

RENDERED: SEPTEMBER 28, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000475-MR

JIMMY DALE STAGE

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2011-SC-000399-DG

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 93-CR-002484

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MOORE, LAMBERT, AND STUMBO, JUDGES.

MOORE, JUDGE: This case is before us on remand from the Kentucky Supreme Court for further consideration in light of that Court's recent decision in *Commonwealth v. Nash*, 338 S.W.3d 264 (Ky. 2011). Upon further consideration, we reverse the decision of the Jefferson Circuit Court and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1994, Stage pleaded guilty to one count of second-degree sodomy and two counts of second-degree sexual abuse. He was sentenced to serve a total of ten years of imprisonment. Before his scheduled release from prison in 2000, the trial court conducted a sex offender risk assessment hearing and found Stage to be a high risk sex offender. Stage appealed that determination, and this Court reversed, holding that the trial court erred in relying on the “risk assessment report without the author of the report available to authenticate the report and to be cross-examined.” Discretionary review was thereafter sought in the Kentucky Supreme Court, but in 2003, that Court denied the motion for discretionary review.

The trial court did not conduct another sex offender risk assessment hearing until 2010.¹ Following the hearing, in which the author of the risk assessment report testified, the court entered an order again finding Stage to be a high risk sex offender, requiring him to “register in accordance with the Kentucky Sex Offender Registration Act [SORA], KRS^[2] 17.510.”

Stage appealed to this Court, contending as follows: “The [Kentucky] Supreme Court has chosen to ignore the title of 2006 Kentucky Acts, Ch. 182. By continuing to characterize sex offender registration as civil and regulatory in

¹ The parties do not explain, and the record before us does not reveal, why the trial court waited almost seven years to hold the re-assessment hearing, but we find the fact that the court allowed such a large amount of time to pass before holding the hearing disconcerting. Additionally, we note that KRS 17.570, pursuant to which Stage’s initial sex offender risk assessment hearing was conducted, was repealed in 2000, soon after the initial risk assessment hearing was held in this case.

² Kentucky Revised Statute(s).

nature, the Supreme Court has rendered the scheme void as a violation of Section 51 of the Constitution of Kentucky.” After briefing was concluded on appeal, Stage moved to file a supplemental brief for the purpose of notifying the Court of a recent Supreme Court case, *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010), in which the Court stated that although “strict compliance with the notification requirement of KRS 418.075 is required, and failure to give notice leaves the constitutional challenge unpreserved,” such an error can be reviewed for palpable error. This Court granted Stage’s motion to file a supplemental brief, then dismissed the appeal *sua sponte* for lack of standing after finding that the 2006 version of the SORA did not apply to Stage. Stage moved for reconsideration, arguing that the Kentucky Supreme Court held in *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010), that an appellate court cannot *sua sponte* raise the issue of a party’s lack of standing. We granted Stage’s motion for reconsideration and modified our original opinion and order, but nevertheless dismissed his appeal due to a lack of case or controversy.

Stage sought discretionary review in the Supreme Court. The Court granted discretionary review, vacated our decision, and remanded for further consideration in light of *Nash*, 338 S.W.3d at 267.

II. ANALYSIS

Stage alleges on appeal that the Kentucky Supreme Court has held that the sex offender registration scheme is a civil regulatory scheme that is not punitive in nature. *See Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010);

Commonwealth v. Baker, 295 S.W.3d 437 (Ky. 2009); *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002). The Commonwealth concedes that “the general registration scheme is still civil in nature.”

However, Stage argues that the title of 2006 Kentucky Acts, Ch. 182, which pertains to the current version of the Kentucky SORA, KRS 17.510, reads “sex offenses and the punishment thereof,” and that Kentucky Constitution Section 51 “prevents enactment of disparate subject matters in a single bill.” Thus, Stage contends that because the title of 2006 Kentucky Acts, Ch. 182 reads “sex offenses and the punishment thereof,” but the Kentucky Supreme Court has held that SORA is civil in nature, the scheme is void because it violates Section 51 of the Kentucky Constitution. Kentucky Constitution Section 51 provides:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

The Commonwealth argues that Stage failed to preserve this claim by failing to raise it in the trial court and by failing to notify the Attorney General of his constitutional challenge to the statute, as he was required to do pursuant to KRS 418.075 and CR³ 24.03. In his reply brief, Stage contended that he was not required to notify the Attorney General. However, in his supplemental brief, Stage

³ Kentucky Rule(s) of Civil Procedure.

alleges that even if the claim is unpreserved, this Court should review it for palpable error, pursuant to *Jones*, 319 S.W.3d at 297.

Both Stage and the Commonwealth failed to note that in the record, there is a motion filed by Stage titled “Motion to Vacate and to Declare the Law,” which was filed in 2007 and essentially makes the same claim that Stage raises in this appeal. The Certificate of Service at the end of that motion states that “[p]ursuant to CR 24.03, copies of this Motion and the Incorporated Memorandum were mailed to Hon. Gregory Stumbo, Attorney General of Kentucky . . . on April 11, 2007.” Therefore, it appears that the Attorney General was notified of this constitutional challenge to the statute. However, it appears from the record before us that the circuit court never ruled on that motion. Therefore, we find it necessary to reverse the circuit court’s decision and remand for findings of fact and conclusions of law concerning that motion, as explained *infra*.

We originally held in this appeal that, pursuant to *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003), the 1998 version of SORA applied to Stage and he therefore lacked standing to challenge the constitutionality of the 2006 version of the Act. Following his motion for reconsideration, we modified our original decision, but nevertheless dismissed the appeal due to a lack of case or controversy after finding that Stage had no judicially recognizable interest in the constitutionality of the 2006 version of SORA. The Supreme Court thereafter granted discretionary review and vacated our decision and remanded for consideration of *Nash*, 338 S.W.3d at 267. In *Nash*, the Kentucky Supreme Court

found that the 2006 amendments to SORA “subjected those required to register under this *or prior law* to a Class D felony for the first offense of violating the registration law and enhanced the penalty for subsequent offenses to a Class C felony.”⁴ *Nash*, 338 S.W.3d at 267 (emphasis added). The Court also found that the 2006 amendments to SORA superceded the Court’s holding in *Peterson* “to the extent that those required to register under *prior law* are also subject to a Class D felony for first offense of violating the registration law and Class C for subsequent offenses.” *See Nash*, 338 S.W.3d at 268 n.26. Thus, according to the Supreme Court’s decision in *Nash*, it appears that the 2006 version of SORA is applicable to Stage. Consequently, we find it necessary to reverse the circuit court’s decision and remand for findings of fact and conclusions of law concerning Stage’s 2007 motion titled “Motion to Vacate and to Declare the Law,” in which he originally made the allegations that he raises in this appeal, because the circuit court failed to enter a decision on that motion.

Accordingly, the order of the Jefferson Circuit Court is reversed and this case is remanded for further findings of fact and conclusions of law concerning Stage’s 2007 motion titled “Motion to Vacate and to Declare the Law.”

ALL CONCUR

⁴ We pause to ponder whether this statement may actually be dicta because the Supreme Court decided that Nash was “never required to register under any version of SORA.” *Nash*, 338 S.W.3d at 268. Nonetheless, because the Supreme Court, in its order remanding Stage’s case to our Court, instructed us to consider *Nash* while reviewing this case on remand, and provided us a pinpoint citation to page 267 of *Nash* where the Court found that the 2006 amendments to SORA applied to those required to register under prior law, we are required to consider it.

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