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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 19, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000460-MR

CARL LEE ADKINS, JR. — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA T. MCCORMICK, JUDGE
NO. 12-CR-000395

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Carl Lee Adkins, Jr., appeals from a judgment of the Jefferson Circuit Court convicting him of first-degree sexual abuse and second-degree burglary, and sentencing him to a total of twenty years' imprisonment. The prosecution was based upon a DNA match made in 2012 concerning an assault on a six-year old girl which occurred in 2007.

As grounds for relief Appellant contends (1) that RCr 9.40 and KRS 29A.290(2) are void pursuant to various separation of power principles; and (2) that the sentencing phase of the trial was fundamentally unfair because the jury heard evidence of criminal offenses which occurred subsequent to the 2007 crimes. For the reasons stated below, we affirm.

Appellant contends that RCr 9.40, which prescribes rules relating to peremptory challenges, and KRS 29A.290(2), which confers this Court with the

authority to establish the number of permissible peremptory challenges, are unconstitutional, and therefore invalid, because the allocation of peremptory challenges is exclusively a legislative function, and, accordingly, KRS 29A.290(2)'s delegation of that function to this Court is void pursuant to various separation of power principles contained in the Kentucky Constitution. Appellant concedes that this issue is not properly preserved for appellate review because he did not raise the issue to the trial court, and, more significantly, nor did he notify the Attorney General of his constitutional challenge to KRS 29A.290 as required by KRS 418.075(1).

KRS 418.075(1) provides that "[i]n 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[.]" We have found the notification requirement of KRS 418.075(1) to be mandatory. *Adventist Health Systems/Sunbelt Health Care Corp. v. Trude*, 880 S.W.2d 539, 542 (Ky. 1994) (overruled on other grounds by *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464 (Ky. 1998)). Raising a constitutional issue for the first time on appeal is insufficient. *Benet v. Commonwealth*, 253 S.W.3d 528, 532 (Ky. 2008) ("[W]e reject any contention that merely filing an appellate brief, which necessarily occurs post-judgment, satisfies the clear requirements of KRS 418.075."). Due to Appellant's failure to comply with the requirements of KRS 418.075(1), we will not address the constitutional issues raised by Appellant in this appeal. *Grider v.*

Commonwealth, 404 S.W.3d 859, 861 (Ky. 2013) (addressing this same constitutional challenge in this identical procedural posture).

Appellant also contends that error occurred because evidence was presented in the sentencing phase concerning criminal conduct by Appellant which occurred after the January 2007 crimes he was on trial for. Appellant did not object to the admission of the evidence at trial, and so the issue is unpreserved.

The crimes occurred in January 2007 and Appellant's trial was held in March 2013. During the penalty phase the Commonwealth presented evidence of misdemeanors committed by Appellant in February, September, and October 2007, and felonies committed in March 2007, June 2009, and July 2009. KRS 532.055(2) provides as follows:

> Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively.
>
> (a) Evidence may be offered by the Commonwealth relevant to sentencing including:
>
> . . .
>
> 2. The nature of *prior* offenses for which he was convicted;
>
> 3. The date of the commission, date of sentencing, and date of release from confinement or supervision from *all prior offenses*;

(emphasis added). In *Logan v. Commonwealth*, 785 S.W.2d 497 (Ky. App. 1989), the Court of Appeals addressed this identical issue as follows:

> The statute contains no such qualification of the word "prior." It states only that the Commonwealth may offer evidence relevant to sentencing, including "[t]he date of the commission, date of sentencing and date of release from confinement or supervision from all prior offenses." In adopting this law, the Kentucky Supreme Court noted that it was intended to cure a perceived deficiency in sentencing procedure, that is the fact that juries were required to sentence "in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of an appropriate penalty." *Commonwealth v. Reneer*, Ky., 734 S.W.2d 794, 797 (1987). Both the offense and the conviction in question certainly occurred prior to the trial of the present case, and their use was in accordance with both the plain meaning and the broader purpose of the statute.

Id. at 499. A year later, in *Templeman v. Commonwealth*, 785 S.W.2d 259 (Ky. 1990), although we did not cite to *Logan*, we adopted its reasoning, stating "the trial judge was correct in allowing the prosecution to introduce evidence of prior criminal convictions which occurred subsequent to the commission of the crime. The term *prior* is the status of the defendant at the time of sentencing, not at the time of the commission of the charged crime." *Id.* at 260 (citing *Ruffin v. State*, 397 So.2d 277 (Fla. 1981) (overruled on other grounds as recognized in *Templeman*)); see also *Conklin v. Commonwealth*, 799 S.W.2d 582 (Ky. 1990) (convictions for misdemeanors which occurred subsequent to the date of the principal offense were admissible into evidence at the penalty phase of the defendant's robbery trial).

In summary, the cited authorities are fatal to Appellant's argument, and we find no error in the admission of the various convictions which occurred subsequent to the January 2011 sexual assault and prior to Appellant's March 2013 trial.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All sitting. All concur.

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