Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0780-OA

DANIEL CAMERON, in his official capacity
as Attorney General of the Commonwealth of Kentucky PETITIONER

AN ORIGINAL ACTION
v. ARISING FROM JEFFERSON CIRCUIT COURT
ACTION NO. 22-CI-003225

HON. MITCH PERRY,
Judge, 30th Judicial Circuit, Jefferson Circuit Court RESPONDENT

AND

EMW WOMEN'S SURGICAL CENTER, P.S.C.,
on behalf of itself, its staff, and its patients;
ERNEST MARSHALL, M.D., on behalf of
himself and his patients; and
PLANNED PARENTHOOD GREAT NORTHWEST,
HAWAI'I, ALASKA, INDIANA, AND KENTUCKY, INC.,
on behalf of itself, its staff and its patients;
ERIC FRIEDLANDER, in his official capacity as Secretary
of Kentucky's Cabinet for Health and Family Services;
MICHAEL S. RODMAN, in his official capacity as Executive
Director of the Kentucky Board of Medical Licensure; and
THOMAS B. WINE, in his official capacity as
Commonwealth's Attorney for the 30th
Judicial Circuit of Kentucky REAL PARTIES IN INTEREST

ORDER
DENYING MOTION FOR INTERMEDIATE RELIEF

** ** ** ** **

This case is before the Court on a petition for writ pursuant to CR[1] 76.36 filed by Daniel Cameron, in his official capacity as Attorney General of the Commonwealth of Kentucky. This Order addresses his request for intermediate relief pursuant to CR 76.36(4), pending review of the petition by a three-Judge panel of this Court.

The Court having reviewed the record, considered written arguments of counsel, and being otherwise sufficiently advised, IT IS HEREBY ORDERED that Petitioner's motion for intermediate relief shall be, and hereby is, DENIED. It is further ORDERED that Petitioner's motion for leave to file a reply is DENIED.

The Jefferson Circuit Court entered a temporary restraining order[2] enjoining the Attorney General and others[3] from enforcing KRS[4] 311.772 and KRS

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[1] Kentucky Rules of Civil Procedure.

[2] *EMW Women's Surgical Center v. Cameron*, No. 22-CI-003225, restraining order (Jefferson Cir. Ct., Jun. 29, 2022).

[3] The other defendants in the Jefferson Circuit Court action are: Eric Friedlander, in his official capacity as Secretary of Kentucky's Cabinet for Health and Family Services; Michael S. Rodman, in his official capacity as Executive Director of the Kentucky Board of Medical Licensure; and Thomas B. Wine, in his official capacity as Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky.

[4] Kentucky Revised Statutes.

311.7701-.7711. After initiating this original action, the Attorney General moved this Court "for a temporary order on the ground that he/she will suffer immediate and irreparable injury before a hearing may be had on the petition." CR 76.36(4).

Review of a motion for intermediate relief pursuant to CR 76.36(4) presumes the relief sought is a writ. That typically leads to a rote analysis under "what we have described as two classes of writs, one addressing claims that the lower court is proceeding without subject matter jurisdiction and one addressing claims of mere legal error." *Collins v. Braden*, 384 S.W.3d 154, 158 (Ky. 2012) (citing *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004)). The Attorney General primarily argues "the second class of writs is at issue here." (Pet. for Writ of Mandamus and Prohibition, p. 8).

Analysis of petitions for writs of this second class typically identifies "the first prong of the threshold inquiry" to be the determination whether there is an "adequate remedy by appeal or otherwise." *Jones v. Costanzo*, 393 S.W.3d 1, 5 (Ky. 2012). As the Attorney General is aware, under similar circumstances, Court of Appeals "Judge Acree determined that CR 65, which allows a party to move to dissolve a restraining order, provided the Governor with a swift and adequate remedy, rendering a writ inappropriate." *Beshear v. Acree*, 615 S.W.3d 780, 796 (Ky. 2020). In that case, the Supreme Court exercised its power pursuant to "Section 110 of the Kentucky Constitution . . . [and] entered an order staying all

orders of injunctive relief issued by lower courts of the Commonwealth[.]" *Id.* at 797. Consequently, there was never a ruling as to the correctness of our determination that CR 65 provided an adequate remedy in such circumstances.[5]

But every case, however like another, must stand or fall on its own merits. Unquestionably, CR 65 provides a remedy in this case as it did when this Court considered the Governor's CR 76.36(4) motion underlying *Beshear v. Acree*. The question, however, always turns on the *adequacy* of the remedy. That requires us to determine what injury needs to be remedied.

The Attorney General identifies the "immediate and irreparable injury" by quoting a recent Kentucky Supreme Court case, as follows: "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d 61, 73 (Ky. 2021). Seeking to remedy that irreparable injury is consistent with his specific duty "to prevent, penalize, and remedy violations of . . . KRS 311.710 to 311.830 regarding abortions . . . ." KRS 15.241(1)(b).

[5] "A restraining order may be dissolved on motion by the judge of the circuit court in which the action is pending . . . ." CR 65.03(2). "Unless it provides an earlier termination date, a restraining order shall remain in force until, and not after, (a) the time set for a hearing on a motion to dissolve the restraining order unless there is then pending a motion for a temporary injunction, or (b) the entry of an order on a motion for a temporary injunction, or (c) the entry of a final judgment, whichever is earlier." CR 65.03(5).

The motion makes clear who will suffer injury. "[T]he Attorney General and the Commonwealth will suffer . . . and the public . . . ." (Emergency Motion for Intermediate Relief, pp. 2, 3). That being so, we must consider the difference when non-enforcement of statutes injures the interest of an individual as compared to the injury to the Commonwealth's interest and that of the public caused by such non-enforcement. On the one hand there is "the 'direct and special interest' of a private individual, which would entitle him to apply in his own behalf for and obtain a writ of mandamus to enforce his private right," while on the other there is "that [interest] which obtains to him in common with the general public or to the mass of the community . . . ." *Louisville Home Tel. Co. v. City of Louisville*, 113 S.W. 855, 858 (Ky. 1908).

When the Attorney General seeks relief from the injury he identifies here – non-enforcement of statutes – he is not trying to remedy an injury to a direct and special interest of a private individual or group of individuals. Rather, his function is as the "guardian" of the supreme authority of the people in whom "the essential power of government reside[s] and emanate[s.]" *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016) (citation omitted). As our high court said, "[A]t common law the duty of the Attorney General was to represent the king, he being the embodiment of the state. But under the democratic form of government now prevailing the

people are the king, KY. CONST. sec. 4, so the Attorney General's duties are to that sovereign . . . [and his] primary obligation is to the Commonwealth, the body politic . . . ." *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867-68 (Ky. 1974) (citation omitted).

The nature and severity of the injury visited upon the body politic, *i.e.*, the people of the Commonwealth, by non-enforcement of statutes does not vary based on the nature of the statutes. The injury is always the same – disregard of the will of the sovereign. That injury is what must be remedied when proven to exist, and it is the duty of the Attorney General to pursue *that* remedy.

The Attorney General reminds us that the "Courts are not the moral authority of the Commonwealth with the right to substitute their own views of public policy in place of the legislature's." (Pet. for Writ of Mandamus and Prohibition, p. 3). That, we have not forgotten and would add the following: "Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise 'raw judicial power.'" *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2022 WL 2276808, at *38 (Jun. 24, 2022) (quoting *Roe v. Wade*, 410 U.S. 179, 222, 93 S. Ct. 705, 763, 35 L. Ed. 2d 147 (1973) (White, J. dissenting)), *holding modified by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d

674 (1992), *overruled by Dobbs*, 2022 WL 2276808). Consequently, we zealously endeavor a disciplined, dispassionate analysis.

That said, we are acutely aware of and sensitive to the substantive issue at stake – "what *Roe* termed 'potential life'" and its termination by abortion. *Dobbs*, 2022 WL 2276808, at *29 (citing *Roe*, 410 U.S. 113). If, for the sake of our analysis, we presume the Attorney General's duty to the sovereign allowed him to pursue preventing one or more imminent abortions, our doubts about the adequacy of the CR 65 remedy would be greater. However, there is no party to this action claiming a direct and special interest that would be injured by a failure to enforce the statutes in question. The inference may be strong, but the evidence is non-existent that any Real Party In Interest will violate the statutes in question before the Jefferson Circuit Court's hearing to decide whether to convert the temporary restraining order to a temporary injunction.

We have taken all the preceding, and more, into consideration. We have also considered the Supreme Court's guidance specifically relating to the remedy provided by CR 65, as follows:

> While we do not hold that a case proceeding along that path should never be diverted by an application to an intermediate court for a writ, we do hold that the intermediate court may consider the remedies inherent within CR 65.01 *et seq.* as factors to be weighed in exercising its discretion to grant or deny the writ.

Goldstein v. Feeley, 299 S.W.3d 549, 555 (Ky. 2009). And, we have considered the Supreme Court's further counsel that "[e]ven when these requirements [for a writ of the second class] are met, the issuance of a writ is not mandatory; instead, whether to grant the writ is in the sound discretion of the Court." *Ridgeway Nursing & Rehab. Facility, LLC v. Lane*, 415 S.W.3d 635, 640 (Ky. 2013) (internal quotation marks and citations omitted). Here, the CR 65 remedy is adequate.

But a question of greater import looms.

The statutes in question are KRS 311.772 and KRS 311.7701-.7711. They are so-called "trigger laws," a term Black's Law Dictionary added to its definitions in 2007 and defined as "*Slang* . . . A statute that is unconstitutional and unenforceable when enacted but contains a provision deferring the law's effective date until the substantive provisions actually become constitutional." *Trigger Law*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Court understands the term more generally as a law deferring its effective date until the occurrence of a specific event. Certainly, this is so when applied to the cited statutes.

The specific "triggering" event identified in both KRS 311.772 and KRS 311.7701-.7711 is the reversal or overruling of *Roe v. Wade*.[6] Although it has

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[6] KRS 311.772(2)(a) states:

> The provisions of this section shall become effective immediately upon, and to the extent permitted, by the occurrence of any of the following circumstances: (a) Any decision of the United States Supreme Court which reverses, in whole or in part,

been commonly reported that this triggering event occurred on June 24, 2022, the date of the decision in *Dobbs*, *supra*, such reporting fails to consider the procedural rules of the Supreme Court of the United States.

> As a formal matter, Supreme Court judgments on review of a federal court decision do not take effect until at least 25 days after they are announced, when the Court issues a certified copy of its opinion and judgment in lieu of a formal mandate. *See* SUP.CT. R. 45. Parties may file a petition for rehearing during that 25-day period, SUP.CT. R. 44, which "result[s] in an automatic stay of judgment or mandate unless the Court otherwise specifically directs," S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 830 (10th ed. 2013); *see* SUP.CT. R. 45. When the Court wants its judgment to take effect sooner, it says so. *Perry* [*v. Perez*, 565 U.S. 388, 399, 132 S. Ct. 934, 944, 181 L. Ed. 2d 900 (2012)] ("The judgment shall issue forthwith."); *Purcell v. Gonzalez*, 549 U.S. 1, 6, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) ("Pursuant to this Court's

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> *Roe v. Wade*, 410 U.S. 113 (1973), thereby restoring to the Commonwealth of Kentucky the authority to prohibit abortion . . . ."

KRS 311.7711(2)(a) states:

> After the issuance of a decision by the Supreme Court of the United States overruling *Roe v. Wade*, 410 U.S. 113 (1973), the issuance of any other court order or judgment restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or the effective date of an amendment to the Constitution of the United States restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, the Attorney General may apply to the pertinent state or federal court for either or both of the following:
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> 1. A declaration that any one (1) or more sections specified in subsection (1) of this section are constitutional; or
>
> 2. A judgment or order lifting an injunction against the enforcement of any one (1) or more sections specified in subsection (1) of this section.

> Rule 45.3, the Clerk is directed to issue the judgment in these cases forthwith.").

Texas v. United States, 798 F.3d 1108, 1118 (D.C. Cir. 2015). In addition to the examples cited in *Texas v. United States*, there is also the case of *Bush v. Gore* which included the passage that: "Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith." 531 U.S. 98, 111, 121 S. Ct. 525, 533, 148 L. Ed. 2d 388 (2000). No such direction to deviate from the Supreme Court's rules is included in *Dobbs*. Only eight (8) of the twenty-five (25) days have passed since the opinion was released, officially, to the press and public. As this Court, for purposes of analysis here, reads KRS 311.7711(2)(a) and KRS 311.772(2)(a), the triggering event has not yet occurred. That being so, there is no injury, even to the body politic, because the statutes will not be enforceable until the expiration of the remaining seventeen (17) days.

This Court's decision to deny intermediate relief by a writ of the second class is not dependent upon this interpretation of the statutes in question. However, like all other considerations addressed herein, it weighs in favor of denying the relief. To whatever extent this interpretation of the statutes carries weight here, its interlocutory nature means it can neither bind the three-Judge panel that will hear the writ petition, CR 76.36, nor support a law-of-the-case argument. *Wright v. Carroll*, 452 S.W.3d 127, 130 (Ky. 2014) (law-of-the-case doctrine is predicated on the rule of finality).

As noted, the availability of a second-class writ was only the Attorney General's primary argument. He also argues the Plaintiffs below[7] lack constitutional standing to bring the underlying action because "only . . . the pregnant mothers" may properly assert a right to obtain an abortion arising under the Kentucky Constitution. Therefore, says the Attorney General, the circuit court does not have subject matter jurisdiction, making a writ of the first class appropriate. (Pet. for Writ of Mandamus and Prohibition, pp. 28-29).[8]

"[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing . . . to ensure that only justiciable causes proceed in court[.]" *Commonwealth, Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 192 (Ky. 2018) (emphasis omitted). Federal constitutional standing is rooted in the Constitution and provides that subject matter jurisdiction extends only to "cases" and "controversies." *Id.* at 193 (citing U.S. CONST. Art. III Sec. 2, cl. 1).

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[7] Real Parties In Interest EMW Women's Surgical Center, P.S.C., Ernest Marshall, M.D., and Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, and Kentucky, Inc. are the plaintiffs in the underlying action.

[8] Despite denominating this a "threshold issue" which could have prevented the circuit court from issuing a restraining order, few pages of the 33-page petition address it. Making the argument pertinent to the request for intermediate relief, the Attorney General concludes in a footnote that "[i]n light of this jurisdictional defect, a first-class writ ordering dismissal [of the underlying circuit court action] is justified here." (Pet. for Writ of Mandamus and Prohibition, p. 29 n.5.) Additionally, based on the limited record before this Court, the Attorney General did not seek dismissal in the circuit court but elected to respond to the merits of the motion for a restraining order.

In *Sexton*, our Supreme Court adopted the constitutional standing doctrine set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), holding that "for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, [a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (internal quotation marks and citation omitted). We conclude that standard is met here.

The challenged statutes directly prohibit Plaintiffs from lawfully engaging in both medication abortions and procedural abortions. (Verified Complaint for Injunctive and Declaratory Relief, p. 16). The Attorney General seeks to enforce the statutes against these specific parties and regarding this specific conduct. The limited record before this Court does not support the conclusion that the Jefferson Circuit Court is prohibited from maintaining proper original jurisdiction over the case to decide its merits; that is, the case is not "*nonjusticiable* due to the [Plaintiffs'] failure to satisfy the constitutional standing requirement[.]" *Sexton*, 566 S.W.3d at 196-97.

