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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001418-MR
AND
NO. 2018-CA-001455-MR

LAWRENCE RICHARDSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM NICHOLAS CIRCUIT COURT
v. HONORABLE JAY DELANEY, JUDGE
ACTION NO. 16-CR-00070

COMMONWEALTH OF KENTUCKY

APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING APPEAL NO. 2018-CA-001418-MR AND
REVERSING AND REMANDING CROSS-APPEAL NO. 2018-CA-001455-MR

** ** * * * * *

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Lawrence Richardson brings this appeal from an August 22, 2018, Final Judgment of imprisonment upon a conditional guilty plea, and the Commonwealth brings a cross-appeal from the same judgment. We affirm Appeal

No. 2018-CA-001418-MR and reverse and remand Cross-Appeal No. 2018-CA-001455-MR.

The Nicholas County Grand Jury indicted Richardson upon the offenses of first-degree sodomy (with a victim less than twelve years old), six counts of first-degree sexual abuse (with a victim less than twelve years old), third-degree terroristic threatening, and incest (with a victim less than twelve years of age). It was alleged that Richardson committed these offenses upon his grandson.

The Commonwealth and Richardson ultimately reached a plea agreement. Under its terms, Richardson would enter a guilty plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to two counts of criminal attempt to commit first-degree unlawful transaction with a minor (victim less than sixteen years old) and third-degree terroristic threatening. Additionally, the Commonwealth and Richardson agreed that the circuit court would determine whether Richardson would be required to enter the sex offender treatment program as required to be subject to post-incarceration supervision; if adverse, either determination would be subject to appeal.

The circuit court accepted Richardson's guilty plea pursuant to *Alford*, 400 U.S. 25. By an August 22, 2018, Final Judgment, the circuit court determined that Richardson was required to complete the sex offender treatment program but

did not order post-incarceration supervision. The circuit court sentenced Richardson to a total of ten-years' imprisonment.

Richardson filed Appeal No. 2018-CA-001418-MR from the Final Judgment challenging the circuit court's determination that he qualified for the sex offender treatment program. The Commonwealth filed Cross-Appeal No. 2018-CA-001455-MR from the Final Judgment challenging the circuit court's refusal to order post-incarceration supervision. The relevant facts to these appeals are not disputed and the issues on appeal look to the interpretation of applicable statutes. As such, our review is *de novo*. *Commonwealth v. Davis*, 400 S.W.3d 286, 287-88 (Ky. App. 2013). We shall initially address Appeal No. 2018-CA-001418-MR and subsequently Cross-Appeal No. 2018-CA-001455-MR.

APPEAL NO. 2018-CA-001418-MR

Richardson contends that the circuit court erred by ordering him to complete the sex offender treatment program. Richardson argues that he suffers from an intellectual disability and is not considered an eligible sexual offender for purposes of the treatment program.¹ Richardson cites to the testimony of his expert witness, Dr. Robert Granacher, a forensic neuropsychiatrist. According to

¹ The Commonwealth seems to suggest that the circuit court did not determine whether Lawrence Richardson should participate in the sex offender treatment program. However, in the August 22, 2018, Final Judgment, the circuit court specifically ordered "that pursuant to [Kentucky Revised Statutes] KRS 439.340(11) and KRS 197.410 defendant shall complete the Sex Offender Treatment Program." Record on appeal at 316.

Richardson, Dr. Granacher testified that Richardson's I.Q. was only 70, he operated at a third-grade level, he was unlikely to benefit from the sex offender treatment program, he had difficulty with memory, he suffered from dementia, and he was intellectually disabled.

The sex offender treatment program is a statutory creature. Kentucky Revised Statutes (KRS) 197.400-440. Within its framework, the Department of Corrections (Department) is tasked with the operation of the program; however, the sentencing court or Department may determine if a sexual offender is eligible to participate in the program. Of particular import is KRS 197.410, which reads:

(1) A person is considered to be a "sexual offender" as used in this chapter when he or she has been adjudicated guilty of a sex crime, as defined in KRS 17.500, or any similar offense in another jurisdiction.

