RENDERED: MARCH 25, 2011; 10:00 A.M.
TO BE PUBLISHED

OPINION OF SEPTEMBER 24, 2010, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000949-MR

FRANK D. HAMILTON — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CR-00141

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2009-CA-000950-MR

HEATHER R. COLE — APPELLANT

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CR-00155

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REMANDING

** ** ** ** **

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Appellants, Frank Hamilton and Heather Cole, appeal their convictions of trafficking in buprenorphine in the Knox Circuit Court. For the reasons that are discussed below, we remand this case to the trial court.[2]

BACKGROUND INFORMATION

Hamilton and Cole were both arrested for selling Suboxone, a synthetic opiate that consists of buprenorphine and naloxone. They both offered the same defense theory to the trial court: that Suboxone was improperly classified as a Schedule III drug. Their cases were consolidated for the purpose of an evidentiary hearing. Following the hearing, the trial court denied Hamilton and Cole's motion to dismiss the indictment. They then entered conditional guilty pleas. This appeal follows.

The Appellants argue that the regulation classifying buprenorphine as a Schedule III drug is invalid, thereby rendering their indictments invalid.

DISCUSSION

Kentucky Revised Statute(s) (KRS) 218A.090 lists the drugs that are included in Schedule III. Buprenorphine is not included. However, the statute begins with the following words: "*unless otherwise rescheduled by regulation* of the Cabinet for Health and Family Services (the Cabinet), the controlled substances

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] This is before this Court again pursuant to a petition for rehearing.

listed in this section are included in Schedule III." (Emphasis added). Kentucky Administrative Regulations (KAR) 902 KAR 55:025 Section 7 provides that "a material, compound, mixture, or preparation which contains any quantity of buprenorphine, or its salts" is designated as a Schedule III controlled substance.

The Appellants do not disagree that the Cabinet legitimately has the authority to promulgate rules classifying controlled substances. *See Com. v. Hollingsworth*, 685 S.W.2d 546 (Ky. 1984). Rather, their contention is that the Cabinet did not make sufficient findings before it did so.

KRS 218A.020 authorizes the Cabinet to add, delete, and reschedule substances enumerated in the schedules by regulation. Subsections (1) and (2) list factors for the Cabinet to consider in its determinations. Subsection (3) provides that "[i]f any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to [the Cabinet], [the Cabinet] may similarly control the substance under this chapter by regulation." The Cabinet acted under the authority of this provision in 2002 when it reclassified buprenorphine from a Schedule V substance to a Schedule III substance.

KRS 218A.020(3) also provides that "[the Cabinet] may similarly control the substance under this chapter by regulation." Appellants argue that the Cabinet did not act under Chapter 218A because it did not make the specific findings mandated in KRS 218A.020(1) and (2) or KRS 218A.080.

The provision that the federal regulations may be adopted *by regulation* leads us to KRS Chapter 13A. It sets forth the procedures that agencies must follow in order to create or amend regulations. KRS 13A.090 directs that

> (1) The Commission's authenticated file stamp upon an administrative regulation or publication of an administrative regulation in the Kentucky Administrative Regulations Service or other publication shall raise a rebuttable presumption that the contents of the administrative regulation are correct.
>
> (2) The courts shall take judicial notice of any administrative regulation duly filed under the provisions of this chapter after the administrative regulation has been adopted.

902 KAR 55:025 Section 7 appeared with the Commissioner's stamp in the October 16, 2002, issue of the Kentucky Administrative Register. Therefore, it is entitled to the rebuttable presumption of correctness created by KRS 13A.090.

If Appellants want to challenge this rebuttable presumption of correctness, they must do so pursuant to KRS 13A.140, which sets forth the proper procedure for such a challenge. Subsection one (1) instructs:

> Administrative regulations are presumed to be valid until declared otherwise by a court, but when an administrative regulation is challenged in the courts it *shall be the duty* of the promulgating administrative body to show and bear the burden of proof to show:
>
> > (a) That the administrative body possessed the authority to promulgate the administrative regulation;
> >
> > (b) That the administrative regulation is consistent with any statute authorizing or controlling its issuance;

> (c) That the administrative regulation is not in excess of statutory authority;
>
> (d) That the administrative regulation is not beyond the scope of legislative intent or statutory authority;
>
> (e) That the administrative regulation is not violative of any other applicable statute; and
>
> (f) That the laws and administrative regulations relating to promulgation of administrative regulations were faithfully followed.

(Emphasis added).

The first issue we must address is whether this is a challenge to the constitutionality of a statute. The Appellants argue that, if the trial court's ruling is affirmed that it did not have jurisdiction, then the statute is rendered unconstitutional.

As set forth above, KRS 218A.020 authorizes the Cabinet to add, delete and reschedule substances enumerated in the schedules by regulation. In its order denying defendant's motion to dismiss the indictment, the trial court held that:

> The challenge to the methodology employed by the DEA [Drug Enforcement Administration] in its decision to reschedule buprenorphine is another matter entirely. Unlike the Cabinet, the DEA derives its authority from the United States Congress, and thus does not fall under the laws of the Commonwealth.
>
> . . . .

> The legislature has [] defined when courts have jurisdiction to hear grievances against federal agencies:
>
> > A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action seeking relief other than monetary damages . . . is entitled to judicial review thereof. An action in a Court of the United States . . . shall not be dismissed . . . on the ground that it is against the United States or that the United States is an indispensable party.
> >
> > 5 U.S.C.A. § 702 (emphasis added).
>
> Inasmuch as the challenge to the action taken by the DEA is a challenge to an action undertaken by a federal governmental agency, and that the weight of authority attributes original jurisdiction to hear such challenges in federal district courts, this Court concludes that this challenge necessarily concerns a question of federal law and therefore this Court lacks subject-matter jurisdiction to adjudicate the challenge.

Circuit Court Order at 8-10.

In so ruling, the trial court called into question the constitutionality of a regulation allowing the Cabinet to base a change in drug scheduling upon an action by a federal government agency, without the ability of the judiciary of the Commonwealth to review its basis.

In *Hollingsworth*, 685 S.W.2d 546, the Kentucky Supreme Court reiterated its previous holding that

> for there to be a constitutional delegation of legislative authority, the legislature must delegate only the administration of the law itself and must not delegate the exercise of its discretion as to what the law shall be. *Legislative Research Commission v. Brown,* Ky., 664

> S.W.2d 907 (1984). This is accomplished by setting forth standards controlling the exercise of administrative discretion.

Id. at 546.

The Appellee in *Hollingsworth* had challenged the constitutionality of KRS 218A.020, arguing that the language therein was too permissive and would allow the Cabinet to reschedule drugs at its pleasure.

In the present action, the trial court was unable to review the DEA's reason for scheduling buprenorphine. In *Touby v. U.S.*, 500 U.S. 160, 111 S. Ct. 752, 114 L. Ed. 2d 219 (1991), the U.S. Supreme Court upheld a delegation of authority to schedule drugs to the Attorney General. The Court's decision was based upon the finding that "Congress [had] set forth in § 201(h) an 'intelligible principle' to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis." *Id.* at 165.

In the present case, there does not appear to be such a constraint and, consequently, the constitutionality of the statute is called into question. While the Appellants did not argue the constitutionality below, it was made an issue when the trial court found that it did not have jurisdiction to review the federal agency's reasons for scheduling the drug.

While the Attorney General's office was not a party to the proceeding at the trial court level, it has become a party at the appellate level. *Owens v. Com.,*

2008 WL 466132 (Ky. 2008)(2006-SC-000713-MR)[3] (citing *Brown v. Com.,* 975 S.W.2d 922 (Ky. 1988) (constitutional challenge first raised on direct appeal)).

We hold that the cases are to be remanded to the trial court. The Kentucky Attorney General and the Cabinet should be made parties and the court, after arguments, should examine whether the statute is rendered unconstitutional.

Thus, we remand the decision to the trial court for additional findings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: Although I am philosophically sympathetic with the reasoning of the majority opinion, which seeks to expedite a judicial consideration of this timely issue, I am compelled to file this dissent in deference to the procedural rules under which we operate.

The Commonwealth, clearly a savvy litigant as to the rules of appellate procedure, failed to name **not one, but two** indispensable parties: the Attorney General and the Cabinet. The proper procedure for this Court is dismissal – not a remand for a second chance to correct an error. No civil litigant would receive such appellate grace to remedy such a fatal omission. And neither would the Commonwealth be so favored – despite the obvious desirability of appellate consideration of this critical issue.

Accordingly, I would dismiss rather than remand.

[3] This is cited pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(c).

BRIEF FOR APPELLANTS:

D. Randall Jewell
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky