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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000580-MR

ANTHONY MARTIN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00459

KENTUCKY DEPARTMENT OF CORRECTIONS
AND KENTUCKY STATE POLICE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ SMALLWOOD AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Anthony Martin appeals from the Franklin Circuit Court's opinion and order which dismissed his complaint for a declaratory judgment against the Department of Corrections and the Kentucky State Police for failure to

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

state a claim. Martin argues he was wrongfully classified as a lifetime registrant on the Sexual Offender Registry rather than a twenty-year registrant, where his two-count indictment resulted in one conviction for the two counts. Although Martin only had one conviction, we agree with the circuit court that each count is a separate offense which qualifies him as a lifetime registrant for having committed two criminal offenses against a victim who is a minor.

In 1995, Martin was convicted of two counts of first-degree sexual abuse with a victim under twelve years of age and sentenced to five years of incarceration, probated. After Martin's probation was revoked, he remained incarcerated until his release on June 1, 2000.²

In 2012, Martin pled guilty to another felony offense for which he was released on parole on October 30, 2013. Upon his release, Martin was classified as a lifetime registrant based on his 1995 conviction.

We review *de novo* the circuit court's construction and interpretation of the Sex Offender Registration Act (SORA), Kentucky Revised Statutes (KRS) 17.500 *et. seq.* *Stage v. Commonwealth*, 460 S.W.3d 921, 923 (Ky.App. 2014).

² According to Martin, at this time he was classified as subject to the ten-year sex offender registration rule in effect at that time. 2000 Kentucky Laws Reg. Sess. Ch. 401, §§15, 17 (S.B. 263). Under the 2000 version of the Kentucky Revised Statutes (KRS) 17.500 and KRS 17.520, Martin should have, upon his release, been classified as a lifetime registrant under the analysis provided in this opinion as the relevant statutory language has not changed as to who qualifies as a lifetime registrant.

Martin concedes that he is subject to SORA.³ KRS 17.520 provides in

relevant part as follows:

(1) A registrant, upon his or her release by the court, the Parole Board, the cabinet, or any detention facility, shall be required to register for a period of time required under this section.

(2) (a) Lifetime registration is required for:

...

3. Any person convicted of a sex crime:

a. Who has one (1) or more prior convictions of a felony criminal offense against a victim who is a minor; or

b. Who has one (1) or more prior sex crime convictions;

4. Any person who has been convicted of two (2) or more felony criminal offenses against a victim who is a minor;

...

³ Martin's classification as a lifetime registrant was made pursuant to the versions of KRS 17.500 and KRS 17.520 in effect when he was released in 2013. The relevant version of KRS 17.500 is contained in 2009 Kentucky Laws Ch. 105 §4 (HB 321) and the relevant version of KRS 17.520 is contained in 2011 Kentucky Laws Ch. 2 §93 (HB 463). However, despite subsequent amendments, none of the relevant language we analyze differs from the current versions of these statutes.

- (3) All other registrants are required to register for twenty (20) years following discharge from confinement or twenty (20) years following the maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever period is greater.

Pursuant to KRS 17.500(3)(a)3 a “criminal offense against a victim who is minor” includes a “sex crime” where “the victim [was] under the age of eighteen (18) at the time of the commission of the offense[.]” KRS 17.500(8)(a) defines a “sex crime” as including “[a] felony offense defined in KRS Chapter 510[.]”

Martin’s conviction was for two counts of first-degree sexual abuse under KRS 510.110 for “subject[ing] another person to sexual contact who is incapable of consent” by being “less than twelve (12) years old” which was a Class D felony.⁴ Because first degree sexual abuse against a minor is a felony offense defined by KRS Chapter 510, it is a sex crime and qualifies as a criminal offense against a minor. *Gullett v. Commonwealth*, 266 S.W.3d 835, 837 (Ky.App. 2008).

In *Embry v. Commonwealth*, 476 S.W.3d 264, 272 (Ky.App. 2015), the Court held that the failure of counsel to inform a criminal defendant of the lifetime registration requirement for sex offenders could not constitute a basis for

⁴ The version of KRS 510.110 under which Martin was convicted is contained in 1974 Kentucky Laws Ch. 406, § 91; under the current version, this same conduct is a Class C felony.

ineffective assistance of counsel. This holding was overruled by *Commonwealth v. Thompson*, 548 S.W.3d 881, 892 (Ky. 2018).

