

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001968-MR

ROBIN ELY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 03-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Robin Sly Ely (hereinafter “Ely”), *pro se* appeals from the Campbell Circuit Court's August 18, 2006, order denying his “Motion in Vacatur, Arresting Judgment Void *ab initio*, Declaration of Rights Demanding Immediate Release” following his conviction for failure to register as a sex offender and subsequent probation revocation. For the following reasons, we affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In 2002 Ely was convicted of possession of a controlled substance in the first degree, first offense,² and possession of marijuana³ in the Kenton Circuit Court. In addition to the sentences imposed for these violations, the circuit court ordered Ely to register as a sex offender pursuant to KRS 17.510⁴ immediately upon his release from detention as he had been previously ordered to become a lifetime registrant in Ohio.⁵ Ely voiced no concerns over this requirement, no appeal was filed from that judgment of conviction, and it appears from the record that he did, in fact, register as required on February 27, 2002.

On December 3, 2002, a warrant was issued in Campbell County, Kentucky, for Ely's arrest for failure to register as a sex offender. According to the affidavit in support of the warrant, although Ely had previously been required to be a lifetime registrant, he had failed to notify authorities of a change in his address as required by KRS 17.510(10),⁶ in that the current resident at his last registered address

² Kentucky Revised Statutes (KRS) 218A.1415.

³ KRS 218A.1422.

⁴ KRS 17.495-17.991 sets forth the statutory framework of Kentucky's sex offender registration system, which systems are more commonly known and referred to as "Megan's Law."

⁵ Ely had been convicted in Ohio for the offenses of kidnapping and rape in the first degree, and pursuant to Ohio's version of Megan's Law was required to become a lifetime registrant as a sex offender. Pursuant to KRS 17.510(7), any person required to register under the laws of another state who later relocates his or her residence to Kentucky is required to comply with the registration requirements as set forth in KRS 17.495 *et seq.*

⁶ In pertinent part, KRS 17.510(10) states as follows:

- (a) If the residence address of any registrant changes, but the registrant remains in the same county, the person shall register, on or before the date of the change of address, with the appropriate local probation and parole office in the county in which he or

affirmatively stated that Ely had not resided there since approximately April of 2002. A Campbell County grand jury indicted Ely on January 16, 2003, for failure to register as a sexual offender and for being a persistent felony offender in the first degree (PFO I).⁷ Pursuant to a plea agreement with the Commonwealth, Ely entered an unconditional guilty plea on February 27, 2003, to the charge of failure to register as a sex offender for which the Commonwealth recommended a five year probated sentence on the conditions Ely serve 60 days in the county jail, followed by three months home incarceration with work release privileges, and obtain a substance abuse assessment and follow all recommended treatment plans, and the PFO I charge was dismissed. The circuit court accepted his plea and sentenced him pursuant to the Commonwealth's recommendation on the same day.

On May 14, 2003, the Commonwealth moved to revoke Ely's probation based on an affidavit from his probation and parole officer stating that Ely had failed to notify the officer of a change in his address, which fact had been detected on a routine home inspection visit. A hearing was held on June 5, 2003, and was continued in

she resides.

- (b) 1. If the registrant changes his or her residence to a new county, the person shall notify his or her current local probation and parole office of the new residence address on or before the date of the change of address.
2. The registrant shall also register with the appropriate local probation and parole office in the county of his or her new residence no later than five (5) working days after the date of the change of address.

⁷ KRS 532.080(3).

progress until June 18, 2003. On June 24, 2003, the circuit court entered an order finding Ely in violation of his probation, revoking same, and ordering Ely to serve the five year sentence previously imposed with credit being given for 103 days jail custody. On August 14, 2003, Ely filed a *pro se* motion for shock probation which was denied without a hearing on September 5, 2003.

