

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000847-MR

DARRELL WAYNE KERNEY

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE BENJAMIN L. DICKINSON, JUDGE
ACTION NO. 90-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING IN PART
** ** * * * * *

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Darrell Wayne Kerney appeals from the order of the Barren Circuit Court, imposing special conditions upon his release from prison on charges of sexual abuse and assault. The circuit court classified Kerney as a high risk sexual offender, and in addition to the registration requirements, imposed five special conditions pursuant to the now-repealed Kentucky Revised Statute (KRS) 17.572. Kerney challenges the imposition of those conditions as a violation of the Constitutional prohibition against ex post facto application of criminal laws. We agree

with appellant and reverse in part the judgment of the circuit court.

Kerney was ordered, in addition to the registration requirements imposed by KRS 17.510, to:

- A. Enter and complete specialized treatment of sexual deviancy and follow all treatment rules;
- B. Be financially responsible for his own treatment and keep his account current;
- C. Take periodic polygraph examinations as directed by the therapist;
- D. Participate in an alcohol and other drug abuse treatment program;
- E. Lead an alcohol and other drug-free lifestyle, and report all prescription medications to his therapist;
- F. Avoid situations which involve single women and intoxicants.

Circuit Court's order at 11. The circuit court's order does not specify what consequences Kerney would face if he violated these terms. Kerney argues on appeal that the circuit court's order is tantamount to a conditional discharge, and violates the prohibition against ex post facto application of the criminal law. Kerney was charged with the underlying offenses in 1990, several years before the enactment of the statute under which the circuit court imposed the above conditions.

The Commonwealth argues that the statute as applied is constitutional, relying on the Kentucky Supreme Court's decision

in Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002). With respect to the registration and notification requirements, the Commonwealth is correct; the statute is remedial in nature and not punitive. However, with respect to the ability of the court to impose conditions upon a person who has served out his sentence, we disagree and hold that the statute violates the prohibition against the retrospective application of a punitive criminal statute. Hyatt considered only the registration and notification requirements and held that those requirements are remedial in nature, creating a new legal status by classifying convicted sex offenders. Hyatt did not involve a situation wherein a court imposed additional conditions on a person who had served out his sentence.

The language the circuit court relied on is as follows: "If the offender is determined to be a high risk sex offender, the . . . notification shall include offender notification as defined in KRS 17.500 and any special conditions imposed by the court or the Parole Board." KRS 17.572(1). The circuit court reasoned that this language gave it the authority to impose special conditions on a high risk sex offender, regardless of whether he was on parole or had served out his sentence. Kerney argues that the court's conditions are indistinguishable from a conditional discharge.

This situation is similar to that found in Purvis v. Commonwealth, 14 S.W.3d 21 (2000), wherein a defendant was sentenced to an additional three years conditionally discharged on his completion of a sex offender treatment program. The Kentucky Supreme Court held that the law was unconstitutionally applied because the law was not in effect at the time the offense was committed, and retrospectively imposes an additional punishment beyond that prescribed at the time of the offense.

This case is not identical to Purvis, in that neither the statute nor the order appealed from specifies any additional punishment that Kerney faces if he violates the conditions imposed by the circuit court. Nevertheless, it is implied that some form of punishment is contemplated if Kerney violates those conditions. This is beyond the notification and registration requirements approved in Hyatt. Unlike Hyatt, which involved only the notification and registration requirements, the court in this case broadly construed the statute in such a way as to imply the power to impose additional conditions upon a person who has otherwise served out a criminal sentence. We believe that such a construction is improper, and amounts to an unconstitutional application of the statute.

For the foregoing reasons, the judgment of the Barren Circuit Court is reversed in part.

COMBS, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Irvin J. Halbleib, Jr.
Dennis Stutsman
Assistant Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky