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(2006-SC-000420-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002051-MR

ROY WHISMAN — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 02-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM,[1] HENRY, VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Roy Whisman appeals from a judgment of the Lewis Circuit Court wherein he was convicted of six counts of Obtaining a Controlled Substance by Presenting a Prescription that was Obtained in Violation of KRS[2] Chapter 218A. See KRS 218A.140(1)(f). The court sentenced Whisman to two and one-half years in prison on each count, with the sentences to run

[1] This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

[2] Kentucky Revised Statutes.

concurrently with each other. Further, the court probated the sentence for five years.

Whisman raises two issues on appeal. First, he argues that KRS 218A.202(6)(b) is unconstitutional. Second, he argues that the law enforcement officers had no right to look specifically at his prescription drug records. We affirm.

Investigators working on an unrelated case received information from two doctors that Whisman was making excuses in order to obtain multiple prescriptions for OxyContin. In addition, one of the doctors told investigators that Whisman's mother had complained about the amount of medication Whisman was prescribed and that she believed he had an addiction problem. Another doctor told investigators that Whisman's mother had advised him that Whisman was selling his pain pills.

Based on the aforementioned information, the investigators obtained a KASPER[3] report on Whisman.[4] KASPER is an electronic system for monitoring controlled substances that are dispensed by practitioners and pharmacists in Kentucky. KRS 218A.202(1) requires the Cabinet for Health Services[5] to establish such a system.

[3] KASPER stands for "Kentucky All Schedule Prescription and Electronic Reporting System."

[4] Because there is no record of the testimony given at the evidentiary hearing on Whisman's motions, the exact sequence of the facts is not clear.

[5] The Cabinet for Health Services is now the Cabinet for Health and Family Services.

KASPER was established in 1999. It requires every dispenser of controlled substances to report to the Cabinet its identity, the identity of the patient, the drug dispensed, the amount dispensed, the date it was dispensed, as well as the identity of the person prescribing the drug. See 902 KAR[6] 55:110, Section 1(2).

Whisman's KASPER report led a Lewis County grand jury to indict Whisman on the charges for which he was ultimately convicted. Following the indictment, Whisman filed a motion to have KRS 218A.202(6)(b) declared unconstitutional and a motion to suppress the evidence. After the motions were denied, Whisman entered a conditional guilty plea. He was thereafter sentenced, reserving his right to appeal the constitutionality of KRS 218A.202(6)(a)-(b). His appeal followed.

KRS 218A.202(6)(a)-(b) provides that the Cabinet is authorized to provide data to:

> (a) A designated representative of a board responsible for the licensure, regulation, or discipline of practitioners, pharmacists, or other person who is authorized to prescribe, administer, or dispense controlled substances and who is involved in a bona fide specific investigation involving a designated person;

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[6] Kentucky Administrative Regulations.

> (b) A state, federal, or municipal officer whose duty is to enforce the laws of this state or the United States relating to drugs and who is engaged in a bona fide specific investigation involving a designated person[.]

Whisman's first argument is that this statute is unconstitutional on its face because it violates the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution and Sections 1, 2, 10, and 11 of the Kentucky Constitution. He notes that the statutory standard that the specific investigation be a "bona fide" one is much less than the probable cause standard required for a warrantless search and even less than the reasonable articulable suspicion standard required for searches in special circumstances. He asserts that the standard for searching private pharmaceutical data surely cannot be lower than that for a search that implicates public safety. In short, Whisman maintains that the statute violates the aforementioned constitutional provisions on its face. The circuit court rejected this argument on the ground that the administrative search exception to the warrant requirement was applicable.

The administrative search exception provides that participants in closely regulated industries have a lessened expectation of privacy under the Fourth Amendment. See New York v. Burger, 482 U.S. 691, 699-700, 107 S.Ct. 2636, 2642, 96

L.Ed.2d 601 (1987). "The exception is for administrative searches in furtherance of the State's regulation of industries that pose large risks to the public's health, safety, or welfare." Thacker v. Commonwealth, 80 S.W.3d 451, 455 (Ky.App. 2002). The administrative search exception has been recognized in Kentucky. Id.

An administrative search is reasonable if (1) there exists a substantial government interest in regulating the particular industry, (2) the regulation providing for the search reasonably serves to advance that interest, and (3) the regulation informs participants in the industry that searches will be made and places appropriate restraints upon the discretion of the inspecting officers. Id., citing Burger, 482 U.S. at 702-03. The applicability of the administrative search exception to KASPER was explained by this court in Thacker as follows:

> Kentucky clearly has a substantial interest in regulating the sale and distribution of drugs and in attempting to trace their movement through the channels of commerce. It is no less clear that the prescription monitoring system, with its substantial safeguards against inappropriate disclosure of data, reasonably advances that interest. The detective testified that, by eliminating the need to inquire about a suspect at virtually every pharmacy in the county, the KASPER reports have significantly streamlined his prescription-fraud investigations. Finally, the statute makes clear to practitioners and patients

> that the data is subject to limited police inspection, and the requirement that officers articulate to the Cabinet bona fide suspicions that the individual about whom they are inquiring has violated a provision of KRS Chapter 218A appropriately restrains their discretion.

Id. at 455.

Whisman argues that this court's reliance on Burger in the Thacker case was misplaced for two reasons. First, he contends that patients, unlike doctors or pharmacies, are concerned with their immediate medical needs and are not concerned with or informed about the regulation of the entire medical industry. Thus, Whisman asserts that doctors and pharmacies, but not patients, can be considered a closely regulated industry.

Second, Whisman argues that this court in the Thacker case misplaced its reliance on the Burger case because although the Court in Burger held that the administrative search exception is analogous to the special needs exception, it later held in Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), that that exception did not apply to the search and seizure of private medical data by law enforcement. See 532 U.S. at 84. In the Ferguson case, the U.S. Supreme Court held that the state could not justify under the special needs exception the use of patients' drug screen records from a state program for substance abuse treatment to

open drug investigations on those patients. Id. Based on these arguments, Whisman maintains that the administrative search exception does not apply to private medical data.

The records involved in this case are unlike private medical records. The information contained in KASPER reports identifies the controlled substance prescribed, the patient, the prescriber, the dispenser, and the date. Unlike the records in the Ferguson case, nothing in the records here discloses the patient's condition or treatment. Furthermore, the Thacker case distinguished private medical records, which it stated were fully protected by the Fourth Amendment of the U.S. Constitution and Section 10 of the Kentucky Constitution, from pharmacy records, which have historically been subject to increased regulation. Id. at 454-55.

Whisman also argues that the bona fide investigation language in KRS 218A.202(6)(a)-(b) does not conform to the requirements of the administrative search exception because it does not inform participants that searches will be made and does not place appropriate restraints upon the discretion of investigating officers. Furthermore, he argues that the KASPER regulation (902 KAR 55:110) does not provide a standardized procedure to ensure that the system is not improperly used to justify what he calls "warrantless investigative forays."

In Thacker, this court addressed each of Whisman's concerns. We stated therein that "the statute makes clear to practitioners and patients that the data is subject to limited police inspection, and the requirement that officers articulate to the Cabinet bona fide suspicions that the individual about whom they are inquiring has violated a provision of KRS Chapter 218A appropriately restrains their discretion." Id. at 455. Therefore, even though Thacker did not determine the facial constitutionality of the statute, its interpretation is sound. We conclude, as we did in the Thacker case, that the administrative search exception applies to the statute.

Whisman's second argument is that KRS 218A.202(6)(a)-(b) violates an individual's right to privacy protected by the U.S. Constitution and the Kentucky Constitution. Citing Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and the Ferguson case, Whisman argues that he has a reasonable expectation of privacy in his prescription records and that they are protected to the same degree as private medical data under the federal constitution. He further contends that Yeoman v. Commonwealth, Health Policy Board, 983 S.W.2d 459 (Ky. 1998), and Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992), which held that the Kentucky Constitution provides even greater privacy protection than the federal constitution, apply to his prescription records. He claims that those records cannot be

obtained without judicial oversight and, therefore, that the statute violates his right to privacy.

