutes and ordering him to register with the appropriate parole officer for a period of 10 years. The written judgment of the trial court, however, nowhere designates the appellant an "eligible sex offender" within the meaning of KRS 197.410. This appeal follows.

Bonner contends that he was denied his right to due process and confrontation by the trial court's refusal to conduct an adversarial hearing on his classification as an "eligible sex offender" for the sex offender treatment program.

While Bonner complains that the trial court impermissibly recognized him as an eligible sex offender, the oral record is not clear whether the trial court intended to so designate him, and the written judgment contains no such finding. Thus, the written judgment controls. *Commonwealth v. Hicks*, Ky., 869 S.W.2d 35, 37-38 (1994). The written judgment of the trial court merely recognizes that appellant is a sex offender, a status imposed by the legislature by virtue of appellant's conviction of sexual offenses of sodomy and incest.³ As to any designation as an "eligible sex offender," appellant

³ Under KRS 197.410(1), a "sexual offender" is any person adjudicated guilty of any felony under KRS Chapter 510, e.g., sodomy in the second degree, or adjudicated guilty of any felony under KRS 530.020, incest. While appellant cites *Hyatt v. Commonwealth*, *supra*, to argue that he was entitled to a hearing, that decision specifically addressed sexual-offender risk assessments hearings. In 2000, KRS 17.500, *et seq.*, was modified such that such hearings are no longer held.

fails to recognize that the legislature has given the Department of Corrections the authority to recognize him as such. See KRS 197.410(2). We find the trial court to have been acting within its discretion to defer making a finding on this issue. In short, we view Bonner's motion as a "pre-emptive strike" designed to absolve him of the requirement to complete sexual offender treatment program, prior to any demonstration that he is unable to complete the program.⁴ If the appellant is unfairly characterized as an eligible sexual offender by the Department, he has recourse to file a declaration of rights action against the Department.

For the foregoing reasons, we affirm the judgment of the Lewis Circuit Court with reference to the designation of Bonner as a sexual offender.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Eucker
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky

⁴ An interesting note is that appellant complains his mental deficiencies prevent him from completing the sex offender treatment program under the auspices of the Department of Correction. Paradoxically, when arguing to the trial court that probation was appropriate, the appellant's counsel suggested that he needed outpatient treatment, both psychological and sexual offender, in the community, implicitly admitting that appellant could benefit from treatment.