

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000253-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 17-CR-000291

SAMUEL W. DAUGHTERY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: The Commonwealth appeals the Jefferson Circuit Court's amended judgment of conviction granting probation to Samuel W. Daughtery on the basis that it erred by failing to require Daughtery to register as a sex offender for his three-count conviction for distribution of matter portraying a

sexual performance by a minor as prohibited by Kentucky Revised Statutes (KRS) 531.340.

In 2017, as the result of an undercover investigation, Daughtery was determined to have downloaded child pornography videos off the internet. Daughtery was indicted on three counts of distribution of matter portraying a sexual performance by a minor, a Class D felony.

To be guilty of distribution of matter portraying a sexual performance by a minor, a defendant merely must bring into the state more than one unit of matter portraying a sexual performance by a minor while having knowledge of its contents or character. KRS 531.340. This is because KRS 531.340(2) contains the presumption that “[a]ny person who has in his or her possession more than one (1) unit of material coming within the provision of KRS 531.300(2) [the definition of ‘matter’] shall be rebuttably presumed to have such material in his or her possession with the intent to distribute it.”

Daughtery entered into a plea agreement to serve a total of two years on these charges or five years if probated.

Daughtery was convicted and sentenced to five years’ incarceration, probated for five years. During the sentencing hearing, Daughtery represented that according to the discovery, although his computer was monitored for three months, it was only discovered that he downloaded the three child pornography videos on

one occasion and all other pornography discovered on his computer was adult pornography. In determining whether to grant Daughtery probation, the circuit court stated it did not believe Daughtery was a risk and, according to the presentence investigation report, Daughtery was not a pedophile and at low risk to reoffend.

In the written judgment, the circuit court noted that although the Commonwealth acknowledged that KRS 531.340 was not one of the felony offenses identified as a “[s]ex crime” in KRS 17.500(8), the Commonwealth contended that Daughtery was nevertheless required to register as a sex offender for his lifetime pursuant to KRS 17.500(3)(a)11. The circuit court disagreed, ruling that Daughtery’s conviction under KRS 531.340 did not require him to register as a sex offender and the Commonwealth appealed that ruling.

The Commonwealth argues that Daughtery was convicted of three criminal offenses against a victim who is a minor and, therefore, pursuant to KRS 17.520(2)(a)4 and KRS 17.500(3)(a)11, Daughtery is required to register as a lifetime sexual offender despite not having been convicted of a sex crime pursuant to KRS 17.500(8)(a).

As the circuit court’s ruling was based upon the construction and interpretation of statutory law, here the Sexual Offenders Registration Act (SORA)

and its amendments, our review is *de novo*. *Stage v. Commonwealth*, 460 S.W.3d 921, 923 (Ky.App. 2014).

SORA, specifically KRS 17.510, “establishes a registration system for sexual offenders and for those who have committed crimes against minors.” *Ladriere v. Commonwealth*, 329 S.W.3d 278, 281 (Ky. 2010). The General Assembly’s purpose in enacting and amending SORA “was aimed at protecting children from crime in general, not just sexually related crime.” *Moffitt v. Commonwealth*, 360 S.W.3d 247, 255 (Ky.App. 2012) (quoting and adopting analysis from *Cox v. Commonwealth*, No. 1:10CV-93-M, 2010 WL 3909236, *5 (W.D. Ky. Sept. 30, 2010)).

SORA does not label those convicted of a crime against a minor as “sexual offenders” but “registrants.” *Id.* at 257. “Registrant” is defined as including “[a]ny person eighteen (18) years of age or older at the time of the offense . . . who has committed: 1. A sex crime; or 2. A criminal offense against a victim who is a minor[.]” KRS 17.500(5).

KRS 17.520(2)(a) requires lifetime sexual offender registration for both sexual offenders and those who have committed certain crimes against minors. Lifetime registration is required for persons convicted of kidnapping or unlawful imprisonment when the victim is a minor and the offense is not

committed by a parent. KRS 17.520(2)(a)1 and 2. Lifetime registration is also 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[.]

KRS 17.520(2)(a).

KRS 17.500(8)(a) defines “[s]ex crime” as “[a] felony offense defined in KRS Chapter 510, or KRS 530.020, 530.064(1)(a), 531.310, 531.320, or 531.335[.]”

KRS 17.500(3)(a)11 defines “criminal offense against a victim who is a minor” as including “[a]ny offense involving a minor or depictions of a minor, as set forth in KRS Chapter 531[.]”

Daughtery was not convicted of a sex crime, but he was convicted of three felony counts against a victim who is a minor. While he appears to fit within the definition of a person “who has been convicted of two (2) or more felony criminal offenses against a victim who is a minor” and, thus, to qualify for lifetime sexual offender registration, we agree with the circuit court that Daughtery’s

offenses should not qualify because they involve a single course of conduct that took place on Daughtery's computer on a single day.

This distinction is significant. Although Daugherty was charged and convicted on three counts, these were all considered a "first offense" under KRS 531.340(3) and charged together as Class D felonies.

While there is no double jeopardy issue as each count Daughtery committed involved a distinct video, each of which qualifies as a separate "matter" under KRS 531.300(2), *see Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky. 2005), we interpret "two (2) or more felony criminal offenses" under KRS 17.520(2)(a)4 as not applying to a continuing course of conduct in downloading videos in a single day to a single device. Daughtery was the subject of one arrest, one guilty plea and he had no prior convictions for any charges against minors prior to the time of the entry of the guilty plea in this action. Therefore, we interpret Daughtery as having only a single offense for purposes of SORA and agree with the circuit court that he was not required to register.

Accordingly, we affirm the Jefferson Circuit Court's amended judgment of conviction.

ALL CONCUR.

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