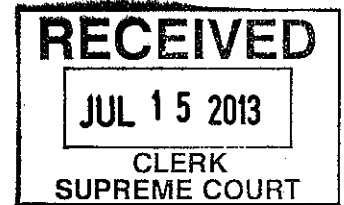


Commonwealth of Kentucky
Supreme Court
No. 2012-SC-00402-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Powell Circuit Court
Hon. Frank A. Fletcher, Judge
Indictment No. 09-CR-133 & 09-CR-143

FLOYD GROVER JOHNSON

APPELLEE

Reply Brief for Commonwealth

Submitted by,

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CERTIFICATE

I certify that the record on appeal was not checked out from the Office of the Supreme Court Clerk and that a copy of this Brief has been served July 15th, 2013 as follows: by mailing to the trial judge, Hon. Frank A. Fletcher, Judge, Breathitt County Justice Center, P.O. Box 946, Jackson, KY 41339-0946; Hon. Ian Sonogo, Assistant Commonwealth's Attorney, 8th Judicial Circuit, lead counsel for *amici curiae* Commonwealth's Attorneys Association, *et al.*, P.O. 1001 Center Street, Suite 205, Bowling Green, KY 42101-2191; Hon. Denise Garrison McElvein, Assistant Missouri Attorney General, lead counsel for *amici curiae* Attorneys General of Missouri, *et al.*, P.O. Box 861, St. Louis, MO 63188; by sending electronic mail to Hon. Darrell Herald, Commonwealth Attorney; and by delivery through Kentucky Messenger Mail to Hon. Emily Holt Rhorer, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

Assistant Attorney General

Introduction — Purpose of the Reply Brief

The purpose of this reply brief is to address only those matters presented in the Appellee's brief that the Commonwealth believes deserve further comment beyond that presented in the Commonwealth's principal brief. The Court should not infer that a failure to address a particular issue means that issue has either more or less merit than those addressed in this reply brief.

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ARGUMENT

I.

There is no explicit limitation on the types of crimes peace officers employed by the Attorney General may investigate but there is an explicit statutory directive to investigate drug crimes.

Appellee makes two fundamental errors upon which he bases his argument that the Attorney General has no statutory authority to investigate matters statewide. First, the legislature's failure to more specifically define the criminal investigative authority of the Office of the Attorney General ("OAG") does not somehow limit that authority. Instead, it underscores the broad discretion the Attorney General enjoys in directing his investigators. Second, Appellee's argument about the statutory non-existence of the "Special Investigations Division" is a red herring because the internal organizational structure and the names of the divisions of the OAG have nothing to do with the authority of the OAG.

A. The Attorney General has Statewide Authority to Investigate Crimes Throughout the Commonwealth of Kentucky and the Legislature has not Limited that Authority.

The Appellee argues that the legislature, by enacting various statutes has limited the criminal investigative authority of the Office of the Attorney General. Appellee argues that the OAG is only permitted to investigate crimes which are specifically enumerated by statute and is not permitted to investigate matters outside those statutes. Appellee, however, confuses the OAG's authority to prosecute crimes with the OAG's authority to investigate criminal activity and shows a misunderstanding of how the Unified

Prosecutorial System works.

The modern Unified Prosecutorial System (“UPS”) statutes were enacted in 1976 and are found at KRS 15.700, *et.seq.* and were enacted to correspond with the creation of the Unified Court System in 1975. Those statutes, along with various provision of KRS Chapter 69, provide the Commonwealth’s and county Attorneys with the authority to prosecute criminal offenses throughout the Commonwealth. KRS 15.730 and KRS 69.013. County and Commonwealth’s attorneys generally must act within their county or judicial circuit. KRS 15.725.

