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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
MAY 14, 2008
(FILE NO. 2007-SC-0842-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001314-MR

TERRY TOBAR — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 05-CR-01640

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Terry Lee Tobar appeals from a judgment of conviction and final sentence entered by the Fayette Circuit Court on May 31, 2006. Prior to the entry of this judgment of conviction, Tobar entered a conditional guilty plea to one count of Failure to Comply with Sex Offender Registration, Kentucky Revised Statute (KRS) 17.510(10). On appeal, Tobar, who contends he is homeless, insists that KRS 17.510(10) is

unconstitutional because it is void for vagueness. Finding that the statute is not vague as it applies to Tobar, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this appeal are simple and straight forward. Tobar was previously convicted of Gross Sexual Imposition, a felony sexual offense, in Ohio. Subsequently, Tobar moved to Lexington, Kentucky, and registered as a sex offender pursuant to Kentucky's Sexual Offender Registration Act, KRS 17.500, *et seq*. Tobar was living at 517 Patterson Street in Lexington and had registered this address as his residence, but, due to a protective order, he was required to leave. Tobar contacted his probation and parole officer and told the officer that his new residence was the Hope Center.[1] However, Tobar was forced to leave the Hope Center because of its policy of not housing registered sex offenders. After leaving the Hope Center, Tobar had nowhere to regularly reside. However, he did not contact his probation and parole officer to inform him that he had left the Hope Center.

Tobar was arrested and later indicted for failing to comply with KRS 17.510(10). Tobar filed a Motion to Dismiss the indictment conceding that he was a registered sex offender but claimed that, after leaving the Hope Center, he was homeless and did not have an address to report. He argued that, because he was homeless, and lacked a permanent address, he was not capable of complying with KRS 17.510(10). Tobar insisted that KRS 17.510(10) was unconstitutional "as it applied to [him] because the statute [was] vague on the course of action someone should take who becomes homeless but is required to report an 'address.'"

[1] The Hope Center is a non-profit organization and facility that, among its many services, provides shelter to homeless individuals.

The trial court held a brief hearing regarding Tobar's motion. The trial court held that the word "residence" as used in the statute was not vague but that the problem hinged on the word "address" and what it meant. The trial court held that a registered sex offender's "address" had to be identifiable, and it noted that Tobar did not have an address because he had been staying at different places after leaving the Hope Center.

After the trial court decided that the statute was not unconstitutionally vague, Tobar entered a conditional guilty plea. During the plea, Tobar testified under oath that after leaving the Hope Center, he stayed with friends or slept in bus stations or walked around all night. According to his testimony, he did not stay in one place for very long, and he did not have an "address." He also conceded that he knew he needed to contact his probation and parole officer regarding his situation but that he did not for fear of being charged with failure to comply with KRS 17.510(10).

After Tobar's plea, the trial court sentenced him to one year's incarceration but suspended the sentence and placed Tobar on probation for five years. Challenging the constitutionality of KRS 17.510(10), Tobar now seeks relief from this Court.

II. STANDARD OF REVIEW

It is well established that in this Commonwealth statutes enacted by the General Assembly are presumed to be constitutional. *Wilfong v. Commonwealth,* 175 S.W.3d 84, 91 (Ky. App. 2004). Thus, we will not declare a statute unconstitutional absent a clear, total and unequivocal constitutional violation. The party who questions the constitutionality of a statute bears the burden of establishing this. Furthermore, the

constitutionality of a statute is a question of law; thus, we review these issues *de novo*. *Id*.

III. ANALYSIS

In Tobar's appellant brief, he argues that KRS 17.510(10) is unconstitutionally vague. According to Tobar, whenever a registered sex offender becomes homeless and is without a physical address, that sex offender has automatically violated KRS 17.510(10) because said offender cannot comply with the statute's registration requirement.

