

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-001896-MR

TANAKA LEE BIRDO

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 82-CR-001594

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BAKER AND SCHRODER, JUDGES, AND HUDDLESTON, SENIOR
JUDGE.¹

SCHRODER, JUDGE. Tanaka Lee Birdo appeals from an order of the
Jefferson Circuit Court designating him as a moderate risk sex
offender pursuant to KRS 17.570. We affirm.

In 1983, appellant pled guilty to five counts of
first-degree rape, four counts of first-degree sodomy, two

¹ Senior Judge Huddleston sitting as Special Judge by assignment of the Chief
Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS
21.580.

counts of second-degree robbery, and one count of fourth-degree assault, and was sentenced to a total of eighteen years' imprisonment. In preparation for a February 1, 2000, release date, pursuant to KRS 17.570, a sex offender risk assessment hearing was held and appellant determined to be a moderate risk sex offender.

This was one of numerous appeals held in abeyance pending a decision by the Kentucky Supreme Court resolving the issue of the constitutionality of the 1998 amendments to Kentucky's sex offender registration laws (hereinafter the "1998 Act"). In Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), rendered February 21, 2002, the Kentucky Supreme Court upheld the constitutionality of the 1998 Act. Subsequently, this Court entered an order requiring appellant to show cause why his appeal should not be summarily affirmed under the authority of Hyatt. In response to the show cause order, appellant conceded that Hyatt disposed of all issues that would have been raised in his appeal, with the exception of legislative intent (as to retroactive application of the 1998 Act). On August 28, 2002, this Court entered an order allowing the appeal to proceed.

Appellant contends that he is not included in the class of persons identified by 1998 Kentucky Acts, Chapter 606, § 199, as being subject to the 1998 Act. Appellant contends that he was already incarcerated at the time the 1998 Act became

effective (July 15, 1998), and that the plain language of Section 199 indicates that the General Assembly intended that the 1998 Act apply only to those persons who were put into jail or prison after July 15, 1998. Appellant contends that although Hyatt mentions the question of legislative intent, the Supreme Court did not address the issue therein.

Section 199 of the 1998 Act states, “[t]he provisions of Sections 138 through 155 of this Act shall apply to persons individually sentenced or incarcerated after the effective date of this Act.” We believe that if the legislative intent was to apply the 1998 Act only to individuals who received sentences after its effective date of July 15, 1998, there would have been no need for the phrase “or incarcerated”. The use of this phrase clearly shows a legislative intent to include inmates who were sentenced before the 1998 Act, and who were still incarcerated when the 1998 Act became effective.

Additionally, we believe that Hyatt is, in fact dispositive of appellant’s claim that the 1998 Act does not apply to him. In Hyatt, the Supreme Court found the 1998 Act to be applicable to three inmates who, like appellant, had been incarcerated before its effective date, and who remained incarcerated on the effective date. As appellant was incarcerated at the time the 1998 Act became effective, we conclude the Act applies to him.

For the foregoing reasons, the order of the Jefferson Circuit Court classifying appellant as a moderate risk sex offender is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. David Niehaus
Deputy Appellate Defender
Jefferson District Public
Defender's Office
Louisville, Kentucky

BRIEF FOR APPELLEE:

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