

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000994-MR

STEPHANIE FLINK

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CR-00176

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Stephanie Flink appeals from a Johnson Circuit Court judgment convicting her of first-degree wanton endangerment. Flink entered a guilty plea conditioned on her right to appeal the trial court's denial of her motion to dismiss the indictment. We reverse.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Flink gave birth to a son on August 7, 2009. Five days later, the child, who was suffering from numerous health problems, was placed in the care of his grandmother. Flink was indicted for wanton endangerment in the first degree under Kentucky Revised Statutes (KRS) 508.060. The indictment charged that on or before November 2008 through August of 2009, she “engaged in conduct which creates an extreme indifference to human life, substantial danger of death or serious physical injury to another, namely (R.W.), her juvenile child.” The basis of the indictment was the allegation that Flink had ingested illegal drugs while she was pregnant and thereby injured her child.

At the time of Flink’s indictment, a factually-similar case, *Commonwealth v. Cochran*, 315 S.W.3d 325 (Ky. 2010), was pending before the Kentucky Supreme Court. Flink filed a motion to dismiss the indictment raising the same arguments that were being addressed in *Cochran*. After a hearing, the trial court denied her motion. She then entered a plea of guilty conditioned on her right to appeal the trial court’s refusal to dismiss the indictment. She was sentenced on May 25, 2010. On June 17, 2010, the opinion of the Supreme Court in *Cochran* became final. It held that an indictment which alleged that Cochran committed wanton endangerment in the first degree when she ingested cocaine while she was pregnant was expressly precluded by the Maternal Health Act of 1992. On appeal, Flink argues that the indictment in her case was similarly invalid.

We agree with Flink that, under *Cochran*, the indictment in her case should also be dismissed. The Commonwealth has attempted to distinguish the cases by arguing that Flink's indictment was based in part on evidence that she committed acts which constituted wanton endangerment during the five days following the child's birth and before his placement with his grandmother. The Commonwealth contends that the indictment is therefore valid because it was not based solely on Flink's ingestion of illegal drugs during her pregnancy. We have carefully reviewed the record but can find no evidence that the Commonwealth raised this argument before the trial court. An appellate court "is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

The Commonwealth also argues, relying on the dissent in *Cochran*, that the unilateral dismissal of an indictment by the trial court violates the doctrine of the separation of powers. The dissent contended that "the judicial branch of government has no authority to dismiss a valid indictment without the consent of the executive branch represented by the Commonwealth's Attorney or the County Attorney." *Cochran*, 315 S.W.3d at 331 (Venters, J., dissenting). This Court, however, "is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Rules of the Supreme Court (SCR) 1.030(8)(a). The majority in *Cochran* held that an indictment that is invalid on its face may be properly dismissed by the trial court. *Cochran*, 315 S.W.3d at 330. Arguably, the indictment in this case was not facially invalid

because it did not specify, as did the indictment in *Cochran*, that the criminal conduct occurred solely when the defendant ingested drugs while the child was *in utero*. Nonetheless, as we have already stated, that is not the argument that was raised by the Commonwealth before the circuit court.

The judgment of conviction is reversed and the case is remanded for dismissal of the indictment.

CLAYTON, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky