

RENDERED: SEPTEMBER 12, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2012-CA-001811-MR

MICHAEL SMITH

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NO. 12-CR-00065

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2013-CA-000364-MR

MICHAEL D. SMITH

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 12-CR-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: These consolidated appeals are brought by Michael D. Smith from judgments entered by the McCracken Circuit Court on September 19, 2012, and Marshall Circuit Court on February 5, 2013, for failing to register as a sex offender under Kentucky Revised Statutes (KRS) 17.510(7). Smith, who is required to register as a sex offender in the state of Illinois, entered guilty pleas to several charges conditioned on his right to appeal whether he is required to register as a sex offender in Kentucky. For the reasons stated, we affirm.

In 1999, when he was fourteen years of age and residing in Illinois, Smith committed the offense of aggravated sexual abuse against a family member under seventeen years of age. He was adjudicated a juvenile delinquent, adjudged a ward of the court and committed to the juvenile division of the Illinois Department of Corrections. Under Illinois law, juvenile sex offenders are required to register, but access to their information is restricted. The Department of State Police and any law enforcement agency may, “in the Department’s or agency’s discretion, only provide the information . . . with respect to an adjudicated juvenile delinquent, to any person when that person’s safety may be compromised for some reason related to the juvenile sex offender.” 730 Ill. Comp. Stat. ( ILCS) 152/121(a).

Further, “[t]he local law enforcement agency having jurisdiction to register the juvenile sex offender shall ascertain from the juvenile sex offender whether the juvenile sex offender is enrolled in school; and if so, shall provide a copy of the sex offender registration form only to the principal or chief administrative officer of the school and any guidance counselor designated by him or her. The registration form shall be kept separately from any and all school records maintained on behalf of the juvenile sex offender.” 730 ILCS 152/121(b).

The registration requirement continues for as long as an offender resides in the state of Illinois. Upon reaching adulthood, an offender may petition the court to be removed from the registry. Following a hearing, the court may, after considering a lengthy list of factors, “terminate registration if the court finds that the registrant poses no risk to the community by a preponderance of the evidence . . . .” 730 ILCS 150/3-5(d).

Smith was convicted twice in Illinois for failing to register as a sex offender, a felony. He later moved to Kentucky, where as an adult in 2008, he was convicted of the felony of failing to register as a sex offender, presumably on the basis of the adjudication in Illinois.

In 2012, Smith was indicted in the McCracken Circuit Court for failing to register as a sex offender and for second-degree persistent felony offender (PFO). Smith entered a plea of guilty to an amended charge of failure to comply with sex offender registration, first offense, and being a PFO in the second degree. In February 2013 in the Marshall Circuit Court, he also entered a plea of

guilty to failure to comply with sex offender registration, second offense. Both pleas were conditioned on his right to appeal the issue of whether he was required to register as a sex offender in Kentucky based on the registration requirement in Illinois. The appeals were consolidated for judicial economy.

Smith argues that requiring him to register as a sex offender in Kentucky, based upon a juvenile adjudication in another state, violates numerous constitutional principles. In the action before the Marshall Circuit Court, Smith failed to notify the Attorney General of his challenge to the constitutionality of KRS 17.510 (7), as mandated by KRS 418.075 and Kentucky Rules of Civil Procedure (CR) 24.03. Moreover, several of the specific arguments raised in his appeal from that judgment are unpreserved because they were never raised before the circuit court. In the McCracken County case, the Attorney General was properly notified of the constitutional challenge and the issues raised on appeal were fully preserved before the circuit court. Therefore, we begin our review by addressing the appeal from the McCracken Circuit Court judgment.

KRS 17.510(6) requires registration in Kentucky by “[a]ny person who has been convicted in a court of any state or territory, . . . of a sex crime or criminal offense against a victim who is a minor . . . .” Smith argues that he is not required to register under this provision because his juvenile adjudication in Illinois was not a criminal “conviction.” Whether he was required to register under subsection (6) is immaterial, however, because Smith was required to register

under subsection (7) of the statute, which provides that an individual who is required to register under the laws of another state must also register in Kentucky:

If a person is required to register under . . . the laws of another state . . . , that person upon changing residence from the other state . . . to the Commonwealth . . . shall comply with the registration requirement of this section, . . . and shall register within five (5) working days with the appropriate local probation and parole office . . . . A person required to register under . . . the laws of another state . . . shall be presumed to know of the duty to register in the Commonwealth.

KRS 17.510(7).

It is undisputed that Smith is required to register under the laws of Illinois; he apparently attempted to have the registration requirement in Illinois terminated during the pendency of the action before the Marshall Circuit Court, but failed.

