

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-000713-MR

DATE 3-13-08 E.A.G. GOWH.P.C.

ANTHONY EDWARD OWENS

APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
NO. 04-CR-003152

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Anthony Edward Owens, was convicted of theft by unlawful taking, receiving stolen property, and being a persistent felony offender in the first-degree. The Jefferson Circuit Court imposed a total sentence of twenty years' imprisonment. He now appeals to this Court as a matter of right, Ky. Const. §110(2)(b), raising one issue for review.

The incident underlying this conviction occurred at a Target Store in Louisville. A store security guard, Steven Meredith, witnessed Appellant and two other men take two cell phones from a display, remove the security tags, and place the phones in a Target shopping bag. The group then left the store without purchasing the items. Meredith summoned the police, who stopped the men in the parking lot. In the trunk of Appellant's car, police found another Target shopping bag containing cell phones. The total value of all the merchandise was over one thousand dollars.

Appellant concedes that the evidence was sufficient to support his conviction, but urges reversal on the grounds that KRS 514.110(1) is impermissibly vague and, therefore, unconstitutional. KRS 514.110(1) permits conviction for receipt of stolen property where the defendant “receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen...” According to Appellant, the statute’s use of the phrase “having reason to believe that [the property] has been stolen” creates a culpable mental state that is vague and confusing. Furthermore, Appellant claims that a mental state of “having reason to believe” is not permitted by KRS 501.030(2), which states that “[a] person is not guilty of a criminal offense unless...he has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense...”

The Commonwealth responds that this sole issue is not preserved, as Appellant did not raise this argument before the trial court. As such, Appellant did not notify the Attorney General that he was challenging the constitutionality of a statute, in accordance with KRS 418.075, while the matter was before the trial court. The Commonwealth directs our attention to Hayes v. Commonwealth, 175 S.W.3d 574, 589 (Ky. 2005), wherein we declined to consider an argument challenging the constitutionality of KRS 250.489, where the issue was not raised in the trial court and notice was not given to the Attorney General. See also Simpson v. Commonwealth, 889 S.W.2d 781, n.1 (Ky. 1994) (“The constitutionality of KRS 534.030(1) was not raised as an issue in this case, and accordingly, we make no decision thereon.”).

In response, Appellant requests palpable error review pursuant to RCr 10.26. Appellant is correct that this Court has at times – though rarely – addressed

unpreserved constitutional challenges. In Brown v. Commonwealth, 975 S.W.2d 922 (Ky. 1998), a constitutional challenge to KRS 507.020(1)(b) was first raised on direct appeal to this Court. Despite the Commonwealth's assertion that the issue was not preserved and, therefore, unreviewable, we nonetheless addressed the merits of the argument "as Appellant has raised a constitutional question." Id. at 923. If this Court determines that palpable error review is warranted, Appellant urges that KRS 418.075 should not otherwise act as a procedural bar. According to Appellant, because the Attorney General represents the Commonwealth in any criminal direct appeal, the filing of the appellate brief satisfies the requirements of KRS 418.075(2).

We agree. Both this Court and the Court of Appeals have explained the underlying purpose of the notification statute: "[T]he intent of the Legislature in its enactment of KRS 418.075 is clear that no judgment shall be entered which decides the constitutionality of a statute until the Attorney General is given notice and an opportunity to be heard." Maney v. Mary Chiles Hosp., 785 S.W.2d 480, 482 (Ky. 1990). In fact, we have noted that it is "the right of the people, by the chief law officer, to be heard on matters affecting the validity of duly enacted statutes." Maney, id. at 481. The Court of Appeals has further explained why notification is necessary in the lower courts, even in criminal matters where the Commonwealth is already a party to the action:

We recognize that in criminal cases such as this the Commonwealth is represented at the trial level by local prosecuting officials. However, Kentucky, unlike the United States and some sister states, does not have a unified prosecutorial system. Although there is a relationship between the Attorney General and local prosecuting officials, Commonwealth's Attorneys do not answer to the Attorney General. Since the Attorney General is elected by registered voters from throughout the Commonwealth, he is in a unique position to defend the constitutionality of an act of the General Assembly. The Attorney General must be given this opportunity at the trial level because a declaration regarding

the constitutionality of a statute affects all the citizens of the Commonwealth, not just the citizens represented by the local prosecuting official. For that reason, we conclude that the notice requirements of [KRS 418.075] must be met in criminal, as well as civil, actions.