In the Whalen case, the U.S. Supreme Court upheld a New York law that provided for the centralized storage of prescription data for controlled substances. 429 U.S. at 591. The Court reasoned that the statute was a reasonable exercise of the state's police powers. 429 U.S. at 598. Further, the Court held that the impact of the statute did not invade any right or liberty under the Fourteenth Amendment. Id. at 603-04. Likewise, we held in Thacker that the expectation of privacy in pharmacy records is less than that in private medical records. Id. at 455.

The Supreme Court in the Whalen case left open the issue of whether a system would be unconstitutional if the security provisions protecting the disclosure of private data were less effective than those under the New York statute. 429 U.S. at 605-06. Whisman argues that KASPER is less effective in protecting against such disclosures.

On the contrary, KRS 218A.202(12) provides that "[k]nowing disclosure of transmitted data to a person not authorized by subsection (6) to subsection (8) of this section or authorized by KRS 315.121, or obtaining information under this section not relating to a bona fide specific investigation, shall be a Class D felony." Furthermore, in the Thacker case,

this court held that "the requirement that officers articulate to the Cabinet bona fide suspicions that the individual about whom they are inquiring has violated a provision of KRS Chapter 218A appropriately restrains their discretion." Id. at 455.

Nor is there support for Whisman's assertion that the elevated privacy protection derived from the Kentucky Constitution applies to his prescription records. In Wasson, the court held that a Kentucky criminal statute that proscribed consensual homosexual sodomy violated the privacy and equal protection provisions of the Kentucky Constitution. Id. at 491-92. In doing so, the court deviated from the U.S. Supreme Court case of Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and held that the Kentucky Constitution provided greater privacy rights than did the federal constitution. See 842 S.W.2d at 491. The facts in this case are clearly distinguishable because prescription drugs are very unlike consensual sexual activity in that they are highly controlled and regulated.

In the Yeoman case, the Kentucky Supreme Court upheld a statute that allowed the collection of private medical data by the Kentucky Health Policy Board. Id. at 477. The court reasoned that the statute carefully shielded the patients' private data by requiring a court order to have any information

disclosed. Id. at 474. Whisman argues that the statute in this case does not meet the standard set in Yeoman because here the only requirement for disclosure of prescription data is the "bona fide specific investigation" language from the statute. However, Whisman ignores the fact that the prescription information can only be disclosed to certain authorities, not to the general public, and that the statute makes it a felony to make further disclosures or to violate the "bona fide specific investigation" provision.

In short, Whisman's arguments in this case ignore two significant distinctions. The first is between private medical data (diagnosis, treatment options, etc.) and prescription drug information. Second, Whisman does not distinguish between disclosures of information to proper authorities and disclosures to the general public. In short, KRS 218A.202 serves the substantial state interest of monitoring the distribution of controlled substances and provides adequate notice and protection regarding disclosures of private data to the general public. Therefore, we conclude that the statute is not unconstitutional.[7]

[7] Other states have held similar statutes to be constitutional. See Murphy v. State, 62 P.3d 533, 538-540 (Wash. Ct. App. 2003); State v. Russo, 790 A.2d 1132 (Conn. 2002); State v. Welch, 624 A.2d 1105 (Vt. 1992); and Stone v. Stow, 593 N.E.2d 294, 299 (Ohio 1992) (interpreting the holding in Whalen to mean "whatever privacy rights were implicated in that case related to the disclosure of information to the *general public*") (emphasis in original).

Whisman's last argument is that the circuit court erred when it denied his motion to suppress the evidence because no individualized suspicion existed to obtain his KASPER records, in violation of his rights under the U.S. Constitution and the Kentucky Constitution. We have already determined that the statute is not unconstitutional. Furthermore, the information provided from the doctors satisfied the requirement that there be a "bona fide specific investigation involving a designated person." As we have noted, this information included information from Whisman's doctors and from his mother.[8]

The judgment of the Lewis Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Astrida L. Lemkins
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Wm. Robert Long, Jr.
Frankfort, Kentucky

[8] Whisman contends that his KASPER records were obtained based solely on an anonymous tip. There is nothing in the record to support this assertion.