

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000174-MR

CITY OF LOUISVILLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS MCDONALD, JUDGE
ACTION NO. 00-CI-003837

LOUISVILLE FRATERNAL ORDER OF
POLICE, LODGE SIX; and DAVID JAMES,
Representative of Group Affected

APPELLEES

OPINION
VACATING

** ** * * * **

BEFORE: COMBS and McANULTY, Judges; and JOHN D. MILLER, Special Judge.¹

COMBS, JUDGE: The City of Louisville (the City) appeals from an opinion and order of the Jefferson Circuit Court entered May 7, 2001. At issue was the constitutionality of an ordinance creating a civilian review board to investigate police misconduct. Finding the ordinance to be unconstitutional, the

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

circuit court permanently enjoined the City from acting pursuant to its terms. We conclude from our review of the record that the lower court erroneously considered the constitutional issue in the absence of an actual controversy, a prerequisite for justiciability in general and for filing a declaratory action in particular. Therefore, we vacate.

The facts underlying this appeal are not complex and can be summarized briefly. On June 13, 2001, the Louisville Board of Aldermen passed Ordinance 48, Series 2000, establishing the Louisville Civilian Review Authority (the Authority), an eleven-member board, whose purpose was to review allegations of police misconduct, including: use of excessive force, inappropriate language, harassment, discrimination, theft, and failure to provide adequate or timely police protection. In passing the ordinance, the Board of Aldermen recognized that the Internal Affairs Unit of the police department should continue to play the leading role in investigating police misconduct. However, the ordinance empowered the Authority to hire its own administrative and investigative staff in order to act as an independent governmental body with oversight authority.

On June 14, 2000, the very next day after passage of the ordinance, the appellees, the Louisville Fraternal Order of Police (FOP) Lodge Six and David James, in his capacity as a

representative of the FOP lodge, filed a declaratory judgment action pursuant to KRS² 418.040, which provides:

In any action in a court of record of this commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked. (Emphasis added.)

They sought a declaration that the ordinance was unconstitutional. Additionally, they asked for temporary and permanent injunctive relief, compensatory and punitive damages, costs, and attorney's fees. The City moved to dismiss the complaint for lack of standing and for failure to state a claim upon which relief could be granted. In two amended complaints, the appellees addressed the standing issue by naming James as a plaintiff in his individual rather than representative capacity and by moving for class certification. The City's motion to dismiss was denied.

In December 2000, the appellees filed a memorandum in support of their request for a permanent injunction and argued that Section 13 of the ordinance was unconstitutional. Section 13 provides as follows:

Subpoena Power. The chairperson of the review authority may compel the presence of fact witnesses and officers by written request to the appointing authority [the

²Kentucky Revised Statutes.

Director of Public Safety] to issue a subpoena pursuant to KRS 15.520 within three (3) days of the receipt of the request. Notice of refusal of the appointing authority to comply with this request shall be forwarded, in writing, to the Mayor, Chairperson of the review authority, Chief, and president of the Board of Alderman. After receipt of the notice of refusal to issue a subpoena from the appointing authority the chairman may then initiate issuance of the same as provided by law.

The appellees contended that a reasonable interpretation of this section of the ordinance would confer subpoena power on the Authority. Relying on Stansbury v. Maupin, Ky., 599 S.W.2d 170 (1980), they argued that the ordinance was a infringement upon the doctrine of separation of powers. They also argued that the ordinance had the potential of violating their rights against unreasonable searches and seizures.

In response, the City renewed its motion to dismiss the lawsuit based on its previous arguments that the appellees lacked standing and that they failed to satisfy the requirements of CR³ 23.01 and 23.02 to proceed as a class. The City also argued that there was no justiciable controversy with respect to Section 13 of the ordinance. As to the merits of the alleged violation of separation of powers, the City contended that the ordinance did not confer subpoena power on the Authority. Rather, it argued that the ordinance merely allowed the Authority to request⁴ the

³Kentucky Rules of Civil Procedure.

⁴We note an obvious inconsistency in this argument in light of the fact that Section 13 is specifically entitled Subpoena Power, conveying on its face the implication of a mandate rather than a request.

issuance of subpoenas from the Director of Public Safety, to whom such power had already been conferred by KRS 15.520, commonly referred to as the Policeman's Bill of Rights.

