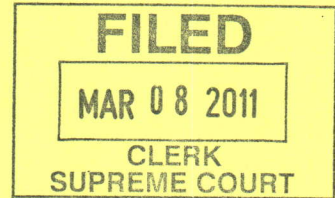


Commonwealth of Kentucky
Supreme Court
No. 2010-SC-65-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. Pamela Goodwine, Judge
Indictment No. 07-CR-0034

ANTHONY NASH

APPELLEE

Reply Brief for Commonwealth

Submitted by,

JACK CONWAY

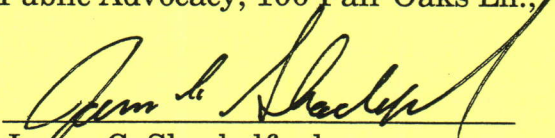
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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been served March 8, 2011 as follows: by mailing to the trial judge, Hon. Pamela Goodwine, Judge, Robert F. Stephens Courthouse, Room 382, 120 North Limestone, Lexington, KY 40507; 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 40601.


James C. Shackelford
Assistant Attorney General

INTRODUCTION

The Appellee has raised a new argument in his brief and this Reply Brief will chiefly address that argument.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not request oral argument.

POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT REGARDING ORAL ARGUMENT i

POINTS AND AUTHORITIES ii

ARGUMENT 1

I. The Appellee’s Guilty Plea Was Not Conditioned on the Issue of Whether Appellee Was Required to Register and it Cannot Now Be Raised. 1

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ARGUMENT

I.

The Appellee's Guilty Plea Was Not Conditioned on the Issue of Whether Appellee Was Required to Register and it Cannot Now Be Raised.

The Commonwealth summarized the most relevant facts in its first brief. It is necessary, however, to underscore certain facts given the Appellee's argument.

The indictment charged Appellee with the felony offense of violating the Sex Offender Registration Act (SORA) in October 2006 after having been convicted as a sex offender in 1993 and after being twice convicted of failure to comply in 2005 and 2006. TR 1. The grand jury charged the offense as a subsequent offense, making it a Class C felony. It also charged Appellee with being a PFO in the Second Degree. *Id.*

The Appellee moved the trial court to amend the violation of the registration act from a felony to a misdemeanor. The motion stated, in full:

Comes the defendant, by counsel, and moves the court to amend count 1 of the indictment, failure to comply with sex offender registration, from a class D felony to a class A misdemeanor. Amendment of the count 1 to a misdemeanor would then require a dismissal of count 2, the PFO charge, and remand of the case to the district court. As grounds for the motion, the defendant states as follows:

The defendant was previously convicted of a sex offense requiring him to register as a sex offender

in 1993. He apparently first was required to register on October 1, 1997. Under the "Megan's Law" statutes in effect at that time, failure to register or comply with the sex offender registration requirements was only a misdemeanor. In *Peterson v. Shake, Ky.*, 120 S.W.3d 707 (2003), the Supreme Court held sex offenders are subject to the version of the registry act in effect at the time the offender registers.

The Commonwealth now attempts to charge the defendant with a felony offense under KRS 17.510(11) under amendments to the statute made effective on July 12, 2006. However, no discovery document has been provided to the defendant indicating he was given notice of a change in the law that would be applied to him. Even if he was given notice, the attempt to apply the new law to this defendant would be unconstitutional as it would amount to an illegal *ex post fact* law under Article I, Section 10, Clause 1 of the United States Constitution and Section 19 of the Kentucky Constitution.

TR 30-31.

Nowhere in the motion did the Appellee argue or suggest that he should never have registered as a sex offender. The Appellee likewise never argued this to the trial court in the hearing on the motion. VR 04/13/2007, 02:21:45-02:29:30. Further, Appellee did not make this argument to the Court of Appeals and the ruling of the Court of Appeals did not address this argument.

Appellee eventually entered a conditional guilty plea 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 Appellant to an enhanced term of ten years imprisonment but probated the sentence. The plea and sentence were expressly conditioned on the trial court's adverse ruling on the motion to amend Count I (SORA violation) and dismiss Count II (PFO). TR 79-81, TR 85-87, VR 08/31/2007, 04:10:50. The Petition to Enter Plea is in the Appendix hereto. The conviction itself is in the Appendix to the Commonwealth's opening brief.

