COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2008-SC-000509-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NUMBER 06-CI-09152

ON APPEAL FROM COURT OF APPEALS
FILE NO. 2008-CA-000027

HONORABLE A.C. McKAY CHAUVIN
Judge, Jefferson Circuit Court — APPELLEE

and

MATTHEW BAUMLER and
CHRISTOPHER WARNER — REAL PARTIES IN INTEREST

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Brief for Appellant was mailed via U.S. Mail, postage prepaid, this 5th day of September, 2008 to: Hon. A.C. McKay Chauvin, Judge, Jefferson Circuit Court, Judicial Center 7th Floor, 700 West Jefferson Street, Louisville, Kentucky 40202; Hon. William P. Koehler, 600 West Main Street, Suite 100, Louisville, Kentucky 40202; Hon. Kenneth P. O'Brien, Sewell, O'Brien & Neal, 401 West Main Street, Suite 1800, Louisville, Kentucky 40202; Hon. Tad Thomas, Office of Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601; Hon. Gerald R. Toner, O'Bryan, Brown & Toner, 1500 South Fourth Avenue, Louisville, Kentucky 40202. The undersigned further certifies that the record on appeal has not been withdrawn from the office of the Court of Appeals Clerk.

RONALD W. CRAWFORD

I. INTRODUCTION

This is an appeal from an original action filed in the Kentucky Court of Appeals which denied Appellant's Petition for Writ of Prohibition.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Cabinet requests that these issues not be orally argued because the Cabinet does not believe that oral arguments are necessary as the Record on Appeal will show that the issues were extensively briefed in the Circuit Court, the Court of Appeals, and this Court. In addition, oral arguments were had in the Court of Appeals.

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STATEMENT OF THE CASE

MAY IT PLEASE THE COURT

On October 30, 2007, the Jefferson Circuit court, Eighth Division, the Hon. A.C. McKay Chauvin, Judge, entered an Order requiring the release of the Kentucky All-Schedule Prescription Electronic Reporting data, hereinafter "KASPER" data in a civil case. ROA, p. 7. The Commonwealth of Kentucky, Cabinet for Health and Family Services, hereinafter "Cabinet" moved the Court to vacate its Order. ROA, p. 7. The Real Party in Interest filed a Response, ROA, p. 39; and the Cabinet filed a Supplemental Memorandum which pointed out that the Court of Appeals entered Writs of Prohibition prohibiting production of KASPER data in two separate cases arising out of Jefferson Circuit Court. One case arose out of 06-CI-003295, Court of Appeals No. 2007-CA-001480-OA, styled Cabinet v. Hon. Denise Clayton, Judge, et al. The other case arose out of 06-CI-002116, Court of Appeals No. 2007-CA-001580-OA, styled Cabinet v. Hon. Judith McDonald-Burkman, Judge, et al. ROA, p. 7 & 8. Judge Chauvin overruled the Cabinet's Motion to Vacate, ROA, p. 8, and the Cabinet filed a Petition for Writ of Prohibition and Mandamus in the Court of Appeals. ROA, p. 4.

The Court of Appeals ordered the Cabinet to file a memorandum addressing the issue of separation of powers raised by the Real Party in Interest, and the Court also ordered oral arguments to be heard on May 21, 2008. ROA, p. 117. The Court also granted motions by the Attorney General to intervene, and the Kentucky Defense Counsel to file a brief as amicus curiae. ROA, p. 122 & 136.

On June 13, 2008, the Court of Appeals entered an Opinion and Order Denying CR 76.36 Relief in Part and Granting CR 76.36 Relief in Part. ROA, p. 167. The appeal to this Court followed.

ARGUMENT

As the Court is probably aware, there is a companion case currently pending in this Court. The number of the case is 2008-SC-000508, and styled Commonwealth of Kentucky, Cabinet for Health and Family Services v. Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, et al. That case involves the issue as to whether or not a criminal defendant is entitled to KASPER data regarding himself, a co-defendant, and a third person described as a "co-occupant" of [the Real Party in Interest Larry Cole's] residence. Appellant's brief in that case has been filed simultaneously with this brief.

Although 2008-SC-000508 involves a question of disclosure of KASPER data in a criminal case in which an accused's right to possible exculpatory or mitigating evidence is in issue, the questions involved in both cases overlap to some extent. Therefore, with the indulgence of the Court, we will be repeating in this case some of the argument we made in the criminal case.

At KRS 218A.202(6)(a) through (h) and (7)(Appendix I), the General Assembly sets out specific persons and entities who may received KASPER records. Subsection (6) provides that Appellant " . . . shall only disclose data to persons and entities authorized to receive that data under this section . . . Disclosure to any other person or entity . . . is prohibited unless specifically authorized by this section . . ." The General Assembly then went on to specifically list the persons and entities to whom KASPER information could be released.

Forty-six (46) years ago in Gateway Construction Company v. Wallbaum, 356 S.W.2d 247 (Ky. 1962), this Court stated that " . . . The words of a statute are to be given their usual, ordinary and everyday meaning . . ." at p. 249. Wallbaum has been followed in St. Clair v. Commonwealth, 140 S.W.3d 510, at 567 & 568 (Ky. 2004); and Stephenson v. Woodward, 182 S.W.3d 162 (Ky. 2005). Indeed, we may say that those decisions followed the will of the General Assembly expressed in KRS 446.080(4): "All words and phrases shall be construed according to the common and approved usage of language, . . ." But in subsection (6), the General Assembly used the phrase " . . . shall only disclose . . ." "Shall" is mandatory. KRS 446.010(30). Thus, Appellant was mandated by the General Assembly to disclose KASPER data only to those persons or entities specifically listed in subsection(6)(a) through (h). In addition to limiting disclosure to certain persons and entities, the legislature provided that KASPER data would not be a public record (subsection 10), and that disclosures to unauthorized persons or entities could result in criminal penalties (subsections 11 and 12).

Further, it is Appellant's position that the fact that the General Assembly very specifically laid out the persons and entities who could receive KASPER data as well as very specific person and entities to whom those persons and entities could transfer KASPER data, necessarily excludes any other persons or entities. The enumeration of some, necessarily excludes the other. Wade v. Commonwealth, 303 S.W.2d 905, 907 (Ky. 1957). " . . . the enumeration of particular things excludes other items which are not specifically mentioned . . ." Louisville Water Company v. Wells, 664 S.W.2d 525, 527 (Ky. App. 1984).

Leo Thacker pled guilty in Fayette Circuit Court to several counts of obtaining and attempting to obtain controlled substances by means of fraud. Thacker appealed on theories of unreasonable search and seizure, and the prohibited disclosure of KASPER information. Judge William Knopf, now Senior Judge Knopf, wrote the opinion in Thacker v. Commonwealth, 80 S.W.3d 451 (Ky. App. 2002). In that Opinion, Judge Knopf wrote that "Subsection (6) of KRS 218A.202 authorizes the Cabinet to release data from the monitoring system to, among a very few others, . . ." The "others" are enumerated. Page 454. However, on page 11 of the Opinion and Order, ROA, p. 177, Senior Judge Knopf states:

> In fact, the extensive list of individuals and entities allowed access to the data under KRS 218A.202(6)(a)-(h) would, in and of itself, raise a serious question regarding any legislative intent to create a privilege.

Further on the same page in Thacker, Judge Knopf noted:

> Subsection (6) further provides that [f] person who receives data or any report of the system from the Cabinet shall not provide it to any other person or entity except by order of a court of competent jurisdiction.

At page 455 of the Thacker opinion, Judge Knopf made the following observations:

> Kentucky clearly has a substantial interest in regulating the sale and distribution of drugs and in attempting to trace their movement through the channels of commerce.[1] It is no less clear that the prescription monitoring system, with its substantial safeguards against inappropriate disclosure of data, reasonably advances that interest. The detective testified that, by eliminating the need to inquire about a suspect at virtually every pharmacy in the county, the **KASPER** reports have significantly streamlined his prescription-fraud investigations. Finally, the statute makes clear to practitioners and patients that the data is subject to limited police inspection, and the requirement that officers articulate to the Cabinet bona fide suspicions that the individual about whom they

[1] *Cf. Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Vermont v. Welch*, 160 Vt. 70, 624 A.2d 1105 (1992); *Stone v. City of Stow*, 64 Ohio St.3d 156, 593 N.E.2d 294 (1992)

> are inquiring has violated a provision of KRS Chapter 218A appropriately restrains their discretion. (emphasis added)

As Judge Knopf noted at page 454 of Thacker, KASPER data contains medical information that is subject to " . . . the constitutional provisions against unreasonable searches and seizures . . ." Respectfully, we pose: What could be the possible justification, the "probable cause" which would permit the intrusion into constitutionally protected KASPER data in a civil case(?). A person's credibility is not in question merely because he or she is taking controlled substances. Commonwealth v. Barroso, 122 S.W. 2d 554, 563 (Ky. 2003).

Even in a criminal case where the defendants life or liberty hangs in the balance,

> [12] If the *in camera* inspection reveals exculpatory evidence, *i.e.*, evidence favorable to the accused and material to guilt or punishment, including impeachment evidence, that evidence must be disclosed to the defendant if unavailable from less intrusive sources. *Eldred, supra*, at 701; *cf. Ritchie, supra*, at 57, 107 S.Ct. at 1001; *see also State v. Peseti, supra*, at 129 (less intrusive sources); *State v. L.J.P.*, 270 N.J.Super. 429, 637 A.2d 532, 537, (Ct.App.Div.1994)(same) Barroso, p. 564 (emphasis added)

In its Memorandum ordered by the Court of Appeals, the Cabinet cited the case of Commonwealth v. DeWeese, 141 S.W.2d 372. ROA, p. 142. KRS 610.340(1) provides in part that " . . . all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 . . . shall be deemed to be confidential . . ." (emphasis added) We respectfully note that the General Assembly did not afford the records the status of "privileged". KRS 610.342(1) allows counsel representing a juvenile to " . . . have full access to all records . . ." (emphasis added) held by multiple entities, including any other public or private entities. Subsection (2) of the same statute provides the courts shall enforce the provisions of KRS 610.342(1).

In DeWeese, while the juvenile's case was in the process of being transferred from District Court to Circuit Court, the juvenile's attorney requested discovery pursuant to the Rules of Criminal Procedure. The District Court ordered discovery. A Circuit Court denied the Commonwealth's Petition for Writ of Prohibition. On appeal to the Court of Appeals, the Court said:

> " . . . KRS 610.342 is not a rule of discovery, indeed if it were, we would be constrained to declare it an unconstitutional encroachment on the powers of the judiciary." p. 378

KASPER is a tool by which designated entities and persons, engaged in bona fide specific investigations of specific individuals suspected of violating the controlled substance laws, may access the KASPER data as an aid in the furtherance of their investigation.

Most respectfully to Judge Knopf and this Court, we fail to see how KRS 610.340 is not a rule of discovery, but KASPER somehow is, especially since the General Assembly specifically gave to the courts the mandate to enforce KRS 610.340(1). Further, it is unlikely that the records referred to in KRS 610.340(1) would contain raw data not guaranteed to be accurate.

In Commonwealth of Kentucky, Cabinet for Health and Family Services v. G.W.F., 229 S.W.3d 596 (Ky. App. 2007), the Court of Appeals found that an Order of the Carter County Circuit Court violated the separation of powers doctrine because the Order required the Cabinet to pay for hair follicle drug screening and because there was no specific statute authorizing the Court to assess such a payment.

In the case at bar, as we have argued in the circuit court and Court of Appeals, only the General Assembly had the power to enact the KASPER statute, and surely it was

in the General Assembly's legislative and constitutional discretion to restrict the dissemination of KASPER data. Just as in G.W.F. above, the General Assembly by not enacting a statute that would have provided funds for hair follicle testing "restricted" purposes for which Cabinet funds could be used, the General Assembly could restrict the dissemination of KASPER data.

If the Court finds that the restrictions on dissemination of KASPER data does infringe on the judiciary, we ask the Court to grant comity. Again, we respectfully emphasize that KASPER is an investigative tool, raw data not admissible into evidence per se. The information contained in the KASPER data may or may not be accurate. There is nothing in the KASPER statute that impinges upon the rules and case law that were in effect before KASPER was enacted.

CONCLUSION

We respectfully urge the Court to find that the restrictions regarding dissemination of KASPER data are within the constitutional power of the General Assembly and not subject to discovery in any civil case. Further, we move the Court to find that the KASPER statute is not a rule of discovery.

If the Court cannot so find, we respectfully ask the Court to grant the restrictions in the KASPER statute comity.

Respectfully submitted,

Cabinet for Health and Family Services

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