Generally speaking, for the Attorney General’s office to get involved in a ***prosecution*** of a case, the locally elected Commonwealth’s Attorney must either ask for the “assistance” of the OAG pursuant to KRS 15.190 or must ask for a special prosecutor to be appointed when there is a conflict or a disqualification pursuant to KRS 15.733 or 15.734. If this occurs, the Attorney General may prosecute the case himself or appoint another county or Commonwealth’s Attorney to act in the shoes of the conflicted or disqualified prosecutor. KRS 15.210; KRS 15.730; KRS 15.735. Therefore, as it relates to prosecution, the statutes make the county and Commonwealth’s Attorneys primarily responsible for prosecution within their political subdivisions, but appropriately permit the Attorney General’s involvement when certain circumstances arise. In addition, several statutes enacted since the creation of UPS have granted the Attorney General concurrent jurisdiction to prosecute crimes without having to first present the investigation to the

locally elected prosecutor.¹

A perfect illustration of this is found in KRS 15.231 which gives the Attorney General "concurrent jurisdiction with the Commonwealth's attorneys and county attorneys for the prosecution of [theft of identity and trafficking in stolen identities]." That statute clearly discusses the role of the Attorney General as it relates to the prosecution of criminal activity; *i.e.*, after a case has been initiated such as through a grand jury proceeding. Other statutes in KRS Chapter 15 cited by Appellee are designed to grant the Attorney General concurrent jurisdiction over prosecutions. These include cases involving metal thefts, KRS 15.232; environmental protection, KRS 15.240; and enforcement of election laws, KRS 15.242.² Those statutes permit the Attorney General to prosecute a case without the permission or without a request from the sitting county or Commonwealth's Attorney. In short, the Attorney General can go straight to the grand jury and indict a case in those circumstances, just as the local prosecutor can.

Thus, the Attorney General recognizes that his authority to prosecute is limited by these statutes. However, the Attorney General's authority to investigate crimes is not limited by these or any other statutes. That authority has never been limited by the legislature or the courts. In fact, the opposite is true. The Attorney General's authority to

¹ KRS 15.200 also provides a mechanism for local officials other than the local prosecutor to request the Attorney General get involved in an investigation. As explained later in this brief and at length in the Commonwealth's principal brief, that statute is not a limiting statute — but merely a mechanism for local civic leaders to request the Attorney General get involved in an investigation.

² This is not an exhaustive list of statutes that provide the OAG with concurrent prosecutorial jurisdiction.

investigate existed at common law and has been recognized in both statutes enacted by the legislature and cases decided by this Court.

The General Assembly granted the Attorney General authority to employ peace officers but said nothing about limiting that authority. “Investigative personnel as designated by the Attorney General shall have the power of peace officers.” KRS 15.150. Furthermore, it has specifically declared that it is “to be the policy of this Commonwealth to encourage cooperation among law enforcement officers” and, to that end, has identified “the Attorney General as chief law enforcement officer of the Commonwealth.” KRS 15.700.

Appellee's argument flies in the face of these statutes. Appellee would have this Court hold that the statewide chief law enforcement officer of the Commonwealth whose investigators are required to be peace officers and who has the authority to bring any action he deems in the public interest cannot investigate criminal activity within the Commonwealth. This reading would leave these statutes meaningless. The more accurate reading would be to hold as the Commonwealth argues — that the Attorney General has statewide authority to investigate criminal activity. The Amicus Curiae Brief of the Commonwealth's Attorneys Association, the County Attorneys Association, the Justice Cabinet, the Kentucky State Police, the Office of Drug Control Policy, the Kentucky Narcotics Officers Association, and Operation UNITE supports this view.

