

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-002145-MR

TERRY DEWAYNE THORPE

APPELLANT

v. APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 01-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.¹

POTTER, SPECIAL JUDGE: Tony Dewayne Thorpe appeals from that portion of a conditional guilty plea requiring him to register as a sex offender for a term of ten years pursuant to Kentucky Revised Statutes (KRS) 17.520. Thorpe alleges that requiring him to register as a sex offender is an impermissible ex post facto application of the statute. Having considered the arguments of the appellant and finding no error, we affirm.

¹Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution.

On March 23, 2001, Thorpe was indicted on five counts of first-degree sexual abuse (KRS 510.110). The charges resulted from the allegation that in November and December 1996 Thorpe had had sexual contact with a child less than fourteen years of age.

On August 28, 2001, pursuant to a plea agreement, Thorpe entered a guilty plea to five counts of second-degree sexual abuse (KRS 510.120). In return for Thorpe's plea, the Commonwealth agreed to recommend a sentence of twelve months on each count, to run concurrently. Under the agreement Thorpe would also receive credit for time served with the balance probated.

The trial court subsequently entered a judgment consistent with the plea agreement, except the trial court also ordered Thorpe to register as a sex offender for a period of ten years pursuant to KRS 17.520. In conjunction with the judgment, and with the Commonwealth and Thorp's agreement, the trial court permitted Thorpe to reserve his right to appeal the judgment insofar as the judgment required him to register as a sex offender. This appeal followed.

The appeal was initially held in abeyance pending a decision by the Kentucky Supreme Court resolving the issue of the constitutionality and/or interpretation of the Sexual Offender Registration Act, KRS 17.500 et. seq., commonly known

as "Megan's Law." On February 21, 2002, the Supreme Court rendered the awaited opinion, Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2002), which upheld the constitutionality of the statutory scheme of the registration act, though it remanded that particular case based on procedural due process grounds.

Under the version of the Registration Act in effect at the time Thorpe committed the offenses in this case, the 1994 version, a person convicted of second-degree sexual abuse was not required to register as a sexual offender at all. See KRS 17.500(3) and KRS 17.510 (1994 version). However, under the 2000 version of the Act, the version of the Act applied to Thorpe in this case, a person convicted of second-degree sexual abuse is required to register as a sex offender for a period of ten years. See KRS 17.500(2)(a)(7); KRS 17.500(4)(a)(2); and KRS 17.520.

While now conceding that pursuant to the Supreme Court's holding in Hyatt the registration statutes do not violate ex post facto, Thorpe nevertheless argues that the order requiring him to register violates ex post facto because KRS 17.495 is an ex post facto law. Thorpe contends that since the Supreme Court did not specifically address this statute in Hyatt, KRS 17.495 is an ex post facto law under Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000).

KRS 17.495 is not codified within the Sexual Offender

Registration Act; however, the statute directly references that Act, was implemented in conjunction with the 2000 amendments to the Act, and is clearly intended to operate in coordination with, and to advance the objectives of, the Act. While we believe the Supreme Court's decision in Hyatt is dispositive of the issue, nevertheless, we will briefly consider Thorpe's argument on the merits.

KRS 17.495 was enacted in 2000 in conjunction with the 2000 amendments to the registration statutes and provides as follows:

No registrant, as defined in KRS 17.500, who is placed on probation, parole, or any form of supervised release, shall reside within one thousand (1,000) feet of a high school, middle school, elementary school, preschool, or licensed day care facility. The measurement shall be taken in a straight line from the nearest wall of the school to the nearest wall of the registrant's place of residence.

Thorpe alleges that pursuant to these provisions, the registration statutes restrict where Thorpe may live, when he may move, and to where he may move. According to Thorpe, these restrictions bring the statute to within the holding in Purvis v. Commonwealth, supra, which held that the conditional discharge provisions of KRS 532.043 violated ex post facto principles. We disagree.

First and foremost, the statute applies only to those

offenders on probation or parole and, as such, does not impose any additional condition which could not have been placed upon such an offender prior to the implementation of the statute. The statute merely makes mandatory a condition that the Department of Probation and Parole could have imposed upon an offender on probation or parole prior to the enactment of the statute.

In addition, a two pronged test is used to determine whether a penal law is ex post facto: (1) it must be retrospective, that is, it must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it." Hyatt at 571. In order to satisfy prong two of the test, the challenged law "must relate to a very real and direct effect on the actual time the prisoner remains behind bars which could include an increase in punishment." Id. That is not the case with KRS 17.495. As with registration itself, KRS 17.495 is

"reasonably related to the nonpunitive goals of protecting the public and facilitating law enforcement . . . [and] [a]ny potential punishment arising from the violation . . . is totally prospective and is not punishment for past criminal behavior."

Hyatt at 572 (citations omitted).

Further, the restrictions imposed by KRS 532.043, the statute struck down in Purvis, are distinguishable from the

restrictions imposed by KRS 17.495. KRS 17.495 imposes conditions upon an offender who would be on probation or parole in any event. On the other hand, the restrictions in Purvis subjected the released offender to three additional years of essentially the full restrictions imposed under the regular probation and parole guidelines even though the offender had served out his original sentence. Thorpe's reliance in Purvis is misplaced.

For the foregoing reasons, the judgment of the Bracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. Hess
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General
Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky