

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2006-CA-000367-MR

DANNY RAY MATTHEWS

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 05-CR-000973

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Danny Ray Matthews appeals from an order of the Jefferson Circuit Court imposing a probated sentence for Matthews' failure to update his information on the sex offender registry. For the following reasons, we affirm.

The Commonwealth does not dispute the facts as set out in Matthews' brief.

In 1988, Matthews pled guilty to a charge of third-degree rape in Jefferson Circuit Court, under indictment 87-CR-000717. He received a sentence of five years to serve. This sentence apparently ran concurrent and consecutive with several other felony

convictions. It appears that Matthews was released from prison on this sentence in October, 1990. Shortly thereafter in December, 1991, a parole violation warrant was issued. Thereafter, in 1995, he was sentenced to an additional four years on unrelated non-sex offense charges. Those sentences ran consecutive to the previously imposed sentences. He remained incarcerated on these charges until October 26, 2003, when he was released. Prior to his release, Matthews completed a Kentucky Sex Offender Registry form which notified Matthews that he was required to register and failure to do so was a class D felony. On the form, Matthews listed an address in Kansas City, Missouri, as his residence. In addition, Matthews signed a Kentucky Criminal Offender Register Responsibility form which also notified Matthews that he was required to register any change of address. This form read that the duty to register would continue for ten years "from the maximum expiration date" of his sentence and any failure to register would be considered a class D felony.

Matthews registered on October 26, 2003, the day he was released from prison. However, the Kentucky State Police sent notification of non-compliance to the prosecuting authorities, because on February 3, 2005, an address verification form was sent to Matthews but was returned unclaimed. In addition, Matthews was issued a Kentucky operators license in June of 2004. That license listed a Kentucky address. Following his arrest on March 25, 2005, Matthews registered again, giving his address as "city at large."

On March 23, 2005, a Jefferson County grand jury returned an indictment charging Matthews with failing to update his registration with the sex offender registry between June 3, 2003, and January 5, 2005. Subsequently, the indictment was amended

to reflect the date of October 26, 2003, to January 5, 2005. In addition, Matthews was charged with being a persistent felony offender in the first degree.

On November 16, 2005, Matthews pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) and RCr 8.09, reserving the issue of, “whether the felony penalty for violating the registry law applies to him based on the date of his sex offense conviction and any other legal defenses to [the] charges.” In exchange for a plea of guilty, the Commonwealth agreed to a term of three years, to be probated and to dismiss the persistent felony offender charge. At final sentencing, the trial court imposed the agreed upon three-year sentence but probated the sentence for a period of five years.

In his pleadings before the trial court, Matthews pointed out that KRS 17.510 was not enacted until 1998, ten years after he was convicted of a sex offense. Matthews argued KRS 17.510 does not confer by plain language or inference that it is to be enforced retroactively, and thus, the Commonwealth does not have jurisdiction to charge him with violation of KRS 17.510. Finally, Matthews argued that the application of KRS 17.510 against him violates the prohibition against *ex post facto* laws contained in the Fifth Amendment to the United States Constitution and §§ 2, 3, and 11 of the Kentucky Constitution. He also argued that the indictment should be dismissed as he was incapable of complying with the registration law because he had no address.

The trial court rejected Matthews’ constitutional arguments, but concluded that his impossibility defense was a question of fact to be decided by a jury. The latter question was never decided as Matthews pled guilty prior to trial. On appeal, Matthews argues that the sex offender registration requirements of KRS 17.510 cannot be

constitutionally applied to him. As a result, he contends that he cannot be convicted of failing to register. Thus, the only issue properly preserved for our review is whether a sex offender convicted in 1988 can be subject to the 2000 amendments to the law which made failure to register a class D felony. This Court reviews questions of fact under a clearly erroneous standard pursuant to CR 52.01, and questions regarding a trial court's legal conclusions *de novo*. *Louisville & Nashville Railroad Co. v. Commonwealth ex rel Kentucky Railroad Commission*, 314 S.W.2d 940 (Ky. 1958).

While the chronology and facts are simple, the history of Kentucky's Sex Offender Registration Statute ("statute") is complicated. A brief review of the statute is necessary for proper determination of the issue. On July 15, 1994, Kentucky enacted its first version of "Megan's Law," the nation's first sex offender registration law enacted in New Jersey, codified as KRS 17.500-540. The law required certain sex offenders to register for a period of ten years following discharge from confinement, maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever was later. Failure to register was penalized as a class A misdemeanor, and the provisions of the law applied to those persons who pled guilty or were convicted of a sex crime after July 15, 1994.

In 1998, the Legislature amended the law to include a classification system based on the potential for recidivism and provided for risk assessments for offenders. Additionally, a new provision was added as KRS 17.510(12) criminalizing knowingly providing false, misleading, or incomplete registration information.<sup>1</sup> The amendments became effective for persons sentenced or incarcerated after July 15, 1998, except for the

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<sup>1</sup> The 1998 version of KRS 17.510(12) punished any violations as a class A misdemeanor.

provisions set forth in KRS 17.520, 17.552, 17.570-578, and 17.991, which did not become effective until January 15, 1999.

