

**Commonwealth of Kentucky
Supreme Court**

No. 2010-SC-00065

FILED

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SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Pamela Goodwine, Judge
Indictment No. 07-CR-00034

ANTHONY NASH

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

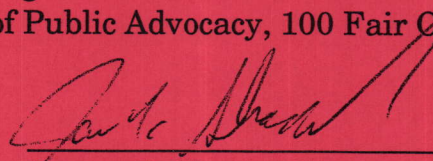
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CERTIFICATE OF SERVICE

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 December 8, 2010 as follows: by mailing to the trial judge, Hon. Pamela Goodwine, Judge, Robert F. Stephens Courthouse, Room 382, 120 North Limestone, Lexington, KY 40517; by sending electronic mail to Hon. Ray Larson, Commonwealth Attorney; and by delivery through Kentucky Messenger Mail to Hon. Samuel N. Potter, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Ln., Suite 302, Frankfort, KY 40602.



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INTRODUCTION

This Court granted the Commonwealth's motion for discretionary review of an opinion from one panel of the Court of Appeals which held increased punishment for a registration violation violated the *ex post facto* clauses of the federal and state constitutions.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that oral argument is unnecessary in this case in light of this Court's opinion in *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010). Therefore, the Commonwealth does not request oral argument but will accede if the Court determines oral argument is helpful.

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STATEMENT OF THE CASE

A Fayette County grand jury charged that on October 25, 2006 Anthony Nash (hereinafter, "Appellee") violated the sex offense registration act by failing to notify appropriate authorities of his change of address. The grand jury charged that Appellee had been convicted of a qualifying sex offense in 1993 and had twice previously been convicted of misdemeanor offenses of failing to notify authorities of a change in address, thereby making the latest offense a "subsequent" offense and a Class C felony. TR 1. The grand jury also indicted Appellee for being a persistent felony offender (PFO) in the second degree due to a previous felony conviction for receiving stolen property. *Id.* It is not entirely clear from the record when the Appellee registered as a sex offender, though Appellee thought he "apparently" first registered October 1, 1997. TR 30-31.

Appellee moved the trial court to amend the indictment to a misdemeanor. Appellee argued he first "apparently" registered as a sex offender in 1997 and that the 2006 amendment making the offense a felony, rather than a misdemeanor, was inapplicable to him. He argued the 2006 amendment was a violation of the *ex post facto* clauses of the state and federal constitutions TR 30-31. The Commonwealth objected and argued that there was no *ex post facto*. TR 37-38. The trial court orally overruled the motion. VR 04/13/2007, 02:26:01.

Appellee initially entered a conditional guilty plea to the Class C

felony which the trial court accepted. TR 57-58; VR 05/22/2007, 02:20:45. At the sentencing hearing, the Court indicated it would probate the sentence. VR 06/22/2007, 04:02:28. The Commonwealth noted that the Class C felony appeared to make Appellee ineligible for probation and sentencing was postponed. *Id.* at 04:03:50; 04:06:00. The trial court, without objection, later allowed Appellee to withdraw his plea because of the misunderstanding about Appellee's eligibility for probation with a conviction on the Class C felony. VR, 08/03/2007, 02:50:15.

Appellee then conditionally pled guilty to the amended charge of failure to comply with the sex offender registration statute, first offense, a Class D felony. He also pled guilty to being a persistent felony offender in the second degree. The trial court sentenced Appellee to an enhanced term of ten years imprisonment but probated the sentence. TR 85-87 (Appendix 1); VR 08/31/2007, 04:10:50.

The Court of Appeals reversed the conviction, relying exclusively on an *ex post facto* analysis. *Nash v. Commonwealth*, No. 2007-CA-02118-MR (Ky.App., Jan. 22, 2010), Appendix 2 hereto. The Commonwealth requested discretionary review on the single issue addressed by the Court of Appeals:

Does the 2006 amendment of the sex offender violate the *ex post facto* clauses of the federal and state constitution because it increased the punishment for failure to comply from a misdemeanor to a felony?

Motion for Discretionary Review, p. 2. This Court then granted the motion.

ARGUMENT

I.

There Was No *ex Post Facto* Violation Simply Because the Degree of Punishment Increased from a Misdemeanor to a Felony.

The Appellee was convicted of a qualifying sex offense in 1993 and subsequently registered as a sex offender. In 2000, the legislature made a violation of the registration act a felony. *See Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003).¹ It amended the statute again in 2006 making the first offense a Class D felony and subsequent offenses a Class C felony:

Any person required to register under this section who knowingly violates any of the provisions of this section or prior law is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense.

