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COMMONWEALTH OF KENTUCKY

APPELLANT

v.

FAYETTE CIRCUIT COURT
HON. PAMELA GOODWINE, JUDGE

ANTHONY NASH

APPELLEE

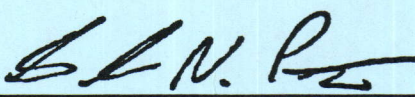
BRIEF FOR APPELLEE

SAMUEL N. POTTER
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane Suite 302
Frankfort, Kentucky 40601
(502) 564-8006

Counsel for Appellee

CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Brief for Appellee were served upon the following named individuals by United States Mail, postage prepaid, on this 16th day of February 2011: Hon. Pamela Goodwine, Judge, Fayette Circuit Court, Div. 4, Room 382, 120 North Limestone Street, Lexington, Kentucky 40507; Hon. Carolyn L. Miller, Assistant Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; Hon. Herbert T. West, Trial Counsel for Appellant, 111 Church Street, Lexington, Kentucky 40507; and by state messenger service to Hon. Jack Conway, 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 Court of Appeals of Kentucky.



SAMUEL N. POTTER

Introduction

The Court of Appeals reversed Anthony Dale Nash’s conviction for Failure to Register as a Sex Offender and Second Degree Persistent Felony Offender, ruling that the amendments to the sex offender registration system in 2006 as applied to him violated the *Ex Post Facto* clause. This Court then granted the Commonwealth’s request for Discretionary Review.

Statement Regarding Oral Argument

Given the disagreement between the parties regarding *Buck v. Commonwealth* and the complexities of the sex offender registration system stemming from its numerous amendments, Mr. Nash believes oral argument would assist this Court in understanding how these issues apply to Mr. Nash’s case, which will assist this Court in rendering a fair and just decision.

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Counterstatement of the Case

On January 9, 2007, a Fayette County Grand Jury indicted Anthony Dale Nash for failing to register as a sex offender in October, 2006. The indictment accused him of being a subsequent offender, alleging he had prior convictions for failing to register in 2005 and 2006. Thus, the indictment listed his level of punishment as a Class C felony. Mr. Nash was also indicted for being a second degree persistent felony. Transcript of Record (TR), 1-2.

Mr. Nash filed a motion to amend the indictment on March 30, 2007. The motion argued that *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003), required the indictment to be amended to a Class A misdemeanor. It also argued that the *Ex Post Facto* clause prohibited the 2006 amendments from applying to him. TR, 30-31. The Commonwealth filed a response on April 9, 2007, that claimed *Peterson* did not apply and no *Ex Post Facto* violation existed. TR, 37-38.

The Fayette Circuit Court held a hearing on the motion on April 13, 2007. The court believed the Commonwealth accurately stated the registration law and its amendments. Because Mr. Nash was indicted in October, 2006 and the amendments to the sex registration law took effect on July 12, 2006, Mr. Nash was subject to the Class C felony subsequent offense enhancement. VR No. 1: 4/13/07; 2:22:50. The Commonwealth believed that Mr. Nash was

eligible for enhancement because he had been charged and convicted of a misdemeanor multiple times pursuant to *Peterson*. VR No. 1: 4/13/07; 2:24:10.

Mr. Nash argued that when he was convicted in 1993, he did not know that he would have to comply with the registration requirements. He had never been convicted of a Class D felony for failing to register. Further, when he pled guilty to failing to register as a misdemeanor, he had no knowledge the law would be changed to make failing to register a felony. Thus, his misdemeanor convictions should not have been used to enhance his current charge to a Class C felony subsequent offense. VR No. 1: 4/13/07; 2:24:45.

The court believed Mr. Nash was aware of the 2006 amendments when this offense arose in October of 2006. The court stated that the law in effect when the offense was committed controlled. VR No. 1: 4/13/07; 2:25:47. The court discounted the importance of using misdemeanors to enhance to a felony, stating Mr. Nash kept violating the law by not registering. The amendment to the registration law was passed to prevent this behavior, according to the court. VR No. 1: 4/13/07; 2:27:55. Then the court overruled Mr. Nash's motion. VR No. 1: 4/13/07; 2:28:20; 2:29:05; TR, 41.

