

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000861-MR

JOE TURNER AND WILLIE UNDERWOOD

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 04-CI-00143

DEPARTMENT OF CORRECTIONS  
AND VERTNER TAYLOR (WARDEN)

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Appellants Joe Turner and Willie Underwood appeal the dismissal of their civil complaint against the Department of Corrections and Warden Vertner Taylor (hereinafter appellees). The court found that appellants failed to state a claim on which relief could be granted. CR 12.02. Appellants alleged that the Department of Corrections' seizure of blood samples from them, being unauthorized and unconstitutional, was

an assault and battery. Their complaint alleged that they were entitled to monetary damages.

Appellants' blood samples were obtained pursuant to KRS 17.170 which states that:

Any person convicted on or after July 14, 1992, of a felony offense under KRS Chapter 510 or KRS 530.020, shall, or who is in the custody of the Department of Corrections on July 14, 1992, under KRS Chapter 510 or KRS 530.020 may, have a sample of blood, an oral swab, or sample obtained through a noninvasive procedure taken by the Department of Corrections for DNA (deoxyribonucleic acid) law enforcement identification purposes and inclusion in law enforcement identification databases.

Appellants first claim their blood was seized illegally because appellees did not have jurisdiction over them due to the statute's effective date. According to appellants' inmate grievance form in the record, they alleged that the paperwork apparently utilized at the time of collection set out KRS 439.3401 as justification for the blood collection. That statute's effective date was after their convictions.

Appellees assert that KRS 439.3401 is not the statute under which appellees proceeded. The blood collection was accomplished under KRS 17.170. If KRS 439.3401 was cited to appellants (they did not provide the form they allude to for the record) it was likely in reference to the definitions section of KRS 439.3401. That statute governs parole for violent offenders

and does not pertain specifically to the DNA database. "Violent offender" is also defined in the statute. As appellees explained below, KRS 439.3401 is merely used as part of the definition of one class of inmates whose DNA is to be taken. Even if it had any application, the effective date of KRS 17.170 would control as to the date since it is the more specific statute. City of Bowling Green v. Board of Education, 443 S.W.2d 243, 247 (Ky. 1969). Thus, this allegation was properly dismissed.

Secondly, appellants argue that they are entitled to damages for assault because they did not consent to supplying blood samples. They argue both that this amounted to unauthorized medical treatment which constituted an assault, and that it violated the Kentucky Constitution § 10 which forbids seizures of persons without a search warrant. However, we agree with the trial court that appellants have not shown any entitlement to monetary damages as a result of the action taken in this case. First, the state agency and officials in this case are protected by sovereign immunity from tort liability. Calvert Inv., Inc. v. Louisville & Jefferson County Metro. Sewer Dist., 805 S.W.2d 133, 139 (Ky. 1991). Moreover, appellants' constitutional claim is not properly reviewable since they did not notify the Attorney General. A party challenging the constitutionality of a statute is required to serve a copy of

the pleading, motion or other paper first raising the challenge upon the Attorney General. KRS 418.075(1); CR 24.03. The notice requirement is mandatory and must be strictly enforced. Maney v. Mary Chiles Hosp., 785 S.W.2d 480, 482 (Ky. 1990). As a result these claims were not reviewable.

For the foregoing reasons, we affirm the trial court's decision that dismissed the complaint on the basis that appellants failed to state a claim upon which relief could be granted.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joe R. Turner, pro se  
Willie R. Underwood, pro se  
Burgin, Kentucky

BRIEF FOR APPELLEE:

Brenn O. Combs  
Frankfort, Kentucky