Citing *Gurnee v. Lexington-Fayette Urban County Government,* 6 S.W.3d 852, 856 (Ky. App. 1999), Tobar insists that a statute will be deemed unconstitutionally vague if those individuals who are affected by it cannot reasonably understand what the statute requires. Tobar asserts that, in evaluating the constitutionality of a criminal statute, a court must focus on a statute's language to determine if it gives a sufficiently definite warning regarding the proscribed conduct as measured by common understanding and practice. *Hardin v. Commonwealth,* 573 S.W.2d 657 (Ky. 1978). According to Tobar, for a statute to comport with the doctrine of void for vagueness, it must provide fair notice to the individuals who are subject to it regarding what conduct is prohibited and must provide standards that discourage arbitrary and discriminatory enforcement. *State Bd. for Elementary and Secondary Educ. v. Howard,* 834 S.W.2d 657, 662 (Ky. 1992). Tobar insists that KRS 17.510(10) is unconstitutionally vague because it gave him no guidance as to how to comply with it once he became homeless. Thus, he concludes that the statute does not provide adequate notice to an individual of ordinary intelligence

that his or her contemplated conduct is illegal. *Martin v. Commonwealth,* 96 S.W.3d 38, 59 (Ky. 2003).

To comport with the void for vagueness doctrine, a statute must 1) provide fair notice to those targeted by the statute, "by containing sufficient definiteness so that ordinary people can understand what conduct is prohibited[,]" and 2) it must have been drafted in such a way to discourage arbitrary and discriminatory enforcement. *Wilfong,* 175 S.W.3d at 95.

How specific a statute must be to survive a constitutional challenge under the vagueness doctrine varies, depending on the type of statute involved. *Id*. The General Assembly is not required to define every word used in the statute and an undefined word will be given a common, everyday meaning. *Id*. In addition, the legislature is not required to address every factual scenario that may arise pursuant to the statute. *Id*. Nor is the General Assembly required to draft a statute with complete precision. *Id*. Just because a statute may have been written in a more precise manner does not mean it is unconstitutionally vague. *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

This issue is one of first impression in the Commonwealth. So, given a lack of case law, we have turned to other states to see how their courts have addressed this issue. We have found very few cases in which an appellate court has addressed whether a sex offender registration statute is unconstitutionally vague. We will give a brief overview of the results of our research.

We turn first to the state of California. In *People v. North,* 5 Cal. Rptr. 3d 337 (Cal. Ct. App. 2003), the California Court of Appeals, California's intermediate

appellate court, addressed whether California's sex offender registration statute, CAL. PENAL CODE § 290 (West 2000), was unconstitutionally vague. According to *North*, in 2000, California's sex offender registration statute required homeless registered sex offenders to give notice when they had a change in "location."[2] In *North*, the appellant was a homeless registered sex offender who failed to notify the proper legal authorities of

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[2] The pertinent part of California's statute reads

> (a)(1)(A) Every person described in paragraph (2) [i.e., those required to register], for the rest of his or her life while residing in, or, if he or she has no residence, while located within California . . . shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located . . . within five working days of coming into, or changing his or her residence or location within, any city . . . in which he or she temporarily resides, or, if he or she has no residence, is located.
>
> (B) If the person who is registering has more than one residence address or location at which he or she regularly resides or is located, he or she shall register in accordance with subparagraph (A) in each of the jurisdictions in which he or she regularly resides or is located. If all of the addresses or locations are within the same jurisdiction, the person shall provide the registering authority with all of the addresses or locations where he or she regularly resides or is located.
>
> (C) If the person who is registering has no residence address, he or she shall update his or her registration no less than once every 90 days in addition to the requirement in subparagraph (A), on a form as may be required by the Department of Justice, with the entity or entities described in subparagraph (A) in whose jurisdiction he or she is located at the time he or she is updating the registration.
>
> . . . .
>
> (f)(1) If any person who is required to register pursuant to this section changes his or her residence address or location, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, the person shall inform, in writing within five working days, the law enforcement agency or agencies with which he or she last registered of the new address or location. The law enforcement agency or agencies shall, within three days after receipt of this

his new address when he became homeless; thus, he was charged and convicted for violating the sex offender registration statute. *Id*. at 340.

On appeal, the appellant argued that CAL. PENAL CODE § 290 (West 2000) was unconstitutionally vague. *Id*. The California Court of Appeals held that subsections (a)(1)(A) and (f)(1) were unconstitutionally vague because when the California legislature used the word "location" to require homeless sex offenders to give notice of where they may be regularly found, the legislature failed to provide enough specificity for either registered sex offenders or legal authorities to understand what the statute required. *Id*. at 347. However, when the legislature used the term "located" as the basis to determine the jurisdiction in which registration was required, it provided both registered sex offenders and legal authorities sufficient guidance as to how to proceed pursuant to the statute. *Id*. Thus, the California Court of Appeals concluded that part of its sex offender registration statute was unconstitutionally vague and part of it was constitutionally valid.

We note that California's sex offender statute is very different from our own; thus, we find that the *North* opinion provides us little guidance in resolving Tobar's constitutional challenge.

Next, we turn to the state of Washington and the case of *State v. Jenkins,* 995 P.2d 1268 (Wash. Ct. App. 2000), an opinion from the Washington Court of Appeals,

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> information, forward a copy of the change of address or location information to the Department of Justice. The Department of Justice shall forward appropriate registration data to the law enforcement agency or agencies having local jurisdiction of the new place of residence or location.

North, 5 Cal. Rptr. 3d at 343-344 (emphases and footnotes omitted).

that state's intermediate appellate court. In 1998, the pertinent part of Washington's sex offender statute, WASH. REV. CODE § 9A.44.130, read

> (5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within seventy-two hours of moving. . . .

Id. at 1270. In 1998, the appellant, a registered sex offender, upon release from incarceration, provided the appropriate legal authorities with an address; however, when authorities attempted to locate him at that address, it was discovered that he did not live there. *Id* at 1269. He was homeless and had slept at various friends' houses. *Id*. The appellant was charged with failure to register as a sex offender. *Id*. at 1269. After a bench trial, he was convicted. *Id*. at 1270. On appeal, the appellant complained that Washington's sex offender registration statute

> was unconstitutionally vague because it did not clearly indicate whether a sex offender may provide a mailing or contact address instead of a residential address. He also [argued] that the provision requiring the offender to give authorities written notice of a change of address lacked clarity as to whether the State must prove that the offender has established a new residence elsewhere or merely prove that the offender is not sleeping at the registered address.

Id.

The Washington Court of Appeals noted that the statute did not define either "residence" or "address"; thus, it gave those words their ordinary meaning. *Id*. at 1271. According to the *Jenkins* Court, in the sex offender registration statute, the Washington legislature did not distinguish between a residential and a mailing address. *Id*. As a result, individuals of ordinary intelligence were left to guess at the meaning of

the term "address." *Id*. Consequently, "[o]ne could reasonably deduce that the statute merely requires an offender to register an address where he or she can be contacted and that a mailing address would be sufficient for that purpose." *Id*.

In addition, regarding the legislature's use of the word "residence," the *Jenkins* Court determined

> one reasonably could conclude that a person without a fixed, regular place to sleep does not have a residence under the terms of the statute. Persons of common intelligence must necessarily guess as to the types of living situations that the term "residence" encompasses. Because of these defects, the term "failure to register" lacks sufficient definiteness as to the proscribed conduct.

Id. Thus, the *Jenkins* Court found the statute unconstitutionally vague. *Id*.

While Washington's sex offender registration statute is similar to ours, we are not persuaded by the *Jenkins* Court's reasoning, believing that it focused too narrowly on the terms "residence" and "address." Therefore, we decline to follow its conclusion.

Finally, we look to Maryland and *Jeandell v. State,* 884 A.2d 739 (Md. App. 2004), an opinion from Maryland's intermediate appellate court known as the Court of Special Appeals. In 2003, Maryland's sex offender registration statute, MD. CODE ANN., C.P. § 11-705(d), required that "[a] registrant who changes residences shall send written notice of the change to the Department [of Public Safety and Corrections] within 7 days after the change occurs." *Id*. at 742. In *Jeandell*, the appellant, a registered sex offender, became homeless and, after becoming homeless, failed to contact his parole agent. *Id*. The appellant was subsequently charged with violating Maryland's sex offender registration statute. *Id*.

