

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001008-MR

LARRY RAY ALVIS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CR-002944

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY,¹ JUDGE; POTTER, SENIOR JUDGE.²

POTTER, SENIOR JUDGE: Larry Ray Alvis (Alvis) brings this appeal from a judgment of the Jefferson Circuit Court, entered April 13, 2005, sentencing him to one-year imprisonment pursuant

¹ Judge William E. McAnulty, Jr. concurred in this opinion prior to his resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge John W. Potter 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.

to a conditional plea of guilty³ on the charge of failure, as a registered sex offender, to give timely notice of his change of address pursuant to Kentucky Revised Statutes (KRS) 17.510. As a condition of the plea, a first-degree persistent felony offender⁴ (PFO I) count was dismissed. Pursuant to the conditional guilty plea, Alvis reserved for appeal the issue of whether the trial court had subject matter jurisdiction over the action, contending that he was subject to a penalty of a misdemeanor, not a felony. We agree and reverse.

The trial court's factual recitation, which is not challenged, is as follows:

On February 19, 1997, the Defendant, Larry Ray Alvis, pled guilty to Rape III. He was sentenced to four years to serve, probated for five years. In February of 1997, Mr. Alvis registered as a sex offender with the Kentucky State Police. On March 15, 2002 Mr. Alvis' probation was revoked and he was sentenced to serve four years. On May 28, 2003 Mr. Alvis signed a new Kentucky Criminal Offender Registry Form prior to being paroled on May 29, 2003. On June 30, 2004 Mr. Alvis turned himself in to his probation officer after numerous parole violations. In October of 2004, Mr. Alvis was indicted for failing to notify his parole officer of a change of address.

Alvis filed a motion to dismiss in the trial court due to lack of subject matter jurisdiction, arguing that he was not subject to the felony version of KRS 17.510 that became

³ Kentucky Rules of Criminal Procedure 8.09.

⁴ Kentucky Revised Statutes 532.080.

effective April 11, 2000, but only subject to a misdemeanor, because he initially registered in February, 1997, under the misdemeanor version of the statute. In denying Alvis's motion, the trial court concluded that despite Alvis's registration in 1997, he became a new registrant in May, 2003, when he registered prior to being paroled from his revoked sentence. Before us, Alvis argues that the trial court erred.

We review questions of fact under the clearly erroneous standard of Kentucky Rules of Civil Procedure (CR) 52.01 and questions of law *de novo*. See generally Brown v. Commonwealth, 40 S.W.3d 873, 875 (Ky.App. 1999). Although the findings of the circuit court are supported by substantial evidence and are not an abuse of discretion, we conclude that the court incorrectly applied the law. Thus, we reverse and remand.

By virtue of his probation on a third-degree rape conviction on February 19, 1997, Alvis was required, under the version of KRS 17.510 in effect at that time, to register as a sex offender, and to timely report any change in address.⁵ Failure to do so was a class A misdemeanor.⁶ In February, 1997, Alvis did register. Effective April 11, 2000, the state legislature changed the penalty for failure to timely report a

⁵ 1994 Kentucky Acts, Ch. 392, § 2(2), (7).

⁶ 1994 Kentucky Acts, Ch. 392, § (8).

change of address to a class D felony.⁷ Section 37 of that legislation provides:

The provisions of Sections 15 to 30 of this Act shall apply to all persons who, after the effective date of this Act, are required under Section 16 of this Act to become registrants, as defined in Section 15 of this Act.

In Peterson v. Shake, 120 S.W.3d 707, 709 (Ky. 2003), the Kentucky Supreme Court concluded, in interpreting the above provision:

It is quite apparent that the 2000 amendments were only intended to apply to persons who were required to *become* registrants following April 11, 2000.

Alvis' probation on the 1997 conviction was revoked in 2002 and he was sentenced to four years. Pursuant to KRS 17.520(4), while incarcerated, Alvis' duty to register or notify of a change of address was suspended:

If a person required to register under this section is reincarcerated for another offense or as the result of having violated the terms of his probation, parole, or conditional discharge, the registration requirements are tolled during the reincarceration.

Then, in 2003, Alvis was paroled. He registered his address again before his release. Despite the Commonwealth's argument, Alvis was already in the system, had already registered, and was only re-entering the system after being suspended from its

⁷ 2000 Kentucky Acts, Ch. 401, § 16(11).

requirements following his incarceration. As Alvis was only subject to a misdemeanor, the trial court erred in not dismissing this action for lack of jurisdiction. Ky. Const. § 112(5) and KRS 23A.010(1).

Because of our resolution of the above issue, we need not address Alvis' contention of palpable error in the trial court's imposition of a term of conditional release after service of the one-year term on the grounds of inapplication of KRS 532.043.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and the case remanded to the trial court to dismiss Indictment No. 04-CR-002944 with prejudice.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel T. Goyette
J. David Niehaus
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Kentucky Attorney General

Tami Allen Stetler
Assistant Attorney General
Frankfort, Kentucky