However, before making this ruling, the Court in *Embry* stated that a defendant who was convicted after pleading guilty to three felony sex crimes against a minor, which were contained in one indictment, qualified “[u]nder KRS 17.520(2)(a)(4), [as] a person ‘convicted of two (2) or more felony criminal offenses against a victim who is a minor’ [and] must register as a sex offender for the duration of his life.” *Embry*, 476 S.W.3d at 268. The Court stated unequivocally that “[w]ithout doubt, [the defendant] was subject to lifetime registration as a sex offender[.]” *Id.*

In *Crabtree v. Commonwealth*, No. 2016-CA-000082-MR, 2017 WL 2211375, *2 (Ky.App. May 19, 2017) (unpublished),⁵ our Court examined whether the above statements in *Embry* were dicta or had precedential value. The Court stated that the *Embry* Court’s “reasoning is necessary to the outcome of that opinion, and is therefore not dicta. . . . The Court could not have reached [its ultimate] holding without first making a determination that the sex offender registration requirement was applicable in that case. Therefore, this statement in

⁵ We consider this and another unpublished opinion pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c) because there are no published opinions that adequately address these issues.

Embry has precedential value.” *Crabtree*, 2017 WL 2211375, at *2 (footnote omitted).

This initial holding in *Embry* is also consistent with *Lewis v. Commonwealth*, No. 2015-CA-001240-MR, 2017 WL 129081 (Ky.App. Jan. 13, 2017) (unpublished). In *Lewis*, the defendant, like Martin, had a conviction for two counts of first-degree sexual abuse of a victim less than twelve. The Court held that Lewis’s conviction for two counts of first-degree sexual abuse of a victim less than twelve constituted sex crimes which qualified the defendant as having been convicted of two or more criminal offenses against a victim who was a minor, requiring lifetime registration. *Id.* at *2.

In *Crabtree*, our Court rejected the same argument that Martin raises. Crabtree argued that because his four-count conviction was contained in the same judgment and he was not previously convicted of any sex crimes, KRS 17.520(2)(a)(4) was inapplicable to him. *Crabtree*, 2017 WL 2211375, at *2. The Court in rejecting his argument relied on *Embry*’s initial holding and also reasoned as follows:

We are also persuaded by the Commonwealth's argument that, had the legislature intended KRS 17.520(2)(a)(4) to be read as Crabtree suggests, it would have included the word “prior.” The legislature did so in KRS 17.520(2)(a)(3)(a)-(b), which requires lifetime registration for “[a]ny person convicted of a sex crime [w]ho has one (1) or more prior convictions of a felony criminal offense against a victim who is a minor[] or

[w]ho has one (1) or more prior sex crime convictions[.]” Because appellate courts “are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used[.]” *City of Covington v. Kenton Cty.*, 149 S.W.3d 358, 362 (Ky. 2004) (quoting *Beckham v. Board of Educ. Of Jefferson Cty.*, 873 S.W.2d 575, 577 (Ky. 1994)), we agree with the Commonwealth's interpretation of KRS 17.520(2)(a)(4).

Crabtree, 2017 WL 2211375, at *3.

The circuit court correctly interpreted the relevant version of SORA to determine that Martin’s classification was appropriate as in his one conviction he was “convicted of two (2) or more felony criminal offenses against a victim who is a minor[.]” KRS 17.520(2)(a)4. If the General Assembly intended to require two separate convictions (one being a prior conviction), it would have stated that requirement as was done in KRS 17.520(2)(a)3 or state a requirement of two or more convictions. Instead, it spoke in terms of two or more criminal offenses against a minor victim.

Accordingly, we affirm the Franklin Circuit Court’s opinion and order, which dismissed Martin’s complaint for a declaratory judgment for failure to state a claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christine Foster
Frankfort, Kentucky

BRIEF FOR APPELLEE,
KENTUCKY STATE POLICE:

Graham Gray
Heather C. Wagers
Frankfort, Kentucky