

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000107-MR

BRIAN KEITH FRAZER

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 96-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

EMBERTON, CHIEF JUDGE. Brian Frazer pleaded guilty to three counts of sodomy in the third degree and was sentenced to five years' imprisonment. Pursuant to KRS¹ 17.570, the trial court conducted a risk determination hearing after which the trial court found him to be a "high risk offender." This appeal followed.

¹ Kentucky Revised Statutes.

Frazer contends that, since the only evidence introduced during the hearing was that he is a "moderate risk" offender, the trial court's finding is not based on substantial evidence. He maintains that unless there is some showing that the certified provider is not properly certified or did not properly perform the evaluation, the trial court is bound by the provider's evaluation. The applicable version of KRS 17.570(3) provides:

In making the determination of risk, the sentencing court shall review the recommendations of the certified provider along with any statement by a victim or victims and any materials submitted by the sex offender.

Under the statute, the court is not bound by the provider's report but is permitted to review other factors such as the victim's statement and the presence, or absence, of any mitigating factors. The trial court noted that Frazer abused his stepson for approximately thirteen years and has a history of deviant sexual behavior. The court also noted that Frazer has repeatedly failed to complete sex offender treatment programs offered. There was more than substantial evidence to support the trial court's finding that Frazer is a high risk offender.

The evaluator did not testify at the hearing; Frazer, however, did not object to her absence, so if we are to review

the issue it must be pursuant to RCr² 10.26. In Hyatt v. Commonwealth,³ the court held that the defendant's due process rights were violated because the author of the report failed to attend. However, in that case, Hyatt properly objected to the admission of the report. Under RCr 10.26, review of unpreserved errors is warranted only where the substantial rights of the defendant have been prejudiced so that there is a substantial possibility that the result would have been different.⁴ Constitutional rights are subject to waiver if the defendant fails to properly object.⁵

Frazer fails to identify what, if any, facts would have been developed that might have changed the result reached had the report provider testified. He does not question the accuracy of the report, but to the contrary, argues it was correct and should have been followed by the trial court. Although Hyatt requires that the provider attend the hearing, in this case the failure of the provider to testify did not affect the trial court's decision. Under RCr 10.26 such failure is not reversible error.

² Kentucky Rules of Criminal Procedure.

³ Ky., 72 S.W.3d 566 (2002).

⁴ Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

⁵ Violett v. Commonwealth, Ky., 907 S.W.2d 773 (1995).

Frazer's remaining contention that KRS 17.570 is unconstitutional was addressed and rejected in Hyatt, supra.

The order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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