

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000508-MR

JOHN SIMEON

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE JOHN DAVID SEAY, SPECIAL JUDGE  
ACTION NO. 03-CR-00227

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: John Simeon appeals the order of the Bullitt Circuit Court denying his CR<sup>1</sup> 60.02 motion to amend his sentence to exclude postincarceration supervision on the basis that KRS<sup>2</sup> 532.043 is unconstitutional as applied to him.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Revised Statutes.

Even though Simeon's sole basis for relief before the trial court was the alleged unconstitutionality of KRS 532.043, he did not provide the Attorney General with the notification required by KRS 418.075. Simeon requests us to excuse his failure to join the Attorney General, reverse the trial court's ripeness determination, and remand this matter so that he can notice the Attorney General and present his substantive arguments with respect to the constitutionality of the statute. For the reasons set forth below, we affirm.

## I. BACKGROUND

Simeon was convicted of sexual abuse and sodomy and was sentenced to a maximum of twenty years of imprisonment in 2005.<sup>3</sup> Pursuant to the version of KRS 532.043(2) that was in effect at the time, a term of three years of conditional discharge was added to his sentence.

There were several amendments to KRS 532.043 in the years following Simeon's sentencing. In 2006, KRS 532.043(2) was amended to increase the conditional discharge period from three years to five years. In 2007, the Supreme Court of Kentucky declared KRS 532.043(5) unconstitutional under Sections 27 and 28 of the Kentucky Constitution because it "impermissibly

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<sup>3</sup> Simeon filed a direct appeal, and the Supreme Court of Kentucky affirmed his conviction. *Simeon v. Commonwealth*, 2005-SC-000237-MR, 2007 WL 541912 (Ky. Feb. 22, 2007). Thereafter, Simeon filed a motion pursuant to RCr 11.42, which the trial court denied. We affirmed the trial court's denial. *Simeon v. Commonwealth*, 2008-CA-002277-MR, 2010 WL 1729093 (Ky. App. Apr. 30, 2010).

conferr[ed] an executive power to revoke a post-incarceration or post-parole conditional release upon the judiciary.” *Jones v. Commonwealth*, 319 S.W.3d 295, 300 (Ky. 2016). The General Assembly subsequently amended the statute to give the power to revoke a defendant’s post-incarceration supervision to the Division of Probation and Parole instead of the courts. 2011 Ky. Acts, ch. 2, § 91.

Simeon filed his first CR 60.02 motion in 2012, arguing that the 2011 amendment to KRS 532.043 is unconstitutional in its entirety under *Jones* because section 26 of the Kentucky Constitution provides that “all laws contrary . . . to this Constitution shall be void.” Simeon interprets this to mean that all and not part of any law should be void if any part of it is unconstitutional. Simeon further argued that in his case, application of subsection (5) as amended would violate the *ex post facto* clause.<sup>4</sup> The trial court denied Simeon’s motion because “[a] careful reading of [*Jones*, 319 S.W.3d at 300] indicates that our Supreme Court considered the constitutionality of KRS 532.043 and upheld the statute holding only that subsection (5) is unconstitutional and as that subsection ‘is severable from the remainder of the statute, the statute’s other provisions remain in force.’” Simeon did not appeal the trial court’s order.

In 2014, while still imprisoned, Simeon filed the CR 60.02 motion at issue here, again arguing that the entirety of KRS 532.043 is unconstitutional

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<sup>4</sup> “No State shall . . . pass any *ex post facto* Law[.]” U.S. CONST. art. I, § 10, cl. 1.

pursuant to *Jones* and that subsection (5) should not be retroactively applied to him. Although Simeon made a substantially similar *ex post facto* argument in his 2012 motion, the Supreme Court of Kentucky rendered *Rogers v. Commonwealth*, 366 S.W.3d 446 (Ky. 2012), two months after the trial court ruled on that motion. In *Rogers*, the defendant was convicted nine months before the effective date of House Bill 463, which included the amendment to KRS 532.043(5). *Id.* at 456. There, the defendant wanted to invoke the new law's penalty provisions, but because he was sentenced before the new penalty provisions became effective, the Court held that he must be sentenced pursuant to the old law. *Id.* Simeon argued that under *Rogers*, the reverse was also true. He argued that all amendments to KRS 532.043 that occurred after his sentencing in 2005 should not apply to him. Finally, Simeon argued that his claim is ripe for review because periods of postincarceration are relatively short, so the issue may become moot before it can be addressed.

The trial court held Simeon's motion in abeyance pending the Supreme Court of Kentucky's decision in *McDaniel v. Commonwealth*, 495 S.W.3d 115 (Ky. 2016), which addressed the issue of ripeness in the context of post-incarceration supervision revocation. Again, the trial court disagreed with Simeon and denied his motion because it found that his claim was not ripe for review under *McDaniel*. This appeal followed.

## II. ANALYSIS

Simeon raised only one issue before the trial court, whether KRS 533.043 is constitutional. He concedes that he did not notice the Attorney General at any point time while this matter was pending before the trial court as required by KRS 418.075(1).

KRS 418.075(1) provides:

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.

*Id.* The Kentucky Supreme Court has made it clear “[t]hat strict compliance with the notification provisions of KRS 418.075 is mandatory[,] meaning that even in criminal cases, [our appellate courts] have refused to address arguments that a statute is unconstitutional unless the notice provision of KRS 418.075 had been fully satisfied.” *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (citations omitted).

Simeon urges us to review the trial court’s ripeness determination notwithstanding his failure to comply with KRS 418.075. To this end, he appears to suggest that we are permitted to do so because no “judgment” has yet been entered by the trial court on his constitutional challenge. We disagree.

Simeon's CR 60.02 motion was based entirely on the alleged unconstitutionality of KRS 532.043. Therefore, it qualifies as a proceeding involving the constitutionality of KRS 532.043. Moreover, while the trial court's judgment did not directly address the constitutional issue, it nevertheless qualifies as a judgment. *See* CR 54.01 ("A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding."). In determining that Simeon's claim was not yet ripe, the trial court rendered a decision that directly touches on who can challenge the constitutionality of KRS 532.043. This is an issue that the Attorney General should have had the opportunity to address as part of the litigation before the trial court.

Simeon is requesting us to review the circuit court's decision for ripeness now and remand his claim so that he can join the Attorney General and proceed to litigate the merits of his claim. There is no exception in KRS 418.075 that allows for this type of procedure, and we decline to judicially create one. Such an exception would lead to protracted piecemeal appeals.

Simeon failed to notice the Attorney General before a judgment was entered on his claim. His failure to do so prevents us from being able to review his claim. Accordingly, we must affirm.

### III. CONCLUSION

For the reasons set forth above, we affirm the Bullitt Circuit Court.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

#### BRIEF FOR APPELLANT:

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#### BRIEF FOR APPELLEE:

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