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OPINION OF MARCH 8, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001695-MR

DAN SEUM, AMY STALKER,
AND DANNY BELCHER — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-00651

GOVERNOR MATT BEVIN
AND ATTORNEY GENERAL
ANDY BESHEAR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER, JUDGE; AND HENRY, SPECIAL JUDGE.[1]

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

CLAYTON, CHIEF JUDGE: Dan Seum, Amy Stalker and Danny Belcher appeal from a Franklin Circuit Court order dismissing their petition for declaratory and injunctive relief against the Governor of Kentucky, Matt Bevin, and the Attorney General, Andy Beshear. The appellants argue that Kentucky Revised Statutes (KRS) 218A.1421 and KRS 218A.1422 are unconstitutional insofar as they criminalize the possession and sale of marijuana for medical purposes.

The three appellants in this case use marijuana to treat various physiological and psychological conditions. Seum uses the drug for the treatment of a pharmaceutical opioid addiction and chronic back pain; Stalker uses the drug to treat pharmaceutical benzodiazepine addiction, bipolar disorder and irritable bowel syndrome; and Belcher uses the drug to treat war injuries, posttraumatic stress disorder and alcoholism.

The appellants filed a petition for declaratory and injunctive relief against the Governor and the Attorney General in their official capacities challenging the constitutionality of KRS 218A.1421 and KRS 218A.1422. These statutes provide that a person "is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana[,]" KRS 218A.1421, and "is guilty of possession of marijuana when he or she knowingly and unlawfully possesses marijuana." KRS 218A.1422. The appellants argued that by failing to exempt

marijuana for medical use, the statutes are unconstitutionally arbitrary and violate their right to privacy.

The appellees filed individual motions to dismiss the petition. The appellants filed responses and the appellees filed replies. Following a hearing, the circuit court entered an order dismissing the petition on the grounds the appellants' claims were nonjusticiable political questions and the constitutionality of Kentucky's marijuana laws was settled in *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000). This appeal followed.

The appellants argue they have raised a justiciable claim that Kentucky's statutes criminalizing the trafficking and possession of marijuana are an arbitrary exercise of legislative power over their lives and thereby violate Section 2 of the Kentucky Constitution and the privacy protections of Sections 1 and 2 of the Kentucky Constitution.

Our standard of review is as follows:

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), *reh'g denied* (Aug. 26, 2010) (internal quotation marks and citations omitted).

We turn first to the circuit court's ruling that the appellants' claims are not justiciable because they raise a political question within the exclusive purview of the legislature.

The political question doctrine is closely related to the concept of the separation of powers. "Section 27 of the Kentucky Constitution mandates separation among the three branches of government and Section 28 specifically prohibits incursion of one branch of government into the powers and functions of the others. The essential purpose of separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Coleman v. Campbell County Library Board of Trustees*, 547 S.W.3d 526, 533-34 (Ky. App. 2018), *disc. rev. denied* (Ky. June 6, 2018), *cert. denied*, 139 S. Ct. 482 (2018) (internal quotation marks and citations omitted).

Specifically, the political question doctrine holds that the judicial branch "should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department, or seek to resolve an issue for which it lacks judicially discoverable and manageable standards[.]" *Bevin v. Commonwealth ex rel.*

Beshear, 563 S.W.3d 74, 81 (Ky. 2018) (internal quotations marks and citations omitted). The circuit court concluded that this case presents a political question because the legislature alone has the constitutional imperative to legislate to protect the public health and welfare by regulating marijuana in the state.

The circuit court's deference to the legislature is well-founded, but its application of the political question doctrine in this instance is overly expansive. The legislature certainly has the sole imperative to legislate to protect the public health and welfare but it is always constrained by the dictates of the state and federal constitutions. Legislation in any area may not trespass upon the constitutional rights of Kentuckians. "[I]t goes without saying that a person who is injured or prejudiced by an unconstitutional law can complain of it." *Veltrop v. Commonwealth*, 269 S.W.3d 15, 17 (Ky. App. 2008) (quoting *Akers v. Floyd Cty. Fiscal Court*, 556 S.W.2d 146, 149 (Ky. 1977)).

Our deference to the legislative branch is nonetheless substantial, in keeping with the scheme of the separation of powers. This deference is reflected in the burden placed upon those seeking to challenge the constitutionality of a statute and in the standard of review employed by the courts. Statutes are presumed to be constitutional. "A statute will not be struck down as unconstitutional 'unless its violation of the constitution is clear, complete and unequivocal.'" *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001) (quoting *Sasaki v.*

Commonwealth, 485 S.W.2d 897, 902 (Ky. 1972), *vacated on other grounds*, 410 U.S. 951, 93 S.Ct. 1422, 35 L.Ed.2d 684 (1973)). "Moreover, the Commonwealth does not bear the burden of establishing the constitutionality of a statute, rather '[t]he one who questions the validity of an act bears the burden to sustain such a contention.'" *Id*. at 572-73 (quoting *Stephens v. State Farm Mutual Auto Insurance Co*, 894 S.W.2d 624, 626 (Ky. 1995)).

When, as in this case, the legislation at issue is not alleged to affect fundamental rights, it is "'endowed with a presumption of legislative validity, and the burden is on [the challenger] to show that there is no rational connection' between the enactment and a legitimate government interest." *Sheffield v. City of Fort Thomas, Ky.*, 620 F.3d 596, 613 (6th Cir. 2010) (quoting *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 198, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979)). In order to pass rational basis scrutiny, laws "need not be supported by scientific studies or empirical data; nor need they be effective in practice." *Id*. at 614. "Rather, '[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'" *Id*. (quoting *Kutrom Corp. v. City of Center Line*, 979 F.2d 1171, 1174 (6th Cir. 1992)).

With these principles in mind, we turn to the appellants' argument that the statutes at issue impose an undue hardship on countless Kentuckians who claim

the need for medicinal marijuana to treat various ailments but cannot obtain and use it without violating the law. The appellants contend that the statutes thereby violate Section 2 of the Kentucky Constitution, which provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

The primary opinion addressing the constitutionality of a statute regulating marijuana is *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000). In that case, the Kentucky Supreme Court held the statute, which defines marijuana for purposes of our criminal code, withstands rational basis scrutiny. Harrelson argued that KRS 218A.010(14), which defines marijuana to include the nonhallucinogenic parts of the plant, was so overbroad as to be arbitrary because it prevented him from growing hemp in Kentucky for his textile business. The Court held that the statute withstands rational basis scrutiny. It explained that the statute was not so unreasonable or arbitrary as to be unconstitutional because "[t]he valid public interest in controlling marijuana is a public issue involving health, safety and criminal activity." *Harrelson*, 14 S.W.3d at 547.

The appellants argue that the hardship imposed on them by being unable to lawfully obtain and possess marijuana is considerably more serious than the economic hardship imposed on Harrelson, who could simply purchase hemp elsewhere. The appellants make numerous arguments relating to the efficacy and

beneficial effects of marijuana use and point to the widespread legalization of medical marijuana in many of our sister states. But the determination that marijuana is safe to use for medical purposes is a determination to be made by the legislature. "The legislature has broad discretion to determine what is harmful to the public health and welfare." *Id*. at 548. Our constitution authorizes the General Assembly, not our courts, to implement statutory changes which reflect public policy regarding health, safety and crime.

The appellants further argue that the statutes violate their right to privacy, which has been extrapolated from the Bill of Rights and Section 2 of the Kentucky Constitution to provide that "[i]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society." *Commonwealth v. Campbell*, 133 Ky. 50, 117 S.W. 383, 385 (1909). In *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) and in *Campbell*, our highest Court held that statutes prohibiting consensual sodomy between adults and the consumption of alcohol within the home violated the right to privacy. In *Campbell*, the Court explained how standards of morality and public decency interacted with the right to privacy:

> Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of

> human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them.

Campbell, 117 S.W. at 386.

Similarly, the *Wasson* Court stated that "immorality in private which does not operate to the detriment of others, is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution." *Wasson*, 842 S.W.2d at 496 (internal quotation marks omitted). Relying on the seminal writings of John Stuart Mill, the Court further stated that "criminal sanctions, should not be used as a means to improve the citizen. The majority has no moral right to dictate how everyone else should live." *Id*. (citation omitted).

By contrast, the statutes at issue here do not criminalize the private possession and sale of marijuana out of misplaced concerns about morality or public decency. As the *Harrelson* court plainly stated, the moral concerns expressed in *Wasson* and *Campbell* are not present because the definition of marijuana implicates the health, safety and well-being of the citizens of Kentucky. *Harrelson*, 14 S.W.3d at 547.

The appellants seek to distinguish *Harrelson* by arguing their medical need for marijuana is more akin to the possession and consumption of alcohol and tobacco than the cultivation of hemp for economic purposes. They point to

research that alcohol and tobacco are significantly more dangerous and addictive than marijuana. This argument blurs the distinction between the recreational and medicinal uses of marijuana and strays from the appellants' apparent defense of medical marijuana. In any event, it remains in the hands of the legislature to determine these parameters.

For the foregoing reasons, the Franklin Circuit Court order dismissing the appellants' petition is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Candace L. Curtis
Daniel J. Canon
Louisville, Kentucky

BRIEF FOR APPELLEE GOVERNOR MATT BEVIN:

M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Carmine G. Iaccarino
Heather L. Becker
Frankfort, Kentucky

BRIEF FOR APPELLEE ATTORNEY GENERAL ANDY BESHEAR:

Andy Beshear
Attorney General of Kentucky

Taylor Payne
Assistant Attorney General
Lexington, Kentucky