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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000607-MR

FLOYD GROVER JOHNSON

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NOS. 09-CR-00133, 09-CR-00133-002,
AND 09-CR-00143

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND CLAYTON, JUDGES.

CAPERTON, JUDGE: Floyd Grover Johnson appeals from the denial of his motion to dismiss the indictments for three counts of first-degree trafficking in a controlled substance, second or subsequent offense, and one count of delivery of drug paraphernalia, due to a lack of jurisdiction and the correspondingly entered conditional guilty plea. Johnson was sentenced to ten years of imprisonment.

After a thorough review of the parties' arguments, the record, and the applicable law, we reverse and remand.

The facts of this appeal are not in dispute. On September 29, 2009, a multi-count indictment was returned by the Powell County Grand Jury charging Johnson with two counts of first-degree trafficking in a controlled substance (morphine and oxycodone), second offense. A second indictment charged Johnson with trafficking in morphine and delivery of drug paraphernalia. Johnson moved to suppress all evidence collected against him in the two cases and to dismiss the indictment because he argued that neither the Attorney General's Office nor the Operation UNITE¹ detectives had jurisdiction to conduct the investigation in Powell County that led to Johnson's indictment. No local law enforcement officer from Powell County was involved in building the case against Johnson. Johnson asserted that the Attorney General's Office was not invited to participate in this investigation pursuant to Kentucky Revised Statutes (KRS) 15.200, and that the UNITE officers could not lawfully engage in the arrest because Powell County is outside the congressional district of Hal Rogers.

The Attorney General's Office of Special Prosecutions made an entry of appearance for the sole purpose of responding to Johnson's motion. The trial court held a hearing and heard the legal arguments of the parties. Thereafter, the trial court denied Johnson's motion, which the court styled as a motion to dismiss.

¹ Unlawful Narcotics Investigations, Treatment and Education.

In denying the motion, the trial court relied on KRS 218A.240(1), which it found gave clear authority to the Attorney General to make arrests regarding controlled substances, both of which were authorized in the two indictments *sub judice*. Because of the court's finding that KRS 218A.240(1) was controlling, the court declined to address the authority or lack thereof of the UNITE officers outside of Hal Rogers's congressional district. The court then reasoned that it would seem that federal monies secured for the arrest of controlled substance dealers would not be limited to a congressional district. Johnson then entered a conditional guilty plea. It is from this that Johnson now appeals.

On appeal, Johnson presents one argument: namely, that the trial court erred to Johnson's substantial prejudice and denied him due process of law when it denied his motion to dismiss the indictments where neither the Attorney General's Office nor Operation UNITE had jurisdiction to investigate drug cases in Powell County. In support thereof, he argues: (1) the authority of the Kentucky Attorney General's Office to conduct investigation is limited by statute; (2) Operation UNITE is not authorized to act in Powell County and, since no local law enforcement officers were involved in these cases, the cases must be dismissed; and (3) it is simply inaccurate that an ordinary citizen could have instituted this case through independent investigation.

In response, the Attorney General's Office argues that the investigators of the Attorney General's Office acted within their common law and statutory jurisdiction and no officers exercised police powers during the

investigation. In support thereof they argue: (1) the Attorney General had common law authority to investigate drug trafficking; (2) peace officers employed by the Attorney General are statutorily mandated to investigate and enforce KRS Chapter 218A; (3) private citizens could have collected the evidence; and (4) suppression and dismissal are not proper remedies.

While the parties present well-reasoned arguments for their respective positions, we believe that these arguments are more appropriately condensed into one issue on appeal: namely, whether the trial court erred in denying Johnson's motion based on its finding that KRS 218A.240(1) provided the Attorney General's Office² with the authority to investigate Johnson's crime.

At the outset, we note that the construction and application of statutes is a question of law, subject to *de novo* review on appeal. See *Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006), citing *Bob Hook Chevrolet Isuzu v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

First we must analyze the effect of KRS 218A.240(1). KRS 218A.240(1) states:

All police officers and deputy sheriffs directly employed full-time by state, county, city, urban-county, or consolidated local governments, the Department of Kentucky State Police, the Cabinet for Health and Family Services, their officers and agents, and of all city, county,

² The parties do not condition their arguments on UNITE officers having independent authority to investigate Johnson's crime. As such, we believe that this is a nonissue and that the UNITE officers involved in the investigation necessarily derived their authority from the jurisdiction, if any, of the Office of the Attorney General.

and Commonwealth's attorneys, and the Attorney General, *within their respective jurisdictions*, shall enforce all provisions of this chapter and *cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled substances*.

KRS 218A.240(1)(emphasis added).

Based on the language used by the legislature, the intent is clear that the enumerated law enforcement officers in the Commonwealth are to enforce controlled substances laws within their jurisdictions. We do not read this statute as expanding upon the Attorney General's jurisdiction but, instead, as a general statement of legislative intent that law enforcement officers shall, within their respective jurisdictions, enforce controlled substances laws and shall cooperate with all agencies charged with the enforcement of the laws of this state. This statute merely commands the cooperation that would be necessary amongst various agencies enforcing the same or similar laws within their respective jurisdictions. Thus, the jurisdiction referenced in KRS 218A.240(1) must be found elsewhere. And, for our purposes, insofar as the office of the Attorney General is concerned, we must look to KRS 15.020.

The Attorney General's authority set out in KRS 15.020 states:

The Attorney General is the *chief law officer* of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the *legal adviser* of all state officers, departments, commissions, and agencies, and when requested in writing shall furnish to them his written opinion touching any of their official duties, and shall prepare proper drafts of all instruments of writing required for public use, and

shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment. He shall communicate with the Legislative Research Commission as required by KRS 418.075. Except as otherwise provided in KRS 48.005(8) and 2000 Ky. Acts ch. 483, sec. 8, he shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and *shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.* When any attorney is employed for any said agency, the same shall have the approval of such agency before such employment. If any funds of any kind or nature whatsoever are recovered by or on behalf of the Commonwealth, in any action, including an ex rel. action where the Attorney General has entered an appearance or is a party according to statutory or common law authority, those funds shall be handled under KRS 48.005.

KRS 15.020 (emphasis supplied).

As stated in KRS 15.020, the Attorney General is the chief law officer of the state, the legal advisor to all state officers, departments, commissions and agencies, and can exercise all common law duties and authority pertaining to the office of the Attorney General,³ except when modified by statute. *See*

³ We note that in *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 949 (Ky. 1959), the court, in construing KRS 15.020, looked to the common law powers of the Attorney General in England prior to 1607. In so doing, the court determined that the Attorney General did not have the common law or statutory authority to intervene in will contests in which a charitable

Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974) (holding that the Commonwealth had the authority to bring an action to challenge the constitutionality of statutes). Thus, while the Attorney General is recognized as having all common law powers pertaining to the office, the General Assembly states that those powers can be modified by statute.

The General Assembly does just that wherein it recognizes that the Attorney General has the duty to represent the Commonwealth in all cases, hearings, and proceedings, except where it is the duty of the County Attorney or the Commonwealth Attorney. This reservation of powers to the County Attorney and Commonwealth Attorney is one of several statutory modifications of the powers of the Attorney General and consistent with the General Assembly's dictate that they can modify the duties of the Attorney General by statute. Thus, the duties and powers of the office of the Attorney General are those at common law as modified by statute. Therefore, our analysis shall focus on statutes that are relevant and modify the powers of the Attorney General.

First we must consider KRS 15.020. KRS 15.020 could be interpreted as giving a broad grant of authority to the Attorney General, or, as merely codifying the inherent common law powers of the office. Either way, we must also consider KRS 15.200, *infra*, which addresses the powers of the office of the Attorney General, for three reasons. Thus, as we discussed *supra*, the General Assembly can modify the powers of the Attorney General as it stated in KRS

trust may be involved.

15.020: as in the case wherein it exercised that power by recognizing that both the County Attorney and Commonwealth Attorney had explicit powers reserved to them. Thus, just as KRS 15.020 was a modification of the powers of the Attorney General, so KRS 15.200 is but another statutory modification.

Second, our jurisprudence demands that we read, if possible, the two statutes to be consistent. *See Economy Optical Co. v. Kentucky Bd. of Optometric Examiners*, 310 S.W.2d 783, 784 (Ky. 1958) (“The rule is that statutes in pari materia should be construed together and, if possible, should be construed so as to harmonize and give effect to provisions of each.”); *and Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000) (“it is the Court's duty to harmonize the law so as to give effect to both statutes.”).

Third, our Supreme Court in *Matthews v. Pound*, 403 S.W.2d 7, 10-11 (Ky. 1966), stated that “The duties of the Attorney General have been enlarged by KRS 15.190, 15.200, and 15.210.” Thus, our Supreme Court views KRS 15.200 as an enlargement of duties of the Attorney General and not mere recognition of existing common law powers. Therefore, the General Assembly and our jurisprudence demand that we read KRS 15.020 and KRS 15.200 together and consistently, if possible.

A plain reading of KRS 15.200 reveals that it addresses the jurisdiction of the Attorney General to investigate and prosecute cases. KRS 15.200 states:

(1) Whenever requested in writing by the Governor, or by any of the courts or grand juries of the Commonwealth, or upon receiving a communication from a sheriff, mayor, or majority of a city legislative body stating that his participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth, the Attorney General may intervene, participate in, or direct any investigation or criminal action, or portions thereof, within the Commonwealth of Kentucky necessary to enforce the laws of the Commonwealth.

(2) He may subpoena witnesses, secure testimony under oath for use in civil or criminal trials, investigations or hearings affecting the Commonwealth, its departments or political subdivisions.

In reading KRS 15.200 and KRS 15.020 with consistency, we believe, consistent with *Pound*, that when the General Assembly enacted KRS 15.020, the Attorney General did not have the common law power to investigate and prosecute cases at will, nor was the enactment of that statute a grant of such a power, but the subsequent enactment of KRS 15.200 was a specific grant of authority to the Attorney General to investigate and prosecute cases in limited circumstances. Accordingly, we hold that the Attorney General's power and authority to

investigate and prosecute cases is defined by KRS 15.200.^{4,5} Therefore, KRS 15.200 is seminal to our analysis.

In interpreting KRS 15.200, it is clear that a request must be made of the Attorney General's Office in writing for it to intervene, participate or direct any investigation or criminal action. Of import in the application of KRS 15.200 is that it takes the governor, courts, grand juries, sheriff, mayor, or majority of a city legislative body to invite the Attorney General to participate in an investigation or to bring a prosecution. This interpretation was the holding of *Hancock v.*

Schroering, 481 S.W.2d 57, 61 (Ky. 1972), wherein the court stated:

⁴ The latter interpretation is also most consistent with KRS 15.231, KRS 15.232 and KRS 15.240, wherein the Attorney General is given the specific authority for either concurrent jurisdiction or to initiate and intervene in actions; such a grant of authority would have been unnecessary if these powers were granted in KRS 15.020 or inherent at common law.

⁵ This power and authority to prosecute cases is distinguishable from that power to bring an action in the public interest explained in *Com. Ex. Rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2010), wherein our Supreme Court stated:

[KRS 15.020](#) provides, in the role as “chief law officer of the Commonwealth of Kentucky[,]” the Attorney General “shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment.” It is unquestioned that “[a]t common law, [the Attorney General] had the power to institute, conduct[,] and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.” Or, in other words, “[u]nder the common law, *the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest*, a broad grant of authority which includes the power to act to enforce the state's statutes.” So we readily conclude that the Attorney General, by virtue of that office, had the right to file an action in the Franklin Circuit Court seeking injunctive relief to prevent the DOC from, in the Attorney General's view, improperly and unconstitutionally applying HB 406 retroactively.

Thompson at 172-173 (internal citations omitted)(emphasis supplied).

The executive or the judiciary only may initiate authority in the Attorney General to intervene in and direct investigation and prosecution of criminal actions or in given, limited situation specified local officials may likewise initiate the Attorney General's authority in such regard. Only in those given instances may the Attorney General then determine first whether or not to intervene at all, and if he does so, whether to act in conjunction with the local prosecutor or to act exclusively.

Hancock at 61.

There is no contention in the case *sub judice* that any of those authorized by statute invited the Attorney General to initiate or participate in the investigation or prosecution of Johnson in Powell County. Reading the aforementioned statutes cohesively,⁶ we must conclude that, without a proper invitation to investigate in Powell County, the Attorney General and, correspondingly, the UNITE officers,⁷ were without authority to initiate the investigation of Johnson, which ultimately led to his grand jury indictment.⁸ The trial court having concluded otherwise, based on an incorrect interpretation of KRS

⁶ See *Commonwealth v. Phon*, 17 S.W.3d 106 at 107–08.

When there appears to be a conflict between two statutes, as here, a general rule of statutory construction mandates that the specific provision take precedence over the general. Moreover, it is the Court's duty to harmonize the law so as to give effect to both statutes. Finally, statutes should be construed in such a way that they do not become meaningless or ineffectual.

⁷ As previously discussed in FN 2, the authority of the UNITE officers to conduct the investigation *sub judice* came from the Attorney General and was not independent.

⁸ In further support of this conclusion, see KRS 15.231, 15.232, and 15.242, all of which grant the Attorney General concurrent jurisdiction in limited circumstances.

218A.240(1), we must reverse the trial court's order denying Johnson's motion and remand for further proceedings.

On remand, the trial court will have to assess whether the testimony presented to the grand jury by the detective(s) for the Attorney General and Operation UNITE resulted in an indictment that should be dismissed. We direct the court's attention to *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008), wherein the Kentucky Supreme Court stated that in certain circumstances trial judges are permitted to dismiss criminal indictments in the pre-trial stage, including cases involving prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, or a lack of jurisdiction by the court itself. Of importance, the *Bishop* court noted that "Whether an indictment premised on an arrest by a police officer who acted outside his lawful jurisdiction should be subject to pre-trial dismissal is an issue of first impression that this Court need not address at this time." *Id.* at 735. Additionally, we believe that the Attorney General's argument that the detective presented evidence that a private citizen could have presented to a grand jury may bear some merit.⁹

In light of the aforementioned, we reverse and remand this matter for further proceedings not inconsistent with this opinion.

⁹ Indeed, this question *may* turn on the court's assessment of whether the evidence from the investigation and/or the testimony presented to the grand jury was collected and offered by the law enforcement officers under color of authority, i.e., under the traditional trappings of law enforcement such as badges, uniforms, use of state equipment in surveillance and, during the course of investigation, identification of the detective as an officer before the grand jury, etc. If color of authority is found, that would tend to militate against a finding that the officers and the Attorney General acted as mere individuals and not as law enforcement officers.

ALL CONCUR.

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