After a bench trial, the appellant was convicted and sentenced to eighty-five days of time served. On appeal before Maryland's Court of Special Appeals, the appellant argued that MD. CODE ANN., C.P. § 11-705(d) was unconstitutionally vague as applied to registered sex offenders who were homeless and argued that the evidence was not sufficient to sustain his conviction. *Id*. The appellant claimed that his homelessness rendered him incapable of complying with MD. CODE ANN., C.P. § 11-705(d) because, as a homeless person, he had neither a residence nor a mailing address he could register. *Id*. Moreover, he argued that Maryland's sex offender registration statute failed to define "residence" and failed to give homeless sex offenders guidance as to how they may comply with the statute's registration requirements. *Id*.

The Maryland Court of Special Appeals held that MD. CODE ANN., C.P. § 11-705(d) provided individuals of ordinary intelligence a reasonable opportunity to know what conduct was prohibited, and it held that the statute was not void for vagueness. According to the *Jeandell* Court, the statute provided

> adequate guidance on how to comply with its requirements. [It] simply require[d] a registrant to provide written notice to the Department within seven days after there has been a change in the place where the registrant was living.
>
> Even a homeless person lives *someplace*. In other words, even though a homeless person may not have a structural residence that the person permanently occupies, that person can still comply with § 11-705(d) by sending the Department written notice that the registrant no longer lives at the last noted residence of record, and by keeping the Department informed of the registrant's *whereabouts* each time that those whereabouts have changed.

Jeandell, 884 A.2d at 744-745. In addition, the Court of Special Appeals found that the evidence was sufficient to support appellant's conviction. *Id*. at 747.

After the Maryland Court of Special Appeals rendered its opinion, the Maryland Court of Appeals, that state's highest court, granted the appellant's petition for writ of *certiorari*. *Jeandell v. State,* 910 A.2d 1141, 1144 (Md. 2006). The Maryland high court reversed the Maryland Special Court of Appeals' decision, thus, reversing appellant's conviction. *Id*. According to the Maryland Court of Appeals,

> [T]he Court of Special Appeals erred in finding that the evidence was sufficient to support a conviction beyond a reasonable doubt because it applied an incorrect interpretation of "residence" as that term is used in § 11-705(d). The term "residence" connotes more than simply a "living location." If "residence" were simply a "living location," as the Court of Special Appeals found, a homeless registrant might have to notify the Department of a change in residences at least every seven days, if not more frequently, with the prospect that the new residence listed in each notice may be out of date and therefore inaccurate. Such a result is inconsistent with the framework of the statute.

Id. (citation and footnote omitted). Addressing only the sufficiency of the evidence, the Maryland Court of Appeals sidestepped and refused to address the issue of whether Maryland's sex offender registration statute was unconstitutionally vague. *Id*. at 1143.

Maryland's sex offender registration statute, like Washington's, is similar to ours. And, while we agree with Maryland's Court of Special Appeals' conclusion that its statute is constitutional, we find its analysis offers us little guidance in resolving Tobar's constitutional challenge. Thus, finding none of the previously mentioned cases to be useful, we will blaze our own constitutional trail.

Tobar starts with the premise that a registered sex offender who is homeless is in automatic violation of KRS 17.510(10) because the statute requires a registered sex offender to have a "solid physical address." And he reasons that a registered sex offender

who is homeless cannot comply with the statute because he has no "solid physical address" to report. So Tobar concludes that the statute is unconstitutionally vague because it does not give persons of ordinary intelligence adequate notice that their contemplated conduct, homelessness, is illegal.

Tobar assumes that the conduct prohibited by the statute is homelessness among registered sex offenders. However, this assumption is erroneous. KRS 17.510(10) states in pertinent part

> [i]f the residence address of any registrant *changes*, but the registrant remains in the same county, the person shall register, on or before the date of the *change* of address, with the appropriate local probation and parole office in the county in which he or she resides.

(emphasis added). The operative word is "change." The statute does not define "change," and the word is used both as a verb and as a noun. As a verb, "change" has been defined as "to make different in some particular[.]" *Merriam-Webster's Collegiate Dictionary* 190 (10th ed. 2001). As a noun, "change" has been defined as "the act, process, or result of changing[.]" *Id*. So, giving "change" its ordinary meaning, it becomes obvious that a *change* pursuant to KRS 17.510(10) occurs when one no longer lives at one's prior residence, whether one moves from one's prior residence to a new residence or one vacates one's prior residence and becomes homeless. Kentucky Revised Statute 17.510(10) requires a registered sex offender to register if his residence is going to *change*. In other words, to state the statute's requirement in the negative, the conduct prohibited by KRS 17.510(10) is not homelessness; rather, it is the failure to register, that is, give notice, of one's change in residence.

The statute clearly states on its face that a registered sex offender must give notice, on or before the day, he or she has a *change* in residence. Thus, if a registered sex offender will have a change in residence and if he is contemplating not registering that change with the appropriate probation and parole officer, then the statute gives more than sufficient notice that such contemplated conduct is illegal. The record supports this conclusion. During the hearing and subsequent guilty plea, Tobar testified that he knew he was about to become homeless, and he admitted that he knew he should have contacted his probation and parole officer regarding the situation. Thus, there is no dispute that he knew he should have contacted his probation and parole officer. However, he conceded that he chose not to out of fear that he would be charged with violating KRS 17.510(10). This, in fact, happened, not because he was homeless but because he failed to give notice. Thus, his argument that the statute is void for vagueness is belied by his own inherent understanding of its requirement.

In addition, Tobar insists that KRS 17.510(10) is unconstitutionally vague because it gives absolutely no guidance to a homeless registered sex offender as to how he or she may comply with the statute's registration requirement. According to Tobar, as the law now stands, once a registered sex offender has become homeless, his "only option is to turn [himself in to] the local jail." This argument only has merit if the prohibited conduct is homelessness among registered sex offenders; however, as discussed *supra*, it is not. The conduct prohibited by the statute is failing to register a change in residence. To avoid this prohibited conduct and, thus, comply with the statute, KRS 17.510(10) simply and succinctly requires registered sex offenders to notify their local probation and parole officer regarding any change in residence. Thus, at the time when a registered sex

offender knows he will have a change in his residence, he must inform the proper authorities of this.

In the 1990s, many states enacted sex offender registration statutes in response to the public outrage over children that had been abducted and sexually molested by convicted sex offenders.[3] In 1994, the General Assembly enacted KRS 17.500 *et seq*., the Sexual Offender Registration Act. *Hyatt v. Commonwealth,* 72 S.W.3d 566, 569 (Ky. 2002). Over the years, the General Assembly has amended this statute several times to clarify it and strengthen its penalties.

Eventually, the constitutionality of the statute was challenged; however, the Kentucky Supreme Court determined that the statute is constitutional. *See id; see also Martinez v. Commonwealth,* 72 S.W.3d 581 (Ky. 2002). Given the statute's goals of protecting the public, specifically children, and facilitating law enforcement, the high Court held that the statute was reasonable and proper and "completely consistent with the exercise of the police power of the Commonwealth to protect the safety and general welfare of the public." *Hyatt,* 72 S.W.3d at 572. The high Court went on to conclude that

> [t]he Commonwealth of Kentucky has a serious and vital interest in protecting its citizens from harm which outweighs any inconvenience that may be suffered because of the notification and registration provisions. The statute clearly serves a public policy and is a wise use of government resources all of which is to be decided by the legislature.

Id. at 574.

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[3] New Jersey was one of the first states to pass a sex offender registration law, which became known as "Megan's Law," and was named after a young girl that had been abducted, molested and murdered by a child molester who had moved into the child's neighborhood unbeknown to the girl's family. *Hyatt,* 72 S.W.3d at 569.

If we were to adopt Tobar's reasoning and declare KRS 17.510(10) unconstitutional, then homeless registered sex offenders would be exempt from the registration requirement found in KRS 17.500, *et seq*. This would encourage homelessness among registered sex offenders and ultimately defeat the statute's purpose: the Commonwealth's overwhelming interest in protecting the public from sex offenders. The General Assembly has decided that, as a matter of public policy, registered sex offenders must notify the appropriate legal authority when they experience a change in residence. Such public policy decisions fall within the legislature's bailiwick, and we will not disturb such decisions lightly.

Based on the reasons set forth *supra*, we conclude that KRS 17.510(10) is not unconstitutionally vague. Thus, we affirm Tobar's judgment of conviction.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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