

RENDERED: SEPTEMBER 24, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000949-MR

FRANK D. HAMILTON

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CR-00141

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2009-CA-000950-MR

HEATHER R. COLE

APPELLANT

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 08-CR-00155

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
DISMISSING

** ** * * * * *

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR JUDGE.

COMBS, JUDGE: Frank Hamilton and Heather Cole appeal their convictions of trafficking in buprenorphine in the Knox Circuit Court. After our review, we dismiss the appeal.

Hamilton and Cole were both arrested for selling Suboxone, a synthetic opiate that consists of buprenorphine and naloxone. They both offered the same defense theory to the trial court: that Suboxone was improperly classified as a Schedule III drug. Their cases were consolidated for the purpose of an evidentiary hearing. Following the hearing, the trial court denied Hamilton and Cole's motion to dismiss the indictment. They then entered conditional guilty pleas. This appeal follows.

The Appellants argue that the regulation classifying buprenorphine as a Schedule III drug is invalid, thereby rendering their indictments invalid. However, because they failed to name an indispensable party to this appeal, we are unable to reach the merits and are compelled to dismiss.

Kentucky Revised Statute[s] (KRS) 218A.090 lists the drugs that are included in Schedule III. Buprenorphine is not included. However, the statute begins with the following words: "*unless otherwise rescheduled by regulation of the Cabinet for Health and Family Services (the Cabinet), the controlled substances listed in this section are included in Schedule III.*" (emphasis added). 902

Kentucky Administrative Regulation(s) (KAR) 902 55:025 Section 7 provides that

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

“a material, compound, mixture, or preparation which contains any quantity of buprenorphine, or its salts” is designated as a Schedule III controlled substance.

The Appellants do not disagree that the Cabinet legitimately has the authority to promulgate rules classifying controlled substances. *See Commonwealth v. Hollingsworth*, 685 S.W.2d 546 (Ky. 1984). Rather, their contention is that the Cabinet did not make sufficient findings before it did so.

KRS 218A.020 authorizes the Cabinet to add, delete, and reschedule substances enumerated in the schedules by regulation. Subsections (1) and (2) list factors for the Cabinet to consider in its determinations. Subsection (3) provides that “[i]f any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to [the Cabinet], [the Cabinet] may similarly control the substance under this chapter by regulation.” The Cabinet acted under the authority of this provision in 2002 when it reclassified buprenorphine from a Schedule V substance to a Schedule III substance.

KRS 218A.020(3) also provides that “[the Cabinet] may similarly control the substance under this chapter by regulation.” Appellants argue that the Cabinet did not act under chapter 218A because it did not make the specific findings mandated in KRS 218A.020(1) and (2) or KRS 218A.080.

The provision that the federal regulations may be adopted *by regulation* leads us to KRS Chapter 13A. It sets forth the procedures that agencies must follow in order to create or amend regulations. KRS 13A.090 directs that

(1) The Commissioner's authenticated file stamp upon an administrative regulation or publication of an administrative regulation in the Kentucky Administrative Regulations Service or other publication shall raise a rebuttable presumption that the contents of the administrative regulation are correct.

(2) The courts shall take judicial notice of any administrative regulation duly filed under the provisions of this chapter after the administrative regulation has been adopted.

902 KAR 55:025 Section 7 appeared with the Commissioner's stamp in the October 16, 2002, issue of the Kentucky Administrative Register. Therefore, it is entitled to the rebuttable presumption of correctness created by KRS 13A.090.

If Appellants want to challenge this rebuttable presumption of correctness, they must do so pursuant to KRS 13A.140, which sets forth the proper procedure for such a challenge. Subsection one (1) instructs:

Administrative regulations are presumed to be valid until declared otherwise by a court, but when an administrative regulation is challenged in the courts it *shall be the duty* of the promulgating administrative body to show and bear the burden of proof to show:

(a) That the administrative body possessed the authority to promulgate the administrative regulation;

(b) That the administrative regulation is consistent with any statute authorizing or controlling its issuance;

(c) That the administrative regulation is not in excess of statutory authority;

(d) That the administrative regulation is not beyond the scope of legislative intent or statutory authority;

(e) That the administrative regulation is not violative of any other applicable statute; and

(f) That the laws and administrative regulations relating to promulgation of administrative regulations were faithfully followed.

(Emphasis added).

In this case, the promulgating administrative body – the Cabinet – has not had the opportunity to perform its statutory duty to defend the validity of the challenged administrative regulation. The Appellants failed to designate the Cabinet as a party to this appeal.

Appellants argue that 902 KAR 55:025 Section 7 is inconsistent with the statutory authority authorized by KRS 218A.020. Therefore, as KRS 13A.140(b) *mandates* that the Cabinet bears the burden to defend the regulation, it is an indispensable party. It is well established that failure to name an indispensable party results in the dismissal of an appeal. *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617, 623 (Ky. 2010).

We also note the predecessor to our current Supreme Court has held that “[o]nly the parties to an appeal are bound by the appellate court’s disposition of the proceeding.” *Levin v. Ferrer*, 535 S.W.2d 79, 82 (Ky. 1975). In the case before us, if 902 KAR 55:025 Section 7 were to be found inconsistent with statutory law, the Cabinet would be responsible for amending the regulation. Therefore, both logically and procedurally, it must be a party to the appeal.

Accordingly, we dismiss this appeal for failure to name an indispensable party.

LAMBERT, SENIOR JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

CLAYTON, JUDGE, DISSENTING: Respectfully, I dissent. The majority has dismissed the appeal for the failure of the Appellants to join the Cabinet for Health and Family Services as an indispensable party. If the regulation promulgated by the Cabinet was the subject of the action, I would concur with the majority's decision. However, I believe that it is the statutory requirements of KRS 218A.020(3) and the resulting constitutional questions which are the actual issues before this Court. Although the facial constitutionality of KRS 218.020(3) is not challenged, the Appellants nevertheless raise constitutional questions. The Appellants argue that the Cabinet has accepted the classification of Suboxone/buprenorphine as a Schedule III controlled substance based upon the federal Drug Enforcement Agency's (DEA) regulation. The trial court determined that it did not have subject matter jurisdiction to review the federal regulation. The Appellants argue that the acceptance of the DEA's classification is improper without the Cabinet's making findings as required in KRS 218A.080. Therefore, they argue, if the trial court is correct and KRS 218A.020(3) does not require findings, then the legislature has impermissibly delegated authority to a state agency, the Executive Branch, without providing adequate standards as required by

Section 28 of the Kentucky Constitution. According to the Appellants, the result of the trial court's decision is that judicial review is precluded. Since I believe that this Court can address these constitutional questions, I would not dismiss the appeal.

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