

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-001106-MR

YOREL PETRIE

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 95-CR-00193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * **

BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. Yorel Petrie was convicted of third-degree rape and was sentenced to serve five years in prison on February 18, 1997. He now appeals from the order of the Henderson Circuit Court entered on March 3, 2000, classifying him as a moderate-risk sex offender pursuant to KRS¹ 17.570. We affirm in part, vacate in part, and remand.

¹ Kentucky Revised Statutes.

Petrie'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 Sex Offender Registration Act, KRS 17.500, *et seq.* On February 21, 2002, those amendments were upheld in Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002). This appeal was then restored to the active docket, and the parties were encouraged to file a joint motion either to affirm summarily or to seek other appropriate relief if the Hyatt decision disposed of the issues on appeal. The Commonwealth filed a motion for summary affirmance and argued that the issues raised in the appeal either had been decided in its favor or had not been properly preserved for review. The Commonwealth's motion was denied, and the appeal was assigned to this panel for disposition on the merits.

Most of the issues raised by Petrie were resolved adversely to him by Hyatt, including: (1) Petrie's claims that the Henderson Circuit Court lacked jurisdiction to impose new conditions on his conviction; (2) that the registration scheme violated the separation of powers doctrine set forth in Section 27 and 28 of the Kentucky Constitution; and (3) that it violates several state and federal constitutional protections. The only unresolved issue remaining for our consideration is Petrie's contention that he was denied due process at the hearing to determine his risk of re-offending.

At the beginning of the assessment hearing, Petrie's counsel moved for a continuance on the grounds that she was not adequately prepared to proceed with the hearing because she had been assigned to represent Petrie only one day before the hearing. Counsel's motion also recited that she did not receive the Sexual Offender Assessment Report, prepared by Dr. Van Nort, until the morning of the hearing. The motion for a continuance was denied. During the hearing, Petrie objected to the introduction of the report on the basis that Dr. Van Nort was not present to allow for cross-examination. The objection was overruled.

At the conclusion of the hearing, relying on the risk assessment, the trial court found that Petrie was a moderate-risk sex offender. However, the court's order provided that it was "subject to review and modification" for a period of thirty days in order to allow Petrie time to provide the court "additional information" as he deemed appropriate. Petrie did not submit additional information, and the order became final and appealable on April 3, 2002.

In Hyatt, the Court discussed the failure of the author of the assessment report to attend a hearing and held that absence to constitute a violation of due process. Id. at 577. In a later case, Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 528 (2002), the Supreme Court discussed in more detail the

minimum due process rights inherent in these risk assessment hearings pursuant to the 1998 amendments to "Megan's law":

Recently, this Court in Hyatt v. Commonwealth, [citation omitted] held that the defendant's due process rights were violated at the risk assessment hearing because the report arrived too late to provide him with notice of its contents, to allow 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. The situation presented in this case is essentially indistinguishable from Hyatt, supra. Defense counsel received Appellant's risk assessment report the day before the hearing. At the hearing, counsel stated he was not prepared to address the conclusions reached by the certified provider and requested a continuance to review the report and have an expert appointed to help prepare for the hearing While due process rights may be limited in certain proceedings, Appellant was entitled to notice of the report's contents in order to be able to present experts to testify during the risk assessment hearing. By failing to grant a continuance, the trial court denied Appellant due process of law.

The Commonwealth acknowledges that the trial court erred in proceeding with the risk assessment hearing under circumstances identical to those considered in Hyatt and Pendleton. However, it contends that Petrie waived any right to complain on due process grounds because he did not take advantage of the "window" of an extra thirty days to provide the

trial court with additional information. We do not agree that such a waiver has occurred.

Petrie properly objected to the introduction and use of the risk assessment report and his inability to cross-examine the author of the report. That issue was certainly preserved for appellate review. The grant of an extra thirty days for Petrie to provide additional information could not cure the violation of due process arising from the improper treatment of the report under the circumstances of this case. The trial court specifically relied upon the contents of the report in reaching its determination that Petrie is a moderate-risk sex offender. Thus, Petrie was guaranteed the right to cross-examine its author under both Hyatt, supra and Pendleton, supra. We remand this matter for an evidentiary hearing in accordance with the pre-2000 amendments.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wettle
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky