

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001481-MR

WILLIAM BUCK

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 07-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: William Buck entered a conditional guilty plea in the Campbell

Circuit Court to one count of failing to register as a sex offender. Buck was

sentenced to three years in prison in accordance with the plea agreement. Buck

now appeals that conviction, arguing the General Assembly and the trial court

¹ Senior Judge Joseph E. Lambert 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.

violated the *ex post facto* clauses of the United States and Kentucky Constitutions applying the sex offender registration law to him. Finding no error, we affirm.

On October 27, 2006, a criminal complaint was filed against Buck alleging he violated the sex offender registration statute as he had not lived at his registered address for two and a half years. A Campbell County grand jury then indicted Buck for failing to register as a sex offender, second or subsequent offense. Buck challenged his indictment based on the *ex post facto* clause of the Kentucky and United States Constitutions. The trial court denied Buck's motion, holding that Buck had a duty to register under the new sex offender registry laws enacted in 1998 and 2000 because he was incarcerated at intermittent times between 1997 and 2005.

On May 7, 2007, Buck opted to enter a conditional guilty plea to the amended charge of failure to register as a sex offender, first offense. The plea was conditioned on Buck's right to appeal the *ex post facto* issue. At the plea hearing, Buck admitted that he lived in Campbell County on October 27, 2006, but that he was registered as a sex offender in Kenton County. He stated that he had not notified authorities of his residence. Buck testified that no one instructed him that he was required to register in Campbell County. The trial court questioned whether this was sufficient for acceptance of a guilty plea. After hearing from the prosecution that Buck would have to sign a number of forms admitting to the charge against him and the fact that Buck had actually given a false registration address that belonged to a vacant building, the trial court agreed to accept Buck's

plea. Buck assured the court that his appeal would only raise the *ex post facto* violation. Subsequent to the plea, the trial court sentenced Buck to three years on the amended charge as recommended by the Commonwealth.

On appeal, Buck argues that the application of KRS 17.510 against him violates the prohibition against *ex post facto* laws contained in the Fifth Amendment to the United States Constitution and §§ 2, 3, and 11 of the Kentucky Constitution. As a result, he contends that he cannot be convicted of failing to register. The facts underlying the current charge are as follows: In 1985, Buck was convicted for sexual abuse in the first degree. Buck received a sentence of three years, to be probated for a period of five years. Buck's probation was later revoked following his conviction in 1987 on two additional felonies. He was sentenced to serve 20 years on the latest convictions to run consecutively with the sex abuse conviction, for a total of 23 years. On February 10, 1997, Buck was released on parole but violated his conditions and was returned to prison on February 17, 2000. On March 1, 2001, Buck was paroled a second time. Again, Buck violated his conditions and was returned to prison on April 1, 2002. Buck was released for a third time on August 1, 2005.

On appeal, the only issue properly preserved for our review is whether a sex offender convicted in 1985 can be subject to the 2000 amendments to the law which made failure to register a class D felony. This Court reviews questions of fact under a clearly erroneous standard pursuant to Kentucky Rules of Civil Procedure ("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).

A brief review of the legislative history of the Kentucky Sex Offender Registration Act (“the Act”) is necessary for proper determination of the issue. In 1994, Kentucky adopted its first version of “Megan’s Law,” the nation’s first sex offender registration law enacted in New Jersey, 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 were 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. Additionally, a new provision was added as KRS 17.510(12) criminalizing knowingly providing false, misleading, or incomplete registration information.² The amendments become 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.

² Violations of the 1998 version of KRS 17.510(12) were punishable as a class A misdemeanor.

The Act was amended again in 2000 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.³ 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 (uncodified).

In 2002, the Kentucky Supreme Court addressed the constitutionality of the 1998 version of the Act in two cases, *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), and *Martinez v. Commonwealth*, 72 S.W.3d 581 (Ky. 2002). In *Hyatt*, the Supreme Court noted that, “Registration and Notification Statutes across the nation have consistently been held to be remedial measures, not punitive, and therefore do not amount to punishment or increased punishment.” *Id.* at 571. Further, the Court concluded that sex offender registration laws were constitutional stating, “[t]he statutes do not amount to an *ex post facto* violation. The registration laws do not punish sex offenders. They have a regulatory purpose only.” *Id.* at 573. The Court went on to say that because the Act in question did “not impose any additional punishment on Hyatt” it was not a violation of the *ex post facto* clauses of either the United States Constitution or the Kentucky Constitution. *Id.*

Likewise, in 2003,

³ The penalty set forth in KRS 17.510(12) was also increased to a class D felony.

The United States Supreme Court addressed this issue in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). In *Smith*, the Alaska Sex Offender Registration Act, like Kentucky's Act, required convicted sex offenders to register with law enforcement authorities. Doe challenged the Act as void under the *Ex Post Facto* Clause. In deciding whether the sex offender registration and notification laws constituted retroactive punishment, which is forbidden by the *Ex Post Facto* Clause, the Court focused on the intention of the legislature stating that:

If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is “so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'” (Citation omitted).

Id. at 92.

After reviewing the statute the [United States] Court determined that, “[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.” *Id.* at 93 (internal citation omitted). The Court concluded that because Alaska's act was nonpunitive, its retroactive application did not violate the *Ex Post Facto* Clause.

Brown v. Commonwealth, 2006-CA-0001860-MR (Ky. App. September 21, 2007, Not To Be Published).

The Kentucky legislature again amended the Act in 2006. *See* 2006 Kentucky Acts, Ch. 182, §§ 1-16, eff. 7/12/06. Buck contends that the recent revision of KRS 17.510 and KRS 17.520 shows that the General Assembly

intended registration to be punishment for conviction of a sex crime, therefore registration cannot be imposed on anyone convicted before 1994, the effective date of the first registration laws. Based on these recent amendments, Buck contends that the reasoning of *Hyatt* and *Martinez* has been undermined and that the Act is unconstitutional as an *ex post facto* law. We disagree. The 1998 sex offender legislation specifically stated that it applied to individuals sentenced or *incarcerated* after July 15, 1998. Buck was incarcerated after July 15, 1998.

KRS 17.510 applies to the date of the defendant's release from prison, not from the date he committed the sexual offense. Buck was released from prison in 1985 and again in 1997. However, he was reincarcerated in 2000 for violating his parole. On March 1, 2001, Buck was released from prison again, three years after KRS 17.510 was enacted. KRS 17.520(4) states that when a Kentucky registrant is reincarcerated, "the registration requirements . . . are tolled during the reincarceration," a prisoner's information is no longer on the registry, and when released, he or she must provide new registry information, not merely a change of address for an otherwise already existing registry listing. Thus, Buck had a duty to register.

Under the 1994 and 1998 versions of the Act, the duty to register was imposed on persons who were convicted or incarcerated for a sex crime after the effective dates of those Acts. In contrast, the duty to register under the 2000 Act applies to "all persons who, after the effective date of this Act, are required . . . to become registrants." In addition, the duty to register is tolled during any period a

registrant is “reincarcerated for another offense or as the result of having violated the terms of probation, parole, or conditional discharge[.]” KRS 17.520(4).

Consequently, the duty to register under the 2000 Act is determined as of the date of the defendant’s release from incarceration, not from the date of the offense, conviction or sentencing. *See* KRS 17.510(2)

In this case, Buck was convicted of a sex offense in 1985 and immediately released on probation. Buck committed two non-sex related offenses while on probation. He was convicted for these offenses in 1987 and received consecutive sentences as follows: ten years for each of the two new felony offenses and three years on the sex abuse first degree. But at that time, he was not subject to the registration requirements of the Act. Thus, the tolling provisions of KRS 17.520(4) did not apply to him as he was not required to register at that time.

Upon his releases from prison in 2001 and 2005, Buck was subject to the registration requirements. The plain language of the 2000 Act requires registration for persons who, after the effective date of the Act, are released from incarceration for a sex crime, KRS 17.510(2); or who, after the effective date of the Act, are released from incarceration on another crime committed while the person was on probation, parole or conditional discharge for a sex crime. KRS 17.520(4). In this case, Buck violated the conditions of his parole in 2000 and 2002 and was reincarcerated in those years for those offenses and the parole violations. Therefore, we cannot find that the trial court clearly erred in finding that Buck is subject to the requirements of the 1998 and 2000 Acts.

Accordingly, the judgment of conviction by the Campbell Circuit

Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky