

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000603-MR

RALPH FRANKLIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 00-CR-002022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

WINE, JUDGE: On September 20, 2000, a Jefferson County grand jury indicted Ralph Franklin on one count each of first-degree sodomy, KRS 510.070(1)(b)(2), and first-degree sexual abuse, KRS 510.110(1)(b)(2). Thereafter, on March 15, 2001, Franklin pleaded guilty to first-degree sexual abuse. The sodomy charge was dismissed. The trial court sentenced Franklin to five years' imprisonment, but probated the sentence for five years.

Shortly thereafter, Franklin violated the conditions of his probation. The trial court revoked his probation and ordered Franklin to serve the five-year sentence. In 2003, Franklin filed a “Motion for Clarification of Sentence,” noting that the Department of Corrections had extended his sentence by three years pursuant to KRS 532.043. The trial court denied the motion. This Court dismissed his subsequent appeal, finding that the motion used by Franklin was not an appropriate mechanism for an inmate to challenge an action of the Department of Corrections. *Franklin v. Commonwealth*, No. 2003-CA-002574-MR, Not To Be Published Opinion, Rendered July 29, 2005.

Franklin was released from prison following completion of his sentence, but he remained subject to the additional three-year period of conditional discharge pursuant to KRS 532.043. In December 2006, the Commonwealth moved to revoke on the grounds that Franklin had violated his conditional discharge. The Court granted the motion on February 15, 2007, and directed Franklin to serve the balance of the three-year sentence. This appeal followed.

On appeal, Franklin first argues that the trial court lacked the authority to add the three-year period of conditional discharge to his sentence because it was not included in the judgment set out in his original sentence. This Court previously rejected the same argument in *Jones v. Commonwealth*, 200 S.W.3d 495 (Ky.App. 2006), finding that a person who is convicted of a sex offense is automatically subject to the period of conditional discharge as a matter of law. Therefore, a person who is convicted of a sex offense is subject to the statute even where the judgment or written order fails to refer to

it. *Id.* at 497. While Franklin urges that *Jones* was wrongly decided, it is nevertheless the controlling authority.

Franklin also challenges the constitutionality of KRS 532.043 on several grounds. He first argues that KRS 532.043 has an irremediable conflict with the sentencing provisions of KRS 532.060(3). He further argues that KRS 532.043(5) is unconstitutional as a violation of the separation of powers clause of the Kentucky Constitution because the statute gives the judicial branch, rather than the executive branch, the power to revoke conditional discharge.

Franklin concedes, however, that he did not raise this issue before the trial court, nor did he give notice of his constitutional challenge to the Attorney General as required by KRS 418.075 and CR 24.03. *See also Brashars v. Commonwealth*, 25 S.W.3d 58, 65 (Ky. 2000). As a general rule, an issue not raised in the circuit court may not be presented for the first time on appeal. *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998). However, on occasion, Kentucky appellate courts have considered constitutional issues which were not raised before the trial court. *See Brown v. Commonwealth*, 975 S.W.2d 922, 923 (Ky. 1998). But unlike in those cases, Franklin was represented by counsel at all relevant times. And based on his prior motion and appeal to this Court, he was clearly on notice that the application of KRS 532.043 would be an issue following his release from prison. Consequently, we find no basis to dispense with the requirements of preservation or notice to the Attorney General.

Nevertheless, Franklin contends that a court may consider a challenge to the constitutionality of a statute at any time. He relies heavily on language in *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918 (Ky. 2002), in which the Kentucky Supreme Court stated that “any statute passed in contravention of the Constitution is void *ab initio*, and any action taken thereunder is a nullity.” *Id.* at 921. Franklin asserts that since KRS 532.043 is unconstitutional and therefore void, the trial court was without authority to impose or revoke any additional period of conditional discharge.

We disagree. Franklin’s argument would require this Court to presume that KRS 532.043 is unconstitutional and then require the Commonwealth to show that it is constitutional. The law is otherwise. A statute enacted by the General Assembly carries a strong presumption of constitutionality. *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002). A statute will not be invalidated as unconstitutional unless it clearly, unequivocally, and completely violates provisions of the Constitution. *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001). Further, the party questioning the constitutionality of a statute bears the burden of proving its contention. *Id.* at 572-73.

Unlike the statute at issue in *Spanish Cove Sanitation*, KRS 532.043 has never been found unconstitutional. Therefore, we must presume that it is constitutional. And since Franklin never raised the issue in circuit court, nor did he comply with the other prerequisites for challenging the constitutionality of a statute, the issue is not

properly presented in this appeal. Consequently, we must decline to address the merits of the issue.

Accordingly, the order of the Jefferson Circuit Court revoking Franklin's conditional discharge is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel T. Goyette  
Louisville Metro Public Defender of  
Counsel

J. David Niehaus  
Office of the Louisville Metro Public  
Defender  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

David W. Barr  
Assistant Attorney General  
Frankfort, Kentucky