We must also address the Attorney General's assertion that *Appalachian Racing, LLC. v. Commonwealth*, 504 S.W.3d 1 (Ky. 2016), and

Beshear v. Acree, *supra*, hold "that a writ is the only way to rectify a restraining order that causes irreparable harm." (Pet. for Writ of Mandamus and Prohibition, p. 29). Neither case so holds.

In *Appalachian Racing*, the Floyd Circuit Court issued a restraining order prohibiting the Racing Commission from considering a license application. 504 S.W.3d at 2. The Supreme Court said that when the circuit court acted, there was "no justiciable claim for a court of law to decide. This is precisely the type of intrusion our separation-of-powers provisions were enacted to prevent. . . . Commission actions are no doubt subject to judicial review, but only once the matter is properly appealable." *Id.* at 6. The Court of Appeals was affirmed as having properly issued a "writ under the 'special cases' writ category – a limited category of writs granted in instances when the 'orderly administration of justice' so requires." *Id.* at 3.

Citing *Beshear v. Acree* for this principle is equally inapposite. There, a petition for a writ was filed in the Supreme Court following this Court's denial of intermediate relief in two original actions pertaining to executive branch COVID-19 restrictions affecting the operation of businesses in the Commonwealth. 615 S.W.3d at 786. The Supreme Court subsequently entered an order "staying all orders of injunctive relief issued by lower courts of the Commonwealth in COVID-19 litigation pending further action of the [Supreme] Court." *Id.* at 797. "The

order expressly authorized the Scott and Boone Circuit Courts to proceed with matters pending before them and issue all findings of fact and conclusions of law they deem[ed] appropriate, but no order, however characterized, would be effective." *Id*. There are two salient points worth emphasizing.

First, the Supreme Court in *Beshear v. Acree* tapped into its foundational constitutional authority providing that "[t]he Supreme Court . . . shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice." KY. CONST. § 110(2)(a). Although this Court of Appeals, too, "may issue all writs necessary in aid of its appellate jurisdiction," KY. CONST. § 111(2), such authority is not coupled with the power to exercise control of the Court of Justice. It would be presumptuous for this Court to proceed as did the Supreme Court in *Beshear v. Acree*.

Second, in *Beshear v. Acree*, the Supreme Court allowed the underlying circuit court actions to proceed (although directing that any orders entered would not be immediately effective), presumably due to the necessity and importance of a written record to aid in its review. 615 S.W.3d at 797. *See also Cox v. Braden*, 266 S.W.3d 792, 795 (Ky. 2008) ("The expedited nature of writ proceedings necessitates an abbreviated record. This magnifies the chance of

incorrect rulings that would prematurely and improperly cut off the rights of litigants . . . .").

The Court agrees with the assertion that, "[t]aken to its logical conclusion, [the Attorney General's] argument would mean that a restraining order preventing any statute from taking effect could always be immediately reversable by this [C]ourt . . . despite there being no right to appeal a trial court's grant of a restraining order." (Response in Opposition, p. 4).

Finally, we address the assertion this Court lacks jurisdiction to entertain the Attorney General's petition for a writ. (Response in Opposition, pp. 2-3). That issue may be revisited by the three-Judge panel owing to the nature of this Order as interlocutory. However, the argument is self-defeating. Citing cases that hold there is no right to appeal a temporary restraining order is support for the notion that an adequate remedy by appeal or otherwise is lacking – one of the requirements for this Court's jurisdiction to entertain writ petitions. KY. CONST. § 111(2), *supra*; CR 76.36.

WHEREFORE, the Attorney General's motion for intermediate relief shall be, and hereby is, DENIED. The Attorney General's motion for leave to file a reply is DENIED. The petition for a writ of mandamus and prohibition shall be assigned to a three-Judge panel of the Court following expiration of the response

time for the petition provided in the Civil Rules. The Court by this Order does not express any opinion as to the merits of the Attorney General's claims.

ENTERED: 07/02/2022

JUDGE, COURT OF APPEALS