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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001201-MR

DAVID BROWN — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 01-CR-00371

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: David Brown appeals from the Christian Circuit Court's order of June 5, 2009, whereby the court denied Brown's motion to vacate his judgment pursuant to CR 60.02. In his CR 60.02 motion, Brown argued to the trial

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

court that the self-defense statutes in effect at the time of his judgment were unconstitutional as they violated §1 of the Kentucky Constitution[2] and thus, under §26 of the Kentucky Constitution[3] were rendered void. Brown did not serve the Attorney General with notice of the constitutional challenge and the trial court did not rule on the constitutionality of the statutes in its order but denied Brown's CR 60.02 motion on other grounds. On appeal, the parties present numerous arguments about whether the constitutional challenge is properly before this Court. After a review of the parties' arguments and the applicable law we have concluded that the constitutional challenge presented by Brown is not properly before this Court. Accordingly, we affirm the denial of Brown's CR 60.02 motion.

Brown was convicted of two counts of first-degree manslaughter by a Christian County jury and his conviction was affirmed on direct appeal in *Brown v. Commonwealth,* 2005 WL 923699 (Ky. 2005). We adopt and incorporate herein the statement of facts set forth by the Supreme Court in its opinion:

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[2] All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
First: The right of enjoying and defending their lives and liberties.
Second: The right of worshipping Almighty God according to the dictates of their consciences.
Third: The right of seeking and pursuing their safety and happiness.
Fourth: The right of freely communicating their thoughts and opinions.
Fifth: The right of acquiring and protecting property.
Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

[3] To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

The fatal shootout that led to Brown's twenty-four year prison sentence stemmed from a number of individually petty disputes between Brown and his next-door neighbors, the Sanderses. As often occurs in disputes between neighbors, individually small incidents blow up into one big confrontation. That happened here. David Brown lived with Rosetta Jackson, his girlfriend, for a few months preceding this incident. During that relatively brief span of time, there were numerous confrontations with the Sanderses. It was after one of the more serious of these clashes that Brown acquired the gun that he eventually used in the shootings.

In one incident, the Sanderses accused Brown of hitting a toddler during a dispute about whether the Sanderses raked trash onto the property where Brown was living. The police were called, and Brown acted upon their recommendation to go somewhere else so that everyone could calm down. But the Sanderses followed Brown, and left only after threatening him once more. Later that night, two bandana-clad men approached Brown with a gun. No violence transpired, but Brown acquired a gun. That gun was used two months later.

The evidence is disputed about what happened surrounding the shooting. But there is agreement that Brown was at his home with Jackson and another friend when the Sanderses knocked on the door. Harvey Sanders, Jr. was there claiming that someone insulted his wife as she was mowing the grass. Brown asked Harvey to leave, and during their heated argument, both Trey and Doug Sanders approached the house. Harvey said that he did not care if anyone in the house with Brown lived or died. Thereafter, the evidence is unclear. Brown claims that he saw Harvey make a “pocket-play” for what he thought was a gun, and that he saw Doug brandish a gun. Then shots were fired in both directions. After the shooting, Harvey and Trey Sanders were found shot in the head, and Brown was shot in the side.

The Commonwealth's version of events differs starkly from Brown's account. According to its theory

there was an altercation, but it was not until the Sanderses were leaving that Brown shot Harvey and Trey. Harvey and Trey died from their wounds, and Brown was tried for murder. The jury found him guilty of first-degree manslaughter.

Brown v. Commonwealth, 2005 WL 923699 (Ky. 2005).

Thereafter, amendments to the self-defense statutes were enacted in 2006.[4] Specifically, the "castle doctrine" of KRS 503.055[5] was enacted, which Brown

[4] KRS 503.050 now states:
(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.
(3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.
(4) A person does not have a duty to retreat prior to the use of deadly physical force.

[5] KRS 503.055 states:
(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
(a) The person against whom the defensive force was used was in the process of unlawfully and forcibly entering or had unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
(2) The presumption set forth in subsection (1) of this section does not apply if:
(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person;
(b) The person sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of the person against whom the defensive force is used;
(c) The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or
(d) The person against whom the defensive force is used is a peace officer, as defined in KRS 446.010, who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person

views as the legislature's attempt to bring the self-defense statutes back in line with constitutional mandates. Brown presented his constitutional challenge to the self-defense statutes in his CR 60.02 motion and argued to the trial court that the self-defense statutes in effect at the time of his judgment were unconstitutional as they violated §1 of the Kentucky Constitution and thus, rendered void under §26 of the Kentucky Constitution.

The trial court did not decide the constitutionality of the self-defense statutes. In its order it denied Brown's CR 60.02 motion for two reasons. First, that no extraordinary grounds for relief existed because KRS 503.055 and the amendments to KRS 530.050 are not to be applied retroactively; and second, that Brown was barred from attacking the constitutionality of KRS 530.050 as it existed in 2001 because he could have made this argument on direct appeal. It is from this denial that Brown now appeals.

On appeal Brown argues that the trial court erroneously denied his CR 60.02 motion for two reasons.[6] First, that the use of an unconstitutional statue to convict

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entering or attempting to enter was a peace officer.
(3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a felony involving the use of force.
(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

[6] Brown also argues that the Courts are charged with the authority to protect and uphold the Kentucky Constitution. This is more of a statement than an argument, and we do agree with the statement.

Brown renders his judgment void and appropriate for attack pursuant to CR 60.02, regardless of whether the issue was raised on direct appeal. Secondly, he argues that the self-defense statutes in effect at the time of his conviction and those same portions still in effect today, are void as contrary to §1 of the Kentucky Constitution.

