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Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000975-MR

JERRELL LAMAR ROBINSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-00894

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Jerrell Lamar Robinson appeals from the Fayette Circuit
Court's judgment following his conditional guilty plea to failing to register as a sex
offender. Pursuant to his plea, Robinson reserved the right to appeal the denial of

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

his motion to amend his indictment from a felony to a misdemeanor. For the reasons stated herein, we affirm.

On July 10, 2007, Robinson was indicted by a Fayette County grand jury for failing to comply with the sex offender registration statute for a second or greater offense, a Class C felony pursuant to KRS 17.510(11). The indictment charged that Robinson was first convicted of a sex crime in 1997 and was later convicted of failing to notify law enforcement of his change of address in 2005.

Citing *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003), Robinson filed a motion to amend his indictment to a Class A misdemeanor, arguing that precedent mandated that the 2006 amendments to the sex offender registration statute did not apply to him. He further argued that the application of the amended version of the sex offender registration statute to him violated the *ex post facto* clauses of the U.S. and Kentucky Constitutions. The trial court rejected his arguments and denied his motion to amend.

On March 7, 2008, Robinson entered a conditional guilty plea to the amended charge of failing to comply with the sex offender registration statute, first offense. After the Commonwealth recommended five-years' imprisonment and a plea colloquy was conducted, the trial court issued its final judgment sentencing Robinson to the recommended sentence but placed him on probation for five years. This appeal followed.

Robinson argues that he should have been charged with a misdemeanor, not a felony, because of the Kentucky Supreme Court's decision in

Peterson v. Shake. Specifically, citing *Peterson*, he argues that he was subject to the statutory penalty existing at the time of his registration, a Class A misdemeanor, not the Class D felony penalty contained in the 2006 version of the sex offender registration statute. Because he registered on September 9, 1998, Robinson argues that he was only subject to the 1998 version of the sex offender registration law, not the 2006 version. We disagree.

In 2006, Kentucky's sex offender registration statutes, KRS 17.500, *et seq.*, were amended from the version which was enacted in 2000. The 2000 statute resulted from the amendment of the 1998 version of the statute. The 1998 version of the statute set the penalty for failing to register as a sex offender at a Class A misdemeanor. However, the 2000 version of the statute enhanced the penalty for failing to register to a Class D felony, which has been maintained in effect in every subsequent amendment, including 2006, 2007, and 2008.

In *Peterson*, the defendant, a convicted sex offender, was released from state custody in June 1999, and registered under the 1998 version of the statute. *Id.* at 708. In 2001, the Kentucky State Police discovered that the defendant changed residences but failed to notify law enforcement. Although Peterson contended that he was subject to the 1998 version, he was indicted for violating the 2000 version of KRS 17.510, a Class D felony, not a misdemeanor as in the 1998 statute, and was convicted. *Id.*

Reversing the conviction, our Supreme Court concluded that the sex offender registration statute's 2000 amendments "were only intended to apply to

persons who were required to *become* registrants following April 11, 2000.” *Id.* at 709. Thus, if an individual was required to and was registered prior to April 11, 2000, the court concluded that he was subject to the 1998 amendments, not the 2000 amendments. *Id.* Because the 2000 statute expressly limited its application to “all persons who, after the effective date of... [the sex offender registration amendments] . . . are required . . . to become registrants . . . ,” the court concluded that a person already registered prior to the 2000 statute’s effective date could not “become” a registrant and, thus, was not subject to the 2000 statute. *Id.*

While Robinson contends that *Peterson* mandates that sex offenders are exclusively regulated by the version of the sex offender registration law in effect at the time of their registration, we do not agree that *Peterson* established such a bright-line rule. To the contrary, when determining the proper version of the sex offender statute to apply, the court stated that the legislature’s statutory intent controlled its application to sex offenders. *Id.* at 709-10. Thus, if the legislature changes the sex offender law to express a more expansive or restrictive coverage of the law, the application of the statute could have a different result than in *Peterson*.

Such a legislative change occurred in 2006 when the General Assembly amended the language of KRS 17.510(11) to provide that “[a]ny person required to register under this section who knowingly violates any of the provisions of this section or prior law is guilty of a Class D felony for the first offense” From a plain reading of the 2006 version of the law, it is clear that

the legislature intended to expand the coverage of the felony penalty to include all registered sex offenders. By expressly providing that a sex offender's first violation of the current version *or prior* [emphasis added] versions of the sex offender law constitutes a Class D felony, the legislature intended to establish a uniform penalty for all sex offenders.

Further, the 2006 statute's inclusive language is dissimilar to the exclusive language used in the 2000 statute, which limited coverage only to those individuals who would "become" a registrant after the law's effective date. In contrast, the operative language added in 2006 to KRS 17.510(11) extended the felony penalty to all persons who violated the current enactment "or prior law." Despite this clear statutory language, Robinson's reading of *Peterson* would have us embrace the illogical conclusion that the legislature intended for individuals required to register under the 2006 statute to be subject to it and the registration requirements under prior laws, leaving prior registrants unaffected by the revised law.

This statutory change in 2006 makes logical sense only if the legislature intended that all sex offenders who knowingly violate this section, in the case of 2006 registrants, or prior law, in the case of 1994, 1998, 2000, 2002 registrants, are guilty of a Class D felony for their first offense. While Robinson argues that we should adopt his interpretation of KRS 17.510(11), we cannot frustrate the purpose of statutory construction by interpreting a statute in an illogical manner. *Commonwealth v. Kerr*, 136 S.W.3d 783, 785 (Ky.App. 2004).

Therefore, we conclude that the legislature intended for the 2006 amendments to include existing registrants within its penalty provision.

Robinson next argues that the *ex post facto* clauses of the U.S. and Kentucky Constitutions prevent the application of the 2006 statute to him. We disagree.

The *ex post facto* clause prohibits the enacting of any law imposing punishment for conduct which was not punishable at the time of the conduct or the imposition of additional punishment than that prescribed at the time of the conduct. *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). An *ex post facto* violation occurs when: (1) a law applies to conduct occurring before its enactment, and (2) the law disadvantages the offender affected by it. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 571 (Ky. 2002). A defendant must establish the existence of both elements of the test before an *ex post facto* violation can lie.

Without addressing the first prong of the test, we conclude that Robinson failed to establish the second element of the *ex post facto* test. In *Hyatt*, the court concluded that “*ex post facto* laws must relate to a very real and direct effect on the actual time the prisoner remains behind bars which could include an increase in punishment.” *Id.* However, “[a]ny potential punishment arising from the violation of the Sex Offender’s Registration Act is totally prospective and is not punishment for past criminal behavior.” *Id.* at 572.

The 2006 statute did not have a real and direct effect on the punishment for Robinson’s past crimes but served only to affect the punishment

for his commission of a *future* crime. Accordingly, the 2006 amendments to KRS 17.510(11) did not constitute a violation of Robinson's constitutional rights to be free from *ex post facto* laws.

For the foregoing reasons, the Fayette Circuit Court's judgment convicting Robinson of violating the sex offender registration statute is affirmed.

ALL CONCUR.

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