

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001909-MR

EDWARD F. ALCORN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DENISE CLAYTON, JUDGE  
ACTION NO. 96-CR-001474

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, ACREE AND WINE, JUDGES.

WINE, JUDGE: Edward Alcorn (Alcorn) appeals the Jefferson Circuit Court's denial of two motions: the first, seeking to disqualify the Commonwealth Attorney as counsel for the government, and the second, seeking a declaration that his information not be published on the state sex offender website. However, Alcorn submits that the latter is no longer an issue as he has moved to a place outside the 1,000 feet restricted zone and does not anticipate moving any time in the foreseeable future. Thus, the issue of whether his information should be published on the sex offender website via the retroactive

application of KRS 17.545 no longer exists. That being the case, the issue is moot and we will not consider it in this appeal.

On October 21, 1996, Alcorn entered an *Alford* plea to three counts of third-degree sodomy and one count of third-degree sexual abuse, with the Commonwealth agreeing to dismiss his first-degree persistent felony offender charge. The trial court entered its final judgment of conviction on the same day, sentencing Alcorn to one year imprisonment, to run consecutively with a prior five-year sentence, for a total sentence of six years' imprisonment.

The trial court held a sex offender risk assessment and determination hearing for Alcorn on February 26, 1999, pursuant to KRS 17.570. Upon reviewing the assessment record, the trial judge found Alcorn was a high-risk offender. Alcorn appealed the ruling to this Court, which rendered an opinion on July 19, 2002, affirming in part, reversing in part and remanding. Relying on the Kentucky Supreme Court's recent decision in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002), this Court remanded the case to the trial court to address the sole issue that Alcorn had the right to have live testimony of the certified provider who made findings in his assessment report and to cross-examine that provider. Discretionary review was denied on November 13, 2002.

On July 30, 2004, Alcorn filed a motion to schedule the new assessment hearing. At that time, he also filed motions challenging the Commonwealth Attorney's representation of the state at the hearing and also his information being added to the sex

offender website. Neither of these issues had been brought before the court in this case prior to this date. The Commonwealth filed responses to the motions on August 26, 2004, and the trial court entered its orders denying them on October 18, 2004, and April 12, 2005.

The remanded assessment hearing finally took place on August 1, 2005, at which time the trial court again found Alcorn to be a high-risk sex offender. This appeal followed.

As noted above, the only issue left for us to address is the issue of whether the Commonwealth Attorney was the appropriate counsel to represent the state of Kentucky during the assessment hearing. The Commonwealth argues this issue was not properly raised before the trial court because the only issue on remand was the determination of risk. The Commonwealth asserts that because Alcorn's pre-hearing motion challenged different aspects of the proceeding than those he raised in his first appeal to this Court, he was prohibited from raising the issue on remand. However, despite the Commonwealth's contentions otherwise, this issue could not properly be raised prior to the Supreme Court's decision in *Hyatt, supra*. Thus, the disqualification issue was properly raised on remand.

Nevertheless, we disagree with Alcorn that the trial court erred by allowing the Commonwealth Attorney to appear on behalf of the Commonwealth at his assessment hearing. Alcorn argues that such hearings are civil in nature, and the Commonwealth Attorney lacks the authority to represent the state in such matters.

In support of his argument that assessment hearings are civil in nature, Alcorn points to the Kentucky Supreme Court's statement in *Hyatt* that sex offender registration statutes are not punitive in nature and thus may be constitutionally applied to offenders convicted before the statute's effective date. *Hyatt*, 72 S.W.3d at 571-73. The Court did not expressly state that assessment proceedings are civil in nature, but only noted that some states classify them as such. *Id.* at 572, citing *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997). But even assuming, *arguendo*, that the assessment hearings in Kentucky are civil, the Commonwealth correctly points to KRS 69.010 (2) which provides:

In each judicial circuit containing a city of the first or second class or an urban-county government, the Commonwealth's attorney shall not be required to represent the Commonwealth in any civil proceedings.

Thus, while the Commonwealth Attorney is not required to represent the Commonwealth in civil matters, the statute does not prohibit such representation.

Furthermore, the former KRS 17.570,<sup>1</sup> which the parties agree is applicable to this case, sets out the procedure for sex offender risk assessment proceedings. While this statute does not expressly state that the Commonwealth Attorney shall appear on behalf of the state at assessment hearings, the Commonwealth clearly has "a serious and vital interest in protecting its citizens from harm" in its duties classifying and registering

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<sup>1</sup> KRS 17.570 was enacted in 1998, effective January 15, 1999, and repealed effective April 1, 2000.

sex offenders, “which outweighs any inconvenience that may be suffered because of the notification and registration provisions.” *Hyatt*, 72 S.W.3d at 674. This interest is consistent with the statutory duties of the Commonwealth Attorney.

Lastly, KRS 69.210(4), which expressly sets out the responsibilities of the county attorney, does not require the county attorney to appear on behalf of the state at a sex offender risk assessment hearing. As such, the trial court did not err in finding that the Commonwealth Attorney was qualified to represent the state at Alcorn’s assessment hearing.

Therefore, the risk assessment determination by the Jefferson Circuit Court is affirmed.

ACREE, JUDGE, CONCURS.

ABRAMSON, JUDGE, CONCURS IN RESULT ONLY.

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