(2) A sexual offender becomes an "eligible sexual offender" when the sentencing court or department officials, or both, determine that the offender:

(a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or an intellectual disability; and

(b) Is likely to benefit from the program.

(3) "Department" is the Department of Corrections.

Accordingly, under KRS 197.410, a sexual offender qualifies as an "eligible sexual offender" if that offender does not suffer from an intellectual disability and is likely to benefit from the program.

In this case, it is true that Dr. Granacher testified that Richardson suffered from several deficits and would likely not benefit from the sex offender treatment program. However, the circuit court obviously did not believe that Richardson suffered from intellectual disability barring him from the sex offender treatment program. The term “intellectual disability” is not defined in KRS 197.400-.440 as to the treatment program and the statute gives the court wide latitude to determine whether an offender is eligible. So, we believe the circuit court was acting well within its discretion and did not abuse that discretion by ordering Richardson to complete the sex offender treatment program.

CROSS-APPEAL NO. 2018-CA-001455-MR

The Commonwealth asserts that the circuit court erred by exempting Richardson from post-incarceration supervision under KRS 532.043.² The Commonwealth advances two arguments: (1) the circuit court violated separation of powers by determining whether Richardson qualifies for post-incarceration supervision, and (2) alternatively, KRS 532.043 mandates that the circuit court impose post-incarceration supervision upon Richardson.

Relying upon *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010), the Commonwealth maintains that only the executive branch may determine if a

² *Roach v. Kentucky Parole Board*, 553 S.W.3d 791 (Ky. 2018) declared subsection (6) of KRS 532.043 as unconstitutional. This holding is irrelevant to our disposition of this appeal.

defendant is subject to post-incarceration supervision under KRS 532.043. We view the Commonwealth's reading of *Jones*, 319 S.W.3d 295 as overly broad. In fact, the Court of Appeals has interpreted *Jones*, 319 S.W.3d 295 as merely holding a separation of powers violation occurs if the circuit court revokes a defendant's post-incarceration supervision pursuant to KRS 532.043:

We note that *Jones* held that only KRS 532.043(5), which involved the procedure for revocation of conditional discharge, was unconstitutional, and that because that provision was "severable from the remainder of the statute," the remaining provisions of KRS 532.043 remained in full force. *Jones*, 319 S.W.3d at 300. The remaining provisions of KRS 532.043 required people convicted of, pleading guilty to, or entering an *Alford* plea to certain offenses (including the one to which Skaggs entered an *Alford* plea) to be subject to a five-year period of conditional release following release from incarceration upon expiration of sentence or completion of parole, and to comply with all orders, education, training, and treatment required by the Department of Corrections. Thus, Skaggs's allegation that the circuit court's order sentencing her to conditional discharge was unconstitutional and void lacks merit because the court was required to order her to be subject to conditional release, as provided by the subsections of KRS 532.043 that remained in effect. Consequently, the circuit court had subject matter jurisdiction over sentencing Skaggs to the period of conditional discharge, and her claim is time-barred.

Skaggs v. Commonwealth, 488 S.W.3d 10, 15 (Ky. App. 2016).

Although we do not believe a separation of powers violation occurred, we hold that the circuit court was mandated to subject Richardson to post-

incarceration supervision per KRS 532.043. *Skaggs*, 488 S.W.3d at 15. KRS 532.043(1) plainly mandates that a defendant pleading guilty to the offense under KRS 530.064(1)(a) “shall be subject to a period of postincarceration supervision[.]” *See Walker v. Commonwealth*, 568 S.W.3d 364, 367 (Ky. App. 2018).

Richardson pleaded guilty to two counts of criminal attempt to commit first-degree unlawful transaction with a minor under KRS 530.064 and KRS 506.010. We believe these offenses come within the ambit of KRS 532.043 and that the circuit court erred by not imposing post-incarceration supervision. We, thus, reverse and remand for the circuit court to impose post-incarceration supervision as mandated by KRS 532.043.

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, we affirm Appeal No. 2018-CA-001418-MR and reverse and remand Cross-Appeal No. 2018-CA-001455-MR.

ALL CONCUR.

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