

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2008-SC-896

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WILLIAM BUCK

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HON. FRED A. STINE, JUDGE
CIR. NO. 07-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

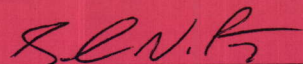
BRIEF FOR APPELLANT

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CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this 28th day of May, 2009: Hon. Fred A. Stine, Judge, Campbell Circuit Court, Div. II, 330 York Street, 2nd Floor, Newport, Kentucky 41071; Hon. Sheryl Egli Heeter, Assistant Commonwealth's Attorney, Campbell County Courthouse, Room 12, Newport, Kentucky 41071; Hon. Aaron Currin, Assistant Public Advocate, 333 Scott Street, Suite 400, Covington, Kentucky 41011; and by messenger mail to the Hon. James Coleman Shackelford, Asst. Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal has been returned to the Clerk of the Kentucky Supreme Court.



SAMUEL N. POTTER

Introduction

Following a deprivation of his *Ex Post Facto* Constitutional rights that allowed prosecution of William Anthony Buck for failing to register as sex offender because the new law retrospectively applied to him and disadvantaged him, this Court granted discretionary review of the Court of Appeals' opinion that affirmed the Campbell Circuit Court judgment convicting him of one count of failing to register as a sex offender and sentencing him to three years in prison.

Statement Regarding Oral Argument

Mr. Buck requests oral argument due to the gravity of Constitutional issues raised by Mr. Buck and their likely reoccurrence in other cases.

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Statement of the Case

William Anthony Buck believed he did not have to register as sex offender because his conviction for first degree sexual abuse occurred in 1985, and the first sex offender registration (SOR) law was not passed until 1994. VR No. 1: 5/7/07; 11:36:45; TR, 29-31 & 45.

He challenged his indictment in Campbell Circuit Court for failing to register as a sex offender based on the *Ex Post Facto* Clause of the Kentucky and United States Constitutions. TR, 25-31; 41-44. After considering written briefs submitted by Mr. Buck and the prosecution and hearing oral argument, the Campbell Circuit Court denied Mr. Buck's motion. TR, 48-50. The court ruled that Mr. Buck had a duty to register under the new SOR laws enacted in 1998 and 2000 because he was incarcerated at intermittent times between 1997 and 2005. TR, 48-50.

Faced with this ruling, Mr. Buck decided to enter a conditional guilty plea. During the plea colloquy, he acknowledged he registered in Kenton County, but was living in Campbell County. VR No. 1: 5/7/07; 11:34:30. No one instructed him to register in Campbell County. VR No. 1: 5/7/07; 11:34:55. The plea colloquy also revealed that he understood he entered a conditional guilty plea that allowed him to raise the *Ex Post Facto* violation with the Court of Appeals. VR No. 1: 5/7/07; 11:31:35.

Mr. Buck was indicted for failing to register as a sex offender, second or subsequent offense, in Campbell County on March 8, 2007. TR, 1. He filed a motion to enter a conditional guilty plea on May 10, 2007. TR, 37. The prosecution amended the charge to failing to register as a sex offender, first offense, and recommended a three year sentence. TR, 36. The Campbell Circuit Court accepted the recommendation and entered a final judgment that reflected it on July 6, 2007. TR, 53-55. Mr. Buck now appeals the denial of his motion to this Court.

Arguments

I. The General Assembly, the Campbell Circuit Court, and the Court of Appeals Violated the *Ex Post Facto* Clauses of the Constitutions the United States and Kentucky by Retroactively Applying the Sex Offender Registration Law to Mr. Buck that Disadvantaged Him by Subjecting Him to Punishment.

Preservation

This issue is preserved. Counsel for Mr. Buck handwrote the word "conditional" on his motion to enter a guilty plea. TR, 47. The Campbell Circuit Court agreed to the conditional plea, stating the issue to be appealed was his ruling on Mr. Buck's motion to bar prosecution based on the *Ex Post Facto* doctrine. The Commonwealth voiced no objection. VR No. 1: 5/7/07; 11:26:10. The court entered a written order reflecting his ruling. TR, 48-50.

