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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001145-MR

EDWARD LEE STURGEON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CR-001971

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2008-CA-001146-MR

EDWARD LEE STURGEON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CR-002638

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

NICKELL, JUDGE: Edward L. Sturgeon (Sturgeon) has appealed from the Jefferson Circuit Court's June 12, 2008, order requiring him to register as a sex offender pursuant to KRS 17.510 upon his release from incarceration. He argues an amendment to the sex offender registry statute adopted by the Kentucky General Assembly in 2006 transformed the registration requirement from a civil mandate to a criminal punishment. For the following reasons, we affirm.

On February 21, 2008, Sturgeon entered into an unconditional plea agreement with the Commonwealth for various sex crimes committed in the late 1970s and early 1980s, but were unreported to police until 2007. Pursuant to the plea agreement, Sturgeon was sentenced to fifteen years' imprisonment. However, the issue of sex offender registration was not part of the plea agreement reached between Sturgeon and the Commonwealth Attorney's Office, because they could not agree on whether the current statute, as amended in 2006, applied to Sturgeon. Defense counsel and the Commonwealth Attorney's Office disagreed on whether the amendment transformed the registration requirement from civil to criminal. Since the parties could not agree, they decided to let the trial court determine whether Sturgeon was required to register as a sex offender under the statute as amended. The trial court was likewise undecided, but all parties agreed the court

¹ Senior Judge J. William Graves 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.

was bound by Supreme Court precedent. Ultimately, the trial court found Sturgeon was required to register. This appeal followed.

As a condition of the plea agreement, the charges levied against Sturgeon in Indictment Nos. 07-CR-001971 and 07-CR-002638 were consolidated for sentencing purposes. Sturgeon filed two separate appeals with this Court. Because the facts and issues presented were identical, the appeals were consolidated by an order of this Court entered on August 20, 2009.

Sturgeon does not attack his underlying convictions or sentence. Therefore, a detailed recitation of the facts is unnecessary to resolve this appeal. The only question before this Court is whether sex offender registration applies to Sturgeon, since the registry, created in KRS 17.510, did not exist when the crimes for which he now stands convicted were committed.

Sturgeon contends that requiring him to register as a sex offender under the 2006 version of the sex offender registration act would be a violation of both federal² and state law³ which prohibit the *ex post facto* enforcement of criminal punishment. He argues the registry is no longer civil⁴ due to an amendment adopted by the General Assembly in 2006, which implicitly overruled the decisions rendered by our Supreme Court in 2002 interpreting the sex offender

² Article 1 of the United States Constitution.

³ KRS 446.080 and Section 19 of the Kentucky Constitution.

⁴ In analyzing the 1998 and 2000 amendments to the sex offender registration laws in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), and *Martinez v. Commonwealth*, 72 S.W.3d 581 (Ky. 2002), our Supreme Court found registration to be a civil requirement, not a criminal punishment.

registration requirements as civil. Sturgeon contends three amendments and the title of the House bill which proposed these amendments shows that the General Assembly's goal was to make these laws criminal.

Before we can address whether Sturgeon's argument is meritorious we must decide if the issue is properly before us. Despite the trial court's statement on the record that this issue was properly preserved for appeal, Sturgeon must satisfy KRS 418.075(1) before this Court can hear his appeal. That statute requires that "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard." The same requirement is also contained in CR⁵ 24.03 which states in pertinent part, "when the *constitutionality* of an act of the General Assembly affecting the public interest is drawn into question *in any action*, the movant shall serve a copy of the pleading, motion, or *other paper* first raising the challenge upon the Attorney General." (emphasis added). The purpose of the statute and the rule is to give the people, through the Attorney General, the right to be heard regarding the validation or invalidation of the laws governing their state. *Maney v. Mary Chiles Hospital*, 785 S.W.2d 480, 481 (Ky. 1990). As noted in the Commonwealth's brief, Sturgeon did

⁵ Kentucky Rules of Civil Procedure.

not serve the Attorney General as required by KRS 418.075(1) and CR 24.03.

Thus, this Court is not at liberty to hear his appeal.