The statute was amended again in 2000 to: (1) eliminate the need for a hearing in the risk assessment procedure; (2) extend the registration requirements to include a website which posts relevant information regarding offenders; and (3) change the penalty for failure to register or timely report a change of address to a class D felony.<sup>2</sup> These amendments were to “apply to all persons who, after the effective date of this statute, are required . . . to become registrants, as defined in Section 15 of this Act.” 2000 Kentucky Acts, Ch. 401, § 37, eff. 4/11/00 (uncodified).

In 2002, the Kentucky Supreme Court addressed the constitutionality of the 1998 version of the statute in two cases: *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002) and *Martinez v. Commonwealth*, 72 S.W.3d 581 (Ky. 2002). In *Hyatt*, the Supreme Court noted that, “Registration and Notification Statutes across the nation have consistently been held to be remedial measures, not punitive, and therefore do not amount to punishment or increased punishment.” *Hyatt*, 72 S.W.3d at 571. Further, the Court concluded that sex offender registration laws were constitutional, stating, “[t]he statutes do not amount to an *ex post facto* violation. The registration laws do not punish sex offenders. They have a regulatory purpose only.” *Id.* at 573. The Court went on to say that because the statute in question did “not impose any additional punishment on Hyatt” it was not a violation of the *ex post facto* clause of either the United States Constitution or the Kentucky Constitution. *Id.* at 573.

The Legislature again amended the statute in 2006. *See* 2006 Kentucky Acts, Ch. 182, §§ 1-16, eff. 7/12/06. Matthews contends that this recent revision of KRS

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<sup>2</sup> The penalty for violations of KRS 17.510(12) was also increased to a class D felony.

17.510 and KRS 17.520 shows that the General Assembly intended registration to be punishment for conviction of a sex crime, therefore registration cannot be imposed on anyone convicted before 1994, the effective date of the first registration laws. Based on these recent amendments, Matthews contends that the reasoning of *Hyatt* and *Martinez* has been undermined and that the statute is unconstitutional as an *ex post facto* law. But since Matthews was charged with the offense of failing to register and/or notify change of address between the time periods of October 26, 2003, to January 5, 2005, he was clearly convicted under the provisions of the 2000 statute. Consequently, the 2006 amendments to the statute are not relevant to this appeal.

Thus, we address the question of whether the statute as amended in 2000 imposes a class D felony on Matthews even though his sexual offense and conviction took place in 1988, prior to any of the statutes requiring registration.

The duty to register under the 2000 version of KRS 17.510 applies to the date of the defendant's release from prison, not from the date he committed the sexual offense. When Matthews was released from prison in 1990, there was no requirement that he register as a sex offender. However, he was reincarcerated in 1995 for additional convictions. On October 26, 2003, Matthews was released from prison again, five years after KRS 17.510 was enacted requiring not only registration but a penalty of one to five years in the penitentiary for failing to do so. KRS 17.520(4) states that when a Kentucky registrant is reincarcerated for another offense, "the registration requirements are tolled during the reincarceration," a prisoner's information is no longer on the registry, and when released, he or she must provide new registry information, not merely a change of address for an otherwise already existing registry listing.

Under the 1994 and 1998 versions of the statute, the duty to register was imposed on persons who were convicted or incarcerated for a sex crime after the effective date of those statutes. In contrast, the duty to register under the 2000 statute applies to “all persons who, after the effective date of this statute, are required . . . to become registrants . . . .”

In this case, however, Matthews was incarcerated for a sex offense in 1988 and released on parole in 1990. In 1991 and 1994, Matthews committed two non-sex related offenses while on parole. He was convicted for these offenses in 1995 and received a four-year sentence. But at that time, he was not subject to the registration requirements of the statute. Thus, the tolling provisions of KRS 17.520(4) did not apply to him as he was not required to register at that time.

Upon his release from prison in 2003, the Corrections Cabinet apparently concluded that Matthews was subject to the registration requirements. The plain language of the 2000 statute requires registration for persons who, after the effective date of the statute, are released from incarceration for a sex crime, KRS 17.510(2); or who, after the effective date of the statute, are released from incarceration on another crime committed while the person was on probation, parole or conditional discharge for a sex crime. KRS 17.520(4). In this case, Matthews apparently violated the conditions of his parole in 1991 and 1994 and was reincarcerated in 1995 for those new offenses and the parole violation. While the record is not entirely clear on this point, Matthews has not preserved any objection to the sufficiency of the evidence that he was subject to the registration requirement upon his release in 2003. Rather, in his brief, Matthews concedes he had a duty to register, subject to the holding in *Peterson v. Shake*, 120

S.W.3d 707 (Ky. 2003). Therefore, we cannot find that the trial court clearly erred in finding that Matthews could be subject to the requirements of the 2000 statute.

Accordingly, the judgment of conviction by the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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