The definition of the term peace officer illustrates the broad authority given those so designated by the Attorney General because the term “includes, sheriffs, constables, coroners, jailers, metropolitan and urban-county government correctional officers,

marshals, policemen, and other persons with similar authority to make arrests” KRS 446.010(31). Appellee trumpets KRS 16.060, setting forth the powers and duties of the Kentucky State Police, as the mandatory model upon which any legislative grant of criminal investigative power to the Attorney General must be based. Appellee argues that the lack of a similar statute regarding the Office of Attorney General implies a reservation of subject matter authority where none is stated. This implied reservation contradicts the broad authority explicit in KRS 446.010(31) and violates the cardinal rule of construction that courts should not either add to or detract from the language of a statute. *See, e.g., Department of Revenue, Finance and Admin. Cabinet v. Wyrick*, 323 S.W.3d 710, 713 (Ky. 2010).

The statute that Appellee argues limits the Attorney General’s authority, KRS 15.200, is actually an expansion of his authority and an expansion of the authority of the local agencies and the Governor to request the Attorney General get involved in a given case. “The duties of the Attorney General have been enlarged by KRS 15.190, 15.200, and 15.210.” *Matthews v. Pound*, 403 S.W.2d 7, 10-11 (Ky. 1966). *Matthews* dealt with grand jury proceedings which relate to *prosecutorial* functions and recognized that the those statutes enlarged the OAG’s prosecutorial authority – not diminished its investigative authority. KRS 15.200 is the authority by which specific agencies officially contact the Attorney General for his assistance. It deals with prosecutions and does not contract the Attorney General’s inherent investigatory authority.

Furthermore, KRS 218A.240 provides a specific statutory authority directing the Attorney General to investigate crimes falling under KRS Chapter 218A. That statute

would be meaningless if the term "jurisdictions" were read to reflect the subject matter jurisdiction of the various entities. For example, a sheriff has subject matter jurisdiction over all crimes committed in his or her county. If the term "jurisdictions" were read to mean subject matter jurisdiction, then it would be superfluous as the sheriff already has it. The same is true for all of the other entities mentioned in the statute including the "... city, county, and Commonwealth's attorneys, and the Attorney General..." Moreover, had the legislature intended for the term to mean subject matter jurisdiction, it would have used the term in the singular form. Instead, the statute 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 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 related to controlled substances.

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

It makes no sense to read this plural term as applying the various entities' subject matter jurisdiction or to the OAG's prosecutorial jurisdiction. For example, the City of Frankfort police have a "respective jurisdiction" limited to the geographical political boundaries of the City of Frankfort, the Franklin County Sheriff has a "respective jurisdiction" limited to his geographical political boundary of Franklin County, and the Kentucky State Police and the Attorney General have statewide "respective jurisdictions."

The plural term “jurisdictions” clearly means the geographic jurisdictions of the various entities. This statute specifically directs him to enforce the provisions of KRS Chapter 218A and because his investigative personnel are required to be peace officers under KRS 15.150, they have the authority to conduct criminal investigations of crimes under KRS Chapter 218A throughout the Commonwealth.

Appellee also argues that a holding in this case will not affect other aspects of the Attorney General’s investigative ability such as cybercrimes. Appellee’s arguments, however, are inconsistent. First, in contradiction of the laws of statutory construction, he argues that KRS 15.150 does not grant OAG investigative authority. Then he admits that KRS 500.120(1)(a) grants the authority for OAG personnel to “investigate” cybercrimes. As discussed above, the Appellee is incorrect about KRS 15.150. Appellee, however, is correct that KRS 500.120 is a recognition of the OAG’s authority to investigate cybercrimes, but it is actually a recognition of the OAG’s broad investigative authority. A reading of KRS 500.150 shows that the legislature took for granted the fact and already recognized that the OAG had the ability to investigate cybercrimes – which had not previously been specifically enumerated in any statute in KRS Chapter 15 or otherwise. KRS 500.120(1)(a) states:

In any investigation relating to an offense involving [cybercrimes] and upon reasonable cause to believe that an Internet service account has been used ... the Attorney General may issue in writing and cause to be served a subpoena...