Because Appellee never questioned the requirement that he register as a sex offender, the Commonwealth never developed any facts showing he was required to register. The primary advantage to the Commonwealth in plea bargaining is that it is relieved of the time and burden of proving its case.

The rule on conditional pleas states:

With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal.

RCr 8.09.

This Court has elaborated on when it will consider issues on appeal from a conditional guilty plea:

Synthesizing our precedent in this area leads to the conclusion that we will consider issues on appeal from a conditional guilty plea only if those issues: (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009).

The Appellee can make no pretense that he meets either the second or third conditions for review of his argument. The issue was not in the guilty plea documents nor brought to the attention of the trial court.

Appellee does argue that since the indictment charges he was convicted in 1993, he did not have to register as a sex offender because the original Megan's Law was not enacted until 1994 and it explicitly applied only to those convicted after its enactment. *See Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010) *citing* 1994 Ky.Acts. Ch. 392 § 6. In effect, the Appellant argues there was insufficient evidence to support the charge, an argument he was precluded from making to the trial court and is precluded from making to this Court.

An indictment need only contain "a plain, concise and definite

statement of the essential facts constituting the specific offense with which the defendant is charged.” RCr 6.10. “An indictment under this section is sufficient if it informs the accused of the specific offense with which he is charged and does not mislead him.” *Wylie v. Commonwealth*, 556 S.W.2d 1, 2 (Ky. 1977); *see also Schrimsher v. Commonwealth*, 190 S.W.3d 318, 325 (Ky. 2006).

Here, the indictment needed only to allege that the Appellee was registered as a sex offender, that he violated the act by failing to notify authorities of a change of address on a specific date and in a specific county. *See* KRS 17.510(11). It did so. TR 1. Though it mentioned a 1993 conviction, it did not have to do so. The indictment did not specify Appellant’s date of registration, nor did it have to do so.

In determining whether an indictment charges an offense, the Court simply determines if the indictment is “defective or facially invalid.” *Commonwealth v. Sears*, 206 S.W.3d 309, 311 (Ky. 2006). A court does not determine whether there is sufficient proof to support the charges because there is no summary judgment in criminal cases. *Id. See also, Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008); *Barth v. Commonwealth*, 80 S.W.3d 390, 403 -404 (Ky. 2001).

Here, the indictment was facially valid. Moreover, the fact that Appellee was in fact registered as a sex offender is *prima facie* proof he was

required to register. The fact he was twice previously convicted of misdemeanor offenses of failing to comply implies that he was properly registered.

The Appellee may have committed crimes after 1994 requiring registration or he may have been released from incarceration on a date which required him to register. *See, e.g., Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002) (1998 and 2000 amendments applied to a defendant convicted of sex offenses in 1991 and 1993). The record is silent about these facts because the defendant waived his right to demand the Commonwealth prove the facts sufficient to convict him. His motion to amend the charge to a misdemeanor assumed he was required to register as a sex offender.

The undersigned counsel takes his prosecutorial duties and ethics seriously. To that end, he spoke briefly with the Assistant Commonwealth Attorney who handled this case. She related that Appellee appears to have committed felonies in 1992, 1993, 1998, 1999, and 2005. Thus, it is quite possible the Appellee faced back-up time on his 1993 sex offense conviction and faced a release date which required him to register as a sex offender. While this is somewhat speculative, it underscores the Commonwealth's argument that the indictment itself is facially valid and the Appellee could have challenged the necessity for registration if he had gone to trial. This was not an argument raised by Appellee's motion to amend and the Court should reject it.

Similarly, the Appellee's request for alternate relief should likewise be rejected. The alternate requested relief — that the Court remand to the trial court to determine whether Appellee was actually required to register — cannot be determined without a jury trial. That is what the Appellee waived in exchange for having the charge reduced from a Class C to a Class D felony and being placed on probation.

CONCLUSION

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

Respectfully Submitted

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