2006 Ky. Acts, Chapter 182, Section 6 (11), codified at KRS 17.510(11).

This Court recently upheld the constitutionality of the 2006 amendment which increased punishment for violation of the Sex Offender Registration Act (SORA). *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010),

¹ *Peterson v. Shake* held that the express language of the 2000 amendment applied only to those who became registrants after April 11, 2000. *Peterson v. Shake*, 120 S.W.3d at 709. The 2006 amendment differed from the 2000 version because it specifically applied to those registering under “prior law.” The statutory interpretation issue is not before the Court as the Court of Appeals did not address it and Appellee did not file a cross-motion for discretionary review.

Appendix 4. It addressed the issue now before the court and expressly held that the increase in punishment in the 2006 version did not violate the *ex post facto* clauses of the state and federal constitutions. *Id.* at 667-668. The defendant in *Buck* had been convicted of a sex offense in 1985. Just as in this case, the defendant in *Buck* was required to register as a sex offender prior to the 2006 amendment. *Id.* at 663.

The opinion in *Buck* expounded on the reasoning in *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002). The Court in *Hyatt* held there was no *ex post facto* violation in the 1998 and 2000 amendments to SORA even though the 2000 amendment changed non-compliance from a misdemeanor to a felony. *Hyatt, supra* at 571; *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, nonpunitive, 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 registrant's 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 Court of Appeals panel in this case made the fundamental mistake of equating the increased punishment of a future event, a registrant's failure to notify of a change of address, with increased burdens imposed by the requirement of registration alone. This is evident when the panel erroneously concluded that increased punishment for future non-compliance, from a misdemeanor to a felony, made the 2006 version of the statute retrospective and punitive. *Nash*, slip op. at 3. The panel reasoned:

Because a felony holds a greater penalty than a misdemeanor, the change in law amounts to an increase in Appellant's initial punishment for his sex offense. Consequently, it is a disadvantage to Appellant to be subject to the newer versions of KRS 17.510 where there is a risk of being charged with an offense that holds a greater penalty.

Id. at 3-4.

The United States Supreme Court in *Smith* was so unconcerned about the punishment for non-compliance with the statute that they failed to mention what punishment the Alaska statute imposed, not even whether it was a misdemeanor or a felony. It was unnecessary to do so because the punishment for non-compliance was prospective in nature, not retrospective. Instead, the Supreme Court analyzed the burden that registration itself imposed upon an offender because registration was applied retrospectively. *Smith v. Doe*, 538 U.S. at 98-106.

This Court applied the analytic framework in *Smith* in the *Buck* case when it held an increase in punishment did not violate the *ex post facto* clauses of the United States or Kentucky constitutions. *Buck v. Commonwealth*, 308 S.W.3d at 665-666.

The applicability of the *Buck* opinion to this one is evident from the Court's disposition of a companion case to this one. On the same day the Court of Appeals issued its opinion in this case, the same panel also issued an opinion employing identical language in holding the 2006 amendments to SORA to violate the *ex post facto* clauses.² This Court granted discretionary review and summarily vacated the Court of Appeals opinion and remanded for reconsideration in light of the *Buck* opinion. *Commonwealth v. Thomas Cardona, Jr.*, Opinion and Order, No. 2010-SC-000104 (Ky. June 9, 2010). On reconsideration, the Court of Appeals held the 2006 amendment to SORA making violation a felony was **not** a violation of the *ex post facto* clauses. *Cardona v. Commonwealth*, 2010 WL 4025682 (Ky.App., Oct. 10, 2010), Appendix 3.

In *Hyatt* and *Buck*, this Court has repeatedly held there was no *ex post facto* violation when the penalty for a violation of SORA was increased from a misdemeanor to a felony for one already registered as a sex offender. *Buck*

² Senior Judge Guidugli was part of the panel in the Court of Appeals' first opinion in *Cardona*. On remand, Judge Taylor comprised the third member of the panel in place of Senior Judge Guidugli whose senior status had presumably expired.

specifically upheld the 2006 amendment which is the one now in front of the Court.

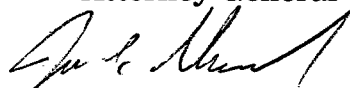
CONCLUSION

For all of the foregoing reasons, this Court should vacate the opinion of the Court of Appeals and affirm the convictions of Appellee.

Respectfully Submitted

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