

RENDERED: OCTOBER 13, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2016-CA-000598-MR

GARY CARMICLE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 15-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

BEFORE: ACREE, DIXON AND JONES, JUDGES.

JONES, JUDGE: Gary Carmicle appeals from a criminal judgment entered by the McCracken Circuit Court convicting him of failure to comply with sex offender registration, second or greater offense; possession of marijuana; and possession of drug paraphernalia. Carmicle, who is required to register as a sex offender in the state of Ohio, entered his guilty plea conditioned on his right to appeal whether he

is required to register as a sex offender in Kentucky. For the reasons stated below, we affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

On June 30, 2005, Gary Carmicle was convicted in Ohio of unlawful sexual conduct with a minor, a felony. The Ohio statute under which Carmicle was convicted criminalizes “sexual conduct” between a person who is at least eighteen years old and a victim who is at least thirteen years old but less than sixteen.<sup>1</sup> In addition to the penalties imposed, the Ohio statute also requires Carmicle to register as a sex offender.

Carmicle later moved to Paducah, Kentucky. Because he was required to register as a sex offender for his crime in Ohio, Carmicle was informed that Kentucky Revised Statutes (KRS) 17.500 *et seq.* requires he also register as a sex offender in Kentucky. As a registered sex offender in Kentucky, Carmicle had to provide his address to the probation and parole office in his home county and notify his probation and parole officer of any intra-county change of address on or before the date of his move.

On January 21, 2015, Carmicle was discovered living at an address other than the one he had registered. Carmicle claimed to have been evicted the night before, leaving him no time to report his change of address to probation and parole. As a result of his violation, Carmicle was subsequently indicted by a McCracken County grand jury for failure to comply with sex offender registration,

<sup>1</sup> Ohio Revised Code Annotated § 2907.04.

second or greater offense. He was also charged with possession of marijuana and possession of drug paraphernalia.

Prior to trial, Carmicle filed a “Motion to Declare KRS 17.510 Unconstitutional as Applied to Defendant; Motion to Dismiss Indictment.” In his motion, Carmicle argued that it was not possible for him to report to probation and parole because he was kicked out of his residence after midnight. Additionally, Carmicle argued that he should not have been required to register in Kentucky because the Ohio offense would not have been a crime in Kentucky. On March 11, 2016, in a written order, the trial court denied Carmicle’s motion.

Following the denial of his motion, Carmicle pleaded guilty to all charges, reserving his right to appeal the applicability and constitutionality of KRS 17.510. The trial court accepted Carmicle’s conditional plea and sentenced him to six and one-half years’ imprisonment. This appeal follows.

## **II. STANDARD OF REVIEW**

Constitutional issues and issues of statutory interpretation and application are purely questions of law and are subject to *de novo* review by this Court. *Louisville & Jefferson Cty. Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky. 2007).

## **III. ANALYSIS**

Carmicle’s sole issue on appeal is whether the trial court erred when it found that KRS 17.510 was not unconstitutional as applied to him. Carmicle preserved the issue with his motion to the trial court and his conditional guilty plea.

Additionally, Carmicle properly notified the Attorney General of his constitutional challenge as mandated by KRS 418.075 and Kentucky Rules of Civil Procedure (CR) 24.01.

Carmicle's argument is as follows: 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 . . . ." (Emphasis added). KRS 17.500(8)(c) defines "sex crime" as a "felony offense from another state or a territory where the felony offense is *similar* to a felony offense specified in *paragraph (a)* of this subsection[.]" (Emphases added). Paragraph (a) includes felony offenses "defined in KRS Chapter 510, or KRS 530.020, 530.064(1)(a), 531.310, 531.320, or 531.335[.]" Carmicle contends that his conviction is not similar to any of the offenses defined in KRS 17.500(8)(a); therefore, he is not required to register in Kentucky. We are not persuaded.

Carmicle's argument ignores KRS 17.510(7), which provides that an individual who is required to register under the laws of another state must also register in Kentucky.

Recently, the Kentucky Supreme Court examined KRS 17.510, specifically subsections (6) and (7), in *Murphy v. Commonwealth*, 500 S.W.3d 827 (Ky. 2016). In *Murphy*, the appellant, Murphy, was required to register as a sex offender in Michigan after a juvenile adjudication for a sex offense. Murphy later moved to Kentucky where he registered as a sex offender under Kentucky's Sex

Offender Registration Act. He also updated his registration several times over the next fourteen months. Subsequently, however, it was discovered during a routine check that Murphy had not been living at the address listed on his registration. Murphy was then charged with failure to comply with the sex-offender registry, first offense. He entered a conditional guilty plea in which he reserved the right to challenge his duty to register as a sex offender in Kentucky. Ultimately, the Court affirmed Murphy's conviction, finding that under KRS 17.510(7), the mere fact that an offender was required to register under the laws of another state is sufficient to require his registration in Kentucky. The Court noted the overlap between subsection (6) and subsection (7); however, the Court stated that each subsection required the registration of persons that the other did not. Specifically, the Court stated:

Although there is overlap between subsections (6) and (7), it is not a complete overlap. Under the plain language of the statute, there is more than a split of duties: each subsection also requires registration of persons that the other does not. Subsection (6) extends to any person in Kentucky who has been convicted of a sex crime or a crime against a minor whether the conviction occurred in Kentucky or elsewhere; subsection (7) cannot be read to require such a person to register. On the other hand, subsection (7) extends to any person who has been required to register in another state or who has been convicted of a crime in another state that would require registration in Kentucky. Subsection (7) does not require that the person required to register in another state have been "convicted" of anything, whereas subsection (6) does . . . . Thus, subsection (6) and subsection (7) both require registration of a set of people that the other does not. This reading allows overlap between the two sections, but it does not render either meaningless.

*Id.* at 831

Moreover, the Court in *Murphy* found it irrelevant that Murphy would not have been required to register as a sex offender had his underlying adjudication occurred in Kentucky. The Court stated that Kentucky's

Sex Offender Registration Act requires registration when another state's law requires registration, even if that offense resulted in only a juvenile adjudication rather than a conviction. We are applying the law of Kentucky here, not that of Michigan, and Kentucky's Act takes into account Michigan's registration requirement. Choice-of-law principles do not require a different outcome.

*Id.* at 833.

Following *Murphy*, the 2017 General Assembly amended subsections (6) and (7) of KRS 17.510. As amended, the statute now provides as follows:

(6) (a) Except as provided in paragraph (b) of this subsection, any person who has been convicted in a court of any state or territory, a court of the United States, or a similar conviction from a court of competent jurisdiction in any other country, or a court martial of the United States Armed Forces of a sex crime or criminal offense against a victim who is a minor and who has been notified of the duty to register by that state, territory, or court, or who has been committed as a sexually violent predator under the laws of another state, laws of a territory, or federal laws, or has a similar conviction from a court of competent jurisdiction in any other country, shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register with the appropriate local probation and parole office in the county of residence within five (5) working days of relocation. No additional notice of the duty to register shall be required of any official charged with a duty of enforcing the laws of this Commonwealth.

***(b) No person shall be required to register under this subsection for a juvenile adjudication if such an adjudication in this Commonwealth would not create a duty to register. This paragraph shall be retroactive.***

(7) (a) *Except as provided in paragraph (b)* of this subsection, if a person is required to register under federal law or the laws of another state or territory, or if the person has been convicted of an offense under the laws of another state or territory that would require registration if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student shall comply with the registration requirement of this section, including the requirements of subsection (4) of this section, and shall register within five (5) working days with the appropriate local probation and parole office in the county of residence, employment, vocation, or schooling. A person required to register under federal law or the laws of another state or territory shall be presumed to know of the duty to register in the Commonwealth. As used in this subsection, “employment” or “carry on a vocation” includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, “student” means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

KRS 17.510(6) & (7) (emphases added). The amendment would support Carmicle’s argument if his Ohio conviction had arisen out of a juvenile adjudication. It did not. Based on *Murphy* and the clear language of the statute, it

is clear that Carmicle was required to register as a sex offender in Kentucky because he was required to register in Ohio, the state where he was convicted.

Finally, Carmicle asserts that KRS 17.510, as it has been applied to him, violates the equal protection clause of United States and Kentucky Constitutions and his constitutional right to travel.<sup>2</sup> “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985). The fundamental “right to travel” encompasses the right “for those travelers who elect to become permanent residents [of a state], the right to be treated like other citizens of that State.” *Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518, 1525, 143 L.Ed.2d 689, 702 (1999). Carmicle argues that had he committed his offense in Kentucky he would not have had to register as a sex offender; therefore, he is being treated differently than similarly situated citizens of Kentucky.

We reject Carmicle’s claim that he is being treated differently than similarly situated Kentuckians. As stated above, under *Murphy* it is irrelevant

---

<sup>2</sup> Carmicle also alleges denial of procedural due process, but “[p]rocedural due process challenges to state sex-offender registry statutes that mandate the registration of all convicted sex offenders have been foreclosed by the Supreme Court’s decision in [*Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003)]” and “challenges based on one’s inclusion on registries must ultimately be analyzed in terms of substantive, not procedural, due process.” *Moffit v Commonwealth*, 360 S.W.3d 247, 252 (Ky. App. 2012) (internal citations and quotations omitted).



whether the underlying crime would have required Carmicle to register. Carmicle is not required to register in Kentucky because of the crime for which he was convicted in Ohio; he is required to register in Kentucky because he is required to register in Ohio. By requiring Carmicle, a registered sex offender, to register, the Commonwealth is treating him no differently than it does its own citizens who are adjudged sex offenders and required by law to register. There is no special burden placed on Carmicle simply because he was convicted a sex offender in Ohio. Carmicle's assertion that he is being treated differently than similarly situated Kentuckians is therefore without merit and, as such, his constitutional challenges fail.

#### **IV. CONCLUSION**

For the foregoing reasons, the order denying Carmicle's motion and the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Emily Holt Rhorer  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky  
  
Megan Kleinline  
Assistant Attorney General  
Frankfort, Kentucky