

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002287-MR

DAVID O. SMITH

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 06-CI-00265

BURLEY FOLEY, Individually and in his official capacity as
Judge Executive of Whitley County; NOLAN BIRD,
Individually and in his official capacity as a Magistrate of Whitley
County; JOHNNY LAWSON, Individually and in his official
capacity as a Magistrate of Whitley County; WAYNE WILSON,
Individually and in his official capacity as Magistrate of Whitley
County; DAVID MYERS, Individually and in his official capacity
as Magistrate of Whitley County; and WHITLEY COUNTY
FISCAL COURT OF WHITLEY COUNTY, KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON, JUDGE; AND GUIDUGLI,¹
SENIOR JUDGE.

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

COMBS, CHIEF JUDGE: David O. Smith appeals from an order of the Whitley Circuit Court that dismissed his declaratory judgment action against the Whitley Fiscal Court and its individual members. After our review, we affirm.

On March 30, 2006, Smith, a citizen of Whitley County, filed a complaint in the Whitley Circuit Court seeking a declaratory judgment against the Whitley Fiscal Court and its individual members. In his complaint, he alleged that a recent \$2.00-per-telephone land line increase in the county's monthly 911 fee was in excess of the amount actually needed to operate the county's 911 emergency telephone system. He charged that the Fiscal Court intended to transfer funds from the county's 911 account to its general fund in order to pay expenses unrelated to the 911 system – a transfer that would be a violation of Kentucky Revised Statutes (KRS) 65.760(3). That provision provides, in relevant part:

All revenues from a tax or fee expressly levied to fund 911 emergency services shall be expended **solely** for the establishment, operation, and maintenance of a 911 emergency communications system; this may include expenditures to train communications personnel and to inform the public of the availability and proper use of 911 service.

(Emphasis added).

In support of his contention that the Fiscal Court planned to transfer funds in violation of KRS 65.760(3), Smith cited to a number of comments made by then-Whitley County Judge-Executive Burley Foley, which were published in a number of local newspapers. Judge Foley suggested that any excess 911 fund fees would be

transferred to the county's general fund to reimburse previous loans made to the 911 system. Smith requested injunctive relief to halt the use of 911 fee funds for the payment of any expenses of the Fiscal Court unrelated to 911 services; he further asked for declarations: (1) that the funds derived from the county's 911 fee be used exclusively to pay expenses related to the 911 system and (2) that the 911 system owed no loans to the Fiscal Court.²

On April 24, 2006, the Fiscal Court filed a motion responding to Smith's complaint by way of a motion to dismiss for failure to state a cause of action. It contended that Smith's claim was speculative in nature because he had failed to allege that the Fiscal Court had ever taken any official action to use 911 funds for unrelated purposes – either by passing a resolution or ordinance or by making a motion to propose any such resolution or ordinance. Therefore, the Fiscal Court argued that no immediate controversy existed as required by KRS 418.040 to serve as a foundation for a claim for declaratory relief. The motion also recited that off-hand or passing remarks by an individual member of the Fiscal Court were not an adequate basis to create such a controversy in the absence of tangible action by the Court.

On May 26, 2006, the circuit court entered an order that dismissed Smith's complaint for failure to state a claim. That order provided as follows:

This declaratory action was filed by Plaintiff, a Whitley County citizen subject to and required to pay a 911 service fee

²Smith later filed an emergency motion for temporary injunctive relief related to his complaint, but this motion was overruled by the trial court. That decision is not a subject of this appeal.

of two (\$2.00) dollars per land phone line in use. The Plaintiff seeks an injunction enjoining the Whitley Fiscal Court and its members from repaying Whitley County for any prior monies contributed to the 911 agency from the General Fund of Whitley County to cover the 911 budget shortfall.

The Defendants contend that Plaintiff has not alleged in his complaint that the Whitley County Fiscal Court or its members have taken any official action to accomplish what the Plaintiff seeks to enjoin by this cause of action. Defendants argue that no official action has been taken and that they cannot determine at this time when or if a 911 budget surplus would occur from which Whitley County could be repaid if the Fiscal Court ever decided to seek repayment.

In order to maintain this declaratory action Plaintiff must allege and demonstrate that an actual and immediate controversy presently exists as required by KRS 418.04 [sic]. Since no official action has been taken by the Whitley Fiscal Court or any of its members, no present controversy exists to be adjudicated.

The Court will not declare the rights of the Plaintiff concerning **contingent events which may or may not ever occur and, at best, are speculative in nature.**

Therefore, IT IS HEREBY ORDERED and ADJUDGED that Defendants' Motion to Dismiss for Failure to State a Cause of Action IS HEREBY SUSTAINED and this case IS HEREBY DISMISSED. (Emphasis added.)

Smith's subsequent motions to amend his complaint and to alter, amend, or vacate the court's order were denied. This appeal followed.

On appeal, Smith argues that the circuit court erred in dismissing his action. He contends that a taxpayer lawsuit like the one now before us should be ripe for adjudication when an official makes public comments threatening to use taxpayer funds in an improper or illegal manner. He also contends that in order to seek relief, a taxpayer

should not have to wait until those funds are actually spent illegally or appropriated improperly through an official action of a governing body.

There is no question that KRS 65.760(3) prohibits the use of 911-related revenues for unrelated purposes; however, the sole issue on appeal is whether Smith's complaint presented a justiciable cause of action at the time it was filed.

