

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-002243-MR

MARION E. PENDLETON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST JASMIN, JUDGE
ACTION NO. 91-CR-001353

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
VACATING IN PART AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

BARBER, JUDGE: Appellant Marion Pendleton appeals the decision of the Jefferson Circuit Court classifying him as a high risk offender following a Sex Offender Risk Assessment.

Pendleton pleaded guilty to one count of first degree rape in 1992, and was sentenced to serve ten years. He was scheduled for release on August 1, 1999. Pursuant to KRS 17.500, *et seq.*, a risk assessment hearing was held. At the hearing, the Commonwealth presented a sex offender risk assessment report. Following the hearing, the Jefferson Circuit Court found that

Pendleton was at a high risk for re-offending. Pendleton argues that this finding was constitutionally and statutorily impermissible, and in error. We affirm the trial court's ruling.

Pendleton claims that the circuit court did not have jurisdiction to conduct the risk assessment, as it had lost jurisdiction after sentencing. Pendleton argues that the General Assembly did not have the authority to permit reopening of criminal cases. KRS 17.570, in effect at the time of the hearing, expressly provided the circuit court with such jurisdiction. Id., at subsections (1), (3), (6) and (8). The hearing was held in accordance with applicable law. We affirm the right of the trial court to conduct the hearing in accordance with the statutory directive.

Pendleton asserts that the sex offender registration and notification laws apply only to those offenders incarcerated after January 1, 1999, which was the effective date of the law. Pendleton argues that retroactive application of the law is ex post facto, and therefore unconstitutional. In Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), the Kentucky Supreme Court found that retroactive application of the law was constitutional. Pendleton's other claims of constitutional error were similarly addressed in Hyatt, supra. We affirm the circuit court's rulings on these issues.

Lastly, Pendleton claims that use of the sex offender report was inappropriate in the absence of the author of the report. Dr. Wagner, the witness before the court had reviewed the test data contained in the report, confirmed that Pendleton had been tested, and signed off on the report. In Hyatt, supra., the Supreme Court held that the author of a sex offender risk report must be present to authenticate the report and be cross-examined regarding its contents. Therefore, Pendleton is entitled to a new hearing in compliance with Hyatt.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kathleen A. Pakes
Daniel T. Goyette
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky