Commonwealth of Kentucky
Supreme Court
No. 2008-SC-896

WILLIAM BUCK — **APPELLANT**

v.

Appeal from Campbell Circuit Court
Hon. Fred A. Stine, V,, Judge
Indictment No. 2007-CR-00102

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served July 27th, 2009 via United States mail to Hon. Fred A. Stine, V, Judge, Campbell Circuit Court, 330 York Street, Newport, KY 41071; via electronic mail to Hon. Jack Porter, Commonwealth Attorney; and via Kentucky messenger mail service to Hon. Samuel N. Potter, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

James C. Shackelford
Assistant Attorney General

INTRODUCTION

William Buck, hereinafter "Appellant," pled guilty for failing to register as a sex offender but reserved his right to raise an *ex post facto* argument. The Court of Appeals denied the appeal and this Court accepted discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellant was convicted for sexual abuse in the first degree in 1985. He received a probated sentence of three years but probation was revoked following his conviction in 1987 on two other unrelated felonies. He was sentenced to serve 23 years on all three of the convictions. He was paroled on February 10, 1997 but violated his conditions and was returned to prison February 17, 2000. He was paroled again in on March 1, 2001 and again violated his conditions and returned to prison on April 1, 2002. He was released for a third time on August 1, 2005 (Transcript of Record, hereinafter "TR," 45; 49-50).

A criminal complaint was filed alleging that on October 27, 2006, Appellant violated the sex offender registration statute because Appellant was not living at his registered address (TR 4). A Campbell County grand jury then indicted Appellant for failing to register as a sexual offender, second or subsequent offense, because he "either provided false, misleading, or incomplete information to the local appropriate probation and parole officer or he changed his residence without notifying the appropriate local probation and parole officer ..." (TR 1).

Appellant sought to bar prosecution by arguing the sexual offender registration statute and amendments thereto were in violation of the *ex post facto* clauses of the federal and state constitutions (TR 25-31; 41-44). The motion was overruled (TR 48-50). Appellant then entered a conditional guilty plea to the amended charge of failure to register as a sex offender, first offense (TR 37-39). The plea was conditioned on Appellant's right to appeal the *ex post facto* issue (Video Record, hereinafter "VR," 05/07/2007, 11:26:10).

The trial court engaged Appellant in a detailed guilty plea colloquy (*Id.* at 11:27:25). Appellant specifically admitted that he lived in Campbell County on October 27, 2006 but was registered as a sex offender in Kenton County and had not notified authorities of his residence (*Id.* at 11:34:28). He stated nobody ever told him he had to register in Campbell County (*Id.*). The trial court questioned whether this was sufficient for acceptance of a guilty plea. The prosecutor mentioned the number of forms Appellant would have signed and also stated Appellant had actually given a false registration address – a vacant building in Newport (*Id.* at 11:35:30). Appellant then indicated his disagreement was simply over whether the law required him to register (*Id.* at 11:36:40). The trial court then accepted the plea (*Id.* at 11:36:40). It later sentenced Appellant to three (3) years on the amended charge as recommended by the Commonwealth (TR 53-55).

ARGUMENT

I.

THE SEXUAL OFFENDER REGISTRATION STATUTE DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE CONSTITUTION.

A conditional guilty plea under RCr 8.09 must specifically reserve an issue before the trial court or it is waived on appeal. Lovett v. Commonwealth, 103 S.W.3d 72, 84 (Ky. 2003). As outlined in the Counterstatement of the Case, *supra*, Appellant reserved only the question of whether he had to register at all under the statute. Thus, Appellant's assertion on appeal that nobody told him he had to register is irrelevant and is factually precluded by his guilty plea.

A sex offender "shall, on or before the date of his or her release by the court, the parole board, the cabinet, or any detention facility, register with the appropriate local probation and parole office in the county in which he or she intends to reside." KRS 17.510(2). Although Appellant's conviction dated back to 1985, he was in and out of prison until released the last time in 2005. He was required to register by the version of the statute in effect in 2005.

In Peterson v. Shake, 120 S.W.3d 707, 708 (Ky. 2003), this Court determined, "It is clear that Appellant is subject to the 1998 version of the Kentucky Sex Offender Registration Act, as he was released from confinement following its enactment." *Id.* at 708. Here, Appellant was likewise not released from confinement until after the enactment of the Sex Offender Registration Act.

The Court in Peterson held the Commonwealth could prosecute under the 1998 version of the statute but not the 2000 version because the plain language of the 2000 amendments applied only to those registering after the effective date of the amendments. *Id.* at 709. As will be discussed below, the legislature used different language in the 2006 amendments but the retrospective application of the 2006 amendments are irrelevant since Appellant's conduct was unlawful under both the 2000 and 2006 versions of the statute. A copy of the relevant portion of 2006 Kentucky Laws Ch. 182 is included at Appendix 1.[1]

This Court previously considered and rejected essentially the same *ex post facto* argument the Appellant makes in this case. Hyatt v. Commonwealth, 72 S.W.3d 566 (Ky. 2002). The Court describes the *ex post facto* argument made in Hyatt:

> Hyatt argues that the Court of Appeals erred in holding that the 1998 and 2000 versions of KRS 17.500 et seq. on their faces, and as applied to him, did not violate the *ex post facto* clauses of the state and federal constitutions. He contends that the retroactive application of the 1998 and 2000 statutes violates his state and federal protection against ex post facto legislation and that the Kentucky Registration and Notification Statutes were not intended to apply to persons who were convicted before July 15, 1994.

