

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-000943-MR

JIMMY DALE STAGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 93-CR-002484

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** * * *

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. Jimmy Dale Stage was convicted of second-degree sodomy and two counts of second-degree sexual abuse in 1994 for crimes perpetrated against his daughter. He was sentenced to serve ten years in prison. Stage appeals from an order of the Jefferson Circuit Court determining that he poses a high risk of sexual recidivism. We affirm in part, vacate in part, and remand.

On December 30, 1999, sixty-one (61) days prior to Stage's anticipated release from prison on the sex-related charges, the Jefferson Circuit Court entered an order requiring that he undergo a sex offender risk assessment pursuant to the 1998 amendments to the Sex Offender Registration Act, KRS¹ 17.500, *et seq.* At the risk assessment hearing conducted on February 25, 2000, Stage's attorney requested a continuance to allow him to effectively represent his client. He stated that he had just met Stage that morning and received a copy of the risk assessment report. He argued that he needed time to subpoena the author of the report in order to protect Stage's right to cross-examine that critical source.

The Commonwealth objected to a continuance. Although it conceded that the report was not ready prior to the day of the hearing, it nonetheless argued that Stage's attorney had adequate time to prepare for the hearing. Stating that Stage was not entitled to present expert testimony or to subpoena the author of the report, the trial court denied the motion for a continuance. The court allowed the parties to submit briefs addressing several issues concerning the constitutionality of the 1998 amendments to the sex offender registration scheme. On March 17, 2000, it entered the order from which Stage appeals. Consistently with the risk assessment's recommendation, the

¹ Kentucky Revised Statutes.

court concluded that Stage was a high-risk sex offender. This appeal followed.

Stage's appeal was abated on September 26, 2000, pending a decision by the Kentucky Supreme Court in three cases concerning the constitutionality of the 1998 amendments to the registration act. On February 21, 2002, those amendments were upheld as constitutional in Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002). This appeal was restored to the active docket, and Stage was directed to show cause why the appeal should not be affirmed pursuant to Hyatt.

Stage acknowledged that his appeal was partially defeated by Hyatt. However, he contended that Hyatt had resolved the issue concerning procedural due process in his favor, leaving two issues for this court's consideration: (1) whether the Legislature intended for the 1998 amendments to have retroactive application to those persons convicted prior to the effective date of the amendments; and (2) whether the circuit court had jurisdiction over the matter. We agree that Stage is entitled to a new hearing. On all other issues, we affirm.

As first enacted in 1994, Kentucky's version of "Megan's Law" originally applied to those persons "convicted after the effective date." However, the 1998 amendments expanded the scope of the statute to include those persons "individually sentenced or incarcerated" after its effective

date of July 15, 1998, encompassing many who had been convicted before the effective date but whose terms of imprisonment were being served after that date. Stage was convicted in 1994—four years before the 1998 amendments were enacted. However, as of July 15, 1998, Stage was still in prison as a result of a pre-amendment conviction. Thus, he was assessed and classified pursuant to the 1998 amendments.

Stage contends that the Legislature did not intend for the 1998 amendments to be applied to him because they contain no clear expression that they were to have retroactive application. See, KRS 446.080(3). Because the Legislature provided that the amendments should apply to those incarcerated as opposed to “still incarcerated” on July 15, 1998, he argues that they were intended to apply only to those whose incarceration began after the effective date of the amendments. We do not agree.

First, the issue of the retroactive application of the amendments was resolved by implication in Hyatt. The Court carefully recited that the issue had been raised in two of the three consolidated cases. By discussing the constitutional guarantees against *ex post facto* laws, the Court indicated that it was fully aware of the retroactivity issue and nonetheless concluded that the statute was intended to apply to those who had been incarcerated prior to July 15, 1998.

The Court stated that its purpose in granting discretionary review was to "reach a definitive disposition of the constitutional questions involved . . . " Id. at 569. Accordingly, it affirmed the order of the Jefferson Circuit Court in one of the three cases grouped under Hyatt. That case was Commonwealth v. Sims, in which the sex offender had been convicted and incarcerated prior to the 1998 amendments and remained incarcerated after July 15, 1998. Like Stage, Sims argued that the Legislature did not intend for the 1998 amendments to apply to him. Id. at 577-78. The Court affirmed the order which had determined that Sims was a high-risk sex offender subject to the classification system created in the 1998 amendments. By so affirming, the Kentucky Supreme Court rejected Sims's argument with respect to the retroactivity of the statute.

The Supreme Court has ruled that the General Assembly intended to expand the scope of the 1994 statute to include all persons incarcerated as of the time of its effective date -- regardless of the date of their original conviction, sentencing, or placement in confinement. See also, Martinez v. Commonwealth, Ky., 72 S.W.3d 581, (2002). Thus, retroactive application, a necessary and logical component of the legislative intent, is constitutional with respect to KRS 17.500 *et. seq.*

Next, Stage argues that the Jefferson Circuit Court lacked jurisdiction to entertain the risk assessment proceeding. He relies on KRS 17.570(1), which provides:

Upon conviction of a "sex crime" as defined in KRS 17.500 and within sixty (60) calendar days prior to the discharge, release, or parole of a sex offender, the sentencing court shall order a sex offender risk assessment by a certified provider . . .

Because the trial court ordered the assessment 61 days before his anticipated release from prison, Stage proposes that the circuit court lacked jurisdiction to conduct the hearing. We disagree.

First, we note that the record shows no indication that Stage ever raised this issue in the circuit court. Further, Stage has failed to comply with CR² 76.12(4)(c)(iv), requiring that he provide "a statement with reference to the record showing whether the issue was properly preserved for review." In general, we do not address issues which are raised for the first time on appeal. See, Abuzant v. Shelter Insurance, Ky.App., 977 S.W.2d 259 (1998). However, even if we were to assume that Stage is referring to subject matter jurisdiction, which can be raised for the first time on appeal, we find no merit to the argument. Considering the purposes of the statute and the nature of the proceeding, we disagree with

² Kentucky Rules of Civil Procedure.

Stage that the temporal provisions of the statute were intended to have any preclusive jurisdictional implications.

However, we do agree with Stage that the trial court erred in denying his motion for a continuance and in relying on the risk assessment report without the author of the report available to authenticate the report and to be cross-examined. In nearly identical circumstances, Hyatt held that the defendant's due process rights had been violated and remanded the matter for a new hearing in order that the author of the risk assessment report might be in attendance. 72 S.W.3d at 577. On this point alone we vacate and remand for a proper hearing.

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

ALL CONCUR.

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