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Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002053-MR

CHARLES ROSARIO

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 08-CR-00112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CAPERTON, JUDGE: This is an appeal from a denial of a motion to modify the terms of Appellant Charles Rosario's probation. Rosario sought an order to vacate the requirement that he register as a sex offender. The Madison Circuit Court found that such registration is not punitive and does not violate the *ex post facto* provisions of the Kentucky and U.S. Constitutions, and accordingly, found that

Rosario was required to register. Rosario seeks the review of this order. On appeal two issues are presented; one, whether Rosario's appeal to this Court was timely filed, and two, whether the registration requirement violates the aforementioned *ex post facto* provisions. Having thoroughly reviewed the law, the arguments of the parties, and the record, we affirm as Rosario's appeal to this Court was untimely filed.

Rosario, as a member of the Maryland Army National Guard, was assigned to active duty at the Bluegrass Army Depot in Richmond, Kentucky, in the spring of 2004. His unit's task was to guard the weapons stored at the facility. Rosario enlisted in our nation's armed forces in 1997, and served in the Air Force for three years before entering the civilian world. In 2003, Rosario reenlisted as a member of the Army National Guard, which led him to Kentucky.

To help pass the time, Rosario and many of the other soldiers in his unit brought computers from home. One of the members of Rosario's unit had worked with computers before joining the military and decided to connect all of the computers together via a network which allowed him to supply all of the computers with wireless internet. Unfortunately, when given internet access, the young soldiers were also given access to all that it avails, which included pornography that the soldiers began downloading and viewing without restraint. It appears that nothing was deemed off-limits, including child pornography.

Information was filed in the Madison Circuit Court on June 12, 2008, in which Rosario was charged with felony distribution of child pornography

pursuant to Kentucky Revised Statutes (KRS) 531.340(2). As part of a plea offer from the Commonwealth, Rosario pled guilty to the charge in return for which the Commonwealth Attorney agreed to recommend a lower sentence.

On August 19, 2008, the circuit court entered a final judgment against Rosario sentencing him to two and a half years, probated for five years with certain specific conditions. At no time was the obligation to register mentioned as one of these conditions.¹ Nevertheless, after meeting with his probation officer, it was revealed to Rosario that, even though he was not considered a sex offender under the law of this Commonwealth at the time the offense was committed, he now must register under the sex offender registration statute due to a 2006 amendment to KRS 17.500 that requires those found guilty of KRS 531.340(2) to register. Thus, even though Rosario would not have been required to register in 2004 when he committed the offense, he was required to register in 2008 because of the amendment to the sex offender statute.

On August 28, 2008, Rosario filed a motion to modify the terms of his probation specifically requesting that the court hold that he was not obligated to register. Rosario argued that he was not a sex offender under Kentucky law, and that requiring him to register under the 2006 version of the law, even though his offense occurred in 2004, was an *ex post facto* application of the law.

The circuit court issued an order denying the motion on September 30, 2008. In this order the circuit court determined that as registration is remedial and

¹ KRS 17.510(3) requires a sentencing court to advise a person convicted of such a crime of the registration requirement.

not punitive in nature, Rosario was required to register and this registration did not violate *ex post facto* constitutional provisions.

Rosario filed for appeal on October 30, 2008. As noted, the two issues before this Court on review are whether the appeal was timely filed, and whether the registration requirement violated the *ex post facto* provisions of the Kentucky and U.S. Constitutions.

The facts in the matter *sub judice* are not in dispute. The standard of review used in our consideration of this appeal is stated in *New v. Commonwealth*, 156 S.W.3d 769, 774 (Ky. App. 2005), which provides that “[o]ur review of a question of law is *de novo* as contrasted with the deferential standard to which we are held as to questions of fact.” We review this matter with this standard in mind.

We first consider the timeliness of the appeal, which is the subject of the motion by the Commonwealth to dismiss. Preliminarily, a question arises as to whether registration under KRS 17.510 would be a probation condition or a statutory mandate, and what effect it has on the timeliness of an appeal.

Registration as required by KRS 17.510 is mandatory and, as such, is not discretionary with the sentencing court. A trial court ordering a registrant to register pursuant to KRS 17.510(3) is merely advising him of what a registrant is, pursuant to statute, obligated to do and does not convert a statutory requirement to a court-imposed condition of probation. Of pivotal importance is the language of KRS 17.510(3) wherein it states:

Any person required to register pursuant to subsection (2) of this section *shall be informed of the duty to register by the court at the time of sentencing* if the court grants probation or conditional discharge or does not impose a penalty of incarceration, *or if incarcerated, by the official in charge of the place of confinement upon release*. The court and the official shall require the person to *read and sign any form that may be required by the cabinet*, stating that the duty of the person to register has been explained to the person. The court and the official in charge of the place of confinement shall require the releasee to complete the acknowledgment form and the court or the official shall retain the original completed form. *The official shall then send the form to the Information Services Center, Department of Kentucky State Police, Frankfort, Kentucky 40601.* (Emphasis supplied.)

It is explicit in the statute that the court is an informational source that advises the registrant of the statutorily mandated duty to register if the court grants probation or conditional discharge or does not order incarceration. The statute does not say that the duty to inform is a condition of probation or discharge. In fact, if sentenced to incarceration, it is the duty of the officer and not the court to inform the registrant of this duty. The registrant is to read and sign a form provided by the Cabinet, not a form provided by the court. Then, regardless of whether the court or the official retains the form, it is sent by the official to the Information Services Center of the Kentucky State Police in Frankfort, Kentucky. While true that the trial court may indeed include sex offender registration as a condition at sentencing, the relief of a registrant from such a condition would not negate the statutory obligation to register. We now hold that sex offender

registration under KRS Chapter 17 is mandatory and neither a condition of sentencing nor at the discretion of the court.

With respect to the arguments of the parties concerning the timeliness issue, the Commonwealth contends that Rosario did not file his challenge within the thirty-day limit required by Kentucky Rules of Civil Procedure (CR)

73.02(1)(a). This rule states that:

The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).

The Commonwealth argues that Rosario must have filed his appeal within thirty days after the date of his final sentence, which contained no registration requirement and was entered on August 19, 2008.

The trial court did enter an order on September, 30, 2008, requiring Rosario to register. Rosario did file a notice of appeal from this order on October 30, 2008, the thirtieth day after the order was entered. The registration requirement was not ruled on or even mentioned at any time prior to the September 30, 2008, order.

The arguments of the Commonwealth and Rosario on the issue of timeliness would certainly be of relevance if sex offender registration were solely a probation condition. However, in that we have held that sex offender registration is imposed by statute and is not a condition of probation, the further action of the sentencing court making registration also a probation condition is duplicitous and

makes moot any decision of this Court as to whether an appeal from the September 30, 2008, order was timely.

Stated simply, where sex offender registration is not a condition of probation but is a statutory mandate as a result of the conviction itself, any appeal must necessarily be from the conviction upon which it is based. In the case before our Court, that conviction was entered of record on August 19, 2008. Certainly, the time for appeal therefrom has long since passed.

In light of the foregoing reasoning, we hereby sustain the motion of the Commonwealth to dismiss the appeal as untimely. In so finding, we need not address the merits of Rosario's second argument concerning the *ex post facto* provisions of the Kentucky and U.S. Constitutions.

Wherefore, we hereby affirm the September 30, 2008, order of the Madison Circuit Court.

ALL CONCUR.

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