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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000733-MR

FREDERICK L. MILLER

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 03-CR-00014 & 03-CR-00379

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY AND TACKETT, JUDGES; MILLER, SENIOR JUDGE.¹

TACKETT, JUDGE: Frederick Miller appeals from the judgment of the Warren Circuit Court finding him guilty of failure to register as a sexual offender. Miller argues on appeal that he cannot be convicted of the charged offense because he was not properly informed of the duty to register and because he was required to register under the prior version of the statute,

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which fixes the penalty for failure to register as a class A misdemeanor. We disagree and affirm.

Miller was originally convicted of criminal attempt to commit sodomy in the first degree in 1987. He was scheduled to be released in April 2000, but was not actually released until May 22 of that year. Upon release, Miller registered as a sexual offender. Shortly after his release he moved to Illinois, and Kentucky authorities informed Illinois authorities of his change of address. Later, Miller returned to Kentucky, moving to Warren County. In September 2002, the state police discovered that Miller had obtained a Kentucky driver's license, but had not registered upon his return from Illinois. Miller was indicted in January 2003 for the offense of failure to register as a sexual offender, and was found guilty at trial in February 2004. He was sentenced to three years' imprisonment, enhanced to ten years due to his status as a persistent felony offender. This appeal followed.

On appeal, Miller argues that the original sentencing court had a duty to inform him of his duty to register as a sex offender, and that because he was never informed of that duty by the sentencing court, he cannot be charged with the offense. Miller quotes several cases on statutory construction principles which state that the word "shall" is mandatory language, as well as Kentucky Revised Statute 446.010(29), which codifies that

principle. See Alexander v. S&M Motors, Inc., 28 S.W.3d 303 (Ky. 2000), White v. Check Holders, Inc., 996 S.W.2d 496 (Ky. 1999). The result urged by Miller would impose a duty on courts that sentenced offenders before any version of the registration requirement was enacted to go back and inform defendants sentenced of their duty to register. The Commonwealth notes that "[t]he essence of statutory construction is to ascertain and give effect to the intent of the legislature." Hale v. Combs, 30 S.W.3d 146, 151 (Ky. 2000). Courts should, the Commonwealth continues, reject a construction of a statute that is unreasonable and absurd in preference for one that is reasonable, rational, sensible and intelligent. Commonwealth v. Kash, 967 S.W.2d 37 (Ky. App. 1997), Estes v. Commonwealth, 952 S.W.2d 701 (Ky. App. 1997). It is, in our view, unreasonable to reach the result urged by Miller. The statute that imposes a duty on the sentencing court to inform the offender that he will, on release, be required to register as a sex offender is obviously intended to apply to courts sentencing offenders after the effective date of the statute, and the language of the statute implies no retroactive duty on courts that have already sentenced offenders for crimes requiring registration.

Most importantly, Miller's argument overlooks the fact that he did in fact register as a sexual offender upon his release. He had actual notice of his duty to comply with the

continuing duty to update his registry under the statute, and did not do so; to interpret the statute in the literal-minded way urged by Miller would be to depart from reality. Miller further argues that in the alternative, he can at most be charged with a misdemeanor, because he registered on March 3, 2000, prior to the effective date of the version of the statute (April 11, 2000) under which he was charged. He cites Peterson v. Shake, 120 S.W.3d 707 (Ky. 2003) in support of his argument. But Peterson involved a registrant who was released in 1998 and charged under the 2000 version of the statute for failing to update his registry when he relocated. The Kentucky Supreme Court rejected the Commonwealth's contention that there is no difference between the duty to initially register and the duty to continually register. Miller argues that because he initially completed the sex offender registry form in March 2000, he was not subject to the higher penalty. We disagree. Miller's registration did not become effective until he was released from prison on May 22, 2000, well after the effective date of the statute. On the registry form that he was required to fill out upon release, he is clearly notified that he is required to notify the local Probation and Parole office prior to any change of address, and that failure to comply is a Class D felony. The form filled out in March has no legal effect here; he had a duty to register upon his release from prison.

This case is readily distinguishable from Peterson because of the key fact of the date of Miller's release and the notice to Miller of the consequences of failure to comply with the law's requirements. Also, the Kentucky Supreme Court has recently held that the registration and notification statutes do not violate the prohibition against ex post facto legislation, as it is remedial in nature and not punitive. "Registration is a reasonable and proper means for achieving its purpose and is completely consistent with the authority of the state to protect . . . its people. It does not punish the offender for past criminal activity and it does not punish the offender twice for the same activity." Martinez v. Commonwealth, 72 S.W.3d 581, 584 (Ky. 2002).

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

ALL CONCUR.

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