Argument

Both the United States Constitution and the Kentucky Constitution prohibit *Ex Post Facto* laws. U.S. Const. Art. I, § 9, cl. 3; Ky. Const., §§ 10 and 19. The United States Supreme Court defined an *Ex Post Facto* law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798):

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less of different testimony than the law required at the time of the commission of the offense, in order to convict the offender.

(recently reaffirmed by *Carmell v. Texas*, 529 U.S. 513, 521-525 (2000)).

The standard for determining whether a law violates the *ex post facto* prohibition is two-part. First, the law "must be retrospective, that is, it must apply to events occurring before its enactment." Second, the law "must disadvantage the offender affected by it." *Purvis v. Commonwealth*, 14 S.W.3d 21, 23 (Ky. 2000), quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *Lynce v. Mathis*, 519 U.S. 433 (1997).

The U.S. Supreme Court recently dealt with an analogous *Ex Post Facto* challenge. The Court held that a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution. *Stogner v. California*, 539 U.S. 607, 632-633 (2003). *Stogner* was indicted for sex-related child abuse in 1998 that allegedly occurred between 1955 and

1973. The statute of limitations effective then was three years, which had expired. However, in 1993, California enacted a new statute of limitations authorizing prosecution of sex-related child abuse where the prior limitations period had expired if the state initiates prosecution within one year of the alleged victim reporting the abuse to the police. *Id.* at 609-610. The Court found this violated the *Ex Post Facto* Clause. *Id.* At 632-633.

Similarities exist between *Stogner* and Mr. Buck's case. Applying the SOR law to Mr. Buck meets the retrospective prong of the *Ex Post Facto* test. Mr. Buck was convicted of first degree sexual abuse in 1985. TR, 45. The General Assembly passed the initial SOR law in 1994, and it explicitly applied only prospectively. It applied only to "persons convicted after the effective date of this Act." *Commonwealth v. Newman*, 145 S.W. 3d 416, 418 (Ky. App. 2004)(quoting 1994 Kentucky Acts, Ch. 392, § 6). The SOR law took effect on July 15, 1994. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 570 (Ky. 2002). Because Mr. Buck was convicted in 1985, the 1994 did not apply to him.

The General Assembly passed a new SOR law in 1998. The new law applied to "persons individually sentenced or incarcerated after July 15, 1998." *Id.* at 570. According to the prosecution's motion, Mr. Buck received parole on February 10, 1997. Parole was revoked on February

17, 2000, and he returned to prison. Parole was granted on March 1, 2001. He was returned to prison April 1, 2002. Mr. Buck was released again on August 1, 2005. As he was in custody after July 15, 1998, the prosecution insisted that the new 1998 SOR law applied to him when he was released. Thus, the first step of the *Ex Post Facto* test of *Purvis*, *Weaver*, and *Lynce* is met because Mr. Buck was forced to register as a sex offender for his 1985 conviction even though it predates the SOR law by nearly a decade.

The retroactive application of the new SOR laws passed in 1998 and 2000 disadvantaged Mr. Buck because he committed a sex offense in 1985 and had no fair warning of the consequences of registration at that time. *See, Bouie v. City of Columbia*, 378 U.S. 347 (1964). This disadvantage satisfies the second prong of the *Purvis*, *Weaver*, and *Lynce* *Ex Post Facto* test. Mr. Buck should not have been prosecuted for failing to register as a sex offender.

To great extent, the prosecution relied on *Hyatt* for the proposition that the "sex offender registration requirements do not violate the ex post facto clause." TR, 46-47. The Campbell Circuit Court adopted this idea in his order denying Mr. Buck's motion, "[t]he Supreme Court in *Hyatt* found that SORAN [Sex Offender Registration and Notification Act] did not violate the *Ex Post Facto* Clause of either Constitution as applied to

Hyatt and similarly situated individuals." TR 48. The Court of Appeals concurred with this line of thinking. Opinion, 5-6. However, a close examination of *Hyatt* proves such reliance was misplaced and illustrates the disadvantage Mr. Buck suffered from retrospective application of the SOR law.

Hyatt actually consists of three cases the Supreme Court of Kentucky consolidated for appeal to interpret the new SOR laws of 1998 and 2000. One of the Appellants, Hyatt, raised an *Ex Post Facto* challenge to the SOR law, and the Supreme Court ruled the SOR law was Constitutional. *Hyatt*, 72 S.W.3d at 571-573. However, the factual circumstances of Mr. Buck's case differ substantially from Hyatt's case. Hyatt raised his *Ex Post Facto* challenge after he was classified as a high-risk sex offender. *Id.* at 570. The General Assembly eliminated the need for a hearing on risk-assessment classification in 2000. *Id.* Unlike Mr. Buck, Hyatt had not been arrested, indicted, or convicted of failing to register as a sex offender. This distinction between risk-assessment and failing to register highlights the disadvantages that violate the *Ex Post Facto* Clause in Mr. Buck's case. While the Court held that Hyatt's classification was not "punitive," the same cannot be said for Mr. Buck's indictment, conviction, and imprisonment.

Likewise, *Smith v. Doe*, 538 U.S. 84 (2003), must be distinguished from Mr. Buck's case. *Smith* did not deal with a conviction and sentence for failing to register. Rather, the Does filed as plaintiffs a 42 U.S.C. 1983 action seeking to declare the original version of Megan's Law passed in 1994 was void with respect to them because it violated the *Ex Post Facto* Clause. *Smith*, 538 U.S. at 91. Thus, the Court's decision was limited to the act of registration and the information provided during the registration process. The Does had not been indicted, convicted, and imprisoned as Mr. Buck has.

The disadvantages Mr. Buck suffered being prosecuted for failing to register as a sex offender are more pronounced than *Hyatt* reflects. The Court believed the "purpose and design" of the SOR law emphasized "its remedial goal and purposes and not the resulting consequential impact that may inevitably but incidentally flow from it." *Id.* at 572. A lot can change in a decade. While the 1998 law might have been remedial, the new 2006 law is penal in nature. The title of the bill that became the new SOR law was "AN ACT relating to sex offenses and the punishment thereof." TR, 28(*citing*, 2006 Ky. Acts, Ch. 182). The title of the bill, the punishment of sex offenders, indicates the act's contents. *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002); TR, 28.

The idea of punishing sex offenders permeates the new SOR law. For example, it increased the length of registration from 10 years to 20 years. KRS 17.520(3). There comes a point in time where registering every address at which one sleeps ceases to be a safety precaution for society and becomes punishment for the individual. Additionally, the new SOR increased punishment for failing to register as a sex offender. Second and subsequent offenders are now subject to Class C felony punishment of 5 to 10 years in prison. KRS 17.510(11). But for the retroactive application of the SOR law, Mr. Buck would not be disadvantaged by this punishment. Further, *Hyatt* added that "registration did not place limitations on the activities of the offender." *Hyatt*, 72 S.W.3d 572. The new 2006 SOR law makes it a crime to live within 1,000 feet of a school, playground, or daycare and subjects violators to felony punishment if it occurs more than once. KRS 17.545(3). Patently, the Court's characterization of the SOR law in *Hyatt* as providing only the "slightest inconvenience" is no longer tenable.

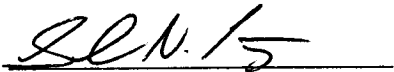
For these reasons, the SOR law is analogous to the conditional discharge statute which the Supreme Court of Kentucky Court found violated the *Ex Post Facto* Clause in *Purvis*, 14 S.W.3d 21. The Court held "[a]bsolute liberty upon expiration of a criminal sentence is a right that if circumscribed would be a certain disadvantage." *Id.* at 24. Prosecution of Mr. Buck for failing to register as a sex offender violates the *Ex Post Facto*

Clause as set forth in *Purvis*, *Weaver*, and *Lynce*. U.S. Const. Art. I, § 9, cl. 3; Ky. Const., §§ 10 and 19. Relief is warranted.

Conclusion

Therefore, William Anthony Buck respectfully requests this Court to remedy the deprivation of Mr. Buck's rights under the *Ex Post Facto* Clauses of the Constitutions of the United States and Kentucky by reversing his conviction and sentence. Alternatively, he requests this Court to reverse and remand his case to the Campbell Circuit Court with instructions to proceed consistent with the legal reasoning set forth above, and/or any and all other relief this Court determines is appropriate.

Respectfully submitted,



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