Id. at 571.

This Court then explained that in order for a statute to be in violation of the federal and state *ex post facto* clauses, that statute "must be retrospective, that is, it must

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[1] Only the relevant portion of the act is included for sake of brevity. The entire act is 103 pages long in the online version from West Publishing. The online version of the actual bill (HB3) is 109 pages long. *See*, http://www.lrc.ky.gov/record/06rs/HB3/bill.doc.

apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 571, *quoting* Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). This Court found the statute to be retrospective but then concluded the statute did not violate the second prong of the test because there was no "real and direct effect on the actual time the prisoner remains behind bars ... ." Hyatt v. Commonwealth, *supra* at 571. Instead, "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." *Id.* (collecting cases).

The Court in Hyatt emphasized, that the registration statutes "do not amount to a separate punishment based on past crimes" and any punishment "is totally prospective and is not punishment for past criminal behavior." *Id.* The Court concluded that the statutes did not violate the *ex post facto* clauses of either the federal or state constitutions. *Id.* at 573; *accord*, Martinez v. Commonwealth, 72 S.W.3d 581, 584 -585 (Ky. 2002).

Following this Court's decisions in Hyatt and Martinez, the United States Supreme Court reviewed an Alaska statute which retroactively required sex offenders to register with the state. Smith v. Doe, 538 U.S. 84, 90, 123 S.Ct. 1140, 1145 (2003). The court concluded the statute was a civil regulatory scheme, nonpuntive, and not an *ex post facto* law. *Id.* at 105-106, 123 S.Ct. at 1154. Just as in the Kentucky statutes, the Alaska statutes provided a criminal penalty for failing to keep authorities informed of a registrants' address. The Supreme Court rejected the argument this was punitive in nature because, "[A]ny prosecution is a proceeding separate from the individual's original offense." *Id.* at 102, 123 S.Ct. at 1152.

The Sixth Circuit Court of Appeals construed a similar Tennessee statute that retroactively reclassified certain sex offenders and required them to register for a longer period of time and be monitored through a satellite monitoring system. Failing to timely and accurately fill out registration information is a felony. Doe v. Bredesen, 507 F.3d 998, 1001-1002 (6th Cir. 2007). The court rejected the registrant's *ex post facto* argument and specifically noted, "The Acts' registration, reporting, and surveillance components are not of a type that we have traditionally considered as a punishment." *Id.* at 1005.

Appellant attempts to distinguish Hyatt by arguing that amendments made in 2006 make the statutory scheme more onerous on registrants. Appellant first argues that the punishment for second and subsequent offenses has been increased from a Class D to a Class C felony. However, the criminalized conduct is the failure to report and not the original conviction of a sexual offense. Thus, there is no retroactive application of the penalty for failing to comply with the registration requirements.

Moreover, Appellant pled guilty to a first offense which was a Class D felony both before and after the 2006 amendment. *See*, 2006 Ky. Laws, Chp. 182, § 6. The enhanced penalty provision was not applied to Appellant.

Appellant also argues that 2006 amendment contained in KRS 17.545 makes it a unlawful for a registrant to live within 1,000 feet of a school, playground, or daycare and this restriction is too inconvenient for the registrants (Brief for Appellant, p. 8). However, these restrictions were largely in place before the 2006 amendment and were codified at KRS 17.495. The 2006 amendments simply moved them to a different statutory section and provided more detail. *See*, 2006 Ky. Laws Ch. 182, § 3 (Appendix 1). The restrictions

on living too close to certain places with easy access to children remain unchanged in substance. This entire argument is a red herring because Appellant was never charged with living too close to a school or daycare. He was indicted for and pled guilty to providing false, misleading, or incomplete information to authorities or changing his residence without notifying those authorities. This was a Class D felony both before and after the 2006 amendments. KRS 17.510(12).

The 2006 act amending the registration laws was titled "AN ACT relating to sex offenses and the punishment thereof." Appellant argues that the title indicates the act was for purposes of punishment (Brief, p. 7) and cites Martinez v. Commonwealth for this proposition. However, this Court in Martinez did not use the title of the bill to interpret the statute. It merely held that Section 51 of the Kentucky Constitution was satisfied by a general description of the contents of the bill.

Only one provision of the 2006 amendments relates to punishment – the increased penalty of a second offense. That does not mean, however, that the remainder of 100 plus page act becomes punitive simply because the title of the act mentions punishment. The legislature was aware of this Court's holdings in Hyatt and Martinez and indicated no disagreement with this Court's opinion. The legislature took no action to substantially change the statutory scheme from a civil and remedial scheme to one intended to punish. There is no reason for this Court to deviate from it's holdings in Hyatt and Martinez.

CONCLUSION

For all the foregoing reasons, the appeal should be denied.

Respectfully Submitted

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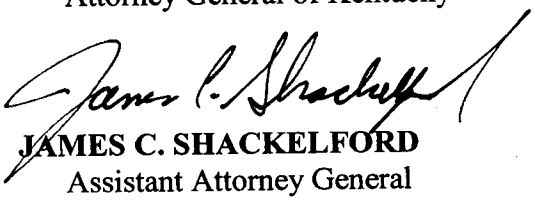

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