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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000757-MR

IVAN BARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 92-CR-002671

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, AND VACATING
AND REMANDING IN PART
* * * * *

BEFORE: COMBS, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE: Ivan Bard brings this appeal from a March 1, 2000 order of the Jefferson Circuit Court. We affirm in part, and vacate and remand in part.

In April of 1994, appellant pled guilty to four counts of third degree rape, seven counts of third degree sodomy, one count of first degree sexual abuse, one count of second degree sexual abuse, and one count of third degree sexual abuse. In May of 1994, he was sentenced to a total of ten years=imprisonment.

In December of 1999, the Jefferson Circuit Court

entered an Order For Sex Offender Risk Assessment. Thereupon, appellant challenged, *inter alia*, the applicability of the Sex Offender Registration Act (the Act)(codified as Kentucky Revised Statutes (KRS) 17.500 *et seq.*) to him. Following a risk assessment hearing, the circuit court entered an Order Of Sex Offender Risk Determination finding appellant to be a high risk sexual offender. This appeal follows.

Appellant argues that the circuit court erroneously concluded that he must register under the Act. Specifically, appellant points out that he was sentenced in May of 1994, before the effective date of the Act; hence, he believes the Act inapplicable to him.

The Act was originally contained in 1994 Ky. Acts Chapter 392 (1994 Act), which was entitled AN ACT relating to the registration of sexual offenders.@ Section 6 of the 1994 Act, in pertinent part, read:

[T]his Act shall apply to persons convicted after the effective date of this Act.
(emphasis added).

Subsequently, the 1994 Act was amended by 1998 Ky. Acts Chapter 606 (1998 Act), which was entitled AN ACT relating to criminal justice matters.@ Section 199 of the 1998 Act¹, in pertinent part, reads:

¹It is an enigma as to why Section 6 of 1994 Ky. Acts Chapter 392 and Section 199 of the 1998 Ky. Acts Chapter 606 were not codified in Kentucky Revised Statutes but were rather placed in Compiler's notes after the codified sections of the aforementioned Acts.

[T]his Act shall apply to persons **individually sentenced or incarcerated** after the effective date of this Act. (emphasis added).

Juxtaposing Section 6 of the 1994 Act with Section 199 of the 1998 Act, we must conclude that Section 199 effectively repealed Section 6. Indeed, both sections deal with the same subject matter, the applicability of the Act, and are clearly repugnant to each other. See Harco Corporation v. Martin, 271 Ky. 572, 112 S.W.2d 693 (1937).

Under Section 6, the 1994 Act applied only to those individuals Aconvicted@ upon its effective date. By contrast, Section 199 expanded the 1998 Act's grasp to include individuals Aincarcerated@ upon its effective date. We interpret the term Aincarcerated@ to mean simply being confined to a penal institution. By utilizing that term, we think the legislature intended that the 1998 Act apply to individuals who were confined in a penal institution upon its effective date. We view Section 199 as effectively expanding the Act's ambit to include individuals who were convicted days, months, years, or even decades before its enactment, but who were confined in a penal institution upon its effective date. Simply put, we believe the 1998 Act applies to all individuals confined in a penal institution upon its effective date.

We are buttressed in our interpretation by Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002). Therein, Hyatt was sentenced to ten years=imprisonment upon second degree rape and

second degree sodomy in 1993. Hyatt argued that the Kentucky Registration and Notification Statutes were not intended to apply to persons who were convicted before July 15, 1994; it appears Hyatt was assessed under the 1998 Act. Id. at 571. Although this issue was not specifically addressed, the Court, nevertheless, applied the 1998 Act to Hyatt.

In sum, we conclude that Section 199 of the 1998 Act repealed Section 6 of the 1994 Act. We interpret Section 199 as encompassing those individuals confined in a penal institution upon its effective date. As appellant was confined in a penal institution upon the effective date of Section 199, we are of the opinion that he must register under the Act.

Appellant also contends that the circuit court committed error by admitting into evidence his risk assessment report.² Specifically, appellant points out that the provider or author of the report was not present to testify at his hearing, thus rendering the report inadmissible. We must agree.

In Hyatt, 72 S.W.3d 566, 577, the Court specifically held:

The procedural due process rights of Hall were violated at the risk assessment hearing because the author of the report failed to attend. Consequently, this case is remanded to the circuit court to conduct an evidentiary hearing in accordance with the pre-2000 amendments. Such a hearing would require the attendance of the author of the report as well as the right of Hall to call expert witnesses to rebut the same.

²Appellant concedes that his remaining arguments were disposed of by Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002).

On the authority of Hyatt, we are of the opinion that the circuit court committed error by admitting the report into evidence. We thus remand this matter to the circuit court to conduct an evidentiary hearing as required by Hyatt.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed in part, and vacated and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

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