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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001608-MR

CHARLES R. REILLY

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 11-CR-00064

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Charles R. Reilly appeals the denial of his motion to enter the deferred prosecution program provided for in KRS 218A.14151. He contends that the circuit court had authority to decide that the prosecutor's reasons for denying deferred prosecution were not substantial and compelling and that deferred prosecution should have been ordered. We conclude that Reilly's

interpretation of KRS 218A.14151 is erroneous and would render the statute unconstitutional under the separation of powers doctrine. For those reasons, we affirm.

In April 2011, Reilly was indicted for the offenses of possession of a controlled substance in the first degree, second or greater offense; possession of a controlled substance, third degree, second or greater offense; possession of marijuana; and possession of drug paraphernalia. In June 2011, he submitted a written request to the Graves County Commonwealth Attorney asking that his prosecution be deferred.

At a hearing, defense counsel informed the circuit court that he anticipated that the prosecutor would deny Reilly's request for deferred prosecution. He requested that the trial court order the prosecutor to permit Reilly to enter the deferred prosecution program. The court denied Reilly's request concluding that absent the prosecutor's agreement, it had no authority to order deferred prosecution.

In 2011, through House Bill 463, the General Assembly made sweeping changes to our penal system. Consistent with the goal of rehabilitation versus incarceration for drug-related offenses, deferred prosecution is a permissible disposition for first or second time offenders. KRS 218A.1415(2)(b). The procedures and substance of the deferred prosecution program are found in KRS 218A.14151, which provides in part:

(1) A defendant charged with his or her first or second offense under KRS 218A.1415 may enter a deferred prosecution program subject to the following provisions:

(a) The defendant requests deferred prosecution in writing on an application created under KRS 27A.099, and the prosecutor agrees[.]

...

(2) If a prosecutor denies a defendant's request to enter a deferred prosecution program, the prosecutor shall state on the record the substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety.

If a defendant does not enter the deferred prosecution program, KRS 218A.1415(2)(d) provides that "he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010." KRS 218A.010(37) addresses presumptive probation and provides:

"Presumptive probation" means a sentence of probation not to exceed the maximum term specified for the offense, subject to conditions otherwise authorized by law, that is presumed to be the appropriate sentence for certain offenses designated in this chapter, notwithstanding contrary provisions of KRS Chapter 533. That presumption shall only be overcome by a finding on the record by the sentencing court of substantial and compelling reasons why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety[.]

Relying on KRS 218A.1415(2), Reilly contends that if deferred prosecution is denied, the court has the authority to determine whether the

prosecutor's reasons are sufficient to comply with that subsection and, if not, to order deferred prosecution. The Commonwealth counters that subsection (1)(a) of that same statute expressly states that the prosecutor must agree to deferred prosecution and, therefore, entry into the program is solely within the prosecutor's discretion. It argues that subsection (2) is triggered when deferred prosecution has been denied requiring that the prosecutor take a position on probation. After considering the relevant statutes, we agree.

“[S]tatutes in pari materia should be construed together and, if possible, should be construed so as to harmonize and give effect to provisions of each.” *Economy Optical Co. v. Kentucky Bd. of Optometric Examiners*, 310 S.W.2d 783, 784 (Ky. 1958). KRS 218A.14151(2) and KRS 218A.010(37) contain the same “substantial and compelling” language. Reading the relevant statutes together, the logical interpretation of KRS 218A.14151(2) is that it applies when deferred prosecution has been denied and probation must be considered. In that event, the prosecutor must take a position on probation and, if opposed, state substantial or compelling reasons on the record “why the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety.” KRS 218A.14151(2); KRS 218A.010(37). However, the court is without authority to question the prosecutor's motives when it rejects a request to defer prosecution or to order probation without the prosecutor's agreement.

We are convinced that our decision is consistent with the statutory language and legislative intent. We add that the interpretation argued by Reilly would render the statute subject to constitutional attack. In *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003), our Supreme Court held that a statute could not confer authority on a court to approve pretrial diversion over the Commonwealth's objection without violating the separation of powers doctrine. "[P]rosecution of crime is an executive function" while "the duty of the executive department is to enforce the criminal laws." *Id.* at 424.

Based on the foregoing, the order of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas M. Ransdell
Assistant Public Advocate
Dept. of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky