

RENDERED: OCTOBER 11, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-000108-MR

JOSEPH WAGGONER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 15-CR-000761

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: Joseph Waggoner appeals the Jefferson Circuit Court's judgment denying his motion for probation after the jury convicted him at trial and the circuit court entered his sentencing agreement with the Commonwealth. We affirm.

## **BACKGROUND**

This case addresses Waggoner's relationship with a fifteen-year-old girl who lied about her age. Believing the girl to be older, Waggoner developed an intimate relationship with her. However, when her parents discovered she repeatedly snuck out of the house to meet Waggoner, they placed her in a teen mental health facility. While at that facility, the girl's story evolved into a claim that Waggoner raped her on multiple occasions. At trial, the jury rejected the girl's story and found Waggoner guilty of two counts of unlawful transaction with a minor (victim under 18), one count of indecent exposure, and one count of possession of marijuana – two felony counts, and two misdemeanor counts.

Waggoner accepted the Commonwealth's offer on a guilty plea to the above crimes. He agreed to a sentence of five years on each count of unlawful transaction with a minor, 90 days for indecent exposure, and 90 days for possession of marijuana. Pursuant to the sentencing agreement, Waggoner agreed to register as a sex offender for life and complete the Sex Offender Treatment Program (SOTP).

At the sentencing hearing, Waggoner requested probation. By the time of sentencing, Waggoner already spent three years in pre-trial custody with no violations. The Commonwealth argued that Waggoner was ineligible for probation

because he was convicted as a felony sex offender, qualifying him as a “violent offender” under the statute. The circuit court agreed and denied probation.

Waggoner appealed.

Since filing the notice of appeal, “it has become clear [to Waggoner], through further research that [he] is and was *statutorily* prohibited from being placed on probation.” (Appellant’s brief, p. 3.) Therefore, Waggoner asserts the claim before this Court that this sentence violates the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution because it constitutes a cruel punishment. Conceding that this claim was not preserved in the circuit court, Waggoner asks that we undertake palpable error review pursuant to RCr<sup>1</sup> 10.26.

### **STANDARD OF REVIEW**

“When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process.” *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). Furthermore, “[a] party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant’s entitlement to due process of law.” *Chavies v. Commonwealth*, 374 S.W.3d 313, 322-23 (Ky. 2012).

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

## ANALYSIS

Waggoner argues that the statute KRS<sup>2</sup> 439.3401, coupled with KRS 532.047, is unconstitutional because it violates the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution. He claims his sentence was cruel and unusual because the crimes of which the jury found him guilty are more akin to a voyeur's offense than that of a "violent offender." Additionally, Waggoner asserts that in addition to being denied probation, he is effectively denied parole and good time credits because of the limited availability of SOTP in prison, which he is required to complete. Therefore, he claims, the denial of probation works as a manifest injustice against him.

The Commonwealth contends that because Waggoner failed to raise his constitutional argument at the circuit court level and failed to notify the Attorney General before the entry of final judgment, he is precluded from presenting the issue on appeal. Based on the controlling precedent, we agree with the Commonwealth, and affirm.

According to CR<sup>3</sup> 24.03, "[w]hen the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action,

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

<sup>3</sup> Kentucky Rules of Civil Procedure.

the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General.” Further, 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.

The Kentucky Supreme Court held in *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008), that the notification provisions of KRS 418.075 are mandatory and require strict compliance. In that case, Benet asserted, as Waggoner now does, that KRS 439.3401 is unconstitutional. However, the Court, adhering to the view that strict compliance with the statute is necessary, opined that filing an appellate brief when the Commonwealth is a party represented by the Attorney General does not comply with KRS 418.075. *Id.* The Court stated that, “[b]ecause 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.” *Id.*

This Court faced a similar issue in *Prickett v. Commonwealth*, 427 S.W.3d 812, 813 (Ky. App. 2013). There, Prickett challenged the constitutionality

of KRS 29A.290(2). This Court applied the reasoning in *Benet* and followed its precedent. *Id.* We do the same here.

Therefore, because Waggoner failed to notify the Attorney General of the constitutionality challenge prior to the entry of the final judgment, he is precluded from making the claim here. It is inconsistent with the plain, unambiguous language of KRS 418.075. Based on the foregoing, the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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