When a motion to dismiss a complaint seeking a declaration of rights has been made, the question presented to the court is not whether the plaintiff will ultimately prevail. Rather, such a motion challenges the sufficiency of the complaint and the court is called on to determine whether the complaint states a cause of action for declaratory relief.

Bank One Kentucky NA v. Woodfield Financial Consortium LP, 957 S.W.2d 276, 278 (Ky.App. 1997). Justiciability is the threshold issue. “One reason for dismissing a complaint for declaratory relief, and the ground upon which the circuit court did so in this action, is that no justiciable controversy exists for the court to resolve.” *Id.* at 279.

In conducting our review of the circuit court's decision, we must construe the complaint in a light most favorable to the plaintiff, treating all of his allegations as true. *Id.* at 278-79. After reviewing the record and the briefs in this case, we conclude that the parties are in general agreement as to the facts. Accordingly, the sole question for our consideration is whether the circuit court erred by dismissing Smith's complaint on the ground that no justiciable controversy existed. Because this is a question of law, we review it under a *de novo* standard. *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006). After

our analysis of the record and the law, we are persuaded that the circuit court committed no error.

KRS 418.040 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.

The requirement of an “actual controversy” is of fundamental importance. A court cannot render advisory opinions as to matters that have not yet ripened into concrete disputes.

Nordike v. Nordike, 231 S.W.3d 733, 739 (Ky. 2007); *see also Freeman v. Danville*

Tobacco Bd. of Trade, Inc., 380 S.W.2d 215, 216 (Ky. 1964); *Commonwealth ex rel.*

Watkins v. Winchester Water Works Co., 303 Ky. 420, 197 S.W.2d 771, 772 (1946). A

court must refrain from deciding “speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties.” *Commonwealth ex rel. Watkins*, 197 S.W.2d at 772; *see also Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962).

Smith argues that a “present actual controversy” does exist because of the statements that Foley made to local media suggesting that funds from the 911 system might be transferred to the general fund in the event of a surplus. However, it is important to note that at the time of his statements, Foley was only one of several members of the Whitley Fiscal Court. A fiscal court “can only act as a body when it is in

session for the purpose of taking action, and can speak only through its orders”

Farmer v. Marr, 238 Ky. 417, 38 S.W.2d 209, 212 (1931); *see also Duff v. Knott County*, 238 Ky. 71, 36 S.W.2d 870, 872 (1931). Of particular significance is a venerable old case which held that “[a] person dealing with the fiscal court must look to the orders of that court, **and not to the oral expressions of individual members of the court. It can speak only through its orders.**” *Leslie County v. Keith*, 227 Ky. 663, 13 S.W.2d 1012, 1013 (1929) (Emphasis added).

The primary conduct about which Smith complains are the comments made by Foley. As an individual member of the Fiscal Court, Foley could not speak for that court in its official capacity. Consequently, we cannot conclude that Foley's alleged threats were sufficiently concrete to create an actual controversy in the sense contemplated by KRS 418.040.

As noted above, KRS 65.760(3) prohibits the use of 911-related revenues for unrelated purposes. The parties themselves are in agreement on this point. However, the record reflects that at no time did the Whitley Fiscal Court, acting as an official body, issue any actual orders calling for a transfer of 911-related funds to the county's general fund; nor did it conduct any activity indicating that such a transfer was imminent, pending, or likely to occur. While Smith points out that the 2006-07 Whitley County Fiscal Court Budget contains a provision indicating that \$32,990 of the 911 budget was being held in “reserve for transfer,” there is nothing in the record reflecting that this provision meant that the money would be transferred to the general fund. On the

contrary, an affidavit filed by the Whitley County Treasurer specifically sets forth that this amount was being held in reserve for upgrades to the county 911 center and any unexpected expenses.

Under the actual state of affairs, Smith has not been affected by the conduct of which he complains; moreover, the contingencies raised by Foley in his statements have not even occurred. They may never occur at all. Four of the named defendants no longer hold office – including Foley. Thus, any adjudication of this matter would be entirely speculative and academic in nature. Consequently, Smith has not presented an actual, justiciable controversy ripe or appropriate for judicial review. *See Freeman*, 380 S.W.2d at 217.

The judgment of the Whitley Circuit Court is affirmed.

GUIDUGLI, SENIOR JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, CONCURRING: I concur with the decision. I write separately to address the arguments raised by the appellant pursuant to the holding in *Beauchamp v. Silk*, 275 Ky. 91, 120 S.W.2d 765 (1938). *Beauchamp* held that:

in cases of this kind involving an attack upon a public . . . expenditure of public funds raised by taxation-a single tax payer within the affected territory might maintain an action questioning the validity of what the statute required, or what the official was threatening to do, upon the ground that the statute so attacked, or the step proposed to be taken by the officer was unauthorized and would involve the illegal and wrongful expenditure of public funds.

Further, the court relied upon *Stiglitz, County Clerk v. Schardien*, 239 Ky. 799, 40 S.W.2d 315, 317 (1931) (negative treatment on other grounds) which held that: “If an act of the Legislature infringes the constitutional rights of a citizen, taxpayer, and voter, he may invoke the processes of the courts to prevent the performance of a duty attempted to be imposed by such a void act.” In *Beauchamp*, the Court was asked to decide whether a particular plaintiff had standing to maintain the action. There was no issue as to whether this was a “present actual controversy” which is the question currently before this Court. Therefore, *Beauchamp* can be distinguished.

BRIEFS FOR APPELLANT:

Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEES:

Gary W. Brittain
Corbin, Kentucky