

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2002-SC-0563-DG

FINAL
DATE 7-3-03 E.A.R.G. v. H.D.C.

MICHAEL DEAN ALLEN

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
NO. 1999-CA-001163
MERCER CIRCUIT COURT NO. 98-CR-0024

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

In 1998, Appellant, Michael Dean Allen, was convicted in the Mercer Circuit Court after a plea of guilty to one count of first-degree sexual abuse and one count of possession of a forged instrument. Prior to his release from custody in May 1999, he was ordered to undergo a sex offender risk assessment. He appeals claiming denial of due process because the trial court classified him as a high risk offender following a hearing in which Appellant's attorney was not afforded: (1) prior review of the risk assessment report; (2) the opportunity to cross-examine the author of the risk assessment report; and (3) the opportunity to call experts to refute the report's conclusions. The Court of Appeals affirmed the trial court, stating:

We further agree with the Commonwealth that the court was well within its authority to rely on the risk assessment by the certified provider. While Allen cites several rules of evidence that this risk assessment allegedly violated, including the rules on admission of hearsay evidence, we conclude that a circuit court is entitled to rely on hearsay evidence and that rules of evidence do not apply in these hearings, in much the same

way as they do not apply in probation and parole revocation hearings. These hearings must be conducted in accordance with minimum requirements of due process, but they are not full-blown trials.

Appellant argues that due process requires the attendance at the risk assessment hearing of the author of the risk assessment report upon which the court relies in making its determination. We agree and reverse the Court of Appeals.

We recently addressed this issue in Hyatt v. Commonwealth, Ky., 72 S.W.3d 566, 573 (2002) wherein we held:

[W]e believe the case should be remanded for the failure of Dr. Wagner to attend the hearing. The procedural due process rights of Hyatt were violated at the risk assessment hearing because the report arrived too late to provide him with notice of its contents, to allow his counsel to read and consider it and to allow sufficient time for preparation including the calling of expert witnesses, if any, to counter the conclusions of the report. We remand this case for an evidentiary hearing, in accordance with the pre-2000 amendments, which would include the rights to present an expert witness.

The opinion of the Court of Appeals in this case is inconsistent with the United States Constitution, the Kentucky Constitution, and this Court's prior ruling on this issue.

Hyatt, *supra*.

The 14th Amendment of the U.S. Constitution provides procedural safeguards against legislatively created procedures that infringe upon an individual's liberty interest. Due process requires that Appellant be given at least an opportunity to be heard at a meaningful time and in a significant manner before the loss of a liberty interest. Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Appellant's due process rights were violated when the trial court failed to provide an opportunity to examine the risk assessment report prior to the hearing. The trial court's rulings prevented Appellant and his attorney from preparing a defense with respect to

the conclusions of the assessment. Minimum due process rights required no less than the preparer of the report be present and available for examination.

Depriving an individual or his counsel the right to examine a report used as evidence violates procedural due process. The information in Appellant's report was particularly damaging, in that it labeled him a high-risk sex offender, which mandates a lifetime reporting requirement. Had Appellant or his counsel been made aware of its contents, they would have at least had the opportunity to consider and prepare a response thereto, as well as call expert witnesses to refute the conclusion of the assessment. Appellant's due process rights extend to his right to examine and confront the preparer of the report. In the absence of the preparer of the report, the report was hearsay. We held this procedure to be improper in Hyatt, supra.

Hyatt, supra, requires that Appellant be afforded a risk assessment hearing. Here, the hearing was legally insufficient as the trial court did little more than "rubber stamp" the conclusion of the sex offender assessment.

The Court of Appeals' decision is reversed, and this case is remanded to the Mercer Circuit Court for a risk assessment hearing in accordance with the requirements of Hyatt, supra.

All concur.

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