On March 19, 2004, Ely filed a *pro se* “Motion to vacate sentence pursuant to K.R.S. 17.500” in Campbell Circuit Court which effectively was a collateral attack on his 2002 conviction from the Kenton Circuit Court which initially required him to register as a sex offender. The Commonwealth filed its response on March 22, 2004, and Ely's motion was denied by order entered on April 5, 2004.

On July 31, 2006, nearly three and one-half years after entering his guilty plea, Ely again filed a *pro se* motion, this time styled as a “Motion in Vacatur, Arresting Judgment Void *ab initio*, Declaration of Rights Demanding Immediate Release.” In this motion, Ely sought relief under “RCr⁸ 11.42, CR⁹ 60.02(e)(f) [sic], KRS 418.040, KRS 419.020; Sections 14 and 16 Kentucky Constitution and the Fourteenth Amendment of the U.S. Constitution, but not necessarily limited to these rules, statutes or constitutional provisions.” Ely's main contention was that he was wrongfully prosecuted under the 2000 amendments to KRS 17.510 which classified his failure to register as a class D felony, instead of being prosecuted under the 1998 version of the statute which made

⁸ Kentucky Rules of Criminal Procedure.

⁹ Kentucky Rules of Civil Procedure.

failure to register a class A misdemeanor. On August 18, 2006, the circuit court entered an order overruling Ely's motion. This appeal followed.

Ely contends the trial court erred in its application of the law when it utilized the felony penalty provisions of the 2000 version of KRS 17.510 instead of the misdemeanor penalty provisions contained in the 1998 amendments. Thus, he challenges the circuit court's exercise of jurisdiction, claiming the district court had exclusive jurisdiction¹⁰ over the matter. We disagree.

This Court reviews questions of fact under a clearly erroneous standard pursuant to CR 52.01, and questions regarding a trial court's legal conclusions *de novo*. *Louisville & Nashville Railroad Co. v. Commonwealth ex rel Kentucky Railroad Commission*, 314 S.W.2d 940 (Ky. 1958). The facts herein are not in issue and are undisputed. Furthermore, it is conceded that Ely is subject to the Kentucky Sex Offender Registration Act (hereinafter “the Act”) and is thus required to become a registrant. The sole question then becomes whether a sex offender convicted in 1977 in another state and who subsequently relocates to Kentucky can be subject to the 2000 amendments to the law which made failure to register a class D felony. Upon the facts before us, we find in the affirmative.

¹⁰ See KRS 24A.110(2), which states in pertinent part:

The District Court has exclusive jurisdiction to make a final disposition of any charge or a public offense denominated as a misdemeanor or violation, except where the charge is joined with an indictment for a felony[.]

A brief review of the legislative history of the Act is necessary for a proper determination of the issue. New Jersey enacted the nation's first sex offender registration law which has become known as "Megan's Law," named after a child who was kidnapped, raped, and murdered by a convicted child molester who had moved into her neighborhood without the community's knowledge. After surviving judicial scrutiny by that state's highest court, numerous other states took notice and began enacting their own versions of Megan's Law. In 1994 Congress adopted the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act in an effort to further encourage the various states to enact their own versions of Megan's Law. If a state failed to adopt such a law which contained certain provisions, Congress could withhold funds from that state under the Omnibus Crime Control and Safe Streets Act of 1968.¹¹

Later that year, Kentucky adopted its first version of Megan's Law, codified as KRS 17.500-540. The law required certain sex offenders to register for a period of ten years following discharge from confinement, maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever was later. Failure to register was set to be penalized as a class A misdemeanor, and the provisions of the law applied to those persons who pled guilty or was convicted of a sex crime after July 15, 1994.

In 1998 the Legislature amended the law to include a classification system based on the potential for recidivism and provided for risk assessments for offenders.

¹¹ 42 U.S.C. § 3765.

Additionally, a new provision was added as KRS 17.510(12) criminalizing knowingly providing false, misleading, or incomplete registration information.¹² The amendments became effective for persons sentenced or incarcerated after July 15, 1998, except for the provisions set forth in KRS 17.520, 17.552, 17.570-578, and 17.991, which did not become effective until January 15, 1999.