The legislature clearly understood that the OAG had existing investigative

authority to conduct cybercrimes investigations — otherwise the granting of the ability to obtain evidence through an administrative subpoena to an agency without existing authority would have been absurd. Furthermore, the statute was amended in the most recent legislative session to add nearly identical language which grants the same authority for the Kentucky State Police to obtain an administrative subpoena. 2013 Ky.Acts Ch. 41 § 3 (HB 39).³ Clearly, the legislature saw the investigators from the OAG and KSP on equal footing to grant them the exact same administrative subpoena authority. This also shows that the difference in the KSP peace officer statute and OAG's peace officer statute is inconsequential.

Rather than considering the Appellee's proposed model statute, a court interprets a statute "on the basis of what is said rather than what might have been said."

Commonwealth v. Harrelson, 14 S.W.3d 541, 546 (Ky. 2000) (citations and internal quotation marks omitted); *see also Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960); *Commonwealth v. Garnett*, 8 S.W.3d 573, 576 (Ky.App. 1999). Moreover, the Kentucky State Police is purely a creation of statute without any common law

³ The new section, KRS 500.150(1)(b) states:

In any investigation relating to an offense involving KRS 510.155, 530.064(1)(a), 531.030, 531.040, 531.310, 531.320, 531.335, 531.340, 531.350, 531.360, or 531.370, and upon reasonable cause to believe that an Internet service account has been used in the exploitation or attempted exploitation of children, the commissioner of the Department of Kentucky State Police may issue in writing and cause to be served a subpoena requiring the production and testimony described in subsection (2) of this section.

underpinnings. It was therefore necessary for the General Assembly to more fully spell out the duties of the State Police. The investigative authority of the OAG existed at common law and was further codified in KRS 15.150 and therefore the investigative authority of the OAG did not need to be specifically enumerated.⁴

The General Assembly authorized the Attorney General to employ peace officers and then directed them to enforce drug laws. KRS 218A.240. Appellee admits, "No doubt investigators in the Attorney General's Office do have the ability to investigate matters statewide - but only if the matter to be investigated is subject to the Attorney General's subject matter jurisdiction." Brief, p. 4. However, the Appellee never identifies any explicit restriction on subject matter jurisdiction and there is none. From Lord Coke's personal interrogation of prisoners⁵ to modern day investigations of charities⁶ and state contracts,⁷ the Attorney General's inherent authority to investigate matters in the public interest is clear. So is his authority to use peace officers the legislature has authorized him to employ.

⁴ The common law authority of the OAG is argued in more detail in the Commonwealth's principal brief and is also the subject of the Brief of Amicus Curiae Attorneys General.

⁵ Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age*, p. 242, 256, 278-279 (2003).

⁶ See *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 948-49 (Ky. 1959).

⁷ *Strong v. Chandler*, 70 S.W.3d 405 (Ky. 2002).

B. The Administrative Structure of the Office of the Attorney General has Nothing to do with the OAG's Authority to Investigate Criminal Activity in the Commonwealth.

Appellee argues, "There is no longer a 'Special Investigations Division'"

Brief, p. 4. He then paradoxically recognizes that KRS 15.010 specifically identifies the Special Investigations Division as an organizational unit of the Department of Law, with the Attorney General as its head. Brief for Appellee, p. 3.⁸ The Attorney General has reorganized the office structure delineated by KRS 15.010 through executive orders in accordance with KRS 12.028. In 2007, then Attorney General Greg Stumbo reorganized the Special Investigations Division of the Office of Attorney General by creating the Kentucky Bureau of Investigations and current Attorney General Jack Conway later created the Department of Criminal Investigations.⁹ The current Department of Criminal Investigations is the current incarnation of the former Special Investigations Division, but lawfully reorganized to better serve the citizens of the Commonwealth. The organizational structure and names of the units within the Office of Attorney General simply have nothing to do with the statewide authority of peace officers employed by the Office of Attorney General.

Moreover, Appellee's entire argument about the organizational structure of the

⁸ KRS 15.010(2) states, "The Department of Law shall include the following major organizational units: ... (c) Special Investigations Division" The General Assembly first enacted this provision in 1998 Ky.Acts Ch. 81, § 1.

⁹ Attached in Appendix 1 to this reply brief are copies of Executive Orders of the Office of the Attorney General covering the period from when the Special Investigations Division was first reorganized through the period covering the indictments in this appeal: AG 07-01, AG 08-01, and AG 09-01. Subsequent Executive Orders have maintained the existence of the Department of Criminal Investigations.

Attorney General's Office is a red herring. The peace officers employed by the Office do not derive their authority from their assignment to a particular department or division. They derive their authority from the common law and by explicit statutory authority. The General Assembly has authorized the Attorney General to employ peace officers without regard to the organizational structure of the Office. KRS 15.150 simply states, in relevant part, "Investigative personnel as designated by the Attorney General shall have the power of peace officers." There is no requirement these peace officers be employed within any specific organizational unit of the Attorney General's Office. The Appellee wants to add a restriction onto this statute, but this Court has stated, "We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Consol. Infrastructure Mgmt. Auth., Inc. v. Allen*, 269 S.W.3d 852, 855 (Ky. 2008) (citations omitted).

II.

Even if the peace officers lacked subject matter jurisdiction, there was no misconduct authorizing dismissal of the indictment.

The Commonwealth is aware of only one instance where a court may dismiss an indictment for prosecutorial misconduct. That instance is inapplicable here because the Appellee does not claim there was any prosecutorial misconduct in this case.

A court may dismiss an indictment if the defendant "demonstrate[s] a flagrant abuse of the grand jury process that resulted in actual prejudice and deprived the grand jury of autonomous and unbiased judgment." *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001) quoting *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky.App. 2000).

There has never been any allegation that the Commonwealth flagrantly abused the grand jury process or presented any untrue evidence to the grand jury. The investigators simply identified the agencies for which they worked and described the course of investigation. The grand jury is entitled to hear evidence from any person and indict based upon that evidence without regard to whether that person is a peace officer or not.

This Court has also considered, but not decided, that a court may dismiss an indictment for “outrageous government conduct” which irrevocably taints the evidence or prejudices the case so much as to deny due process and fundamental fairness. *Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009). This is not the case to craft a severe remedy for outrageous government conduct. There was no outrageous government conduct. Even if the Court determines that peace officers employed by the Office of Attorney General have no authority to investigate drug crimes, there is a good faith argument to believe they have that authority. Thus, there is no outrageous conduct.

To clarify — the investigators in this case were not acting as private persons in the investigation and testimony to the grand jury. Nevertheless, they were exercising the authority that even a private person has when investigating drug dealing and testifying to the grand jury. Thus, there was no abuse of the grand jury process or outrageous government conduct when pursuing this investigation. There is simply no reason to remand for an evidentiary hearing on this matter.

CONCLUSION

The Office of Attorney General has inherent common law authority to investigate matters in the public interest, including criminal matters. The General Assembly has

specifically authorized the Attorney General to employ peace officers in these investigations and has explicitly directed those peace officers enforce KRS Chapter 218A. This Court should therefore reverse the Court of Appeals and affirm the convictions of the Appellee.

Respectfully Submitted,

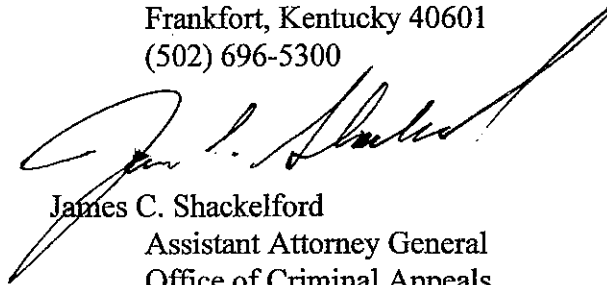
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APPENDIX

Description

Appendix No.

Executive Orders of the Office of Attorney General

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