On May 22, 2007, Mr. Nash moved to enter a conditional guilty plea. He reserved the right to appeal his motion to amend the indictment. TR, 54-56. The court asked Mr. Nash to explain what happened. Mr. Nash said that he

got locked up for seven months on a past failing to register charge. When he was released, it was tough for him to get things together. He could not find a job or a place to live. This stress led him to not turn in the paperwork he needed to comply with law. VR No. 1: 5/22/07; 2:15:28. The court accepted his conditional plea and scheduled his sentencing hearing. VR No. 1: 5/22/07; 2:20:45.

At his sentencing hearing on June 22, 2007, the court was going to grant Mr. Nash probation. VR No. 1: 6/22/07; 4:02:28. However, the Commonwealth said he pled guilty to a Class C felony and was not eligible for probation. VR No. 1: 6/22/07; 4:03:50. The Court postponed the sentencing hearing so that Mr. Nash could confer with his lawyer. VR No. 1: 6/22/07; 4:06:00. At a subsequent hearing, the court allowed Mr. Nash to withdraw his guilty plea. VR No. 1: 8/3/07; 2:50:15.

The Commonwealth amended its offer shortly thereafter. The new deal amended the subsequent offense enhancement, a Class C felony, to a first offense, a Class D felony. The new deal recommended a five year sentence enhanced to ten years pursuant to his status as a second degree persistent felony offender. This new deal allowed for probation. VR No. 1: 8/31/07; 4:10:50. The court recognized the new deal was also a conditional plea that preserved the same issues as before. VR No. 1: 8/31/07; 4:11:30.

Mr. Nash apologized to the court for the previous failure to register charges. He explained that after being released from jail, he became homeless and could not report an address. VR No. 1: 8/31/07; 4:18:45. Mr. Nash added that he had been compliant for three years. He did not just wake up and decide to break the law because he did not like it. Rather, because he was not a rich person, he needed time to find a place to stay after being released from jail. VR No. 1: 8/31/07; 4:19:40. After hearing Mr. Nash's statements, the court followed the recommendation and granted him probation. VR No. 1: 8/31/07; 4:23:20. He would be released as soon as his address in Knox County was verified as complying with the sex offender registration statute. VR No. 1: 8/31/07; 4:26:55. The court entered a final judgment reflecting these rulings on September 13, 2007.

Mr. Nash appealed that order to the Court of Appeals as a matter of right.¹ The Court of Appeals reversed his conviction, finding that application of the 2006 amendments to the sex offender registration system to him violated the *Ex Post Facto* clause. Following the Commonwealth's request, this Court granted Discretionary Review.

¹Mr. Nash originally preserved two issues for appeal. Only the first issue—that he can only be subject to a Class A misdemeanor—was addressed in the Brief for Appellant in the Court of Appeals. The second issue dealt with the use of prior failing to register convictions that were punished as Class A misdemeanors to enhance the present allegation to a subsequent offense, which is a Class C felony. However, the final plea agreement reached by the parties and accepted by the court amended the subsequent offense to a first offense, which is a Class D felony, so Mr. Nash would be eligible for probation. Because no

Arguments

I. Because *Buck v. Commonwealth* does not apply to his case, Mr. Nash's felony conviction for Failure to Register as a Sex Offender should be reversed.

Argument

In an opinion rendered on January 22, 2010, the Court of Appeals determined that the 2006 amendments to the Sex Offender Registration Act (SORA) violated the *Ex Post Facto* Clause as applied to Mr. Nash. The Commonwealth argues in the Brief for Appellant that this Court's recent opinion in *Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010), contradicts the opinion of the Court of Appeals. Thus, the Commonwealth asserts, Mr. Nash's convictions should be reinstated.