Jacobs v. Commonwealth, 947 S.W.2d 416, 419 (Ky.App. 1997) (internal citations omitted).

We are persuaded that the requirements of KRS 418.075(2) have been satisfied in this instance. Relating specifically to appeals before the Court of Appeals and this Court, the statute requires that “the Attorney General shall, before the filing of the appellant’s brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum.” KRS 418.075(2). Here, this requirement has been met, as the Attorney General represents the Commonwealth – a party to the appeal – and, therefore, is served with all documents in the matter. More importantly, the underlying intent and purpose of the notification statute has been satisfied, as the Attorney General’s right to be heard on the constitutional validity of the statute has not been infringed upon.

Such a conclusion, however, does not obligate this Court to address the merits of Appellant’s challenge to KRS 514.110(1). RCr 10.26 does not require review of unpreserved errors; rather, the rule states that palpable errors affecting the substantial rights of a party “may be considered by ... an appellate court on appeal, even though insufficiently raised or preserved for review...” (emphasis added). Here, the trial court was given no opportunity to consider the merits of this argument. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge

and another to the appellate court.”). More importantly, we note that Appellant concedes that the evidence was sufficient to support his conviction on all charges. For these reasons, we detect no manifest injustice and, therefore, decline to address the merits of the issue.

Our holding herein is limited. In criminal appeals where the Commonwealth is a party represented by the Attorney General, and the constitutional validity of a statute is raised for the first time on direct appeal, the notice requirement of KRS 418.075(2) is satisfied by the filing of the appellate brief. It should be emphasized that our holding in no way derogates from this Court’s right to decline review of unpreserved issues, notwithstanding satisfaction of the notice requirement.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

Cunningham, Noble, Scott, JJ., concur. Minton, J., concurs by separate opinion in which Lambert, C.J., and Schroder, J., join. Abramson, J., not sitting.

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OPINION BY JUSTICE MINTON

CONCURRING IN RESULT ONLY

I disagree with the conclusion that Appellant has satisfied the notice and preservation requirements of KRS 418.075 merely by filing his appellate brief.¹ I believe we should affirm because Appellant failed to comply with KRS 418.075,² rather than

¹ See Brashars v. Commonwealth, 25 S.W.3d 58, 65-66 (Ky. 2000) (rejecting argument that notice to the Attorney General regarding constitutionality of a statute was not required because Commonwealth was already a party to the criminal action); Jacobs v. Commonwealth, 947 S.W.2d 416, 419 (Ky.App. 1997) (“We recognize that in criminal cases such as this the Commonwealth is represented at the trial level by local prosecuting officials. However, Kentucky, unlike the United States and some sister states, does not have a unified prosecutorial system. Although there is a relationship between the Attorney General and local prosecuting officials, Commonwealth’s Attorneys do not answer to the Attorney General. See generally KRS 15.220 and 15.725. Since the Attorney General is elected by registered voters from throughout the Commonwealth, he is in a unique position to defend the constitutionality of an act of the General Assembly. The Attorney General must be given this opportunity at the trial level because a declaration regarding the constitutionality of a statute affects all the citizens of the Commonwealth, not just the citizens represented by the local prosecuting official. For that reason, we conclude that the notice requirements of [KRS 418.075] must be met in criminal, as well as civil, actions.”).

² See, e.g., Hayes v. Commonwealth, 175 S.W.3d 574, 589 (Ky. 2005) (refusing to consider issue involving constitutionality of a statute because the issue was not properly raised in the trial court, and proper notice was not given to the Attorney General pursuant to KRS 418.075).

because we decline to exercise the discretion afforded us under RCr 10.26 to review for palpable errors.

Lambert, C.J., and Schroder, J., join this opinion.