In denying the City's renewed motion to dismiss, the circuit court declared the ordinance unconstitutional as follows:

It is true that the Director of Public Safety has the statutory power to issue subpoenas and that the ordinance was crafted in an attempt to utilize the Director's subpoena ability for the Civilian Review Authority's investigative benefit. These facts, however, do not alleviate the constitutional problems of Section Thirteen of Ordinance 48, Series 2000. Stansbury v. Maupin, Ky., 599 S.W.2d 170 (1980), clearly holds that the Louisville Board of Alderman [sic] does not have the authority to compel witness testimony through the use of subpoena power, or to confer similar authority to a committee. The City of Louisville attempts to draw a distinction between the case at bar and the Stansbury case by arguing that the Board of Alderm[e]n in Stansbury sought to issue a subpoena to compel witness testimony in the name of the City of Louisville, while in this case the subpoena witness testimony would be issued by the director of Public Safety pursuant to statutory authority. This Court does not find that argument to be persuasive.

The constitutionality of an ordinance cannot be maintained simply b[y] doing indirectly what it is impermissible to do directly. Even if it is the Director of Public Safety that issues a subpoena compelling police officer testimony during an investigation by the Civilian Review Authority, it is obvious that the Authority would be the entity controlling the subpoena requests. By virtue of the ordinance conferring the power upon the Authority to instruct the Director of Public Safety when and to whom a subpoena should be served, the Board of Alderm[e]n has unlawfully conferred

subpoena power, a power which it does not have, to another entity.

The court concluded that this unconstitutional provision could not be severed from the remaining provisions of the ordinance. Thus, it permanently enjoined the City from acting pursuant to the tainted ordinance. The order was made final and appealable by the incorporation of CR 54.02 recitals. Remaining on the court's docket for future adjudication were the issues of the appellant's damages, both compensatory and punitive; costs; and attorney's fees.

Preliminarily, we note that the trial court did not address the issue raised by the City questioning the existence of a justiciable controversy. The issue of whether a party has satisfied the actual controversy requirement in order to maintain a declaratory judgment action is separate and distinguishable from the question of standing. General Drivers, Warehouseman & Helpers Local Union No. 89, v. Chandler, Ky.App., 968 S.W.2d 680, 684 (1998); see also, Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995). It is a well established principle that a court must refrain from exercising its jurisdiction if no justiciable controversy be found. No court is authorized to issue advisory opinions. Spanish Cove Sanitation Inc. v. Louisville-Jefferson County Metropolitan Sewer District, Ky., 72 S.W.3d 918, 921 (2002). The doctrine of ripeness is a critical element of justiciability, and we conclude that that threshold doctrine has not been met at this premature

state of litigation. See, Associated Industries, supra, at 951; and Wells v. Blair, Ky.App., 736 S.W.2d 346 (1987).

The appellees have not alleged that James or any other police officer has been called to testify before the Authority, that any subpoenas have been requested or issued, or that any investigation has been initiated by the Authority. While the appellees anticipate that the ordinance may ultimately violate their constitutional rights, there is no actual controversy placing those rights in peril. The mere possibility of future harm will not suffice to support an award of a temporary injunction C much less to provide a basis for a permanent injunction. See, Chapman v. Beaver Dam Coal Co., Ky., 327 S.W.2d 397, 400 (1959). Thus, the appellees have failed to establish either the existence of a justiciable controversy or entitlement to injunctive relief. See, Black Unity League of Kentucky v. Miller, 394 U.S. 100, 89 S.Ct. 766, 11 L.Ed.2d 107 (1969).

In vacating the opinion of the Jefferson Circuit Court, we are basing our decision on this procedural point alone without criticizing or even addressing the careful reasoning of the court on the substantive issue of the constitutionality of the ordinance. That question must await the implementation of the procedures set forth in the ordinance upon the occurrence of an investigation of police misconduct at a future time, which would give rise to the requisite actual controversy.

As we hold that no actual controversy underlies this action, we vacate the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Keith B. Hunter
Louisville, Kentucky

BRIEF FOR AND ORAL ARGUMENT
APPELLEE:

Thomas Swicegood
Louisville, Kentucky