Smith argues that KRS 17.510(7) violates the equal protection clause because out-of-state juvenile sex offenders who move to Kentucky are treated more harshly than in-state juvenile sex offenders who become adults. He contends that if he had committed the underlying offense in Kentucky rather than in Illinois, he would not be required to register and his entire juvenile record would be completely confidential under KRS 17.500(5) and KRS 610.320.

Not all juvenile offenders in Kentucky avoid the registration requirement, however.

It is axiomatic that a juvenile offender has no constitutional right to be tried in juvenile court. In our Unified Juvenile Code, our Legislature has created a

scheme in which most juvenile offenders are proceeded against in the juvenile division of district court. However, our Legislature has recognized that not all juvenile offenders should be proceeded against in juvenile court and, accordingly, the scheme it enacted provides for both automatic and discretionary transfer of certain juvenile offenders to circuit court.

*Stout v. Com.*, 44 S.W.3d 781, 785-86 (Ky. App. 2000).

Thus, under KRS 635.020(2),

If a child charged with a capital offense, Class A felony, or Class B felony, had attained age fourteen (14) at the time of the alleged commission of the offense, the court shall, upon motion of the county attorney made prior to adjudication, and after the county attorney has consulted with the Commonwealth's attorney, that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.

If a child is deemed to be a youthful offender, his or her case may be transferred to Circuit Court. KRS 640.010. A youthful offender who is convicted of a sex crime, or a criminal offense against a victim who is a minor, is required to register. KRS 17.500(5).

In Illinois, Smith committed the offense of aggravated criminal sexual abuse, described as a "Class 2-Felony" in the record. Smith has not conclusively shown whether, if he had committed the same offense in Kentucky, his case would not or could not have been transferred to circuit court, where he would have been subject to the registration requirement.

Assuming for purposes of this appeal, however, that Smith would not have been required to register had he committed the offense in Kentucky, we turn

to his equal protection argument. Because the differential treatment of in-state and out-of-state offenders does not involve a suspect class, we review the statute only to determine whether it is rationally related to a legitimate state purpose. *Com. v. Howard*, 969 S.W.2d 700 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1998)). Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.* “Merely because the statute may result in some practical inequity does not cause it to fail the rational basis test for review.” *Id.* at 703.

Smith argues that the differential treatment of out-of-state offenders undermines Kentucky’s interest in protecting the privacy of juveniles and its “theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority.” *Petitioner F. v. Brown*, 306 S.W.3d 80, 86 (Ky. 2010). But Kentucky’s interest in protecting juveniles must be balanced against the aims of the Sex Offender Registration Statutes of 1998 and 2000 which “are directly related to the nonpunitive goals of protecting the safety of the public.” *Hyatt v. Com.*, 72 S.W.3d 566, 572 (Ky. 2002). Our state Supreme Court has observed that “[t]he registration and notification required by the statutes are nonpunitive and provide only the slightest inconvenience to the defendant, although they provide the overwhelming public policy objective of protecting the public.” *Id.* at 573.

The requirement that individuals required to register in another state must also register in Kentucky is rationally related to Kentucky's goal of protecting the public, "based upon legislative determinations that convicted sex offenders pose an unacceptable risk to the general public once released from incarceration." *Com. v. McBride*, 281 S.W.3d 799, 805 (Ky. 2009).

In a factually-similar case, an appellant who entered a plea of guilty to third-degree sexual assault in Colorado was required to register in South Carolina as having committed an ABHAN [Assault and Battery of a High and Aggravated Nature]. The Supreme Court of South Carolina rejected his claim that the classification violated the equal protection clause, ruling that:

[T]he state's action is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal. Registering persons who committed crimes in another state when they move to South Carolina is a reasonable method of achieving this goal. The state's classification of Appellant as a sex offender satisfies rational scrutiny . . . because Colorado deemed him a sex offender, and South Carolina gives comity to Colorado's adjudication. Therefore, the statute reasonably protects South Carolinians because the registry notifies them of Appellant's sex offense.

*Hendrix v. Taylor*, 579 S.E.2d 320, 324 (S.C. 2003) (footnotes omitted).

Under Illinois law, Smith is deemed a sufficient threat to be required to remain on that state's sex offender registry; the requirement that he also be required to register in Kentucky, albeit in a registry with fewer access restrictions, is rationally related to a legitimate governmental interest and must be upheld.



