

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000030-MR

DANIEL C. HAWK

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 11-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Daniel C. Hawk, entered a conditional guilty plea in the Montgomery Circuit Court to failure to register as a sex offender, second offense. He was sentenced to five years' imprisonment probated for a period of five years. He now appeals to this Court. For the reasons set forth herein, we reverse and remand for further proceedings.

On January 14, 2011, Appellant was indicted by a Montgomery County grand jury for failure to register as a sex offender, second offense, which is a Class C felony. Appointed counsel thereafter moved to amend the indictment to failure to register, first offense, which is a Class D felony. Counsel argued that Appellant's prior misdemeanor conviction was under Michigan's Sex Offender Registration statute and could not be used to elevate the failure to register in Kentucky to a second offense. The trial court denied the motion and Appellant thereafter entered a conditional guilty plea. This appeal ensued.

In this Court, Appellant argues that the trial court erred in denying his motion to amend the indictment because the plain language of KRS 17.510(11) mandates that he can only be found guilty of a first offense. The Commonwealth responds that because Michigan's reporting system is similar to that in Kentucky, we should give full faith and credit to the Michigan violations. The Commonwealth posits that to do otherwise, would allow out-of-state sex offenders who previously failed to comply with their registration duties to be given a clean slate upon moving to Kentucky.

KRS 17.510, Kentucky's sex offender reporting statute, sets forth the requirements, procedure and penalties. Subsection (7) provides that a person required to register in another state or that has been convicted of an offense in another state that would require registration if committed in Kentucky must register in Kentucky within five working days of changing residence to Kentucky,

or entering the state for employment or school.¹ Further, Subsection (11) provides 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 and a Class C felony for each subsequent offense.” (Emphasis added).

We must agree with Appellant that the plain language of KRS 17.510 requires a prior conviction under the current Kentucky statute, or a prior version of such, to sustain a conviction for failure to register, second offense. If the legislature had intended to punish someone who has a prior offense in a foreign jurisdiction as a second time offender, it would have been so stated in the statute. *See* KRS 189A.010(4)(e) (DUI statute).

It is the role of the legislature rather than the judiciary to designate the elements of and penalties for criminal conduct. *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky. App. 2004). It is the judiciary’s role “to impose sentences within the statutory limits prescribed by the legislature.” *Id.* at 92. While the Commonwealth may wish out-of-state registration offenders from entering Kentucky with a “clean state,” such is a matter left to the discretion of the legislature.

¹ As used in subsection (7), “employment” or “carry on a vocation” includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. “Student” means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

Because Appellant does not have a prior conviction in Kentucky for failing to register under KRS 17.510, his conviction for failure to register, second offense must be vacated. This matter is remanded to the Montgomery Circuit Court for further proceedings consistent with this opinion.

ALL CONCUR.

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