

RENDERED: June 20, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000684-MR

CHARLES SIMPSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 90-CR-00608

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART, VACATING AND REMANDING IN PART

** ** * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND JOHN WOODS POTTER,
SPECIAL JUDGE.¹

McANULTY, JUDGE: Charles Simpson appeals from a Fayette Circuit
Court order assessing him as a high risk sex offender. We
affirm in part and vacate and remand in part.

¹ Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On September 18, 1990, Charles Simpson was indicted for one count of sexual abuse first degree and one count of sodomy first degree. The crimes occurred between 1986 and 1990. On November 30, 1990, Appellant pleaded guilty but mentally ill to sexual abuse first degree and to an amended charge of sodomy second degree. The Commonwealth recommended a sentence of five years on the sexual abuse charge and ten years on the sodomy charge. In January, 1991, the circuit court sentenced Appellant to prison for a term of fifteen years.

On January 7, 2000, following a notification of release from the Department of Corrections, the circuit court ordered Appellant to undergo a sex offender risk assessment pursuant to KRS 17.570. The circuit court originally scheduled the sex offender risk hearing for February 18, 2000, but continued the hearing until February 28, 2000.

Dr. John Scanish, a certified sexual offender risk provider for the Department of Corrections, testified at the hearing. Dr. Scanish testified that the three risk assessment instruments he used for testing Appellant all showed Appellant to be a moderate risk to reoffend. However, Dr. Scanish determined that Appellant's assessment should be high risk because Appellant admitted to a longstanding pattern of sexual offending and attraction to children.

On February 29, 2000, the circuit court assessed Appellant as high risk, precipitating this appeal.

Appellant presents three arguments for our review. First, Appellant claims that KRS 17.510, the registration system for adults who have committed sex crimes or crimes against minors, as applied to Appellant, is an ex post facto law. Second, Appellant contends that KRS 17.510, as applied to Appellant, is a violation of the double jeopardy clause of the United States Constitution. Third, Appellant argues that the circuit court erred by conducting the risk assessment hearing and allowing the testimony of Dr. Scanish without first conducting a Daubert hearing as requested by Appellant and required by law. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995).

On July 10, 2002, this Court ordered this appeal and others to be held in abeyance pending the Kentucky Supreme Court's ruling relative to the constitutionality of KRS 17.570 and related issues. In Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), our Supreme Court resolved the issues raised by Appellant on appeal.

In Hyatt,

Hyatt sexually abused his younger sister over a period of time. In 1991, he pled guilty to one count of first-degree sexual

abuse and the circuit court sentenced him to one year in prison. The sentence was suspended and Hyatt was probated for a period of three years. After the trial judge revoked his probation, Hyatt pled guilty to additional charges of second-degree rape and second-degree sodomy. In 1993, the circuit court sentenced him to five years in prison on each count to be served consecutively.

On January 11, 1999, the circuit court ordered Hyatt, an inmate, to undergo a sex offender risk assessment pursuant to KRS 17.570.

. . .

Hyatt was represented by counsel at a hearing and on the morning of the hearing the risk assessment arrived by facsimile and the circuit court admitted the report. Hyatt did not present any evidence to counter the conclusions of the report and the court relied on the report exclusively to classify Hyatt as a high-risk sex offender. Hyatt appealed this classification to the Court of Appeals. . .

The Court of Appeals panel rejected the constitutional objections of Hyatt to the statutory system and found that neither double jeopardy, ex post facto, nor due process rendered the statute unconstitutional. The Court of Appeals did reverse and remand on procedural due process grounds, holding that Hyatt was entitled to call expert witnesses and to receive timely notice of the Risk Assessment Report.

Id. at 570-71.

The Kentucky Supreme Court granted discretionary review and held as follows:

It is the decision of this Court that the opinion of the Court of Appeals holding that the sex offender classification, registration and notification system is constitutional must be affirmed. The statutes do not amount to an ex post facto violation. The registration laws do not punish sex offenders. They have a regulatory purpose only. The dissemination of information has never been considered a form of punishment. The Act in question does not impose any additional punishment on Hyatt, and are not ex post facto laws under either the United States Constitution or the Kentucky Constitution.

We further agree with the Court of Appeals that this case should be remanded to the circuit court because of the untimely arrival of the Risk Assessment Report. In addition, we believe the case should be remanded for the failure of Dr. Wagner to attend the hearing. The procedural due process rights of Hyatt were violated at the risk assessment hearing because the report arrived too late to provide him with notice of its contents, to allow his counsel to read and consider it and to allow sufficient time for preparation including the calling of expert witnesses, if any, to counter the conclusions of the report. We remand this case for an evidentiary hearing, in accordance with the pre-2000 amendments, which would include the rights to present an expert witness.

Id. at 573.

As set out above, in Hyatt, the Kentucky Supreme Court specifically considered and rejected Appellant's first argument that KRS 17.510, the registration system for adults who have committed sex crimes or crimes against minors, is an ex post

facto law. The application of the sex offender statutes to Appellant is constitutional.

