

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

NO. 2004-CA-001178-MR

BRIAN SMITH

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE PAUL W. ROSENBLUM, JUDGE  
ACTION NO. 04-CI-00183

COOKIE CREWS, WARDEN,  
LUTHER LUCKETT CORRECTIONAL  
COMPLEX

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: BUCKINGHAM, JOHNSON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Brian Smith appeals from an order of the Oldham Circuit Court denying his petition for declaration of rights. Because the Attorney General was not given notice of the proceedings before either the trial court or this court, we decline to address the arguments raised by Smith in his appeal. Thus, we affirm.

The Jefferson Circuit Court entered a Judgment of Conviction and Sentence on July 17, 2003, sentencing Smith to five years in prison for first-degree sexual abuse and being a

persistent felony offender. On May 4, 2004, Smith filed a Petition for Declaration of Rights in the Oldham Circuit Court, naming Cookie Crews, Warden of the Luther Lockett Correctional Complex, as respondent. Smith sought to have the court declare various statutes unconstitutional, claiming the effect of the statutes was that he was arbitrarily forced to attend the Sex Offender Treatment Program and thereby denied "good time credits." Further, he contends the effect of the statutes results in his not being eligible for parole after serving 20% of his sentence.

Smith was convicted of first-degree sexual abuse, a Class D felony, in violation of KRS<sup>1</sup> 510.110. Because he was a sex offender, Smith was required by the Department of Corrections (DOC) to complete the Sex Offender Treatment Program before any good time could be credited to his sentence and before he could become eligible for parole. See KRS 197.045(4). Further, because Smith was convicted of a felony offense under KRS Chapter 510, he is subject to a period of conditional discharge for three years following his release from incarceration upon expiration of his sentence or completion of parole. See KRS 532.043.

Smith's first argument is that KRS 197.410 is unconstitutional. That statute provides in part as follows:

---

<sup>1</sup> Kentucky Revised Statutes.

- (2) A sexual offender becomes an "eligible sexual offender" when the sentencing court or department officials, or both, determine that the offender:
  - (a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or mental retardation; and
  - (b) Is likely to benefit from the program.

KRS 197.410(2). He states he does not have a mental, emotional, or behavioral disorder, and that it defeats the intent of the legislature to require him to complete the Sex Offender Treatment Program. He contends that he is not in need of sex offender treatment and that neither the trial court nor the DOC should have been given the authority under the statute to determine who must participate in the program. He asserts that neither the court nor the department are qualified to make such determinations, and he draws an analogy with competency determinations whereby psychologists and psychiatrists are called as expert witnesses to prove competency.

Noting that DOC determined he was an eligible sexual offender for purposes of participating in the treatment program, Smith next argues that when DOC, not the courts, makes such determinations, it violates the separation of powers doctrine. He maintains that such determinations should be made by courts at sentencing hearings and that those determinations by DOC infringe on the judicial authority of the courts.

Smith's third argument is that the statutes that deprive him of good time credit and parole eligibility until he completes the treatment program are unconstitutional in that they derive from KRS 197.410. The statutes to which Smith refers are KRS 197.045(4), which denies good time credit until the program is completed, and KRS 439.340(11), which denies parole eligibility until the program is completed.

Finally, claiming that he is required to serve a "split sentence" because he must serve a period of conditional discharge for three years after he is released from incarceration or parole, Smith contends that KRS 532.043 is unconstitutional as is KRS 532.060(1). Smith bases his argument on the fact that the maximum sentence for first-degree sexual abuse is five years and that he could conceivably end up actually serving eight years in prison for the offense.<sup>2</sup>

KRS 418.075 provides in parts as follows:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

- (1) 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

---

<sup>2</sup> This court rejected constitutional challenges to KRS 532.043 in Wilfong v. Commonwealth, 175 S.W.3d 84 (Ky.App. 2004).

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.

- (2) In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum 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.

KRS 418.075(1) and (2). The respondent in this case is the prison warden. Having reviewed the record before both the circuit court and this court, it is apparent that the Attorney General was not served with any pleadings, papers, or other documents so as to have notice of Smith's challenge to the constitutionality of the aforementioned statutes. Therefore, pursuant to Jacobs v. Commonwealth, 947 S.W.2d 416, 419 (Ky.App. 1997), we decline to consider the constitutionality of the statutes. As Smith does not argue that the statutes were not followed in his case, he has no other arguments to support his appeal.

Therefore, the order of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

Brian Smith, *Pro Se*  
Luther Lockett Correctional  
Complex  
LaGrange, Kentucky