Secondly, Smith argues that Kentucky's registration requirement hampers his constitutional right to travel because his Illinois juvenile adjudication would be recorded in a Kentucky registry open to the general public. "[T]he right to travel is not contravened by a state's enactment and enforcement of reasonable regulations to promote safety." *Bess v. Bracken County Fiscal Court*, 210 S.W.3d 177, 183 (Ky. App. 2006). Even if KRS 17.510(7) does place some burden on Smith's right to change his residence from Illinois to Kentucky, it will be upheld if it is "shown to be necessary to promote a compelling governmental interest." *Saenz v. Roe*, 526 U.S. 489, 499, 119 S. Ct. 1518, 1524–25, 143 L. Ed. 2d 689, 701–02 (1999). In a similar case, the Idaho Supreme Court held that the requirement that an individual register as a sex offender upon relocating to Idaho did not violate his right to travel, because the state had "a compelling and strong interest" "in preventing future sexual offenses and alerting local law enforcement and citizens to the whereabouts of those that could reoffend[,]" which "outweighs any burden imposed." *State v. Yeoman*, 236 P.3d 1265, 1269 (Idaho, 2010) (footnotes omitted). The same reasoning applies to this case. The burden of participating in Kentucky's registry, as opposed to the more restricted registry in Illinois, simply does not outweigh Kentucky's interest in protecting its citizens.

Thirdly, Smith contends that the registration requirement violates his substantive due process rights because it is over-inclusive, reiterating his earlier argument that if he had committed the underlying offense as a juvenile in Kentucky, he would not be subject to registration as an adult; and also pointing out

that in Kentucky, unlike in Illinois, he does not have the right to petition the court to be removed from the registry. Substantive due process “is based on the idea that some rights are so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote . . . .” *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009).

Smith has not successfully identified a fundamental right that is being impermissibly regulated by the registration requirement. We thus agree with the Commonwealth that since there is a rational basis for the registration requirement under an equal protection analysis, the same rationale applies to Smith’s substantive due process claims.

Fourthly, Smith argues that the registration requirement violates full faith and credit because it undermines the goals of both the Illinois statutes and Kentucky statutes to keep juvenile offenses from appearing on adult registries. The federal Court of Appeals for the Seventh Circuit recently addressed the case of Mitchell Rosin, who pleaded guilty to third-degree sexual abuse in the state of New York, and later moved to Illinois, where he was required to register as a sex offender, even though the New York judgment made no provision for registration. He brought suit, alleging a violation of the Full Faith and Credit clause of the U.S. Constitution. The appellate court rejected his arguments, stating as follows:

[T]hat Illinois’s sex-offense registration laws may be draconian in the current application does not render them invalid. Rosin contends, with apparent reasonableness, that the Full Faith and Credit Clause of the U.S. Constitution requires Illinois to recognize the New York

Order of Probation. But he then goes a step further by arguing that the New York order controls the manner in which Illinois can provide protection within its own borders. In particular, Rosin asserts that Illinois is constitutionally prohibited from requiring him to register as a sex offender on the basis of his 2003 conviction. He maintains this position despite the conspicuous absence in the order of any provision relieving him of an obligation to register. Nor does the order purport to prevent any other state from requiring him to register.

The absence of such language is dispositive, for without it there is no judgment to which Illinois is required to afford full faith and credit. The printed provision in the order that would require Rosin to register in New York as a sex offender was simply crossed out. No affirmative provision was added. Despite Rosin's protestations to the contrary, this section's being eliminated cannot fairly be construed as an attempt by New York to preclude other states from requiring him to register. And, of course, New York has no extra-territorial jurisdiction to exercise police power in Illinois.

*Rosin v. Monken*, 599 F.3d 574, 576 (7th Cir. 2010) (citations omitted).

Similarly, Smith can point to no language in the Illinois adjudication that can be construed as an attempt to preclude other states from requiring him to register, nor does Illinois have extra-territorial jurisdiction to exercise police power in Kentucky.

Finally, Smith argues that his punishment is cruel and unusual because the registration requirement is out of proportion to the offense he committed when he was only fourteen years of age. The Kentucky Supreme Court has held that lifetime registration as a sex offender does not constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution:

As noted by the Supreme Court of Kentucky in *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (Ky. 2002), “the designation of sexual predator is not a sentence or a punishment but simply a status resulting from a conviction of a sex crime.” The Court further stated that registration does “not constitute a disability or restraint; . . .” *Id.* Because registration as a sex offender is not “a punishment but simply a status,” we conclude that lifetime registration as a sex offender does not constitute cruel and unusual punishment.

*McEntire v. Com.*, 344 S.W.3d 125, 128-29 (Ky. App. 2010).

Smith has failed to show that the registration requirement in his case is a punishment rather than a status intended to protect the public. Therefore, we conclude that requiring Smith to register does not constitute cruel and unusual punishment.

In light of our disposition of these arguments in the McCracken Circuit Court action, we need not address the virtually identical arguments raised in the Marshall Circuit Court action. Accordingly, the judgments of the McCracken Circuit Court and the Marshall Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

James C. Shackelford  
Assistant Attorney General  
Frankfort, Kentucky