

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001456-MR
AND
NO. 2004-CA-001790-MR

ROBERT NEAL RIEMENSCHNEIDER

APPELLANT

v. APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 03-CR-00189
HONORABLE LEWIS PAISLEY, SPECIAL JUDGE
ACTION NO. 04-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Robert Neal Riemenschneider

(Riemenschneider) brings this consolidated appeal from 1) an Order of the Fayette Circuit Court (Indictment No. 03-CR-00189), entered June 23, 2004, overruling his motion, made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, to set aside his

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

felony conviction for failure to comply with sex offender registration;² and 2) a Judgment and Sentence of the Fayette Circuit Court, entered August 12, 2004, (Indictment No. 04-CR-00036), (amended August 17, 2004, to reflect a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09), adjudging him guilty of one count of failure to comply with sex offender registration and one count of second-degree persistent felony offender (PFO II),³ and sentencing him to one-year imprisonment, enhanced by PFO II to five-years imprisonment. The sole issue on appeal is whether, in both cases, the 2000 version of the sexual offender registration statute, which enhanced the penalty from a misdemeanor to a felony, applied to Riemenschneider. We affirm.

Indictment No. 03-CR-00189

On February 24, 2003, a Fayette County Grand Jury indicted Riemenschneider for failure to comply with sex offender registration, a class D felony, charging that he "fail(ed) to notify the appropriate probation and parole officer of his change of address while having been convicted as a sex offender in Whitfield County, Georgia, in 1997." Riemenschneider, with advice of counsel, pleaded guilty and on April 8, 2003, final judgment was entered, sentencing him to imprisonment for two-

² Kentucky Revised Statutes 17.510.

³ Kentucky Revised Statutes 532.080.

years, probated for a period of three-years, subject to conditions including registration as a sex offender. On April 23, 2003, an order was entered modifying the final judgment to reflect a three-year conditionally discharged sentence with an additional condition of mental health treatment. On April 9, 2004, Riemenschneider, through counsel, filed a CR 60.02(e)⁴ motion to set aside his felony conviction or amend it to a misdemeanor, arguing that under Peterson v. Shake, 120 S.W.3d 707 (Ky. 2003), he was subject only to a misdemeanor. The trial court overruled his motion by order entered June 23, 2004, finding that Riemenschneider was not required to be registered until he came into Kentucky in March, 2001, after the effective date of the 2000 amendment to Kentucky Revised Statutes (KRS) 17.510 (enhancing failure to register from a misdemeanor to a felony), and thus Peterson was distinguishable. This appeal (number 2004-CA-001456-MR) follows.

Indictment No. 04-CR-00036

On January 12, 2004, a Fayette County Grand Jury indicted Riemenschneider for failure to comply with sex offender registration, a class D felony, charging that he "fail(ed) to notify the appropriate probation officer of his change of

⁴ On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

address, while having been convicted as a sex offender in Whitfield County, Georgia in 1997;" and also as a PFO II, based on his previous conviction for failure to comply with sex offender registration (Indictment No. 03-CR-00189). On April 9, 2004,⁵ Riemenschneider, through counsel, filed a motion asking either to dismiss the failure to comply charge or to amend it to a misdemeanor, arguing as he did in Indictment No. 03-CR-00189 that under Peterson he was subject only to a misdemeanor. On June 28, 2004, the trial court's order overruling the motion was entered. In so ordering, the court found as did the court in the previous indictment that Riemenschneider was required to register when he entered Kentucky and thus the felony version of KRS 17.510 applied to him. Six weeks later Riemenschneider, with advice of counsel, pleaded guilty as indicted and was sentenced, by judgment entered August 12, 2004, to one-year imprisonment, enhanced to five-years. The judgment was later amended, by order entered August 17, 2004, to reflect that the plea was conditional. This appeal (number 2004-CA-001790-MR) follows.

On September 30, 2004, this Court granted Riemenschneider's motion to consolidate the appeals. On appeal, Riemenschneider argues in each of his indictments that it was error to apply the 2000 version of KRS 17.510. We disagree.

⁵ This is the same date the CR 60.02(e) motion was filed in Indictment No. 03-CR-00189.

