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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000384-MR

JAMES GOSNELL — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 09-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, MOORE, AND VANMETER , JUDGES.

VANMETER, JUDGE: James Gosnell appeals from a McCreary Circuit Court order denying his motion to amend sentence. Gosnell is challenging the constitutionality of the retroactive application of the amended version of Kentucky Revised Statutes (KRS) 532.043 to his sentence. Because he is asking for an advisory opinion, we affirm.

Gosnell entered a plea of guilty to one count of sexual abuse in the first degree, a Class C felony, for having sexual contact with a female less than twelve years old. On April 22, 2010, he was sentenced to eight years' imprisonment to be followed by five years of conditional discharge. His sentence was in accordance with KRS 532.043, which at that time required the imposition of a period of conditional discharge following the service of a sentence for certain sex offenses. Subsection (5) provided that if a person violated a provision of discharge, the violation would be "reported in writing to the Commonwealth's attorney in the county of conviction." The Commonwealth's attorney could then petition the court "to revoke the condition discharge and reincarcerate the defendant[.]"

Shortly thereafter, the Kentucky Supreme Court held that KRS 532.043(5) violated the separation of powers doctrine by conferring upon the judiciary an executive power to revoke post-incarceration conditional release. *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010). The Court explained its reasoning as follows:

> Under KRS 532.043, the General Assembly added a period of conditional discharge to the sentence of incarceration of persons convicted of certain offenses. The three-year (now five-year) period of conditional discharge is to be served beginning upon the person's final release from incarceration or parole. The conditions and supervision of the felony conditional discharge are set by the executive branch. Violations, however, are reported to the judicial branch (the court in the county of conviction) by the Commonwealth Attorney, for revocation (as opposed to an appeal of a decision by the

> Parole Board). Thus, the statute imposes upon the judiciary the duty to enforce conditions set by the executive branch.

Id. at 298-99 (internal footnotes omitted).

The Court concluded that "[o]nce a prisoner is turned over to the Department of Corrections for execution of the sentence, the power to determine the period of incarceration passes to the executive branch." *Id*. at 300.

In response to this holding by the Supreme Court, the Kentucky Legislature amended KRS 532.043 to replace "conditional discharge" with "postincarceration supervision." Under the revised statute, "[p]ersons under postincarceration supervision . . . shall be subject to the supervision of the Division of Probation and Parole and under the authority of the Parole Board." KRS 532.043(4). If a defendant violates the terms of the postincarceration supervision, "the violation shall be reported in writing by the Division of Probation and Parole. Notice of the violation shall be sent to the Parole Board to determine whether probable cause exists to revoke the defendant's postincarceration supervision and reincarcerate the defendant as set forth in KRS 532.060." KRS 532.043(5). The revised terms of the statute were made applicable to persons "convicted, pleading guilty, or entering an Alford plea after July 15, 1998." KRS 532.043(6).

On November 1, 2012, Gosnell filed a motion to amend sentence, asking the five-year conditional discharge period to be removed from his sentence. He argued that any sentence must be supported by an indictment and a jury verdict; that a judge can only adjust or change a sentence if it is to ameliorate its effect on

the defendant; and that the addition of the discharge period constituted double jeopardy. The circuit court denied the motion in an order entered on January 8, 2012, and this appeal followed.

On appeal, Gosnell's arguments differ substantially from those in his motion before the trial court, in that he mounts a constitutional challenge to the revised version of KRS 532.043. He contends that his original sentence imposing conditional discharge supervised by the Commonwealth and the judiciary, provided him with due process protections that are not available under the revised version of the statute. He argues that the current version of the statute which grants revocation powers to the Division of Probate and Parole infringes upon his right to counsel, uses an inadequate evidentiary standard, and has insufficient provisions for review or appeal.

Gosnell's argument is not preserved for our review. "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Nor did Gosnell follow the mandatory procedure to notify the Attorney General of his constitutional challenge to the statute. KRS 418.075(1), (2).

Even if we were to address his constitutional argument, however, we agree with the Commonwealth that it is not ripe for review.

> [T]wo of the most fundamental rules applied by the courts when considering constitutional challenges are "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is

> required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885); *Communist Party of United States*, 367 U.S. at 71–72, 81 S. Ct. 1357. In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations.

W.B. v. Commonwealth, 388 S.W.3d 108, 113-14 (Ky. 2012).

Gosnell is presently serving his eight-year sentence for sexual abuse. Not only is he not presently on postincarceration supervision, in the event that in the future he is released, he may never be subject to revocation proceedings before the Parole Board. Indeed, by the time he is released, KRS 532.043 may have been amended yet again.

His situation is unlike that of the appellants in the *Jones* case, who only filed mounted their constitutional challenge to the statute after they served out their sentences, were released and placed on conditional discharge, violated the terms of their discharge, and were revoked and reincarcerated. By contrast, any opinion in Gosnell's case would be purely speculative and advisory in nature, and thus far beyond the purview of our role as an appellate court. "Ripeness . . . prevents courts from interfering with legislative enactments until it is necessary to do so, and thus enhances the quality of judicial decision-making by ensuring that cases present courts an adequate record to permit effective review and decision-making." *Id.* at 114.

Finally, Gosnell argues that he was denied "fair warning" about the changes in the law regarding postincarceration supervision, contending that the changes are being applied to him retroactively and unfairly. A "fair warning" violation occurs "[w]hen a[n] . . . unforeseeable state-court [sic] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect [being] to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Walker v. Commonwealth*, 127 S.W.3d 596, 603 (Ky. 2004) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354–55, 84 S. Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964)). "[T]he touchstone [for determining fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Tharp v. Commonwealth*, 40 S.W.3d 356, 362 (Ky. 2000) (quoting *United States v. Lanier*, 520 U.S. 259, 267, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997)).

At the time he entered his guilty plea, Gosnell was fully aware that he would have to serve five years of conditional discharge following his release. Thus, the length or severity of his sentence has not been altered by the statutory amendment, nor is he being subjected to increased criminal liability for past conduct. The only change caused by the revision of KRS 532.043 is that the procedure for revoking postincarceration supervision has been moved from the courts to probation and parole authorities. As we have already stated, Gosnell's arguments regarding the constitutionality of the regulations governing the revised

revocation procedure are speculative at this point, because he has not been subjected to these regulations.

For the foregoing reasons, the order denying Gosnell's motion to amend sentence is affirmed.

ALL CONCUR.

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