In 2000 the Act was again amended to: (1) eliminate the need for a hearing in the risk assessment procedure; (2) extend the registration requirements to include a website which posts relevant information regarding offenders; and (3) change the penalty for failure to register or timely report a change of address to a class D felony.¹³ These amendments were to “apply to all persons who, after the effective date of this Act, are required under Section 16 of this Act to become registrants, as defined in Section 15 of this Act.” 2000 Kentucky Acts, Ch. 401, §37, eff. 4-11-00.¹⁴

Ely contends the plain language of the statute and the accompanying legislative history preclude application of the 2000 amendments to him, as the sex offense conviction requiring his registration occurred some 23 years prior to their enactment. Ely declares that his conviction “required him to register as a sex offender pursuant to the (1998) version of KRS 17.510” and relies heavily on the case of *Peterson*

¹² The 1998 version of KRS 17.510(12) set forth the penalty for its violation as a class A misdemeanor.

¹³ The penalty set forth in KRS 17.510(12) was also increased to a class D felony.

¹⁴ The Legislature again amended the Act in 2006, *see* 2006 Kentucky Acts, Ch.182, §§1-16, eff. 7-12-06. As there is no argument this most recent amendment could apply to Ely, we shall not indulge in discussion of the changes contained therein.

v. Shake, 120 S.W.3d 707 (Ky. 2003) in support of his position. Our review of the record reveals no support for this claim.¹⁵ Furthermore, Ely's reliance on *Peterson* is misplaced.

In *Peterson*, the Supreme Court of Kentucky reversed a Jefferson Circuit Court's application of the 2000 version of the Act to a sex offender who had been released from state custody and registered with the sex offender registry in 1999, then subsequently failed to notify the registry of a change in his address. Finding no ambiguity in the language regarding the effective date set forth in Kentucky Acts, Ch. 401, §37, the Supreme Court stated “[i]t is quite apparent that the 2000 amendments were only intended to apply to persons who were required to *become* registrants following April 1, 2000” [emphasis original]. *Peterson*, 120 S.W.3d at 709. As the defendant therein was already on the registry, he “could not have 'become' a registrant, as he already was one.” Ely argues this holding--and that of an unpublished opinion of this Court--stands for the principle that sex offenders convicted before 2000 can never be charged with a felony for failing to register their address. This argument is devoid of merit.

Peterson and the later case of *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005), clearly hold the provisions of the 2000 amendments cannot be retroactively applied to persons who were already registered pursuant to prior versions of the Act. To hold otherwise would be violative of the Constitutional prohibition against enacting and enforcing ex post facto laws.¹⁶ However, Ely does not fit the criteria

¹⁵ We note that Ely's brief contains no references to the record on appeal.

¹⁶ The Supreme Court of Kentucky has previously held in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), that the sex offender registration system passes Constitutional muster and the enacting statutes do not amount to an ex post facto violation, even in light of the possible

elucidated in *Peterson* and *Dickerson*. Unlike the defendants in those cases who were already included in the database prior to being charged under the 2000 penalty scheme, Ely was first required to become a registrant--and, in fact, did first register--in February 2002, nearly two years after the effective date of the 2000 amendments. Therefore, the plain, unambiguous language of the statutes and accompanying legislative history mandate that Ely be subjected to the felony penalty provisions included in the 2000 amendments. The circuit court correctly applied the law to the uncontroverted facts and nothing in the record indicates Ely was entitled to the relief requested.

Thus, for the foregoing reasons, the judgment of the Campbell Circuit Court denying Ely's motion for relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robin Ely, *Pro Se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky

retroactive application of some of the amendments. The decision also includes a thorough discussion and analysis of registration and notification systems from across the nation and the judicial treatment they have received insofar as constitutional challenges to them have been raised.