

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
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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BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED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

2011-SC-000729-MR

JAMES E. HARVEY

APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 08-CR-000462-001 AND 11-CR-001942

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted James Harvey of the charge of complicity to manufacturing methamphetamine and of being a first-degree persistent felony offender (PFO 1). He received a sentence of thirty-five years in prison. He now appeals from the judgment as a matter of right,¹ contending that the statute under which he was charged and convicted, Kentucky Revised Statutes (KRS) 218A.1432(1)(b), is unconstitutional and that his PFO 1 conviction was not supported by sufficient evidence of prior convictions. We decline to review these issues because they are not properly before the Court. Accordingly, we affirm the judgment of the trial court.

¹ Ky. Const. § 110(2)(b).

I. ANALYSIS.

Because the factual and procedural history of Harvey's case is not germane to our resolution of his appeal, we proceed directly to our analysis of the case.

A. **The Constitutionality of KRS 218A.1432(1)(b) is not Properly Before this Court.**

The circuit court jury found Harvey guilty of manufacturing methamphetamine under KRS 218A.1432(1)(b). Under this statute, a "person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine."

Harvey argues that KRS 218A.1432(1)(b) is unconstitutional under Sections 2² and 29³ of the Kentucky Constitution because it is unintelligible. Harvey concedes that he failed to preserve this error at trial and failed to notify the Attorney General of his constitutional challenge to KRS 218A.1432(1)(b). He asks this Court for review solely on the basis that an unconstitutional statute is void, and no court has jurisdiction to enforce it.

² "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2.

³ "The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" Ky. Const. § 29.

We decline to review this issue because Harvey did not notify the Attorney General of the constitutional challenge as required by KRS 418.075(2).⁴ KRS 418.075(2) provides, in pertinent part, that

[i]n any appeal to the Kentucky . . . Supreme Court[,] . . . which involves the constitutional validity of a statute, 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. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.

“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.”⁵

In keeping with our case law, we decline to address this issue because Harvey failed to notify the Attorney General of his constitutional challenge to KRS 218A.1432(1)(b).

Embedded in Harvey’s constitutionality argument appears to be a claim that the manufacturing jury instruction was erroneous because of the absence

⁴ See also Kentucky Rules of Civil Procedure (CR) 24.03 (“When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney General.”).

⁵ *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) (citations omitted); see also *Hayes v. Commonwealth*, 175 S.W.3d 574, 589 (Ky. 2005), and *Harris v. Commonwealth*, 338 S.W.3d 222, 228-29 (Ky. 2011).

of the word “unlawful.” We also decline to address this issue, which is unpreserved for appellate review.⁶

Harvey does not request palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26, nor does he adequately brief the issue. We have stated that “[a]bsent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review under RCr 10.26 unless such a request is made and briefed by the appellant.”⁷ Accordingly, we will not review the jury instruction.

B. We Decline to Review Harvey’s Unpreserved Claim Regarding his PFO Conviction.

The jury found Harvey guilty of being a PFO 1. The Commonwealth presented evidence that Harvey had been previously convicted of possession of a firearm by a convicted felon and flagrant non-support. Harvey claims the Commonwealth failed to prove that he was convicted of the flagrant non-support charge because the certified copy of the judgment of conviction is stamped as “Filed,” rather than “Entered.”

This issue is likewise not preserved for appellate review. Harvey claims that this is a sentencing issue that may be raised for the first time on appeal. We disagree.

⁶ To preserve an instructional error for review adequately, the party must fairly and adequately present its objection to the trial court by an offered instruction or by motion. Kentucky Rules of Criminal Procedure (RCr) 9.54(2).

⁷ *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008) (citations omitted).

“Sentencing issues may be raised for the first time on appeal because sentencing is jurisdictional. But not all sentencing issues are jurisdictional.”⁸

[T]he phrase “sentencing issues” does not refer to any issue that arguably affected the ultimate sentence imposed. Instead, it refers to a claim that a sentencing decision is contrary to statute, as in *Ware*, or was made without fully considering what sentencing options were allowed by statute, as in *Hughes*. Such sentencing issues are “jurisdictional,” (citation omitted)⁹

In *Chavies v. Commonwealth*,¹⁰ the defendant argued that the trial court erroneously admitted evidence of amended and dismissed charges during the penalty phase of his trial. We held that this evidentiary issue was not a jurisdictional sentencing issue that could be raised for the first time on appeal. “Erroneous evidentiary procedures in the penalty phase are not contradictory to statute within the meaning of *Ware*.”¹¹

Harvey’s claimed error is also an evidentiary error rather than a jurisdictional one. Harvey does not claim that he was not convicted of flagrant non-support. So his argument is not that he was convicted of being a PFO 1 contrary to the PFO statute, which requires two prior convictions.¹² He merely claims that the Commonwealth’s proof of his flagrant non-support conviction was deficient. This is an evidentiary issue that was not preserved in the trial

⁸ *Chavies v. Commonwealth*, 354 S.W.3d 103, 114 (Ky. 2011) (citation and internal quotation omitted).

⁹ *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010) (citing *Ware v. Commonwealth*, 34 S.W.3d 383 (Ky.App. 2000), and *Hughes v. Commonwealth*, 875 S.W.2d 99 (Ky. 1994)).

¹⁰ 354 S.W.3d at 114.

¹¹ *Id.*

¹² KRS 532.080(3).

court. Nor does Harvey request palpable error review.¹³ So we decline to review it.

II. CONCLUSION.

Harvey's claimed errors are not properly before this Court, and we decline to address them. Accordingly, the judgment is affirmed.

All sitting. All concur.

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¹³ See *Shepherd*, 251 S.W.3d at 316 (citations omitted).