Sturgeon argues that he is not mounting a constitutional challenge, but merely a rhetorical one.⁶ He contends “the issue of constitutionality only comes up if the government insists on trying to apply retroactively the newly-minted punishment of registration.” Whether rhetorical or constitutional, the issue before this Court appears to be the same. One cannot characterize a constitutional argument as something it is not merely to circumvent required procedures.

The notice requirement of KRS 418.075 is a mandatory prelude in all cases, whether civil or criminal, before a court may consider the constitutionality of a statute. *Jacobs v. Commonwealth*, 947 S.W.2d 416, 419 (Ky. App. 1997) (quoting *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude*, 880 S.W.2d 539, 542 (Ky. 1994)). Notifying the Attorney General of an impending constitutional challenge serves a significant role in the judicial process as a ruling by this Court may affect the interests of those outside the present litigation. *Jacobs*, 947 S.W.2d at 419. For similar reasons, the Court in *Jacobs* concluded the notice requirements of KRS 418.075⁷ applied to both criminal and civil actions. *Id.* Further, since the Attorney General must receive notice before entry of

⁶ Sturgeon does not explain exactly what he means when referring to his argument as “rhetorical.” However, we note the definition of rhetorical is “of, relating to, or concerned with rhetoric” or “employed for rhetorical effect; *especially*: asked merely for effect with no answer expected <a rhetorical question>.” Merriam-Webster’s Collegiate Dictionary 1002 (10th ed. 2002).

⁷ *Jacobs* references KRS 418.075 throughout the opinion except for one occasion where it cites a non-existent KRS 418.074. We deem the reference to KRS 418.074 to be a typographical error.

judgment, “merely filing an appellant brief, which necessarily occurs post-judgment, [will not] satisf[y]” KRS 418.075. *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008). In *Benet*, the defendant failed to file his constitutional challenge with the Attorney General, thus the issue was not preserved for our review. *Id.* *Benet* is directly on point with the instant case. Sturgeon did not file his constitutional challenge with the Attorney General “prior to entry of judgment,” thus, his challenge, whether rhetorical or constitutional, is not preserved for our review. *Id.*

Even if the issue had been preserved for our review, we would still affirm the trial court’s ruling which correctly concluded it was bound by Supreme Court precedent. In 2002, the Supreme Court of Kentucky held sex offender registration laws were civil and thus, there was no violation of *ex post facto* laws in applying these requirements retroactively. *Hyatt*, 72 S.W.3d at 571; *Martinez*, 72 S.W.3d at 584. “In order to ascertain whether an *ex post facto* violation has occurred, the court must first determine whether a change in law or regulation creates a significant risk of increased punishment for the inmate.” *Stewart v. Commonwealth*, 153 S.W.3d 789, 793 (Ky. 2005) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588 (1995)). In mounting an *ex post facto* challenge, Sturgeon must show “its retroactive application will result in a longer period of incarceration than under the earlier rule.” *Id.* (citing *Garner v. Jones*, 529 U.S. 244, 251, 120 S.Ct. 1362, 1368, 146 L.Ed.2d 236 (2000)). Sturgeon has not made the required showing as the

requirements of the amended sex offender registration statute do not increase his overall period of incarceration. *Id.* Since the amended version does not impose any additional period of incarceration upon Sturgeon, the retroactive application of the sex offender registration act has not resulted in an *ex post facto* violation. *Id.* (citing *Garland v. Commonwealth*, 997 S.W.2d 487, 489 (Ky. App. 1999)).

Further, sex offender registration laws do not “punish sex offenders,” they serve only a “regulatory purpose.” *Bray v. Commonwealth*, 203 S.W.3d 160, 164 (Ky. App. 2006) (citing *Hyatt*, 72 S.W.3d at 571). “The dissemination of information has never been considered a form of punishment.” *Id.* The provisions of this Act do not “impose any additional punishment and are not *ex post facto* laws under either the United States Constitution or the Kentucky Constitution.” *Id.* Finally, the sex offender registration act remains substantially the same today as it did when the Supreme Court rendered its decisions. Therefore, since the current version, as amended in 2006, is virtually the same as the 1998 and 2000 amended versions, which were deemed to be civil by our Supreme Court, we find no reason to disturb the precedent already in place.

For the foregoing reasons, we affirm the order of the Jefferson Circuit Court requiring Sturgeon to register as a sex offender.

ALL CONCUR.

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