The Commonwealth argues[7] that the reversal of the trial court is not warranted as Brown failed to properly serve the Attorney General with his constitutional challenge at the trial court level. Thus, this Court should not now consider his challenge. In reply, Brown argues that the issue concerning notice to the Attorney General is now moot as his CR 60.02 motion was denied on procedural grounds and not on the constitutional challenge; that the Attorney General is now on notice and could have taken the opportunity to respond to the constitutional challenge in its Appellee brief; and that if this Court finds that the failure to notify the Attorney General of the constitutional challenge at the trial court level is a fatal error, the appropriate remedy is to void the judgment of the court and remand the case for further proceedings. We disagree with Brown that the notice issue is moot on appeal for the reasons set forth *infra*. *See also Brashars v. Commonwealth,* 25 S.W.3d 58, 66(Ky. 2000)("we, as well as the trial

[7] The Commonwealth also argues that Brown's constitutional challenge was addressed on direct appeal and rejected by the majority of the Kentucky Supreme Court; as such, the argument is controlled by the law of the case. However, on Brown's direct appeal the constitutional challenge was not argued to the Kentucky Supreme Court and was only addressed in Justice Scott's learned dissent. Thus, the issue appears to have been addressed solely by dicta and is not now binding. *See H.R. ex rel. Taylor v. Revlett*, 998 S.W.2d 778, 780-781 (Ky.App. 1999) and *Brown v. Commonwealth,* 2005 WL 923699.

court, have been deprived of an adversarial hearing regarding the constitutionality of [the statute].”). Moreover, we disagree that the appropriate remedy in the case *sub judice* is to vacate the order and remand. As noted in *Brashars*, “Accordingly, we hold that the appellants' failure to notify the Attorney General of their constitutional challenges alone provided the trial court with a sufficient basis to overrule the motions and affirm the trial court's ruling.” *Id.* at 66. With these arguments in mind we turn first to the Commonwealth’s argument as it is wholly dispositive.[8]

As noted, the Commonwealth argues that the reversal of the trial court is not warranted as Brown failed to properly serve the Attorney General with his constitutional challenge at the trial court level; thus, this Court should not now consider his challenge. Recently, in *Benet v. Commonwealth*, 253 S.W.3d 528,

[8] Brown failed to obtain a ruling from the trial court concerning the constitutionality of the statute; therefore, he has waived this issue on appeal. As stated in *Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-351 (Ky.App. 2008):

> [T]he circuit court did not address any of these issues in reaching its decision. We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible. This is why we require that an appellant not only present an issue to the lower court on the record but also to make reasonable efforts to obtain a ruling from the court on the record concerning that issue. *See, e.g., Williams v. Williams,* 554 S.W.2d 880, 882 (Ky.App.1977) (failure to obtain a ruling constitutes waiver). Here, the appellants failed to invoke legitimate procedural mechanisms, such as a motion to alter or amend, to obtain a ruling on any issues that the circuit court failed to address. Consequently, we hold that the issues not ruled upon in the circuit court are not properly preserved for our review.

Thus, the trial court's silence in regard to Brown’s claim of the unconstitutionality of the statute was not reached by the trial court and, therefore it is not properly before our Court. *See also Smith v. Com.,* 244 S.W.3d 757, 760 (Ky. App. 2008) *(“*Because our precedents have clearly established that a failure to obtain a ruling from a trial court operates as a waiver of the issue for purposes of appellate review…)

532 (Ky. 2008) our Kentucky Supreme Court held that strict compliance with the notice requirements of KRS 418.075[9] is mandatory prior to appellate review of a constitutional challenge. In so holding, the Court stated:

> KRS 418.075(1) provides, in relevant part, that "[i]n 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...." We have made plain that strict compliance with the notification provisions of KRS 418.075 is mandatory[,]meaning that even in criminal cases, we have refused to address arguments that a statute is unconstitutional unless the notice provisions of KRS 418.075 had been fully satisfied.
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> In the case at hand, Benet admits that he did not notify the Attorney General of his constitutional challenge during the pendency of the circuit court proceedings. Thus, Benet has failed fully and timely to comply with the strict rubric of KRS 418.075, leaving his constitutional challenge unpreserved for our review. Because the plain language of KRS 418.075 requires notice be given to the Attorney General prior to the entry of judgment, we reject any contention that merely filing an appellate brief, which necessarily occurs post-judgment, satisfies the clear requirements of KRS 418.075.

Benet at 532 (internal citations omitted).

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[9] *See also* CR 24.03 and *Maney v. Mary Chiles Hosp*., 785 S.W.2d 480, 482 (Ky.1990) which held:

> To assure compliance with the notice statute, we hold that it is the duty of all parties to give the required notice and the duty of the trial court to refrain from entry of judgment until the notice has been given. Unless the record shows that the requirements of KRS 418.075 have been observed, any judgment rendered which decides the constitutionality of a statute shall be void....It is our view that KRS 418.075 is mandatory and that strict enforcement of the statute will eliminate the procedural uncertainty.

Given the unequivocal holding in *Benet* we must agree with the Commonwealth that Brown's failure to serve notice upon the Attorney General of his constitutional challenge at the trial court level makes his claimed error upon appeal unpreserved. Accordingly, we decline to review the merits of Brown's constitutional challenge, and we affirm the trial court's denial of Brown's CR 60.02 motion.

ALL CONCUR.

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