

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001866-MR

MICHAEL L. HARRIS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 83-CR-00507

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * * * *

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KELLER, JUDGE: Michael L. Harris (Harris) appeals *pro se* from an order of the Fayette Circuit Court denying his motion seeking a determination that his sentence for rape and sodomy had been satisfied. For the following reasons, we dismiss this appeal.

¹ Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

Harris is currently serving a thirty-eight-year sentence for two separate convictions. In case number 83-CR-00507, a jury convicted Harris of two counts of rape in the first degree and of two counts of sodomy in the first degree. Harris was sentenced to twenty years' imprisonment on each count, with the terms to be served concurrently. In case number 90-CR-00487, a jury convicted Harris of one count of trafficking in a controlled substance and for being a persistent felony offender in the second degree. He was sentenced to eighteen years' imprisonment to be served consecutively with his twenty-year sentence in case number 83-CR-00507.

On August 27, 2008, Harris filed a motion in the Fayette Circuit Court asking the court to order the Department of Corrections to relieve him of his sentence. By order dated September 25, 2008, the trial court denied his motion. This appeal followed.

On appeal, Harris argues that although Kentucky Revised Statute (KRS) 532.110 permits the trial court to aggregate his 83-CR-00507 and 90-CR-00487 sentences, KRS 532.110 is unconstitutional. Specifically, Harris contends that the aggregation of his sentences pursuant to KRS 532.110 is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and hence, unconstitutional. Furthermore, Harris argues that because his sentences are aggregated, he is unable to receive "work for time" credit to reduce his sentence pursuant to KRS 197.047.

Before we can address whether Harris' argument is meritorious, we must decide if the issue is properly before us. First, Harris did not argue that KRS 532.110 is unconstitutional in his motion to the trial court. Therefore, this issue is unpreserved for our review. *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986) ("It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court"); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court").

Additionally, in order for this Court to address the constitutionality of KRS 532.110, Harris was required to notify the Kentucky Attorney General's Office. KRS 418.075(1) requires the following:

In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

The same requirement is also contained in Kentucky Rule of Civil Procedure (CR) 24.03 which states in pertinent part the following:

When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion, or other paper first raising the challenge upon the Attorney General.

The purpose of the statute and the rule is to give the people, through the Attorney General, the right to be heard regarding the validation or invalidation

of the laws governing their state. *Maney v. Mary Chiles Hosp.*, 785 S.W.2d 480, 481 (Ky. 1990). A review of the record reveals that no such notice was provided to the Kentucky Attorney General's Office as required by KRS 418.075(1) and CR 24.03. Thus, this Court is not at liberty to hear Harris' appeal.

For the foregoing reasons, it is ORDERED that this appeal be, and it is DISMISSED.

ALL CONCUR.

ENTERED: May 21, 2010

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Michael L. Harris, *pro se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Wesley W. Duke
Justice and Public Safety Cabinet
Office of Legal Services
Frankfort, Kentucky