

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000942-MR

CARLOS COUCH

APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
INDICTMENT NO. 05-CR-00295

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Carlos Couch appeals his conviction for failing to register as a sex offender. For the reasons set forth herein, we affirm the judgment of the Perry Circuit Court.

Couch was convicted of a felony level sexual offense in the state of Ohio concerning improper contact with an eight year old female child. As part of this conviction, Couch was required to register as a sex offender at a minimum of once per year and was also required to notify the Ohio office if he intended to move his residence

or if he intended to be outside of the state of Ohio for more than five days. The purpose of this requirement being that the sending state (Ohio in this case) would notify the potential receiving state (Kentucky) that a sex offender was coming into its jurisdiction.

In early September 2005, Officer Joey King of the Kentucky State Police received a complaint that a suspected sex offender was residing in the Yerkees area of Perry County. Upon investigating, King discovered that Couch was not registered in Kentucky as a sex offender; therefore he obtained an arrest warrant for Couch. The arrest was effected on September 16, at which time Couch stated that he was “trying to get papers to register in Kentucky.”

At trial, Couch called his mother as a witness to explain that he was “in and out” of the Yerkees areas and was not living there on a permanent basis. However, the trial court, pursuant to KRE 614, called Kristin Diltner, an intake officer at the local jail, who testified that Couch advised her during the intake process that his address was in Yerkees and that he had been in the area for about six months. These responses were given after Diltner advised Couch that he did not have to answer.

After considering the evidence, the trial judge made a finding beyond a reasonable doubt that Couch had failed to register and that he was in violation of KRS 17.520. Further hearings were held concerning Couch's motion for judgment of acquittal. At this time, Couch first raised the objection that the information of Diltner should not have been used under the language contained in RCr 4.08.

After a thorough hearing, the trial court held that the court found Couch guilty of the violation even without the Diltner information, reemphasized its ability to call its own witnesses, and denied the motion. Couch was sentenced to five years' incarceration with four suspended. This appeal followed.

Couch first argues that the trial court erred in admitting Diltner's testimony. We agree but hold that the error was harmless.

RCr 4.08 clearly states that:

Information supplied by a defendant to a representative of the pretrial services agency during the defendant's initial interview or subsequent contacts, or information obtained by the pretrial services agency as a result of the interview or subsequent contacts, shall be deemed confidential and shall not be subject to subpoena or to disclosure without the written consent of the defendant . . .

Therefore, it was improper to permit Diltner to testify as to Couch's pretrial statements without his written authorization.

Although the trial court erred in admitting the testimony, any error in this circumstance was harmless, and this Court will not reverse a judgment based on harmless error. RCr 9.24. Rather, “[o]ur harmless error standard requires ‘that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.’ ” *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky.2005) (quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky.1969), overruled on other grounds by *Blake v. Commonwealth*, 646 S.W.2d 718 (Ky.1983)).

The Commonwealth introduced ample other evidence from which the trial court could find guilt, namely Couch's own admission to Officer King that he was trying to get papers in Kentucky thereby evidencing his knowledge of the requirement and intent to stay in Kentucky. Additionally, King saw Couch on September 11, 2005, and again when he was arrested on September 16, 2005, constituting a five day period that would put Couch in violation of the registration requirements. We therefore find no “substantial possibility that the result would have been any different”; thus any error was nonprejudicial and harmless.

We need not address the remainder of Couch's arguments as they are rendered moot by this opinion or are unlikely to recur upon remand. Accordingly, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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