Moreover, the Kentucky Supreme Court specifically considered and rejected Appellant's second argument that 17.510, as applied to Appellant, is a violation of the double jeopardy clause of the United States Constitution. See id. at 580. On this issue, the Court reasoned as follows:

We reject the claims that the statutes are unconstitutional because they violate the principles of double jeopardy. A careful review of the statutes indicates that the registration laws do not expose any individual to double jeopardy when applied to a criminal who has already been convicted of committing a sex crime. The statutes have a remedial purpose and are not excessive when compared to that purpose. The statutes protect the public and aid law enforcement in monitoring sex offenders. The fact that the statutes are intended to deter recidivism does not warrant declaring them unconstitutional as a violation of double jeopardy principles. The dissemination of information by whatever means has not been considered a form of punishment. The restrictions imposed on sex offenders are not comparable in any way to any form of incarceration. The statutes serve a regulatory purpose.

. . .

They [the statutes] do not involve a second prosecution for the same offense after acquittal. They are not a second prosecution for the same offense after conviction, and multiple punishments for the same offense are not involved.

Id. at 580 (internal citations omitted).

We move to Appellant's final argument that the circuit court should have conducted a Daubert hearing prior to admitting the testimony of Dr. Scanish. Appellant's concern was that the scientific evidence presented by Dr. Scanish did not meet the admissibility test of Daubert, 113 S. Ct. 2786 at 2795-96, especially in light of the fact that three designated risk assessment instruments determined that Appellant posed a moderate risk to reoffend, yet the doctor's ultimate assessment was that Appellant was a high risk to reoffend. Accordingly, Appellant requests that this court vacate the findings of the circuit court and order that a Daubert hearing be held before any further risk assessment hearing.

"[A] court of appeals is to apply an abuse-of-discretion standard when it 'reviews a trial court's decision to admit or exclude expert testimony.'" Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999) (citing General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508). Thus, we are left with the question of whether the circuit court abused its discretion in failing to hold a Daubert hearing prior to assessing Appellant as high risk when Appellant specifically requested such a hearing.

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). In this case, Appellant was to be released from prison on March 1, 2000. On January 7, 2000, following a notification of release from the Department of Corrections, the circuit court ordered Appellant to undergo a sex offender risk assessment pursuant to KRS 17.570, as in effect from January 15, 1999 to July 14, 2000.

The court clerk entered the risk assessment report on February 10, 2000. On February 16, 2000, counsel for Appellant filed a motion to exclude the testimony of Dr. Scanish, the psychologist who performed the risk assessment, and requested a Daubert hearing.

The circuit court originally scheduled the sex offender risk hearing for February 18, 2000; however, the court continued the hearing until February 25, 2000, to allow counsel for Appellant to procure an expert to testify on the reliability of the risk assessment methods used to evaluate Appellant. On February 25, 2000, Appellant's counsel informed the court that they had contacted a number of individuals to testify regarding the methodology, but those potential experts could not be ready on the notice given. Appellant's counsel objected to the court

holding the risk assessment hearing prior to any Daubert hearing.

The court took the issues raised by Appellant under advisement, but set the risk assessment hearing for February 28, 2000, because Appellant was scheduled to be released on March 1, 2000. The trial court advised Appellant that KRS 17.570, the statute governing risk assessment proceedings at that time, required the trial court to conduct a hearing prior to the sex offender's release to determine the sex offender's risk level. However, KRS 17.570 also mandated that the court allow the sex offender to appear at the risk assessment hearing and be heard. In addition, KRS 17.570 required the court to review any materials submitted by the sex offender prior to making its risk assessment determination.

On February 28, 2000, the court ordered the parties to go forward on the risk assessment. When counsel for Appellant attempted on cross examination to question Dr. Scanish on the reliability of the instruments used, Dr. Scanish replied that he was not prepared to discuss Daubert matters that day. After hearing the testimony of Dr. Scanish, the court assessed Appellant as a high risk. A high risk assessment required Appellant to register as a sex offender for his lifetime, while a moderate risk assessment would have only required Appellant to

register for 10 years. See KRS 17.520, as in effect from January 15, 1999 to April 11, 2000.

We believe that Appellant's procedural due process rights were violated because Appellant requested and was entitled to a Daubert hearing prior to the risk assessment hearing. See Hyatt, 72 S.W.3d at 573. In other words, Appellant was entitled to be heard. Appellant should have been allowed to submit evidence challenging the reliability of the assessment methods prior to the court's determination of his risk level. Since the Appellant could not present an expert prior to his originally scheduled release date, the court could have continued the risk assessment hearing and required the Appellant to register his address with probation and parole in the interim.

In concluding that Appellant was entitled to a Daubert hearing, we acknowledge that a trial court is not required in all circumstances to have a Daubert hearing; however, in those circumstances where it does not conduct a hearing, a court must be able to rely on some basis that the theory or technique (1) is generally accepted in the scientific community; (2) can be and has been tested; (3) has been subjected to peer review and publication; or, (4) with respect to a particular technique, does not have a known high rate of error. See Hyatt, 72 S.W.3d at 575; Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 248-

49 (6th Cir. 2001); Goodyear Tire, 11 S.W.3d at 578-79 (2000). In this case, the trial court had no such basis for admitting the testimony without a Daubert hearing. In fact, the trial court agreed that a hearing was necessary, yet did not conduct one because Appellant was scheduled to be released from prison prior to the time the hearing could be scheduled. Thus, Appellant should be permitted to present evidence in support of his beliefs that the tests are unreliable and further challenge Dr. Scanish's conclusion that Appellant was a high risk sex offender.

Accordingly, we vacate and remand this case for an evidentiary hearing, in accordance with the pre-2000 amendments, which would include the right to present an expert witness to testify on the reliability of the instruments as well as refute Dr. Scanish's testimony.

ALL CONCUR.

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