Mr. Nash argues that because the facts of *Buck* differ from his situation, the holding in that case does not apply to him. A careful understanding of the several changes in the SORA and the corresponding effective dates is required before Mr. Nash's case can be distinguished from the *Buck* case.

The General Assembly passed the initial SORA in 1994. The "registration requirements applied only 'to persons convicted after the effective date' of the Act." *Id.* at 663 (quoting, 1994 Ky. Acts ch. 392, § 6 (uncodified)). The SORA

enhancement occurred below in Mr. Nash's case, the issue of using prior misdemeanors to enhance a felony was not raised before the Court of Appeals and will not be addressed herein.

took effect on July 15, 1994. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 570 (Ky. 2002).

The General Assembly amended the SORA in 1998. The new legislation was drafted to apply the registration requirements to “persons individually sentenced or incarcerated after the effective date of this Act.” *Buck*, 308 S.W.3d at 663 (*quoting*, 1998 Ky. Acts ch. 606, § 199 (uncodified)). This change took effect on July 15, 1998. *Id.*

The General Assembly amended the SORA for a second time in 2000. This amendment increased the penalty for not registering from a Class A misdemeanor to a Class D felony. This change applied “to all persons who, after the effective date of this Act, are required . . . to become registrants” *Buck*, 308 S.W.3d at 663 (2000 Ky. Acts ch. 401, § 37 (uncodified)). This change took effect on April 11, 2000. *Peterson v. Shake*, 120 S.W.3d 707, 709 (Ky. 2003).

The General Assembly amended the SORA for a third time in 2006. These amendments increased the length of registration for some offenses and “enhanced the penalty for a second or subsequent offense to a Class C felony, and criminalized the violation of ‘prior law.’” *Buck*, 308 S.W.3d at 663-664. These changes took effect on July 12, 2006. *Commonwealth v. Baker*, 295 S.W.3d 437, 440 (Ky. 2009).

Now that the changes to the SORA and their respective effective dates have been summarized, Mr. Nash will now set out the details of the *Buck* case in order to properly distinguish it from the case at hand.

Buck was convicted of First Degree Sexual Abuse in 1985. He received a probated three year sentence. In 1987, Buck was convicted of two unrelated felonies that were not sex offenses. However, he “was sentenced to serve 23 years for *all three* convictions.” *Buck*, 308 S.W.3d at 664 (emphasis added). Buck was granted parole in 1997. However, this Court noted that “[b]ecause the 1994 version of SORA applied only prospectively, Buck was not subject to SORA’s registration requirements.” *Id.*

In 2000, Buck violated his probation and was reincarcerated. This Court observed that the 1998 amendments applied to Buck because he was incarcerated after the effective date of those amendments. Additionally, the 2000 amendments applied to him because he remained incarcerated when they became effective. *Id.* Thus, Buck was required to register as a sex offender once he released from prison until his registration period expired.

The holding of *Buck* does not apply to Mr. Nash because of the factual differences between the two cases. The record indicates that Mr. Nash was convicted of Sodomy in the Third Degree in 1993. In his Motion to Amend, Mr. Nash noted that he was convicted of a sex offense in 1993. TR, 30. This

1993 conviction is referenced in his indictment. TR, 1. A printout of his SORA profile lists the offense as Sodomy in the Third Degree. TR, 13.²

The record also indicates that Mr. Nash was required to register in 1997. The SORA printout lists his registration date as October 1, 1997. TR, 13. His Motion to Amend states that “[h]e apparently first was required to register on October 1, 1997.” TR, 30.

Mr. Nash asserts that he should not have had to register at this point. As stated above, the initial SORA applied only to sex offense convictions after July 15, 1994. *Hyatt*, 72 S.W.3d at 570; *Buck*, 308 S.W.3d at 663. Because his conviction occurred in 1993, Mr. Nash was improperly forced to register in October, 1997.

At this point, his factual situation is similar to *Buck*. Buck was released on parole in 1997. “Because the 1994 version of SORA applied only prospectively, Buck was not subject to SORA’s registration requirements.” *Buck*, 308 S.W.3d at 664. Neither should have Mr. Nash been subjected to the SORA’s registration requirements.

It is at this point where Mr. Nash’s case diverges from the *Buck* case. Buck had his parole revoked in February, 2000. He was reincarcerated on the

²All three of these documents have been included in the Appendix to this Brief.

sentence from his conviction for First Degree Sex Abuse and two other non-sex offenses. Because he remained incarcerated after the effective date of the 2000 amendments, he then became required to register and was subject to a Class D felony for failing to register. *Id.* at 664.

In contrast, nothing in the record indicates that Mr. Nash was ever reincarcerated for his 1993 sex conviction or for any other subsequent sex conviction after October 1, 1997. Mr. Nash was subsequently convicted for a non-sex conviction. His indictment for PFO indicates he was convicted of Receiving Stolen Property Over \$300.00 (RSP) in 1999. TR, 1. The record does not indicate whether he was incarcerated for the offense. Even if he was incarcerated on this RSP offense after April 11, 2000, that, by itself, would be insufficient to require him to register as a sex offender because RSP is not a sex offense.

Based on this analysis, the *Buck* case does not control Mr. Nash's situation. Therefore, the holding of *Buck* that 2006 amendments to the SORA do not violate the *Ex Post Facto* clause does not apply to Mr. Nash.

Because *Buck* does not determine the outcome of his case, Mr. Nash offers two possible resolutions. First, if this Court concludes that Mr. Nash had to register on October 1, 1997, then he asserts that this Court should affirm the Court of Appeals opinion.

The Court of Appeals correctly stated the *Ex Post facto* clause test: “For a law to be *ex post facto*, ‘it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.’ *Hyatt v. Commonwealth*, 72 S.W.3d 566, 571 (Ky. 2002)(quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981)).” Opinion, 2-3. The panel found the 2006 law under which Mr. Nash was charged to be retrospective because he was convicted and sentenced “long before” the statute was amended to change the penalty to a felony. Opinion, 3. This exposure to increased punishment clearly disadvantaged Mr. Nash. Opinion, 3.

Next, the Court of Appeals moved to the analysis required by *Commonwealth v. Baker*, 295 S.W. 3d 437, 442 (Ky. 2009) and *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed. 2d 164 (2003). *Smith* listed five factors to determine if a “statute is ‘so punitive either in purpose or effect as to negate the state’s intention to deem it civil.’ *Smith* at 92.” Opinion, 4(internal citation omitted). Following the analysis, the Court believed that “[b]alancing these five factors is a close call.” Opinion, 7. Ultimately, though, the Court concluded that “the law is *excessive* in light of this nonpunitive purpose.” Opinion, 7(emphasis added). The Court then added one final caution:

The 2006 version of the statute provides that any person required to register ‘who knowingly violates any of the provisions of this section *or prior law* is guilty of a Class D felony ...’ KRS 17.510(11)(emphasis added). It doesn't make sense that simply including the language, ‘or prior

law' will negate an *ex post facto* violation. If this were the case, the legislature could in effect 'violate' the *ex post facto* clause by amending statutes to increase punishments and simply say that they apply to previously convicted people. It should not be that easy to get around a constitutional guarantee.

Second, if this Court concludes that a question exists as to whether Mr. Nash is required to register as sex offender, then his case should be remanded to the Fayette Circuit Court for further proceedings where additional information can be developed regarding the specific dates of all his prior offenses and the dates for his incarceration to determine whether he has to register or not.

Conclusion

For these reasons, Anthony Dale Nash respectfully requests this Court to grant him relief consistent with his argument set out above from his felony conviction for Failure to Register as a Sex Offender in Fayette Circuit Court. Further, Mr. Nash respectfully requests any and all other relief this Court determines is appropriate in his case.

Respectfully submitted,



Samuel N. Potter
Counsel for Respondent/Appellee
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601