We first note with regard to Indictment No. 03-CR-00189, the applicability of CR 60.02 is limited to those issues which could not be raised in other proceedings. McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997), *cert. denied*, 521 U.S. 1130, 117 S.Ct. 2535, 138 L.Ed.2d 1035 (1997). A CR 60.02 motion is not an opportunity to re-litigate issues which could have reasonably been presented by direct appeal or, in Riemenschneider's case, by a motion made pursuant to RCr 11.42. Gross v. Commonwealth, 648 S.W.2d 853, 856-57 (Ky. 1983). Despite this deficiency, we will address the issue on the merits because it is identical to that in Indictment No. 04-CR-00036.

Riemenschneider does not argue that the trial courts' findings of fact are incorrect. The following is undisputed. Riemenschneider 1) was indicted in the July, 1996, term, Whitfield County, Georgia, Superior Court, for child molestation;⁶ 2) pleaded guilty on March 7, 1997 to an amended charge of felony sexual battery and was sentenced to twelve-months imprisonment; and 3) was released from Georgia custody in January, 1998. On March 8, 2001, he registered in Kentucky as a sex offender, listing his current address as the Hope Center in Lexington, Kentucky; listing a previous address in Little Rock,

⁶ Whitfield County, Georgia, Indictment No. 36320-T charged that Riemenschneider, "between the 13th day of July, 1996 and the 16th day of July, 1996, did an immoral and indecent act to [AFM], a child under the age of sixteen (16) years, by touching and rubbing her vagina and vaginal area, with intent to arouse and satisfy the sexual desires of said accused"

Arkansas; and indicating his presence in Kentucky for vocational purposes. The registration form further listed Georgia as the state requiring "lifetime" sex offender registration, describing the Georgia conviction as "Sexual Assault: Mr. Riemenschneider self reports that he 'patted' a neighbor child [age 8] on her buttocks while child was sleeping over at his house."

Riemenschneider bases his argument on the trial courts' application of the law. This court reviews a trial court's application of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). For the following reasons, we conclude that the trial courts herein correctly applied the law.

At issue is the version of KRS 17.510, effective April 11, 2000, which upgraded the offense of failure to comply with sex offender registration from a class A misdemeanor to a class D felony. Riemenschneider contends that this version of the statute does not apply to him, arguing that the record is silent as to when he actually came to Kentucky and was actually required to register, and if he came to Kentucky and was thus required to register before the effective date of the statute, he is only subject to the prior misdemeanor versions of the statute.

In Peterson at 709, the Kentucky Supreme Court held that "the 2000 amendments [including the enhanced penalty] were

only intended to apply to persons who were required to *become* registrants following April 11, 2000." It is undisputed that Riemenschneider registered after that date, as he registered on March 8, 2001. There is no evidence in the record, and no argument was made to either trial court, that Riemenschneider entered the Commonwealth before April 11, 2000. As indicated above, on appeal Riemenschneider does not dispute the factual findings of the trial courts, which are substantially supported by the record. As such, the trial courts' application of the 2000 (felony) version of KRS 17.510 to Riemenschneider is correct.

This conclusion is further supported by Commonwealth v. Newman, 145 S.W.3d 416 (Ky.App. 2004). Newman cited the legislative history of the 2000 amendments specifically providing that the 2000 amendments apply to persons who after April 11, 2000, "*are required under [KRS 17.510] to become registrants.*" *Id.* at 418. Although in Newman the Court found that the 2000 version did not apply because Newman was not required to become registered under *section 2* of KRS 17.510, the applicable sections herein are KRS 17.510 (6) *and* (7), which apply to Riemenschneider and provide in pertinent part:

(6) Any person who has been convicted in a court of another state . . . of a sex crime . . . shall be informed at the time of his or her relocation to Kentucky of the duty to register under this section, and to comply

with the requirements of subsection (4)(b) of this section, by the interstate compact officer of the Department of Corrections or the Department of Juvenile Justice

(7) [I]f the person has been convicted of an offense under the laws of another state . . . that would require registration if committed in this Commonwealth, that person upon changing residence from the other state . . . to the Commonwealth . . . shall comply with the registration requirement of this section

We decline to address Riemenschneider's arguments as to whether the 1994 or 1998 misdemeanor versions of KRS 17.510 apply to him. Not only were these theories not presented to either trial court and not preserved for our review,⁷ (Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky.App. 1998)), our conclusion that the 2000 version applies is dispositive of these arguments as well.

For the foregoing reasons, the judgment and the order of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Kentucky Attorney General

Brian T. Judy
Assistant Attorney General
Frankfort, Kentucky

⁷ In fact, in arguing before the trial courts below that the misdemeanor versions of the prior statutes applied to him, Riemenschneider effectively conceded this issue.