

RENDERED: JUNE 17, 2011; 10:00 A.M.  
TO BE PUBLISHED

OPINION AND ORDER OF FEBRUARY 18, 2011, WITHDRAWN

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000475-MR

JIMMY DALE STAGE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 93-CR-002484

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER  
DISMISSING APPEAL

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BEFORE: LAMBERT AND MOORE, JUDGES, ISAAC,<sup>1</sup> SENIOR JUDGE.

MOORE, JUDGE: Jimmy Dale Stage has filed a motion to reconsider our prior opinion and order dismissing this appeal from the Jefferson Circuit Court's order of sex offender risk determination due to Stage's lack of standing. After a careful

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<sup>1</sup> Senior Judge Sheila R. Isaac, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

review of the record, we GRANT Stage's motion for reconsideration and WITHDRAW our opinion and order rendered on February 18, 2011 by separate order. The present opinion and order is ORDERED SUBSTITUTED in its entirety for that originally rendered. Nevertheless, we DISMISS this appeal due to a lack of case or controversy.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

In 1994, Stage pleaded guilty to one count of second-degree sodomy and two counts of second-degree sexual abuse. He was sentenced to serve a total of ten years of imprisonment. Before his scheduled release from prison in 2000, the trial court conducted a sex offender risk assessment hearing and found Stage to be a high risk sex offender. Stage appealed that determination, and this Court reversed, holding that the trial court erred in relying on the "risk assessment report without the author of the report available to authenticate the report and to be cross-examined." Discretionary review was thereafter sought in the Kentucky Supreme Court, but in 2003, that Court denied the motion for discretionary review.

The trial court did not conduct another sex offender risk assessment hearing until 2010.<sup>2</sup> Following the hearing, in which the author of the risk assessment report testified, the court entered an order again finding Stage to be a

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<sup>2</sup> The parties do not explain, and the record before us does not reveal, why the trial court waited almost seven years to hold the re-assessment hearing, but we find the fact that the court allowed such a large amount of time to pass before holding the hearing disconcerting. Additionally, we note that KRS 17.570, pursuant to which Stage's initial sex offender risk assessment hearing was conducted, was repealed in 2000, soon after the initial risk assessment hearing was held in this case.

high risk sex offender, requiring him to “register in accordance with the Kentucky Sex Offender Registration Act [SORA], KRS<sup>[3]</sup> 17.510.”

Stage appeals to this Court, contending as follows: “The [Kentucky] Supreme Court has chosen to ignore the title of 2006 Kentucky Acts, Ch. 182. By continuing to characterize sex offender registration as civil and regulatory in nature, the Supreme Court has rendered the scheme void as a violation of Section 51 of the Constitution of Kentucky.” After briefing was concluded on appeal, Stage moved to file a supplemental brief for the purpose of notifying the Court of a recent Supreme Court case, *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010), in which the Court stated that although “strict compliance with the notification requirement of KRS 418.075 is required, and failure to give notice leaves the constitutional challenge unreserved,” such an error can be reviewed for palpable error. This Court granted Stage’s motion to file a supplemental brief, then dismissed the appeal *sua sponte* for lack of standing. Stage moved for reconsideration, arguing that the Kentucky Supreme Court held in *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010) that an appellate court cannot *sua sponte* raise the issue of a party’s lack of standing. We grant Stage’s motion for reconsideration and modify our original opinion and order, but nevertheless dismiss his appeal for the reasons set forth in the following analysis.

## II. ANALYSIS

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<sup>3</sup> Kentucky Revised Statute.

Stage alleges on appeal that the Kentucky Supreme Court has held that the sex offender registration scheme is a civil regulatory scheme that is not punitive in nature. *See Buck v. Commonwealth*, 308 S.W.3d 661 (Ky. 2010); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002). The Commonwealth concedes that “the general registration scheme is still civil in nature.”

However, Stage argues that the title of 2006 Kentucky Acts, Ch. 182, which pertains to the current version of the Kentucky SORA, KRS 17.510, reads “sex offenses and the punishment thereof,” and that Kentucky Constitution Section 51 “prevents enactment of disparate subject matters in a single bill.” Thus, Stage contends that because the title of 2006 Kentucky Acts, Ch. 182 reads “sex offenses and the punishment thereof,” but the Kentucky Supreme Court has held that SORA is civil in nature, the scheme is void because it violates Section 51 of the Kentucky Constitution. Kentucky Constitution Section 51 provides:

No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.

The Commonwealth argues that Stage failed to preserve this claim by failing to raise it in the trial court and by failing to notify the Attorney General of his constitutional challenge to the statute, as he was required to do pursuant to KRS

418.075 and CR<sup>4</sup> 24.03. In his reply brief, Stage contended that he was not required to notify the Attorney General. However, in his supplemental brief, Stage alleges that even if the claim is unpreserved, this Court should review it for palpable error, pursuant to *Jones*, 319 S.W.3d at 297.

Both Stage and the Commonwealth failed to note that in the record, there is a motion filed by Stage titled “Motion to Vacate and to Declare the Law,” which was filed in 2007 and essentially makes the same claim that Stage raises in this appeal. The Certificate of Service at the end of that motion states that “[p]ursuant to CR 24.03, copies of this Motion and the Incorporated Memorandum were mailed to Hon. Gregory Stumbo, Attorney General of Kentucky, . . . on April 11, 2007.” Therefore, it appears that the Attorney General was notified of this constitutional challenge to the statute. However, it appears from the record before us that the circuit court never ruled on that motion. Under these circumstances, we would usually reverse and remand for the circuit court to enter its findings of fact and conclusions of law concerning such a motion. In the present case, however, for reasons that will be discussed *infra*, we find it unnecessary to reverse and remand for further findings.

Stage argues that 2006 Kentucky Acts, Ch. 182 violates Section 51 of the Kentucky Constitution, due to the fact that the Supreme Court has characterized the scheme as civil and nonpunitive in nature. Pursuant to the record before us, Stage was released from prison on March 8, 2000, and he registered as a

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<sup>4</sup> Kentucky Rule of Civil Procedure.

sex offender in February 2000. The Kentucky Supreme Court has held that when a sex offender is released from prison, the version of the statute then in effect, which the sex offender is required to register under, is the version of the statute applicable to that sex offender. *See Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003). The 1998 version of Kentucky's SORA was the version in effect when Stage was released from prison and initially registered.<sup>5</sup> Therefore, we originally held in this case that Stage lacked standing to challenge the constitutionality of the 2006 version of the Act, which is 2006 Kentucky Acts, Ch. 182.

However, in his motion for reconsideration, Stage contends that the Supreme Court held in *Harrison* that an appellate court may not *sua sponte* raise the issue of a party's lack of standing.<sup>6</sup> In *Harrison*, the Supreme Court noted that precedent in Kentucky "defines standing as a require[ment] that a party have a judicially recognizable interest in the subject matter of the suit." *Harrison*, 323 S.W.3d at 705. The Court noted that "the Harrisons had an interest in the custody of the children." *Id.* Pursuant to *Harrison*, "an appellate court cannot resolve, on its own motion, a case based upon what it perceives to be a lack of standing if the issue of standing has never been raised by any party." *Id.*

Yet, the Harrisons had an interest in the custody of the children.

Therefore, in *Harrison*, the Supreme Court did not analyze and resolve the issue of

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<sup>5</sup> The 2000 version of SORA became effective shortly thereafter, on April 11, 2000.

<sup>6</sup> For whatever reason, the Commonwealth did not question Stage's right to litigate this issue either in the circuit court or on appeal. Moreover, we note that the Commonwealth did not respond to Stage's motion for reconsideration.

standing as it relates to whether a case or controversy existed because--as the Court held--the Harrisons had a judicially recognizable interest. Rather, the Court in *Harrison* analyzed the relationship between standing and subject matter jurisdiction, not the fundamental justiciability of a case.

In the present case, Stage simply has no judicially recognizable interest in the constitutionality of the 2006 version of the Act, *i.e.*, 2006 Kentucky Acts, Ch. 182, which distinguishes this case from *Harrison*. We note how broadly the holding in *Harrison* reads, but to apply *Harrison* as urged by Stage essentially requires us to ignore the Kentucky Constitution and the Supreme Court's longstanding prohibition against issuing advisory opinions. Ky. Const. § 110; *Commonwealth v. Hughes*, 873 S.W.2d 828, 829-30 (Ky. 1994) (citing *Brown v. Baumer*, 301 Ky. 315, 191 S.W.2d 235, 238 (1945)); *Medical Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008); *see also Kentucky High School Athletic Association v. Davis*, 77 S.W.3d 596, 599 (Ky. App. 2002).

The Kentucky Supreme Court

has repeatedly reaffirmed the proposition that [courts have] no jurisdiction to decide issues which do not derive from an actual case or controversy. Ky. Const. § 110, *In Re Constitutionality of House Bill No. 222*, 262 Ky. 437, 90 S.W.2d 692 (1936) (“Power to render advisory opinions conflicts with Kentucky Constitution Section 110 and thus cannot be exercised by the Court”). . . . [I]n *Philpot v. Patton*, Ky., 837 S.W.2d 491, 493 (1992), [the Court] reiterated that “[o]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case or controversy.”

*Hughes*, 873 S.W.2d at 829-30.

Without “an actual case or controversy,” it is “impossible for this Court to grant actual or practical relief.” *Hughes*, 873 S.W.2d at 830 (citing *Brown*, 301 Ky. 315, 191 S.W.2d at 238). Thus, we are prohibited from issuing an advisory opinion on the question presented by Stage as he lacks a judicially recognizable interest in the outcome of the case and can be afforded no relief.

Finally, we note that although the title of 2006 Kentucky Acts, Ch. 182 reads “sex offenses and the punishment thereof,” the title of the 1998 Act

where the 1998 version of SORA is found is different. Rather, 1998 Kentucky Acts, Ch. 606 is simply titled “AN ACT relating to criminal justice matters,” and Stage raises no challenge to its constitutionality. Therefore, we hereby ORDER that this appeal be and is DISMISSED.

ALL CONCUR.

ENTERED: June 17, 2011

/s/ Joy A. Moore  
JUDGE, COURT OF APPEALS

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