

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000046-OA

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES

PETITIONER

v. ORIGINAL ACTION
REGARDING KENTON CIRCUIT COURT
ACTION NO. 07-CR-467-1

HON. GREGORY M. BARTLETT, JUDGE,
KENTON CIRCUIT COURT

RESPONDENT

AND

LARRY COLE; JONATHAN COX;
AND SANDRA D. YOUNG

REAL PARTIES IN INTEREST

OPINION AND ORDER
DENYING CR¹ 76.36 RELIEF

* * * * *

¹ Kentucky Rules of Civil Procedure.

BEFORE: STUMBO AND TAYLOR, JUDGES; KNOPF,² SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This matter is before the Court on a petition for writs of prohibition and mandamus. For reasons henceforth stated, the Court hereby ORDERS that this petition be DENIED.

Petitioner, Commonwealth of Kentucky, Cabinet for Health and Family Services, petitions this Court to direct the respondent trial court to vacate its order entered November 13, 2007, ordering it to produce the KASPER³ records of the real party in interest Larry Cole, as well as those of the real parties in interest Jonathan Cox and Sandra Young, to it under seal for a review *in camera* prior to deciding whether to provide copies to counsel.

The background facts as related by Cole are that he co-occupied with Young a residence that was searched for controlled substances pursuant to a warrant supported in part by law enforcement's review of a KASPER report pertaining to Young, according to the affidavit for the search warrant. Following indictment charging him with trafficking in a controlled substance, Cole moved for the discovery of his KASPER records, as well as those of Young and of Cox, a

² Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

³ KASPER is the acronym for Kentucky All-Schedule Prescription Electronic Reporting that is administered by the Cabinet. Details pertaining to what this monitoring system consists of and the Commonwealth's substantial interest in creating it are found in *Thacker v. Commonwealth*, 80 S.W.3d 451, 453, 455 (Ky. App. 2002) (reversed in part on other grounds by *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006).

co-defendant,⁴ and to suppress the affidavit as including false and misleading information. The record indicates that the Cabinet has already produced Cole's and Young's reports to law enforcement and that the Commonwealth's Attorney has a copy of them. The trial court granted the motion for discovery, holding that it is a court of competent jurisdiction under KRS⁵ 23A.010(1) and KRS 218A.202(8), and that the records “can and should be produced” pursuant to an order.

The Cabinet moved to vacate, based on its literal interpretation of the restrictive provisions set forth in KRS 218A.202(6), as amended effective June 26, 2007, and even as the statute provided before the amendments. The trial court orally denied the motion following a hearing and, subsequently, entered a written order after this original action had been filed. In that order, the court stated that it had previously found that Cole had made a sufficient showing that the KASPER records “may contain information which is relevant or exculpatory to the Defense.” The court determined that Cole’s request was reasonable since the Cabinet has not argued that the production would be burdensome. It further determined that Cole’s rights to due and compulsory process under Section 11 of the Kentucky Constitution and the Sixth Amendment of the United States

Constitution took precedence over any statutory prohibition so that, pursuant to its

⁴ The record shows that Cole also requested the trial court orally to issue a subpoena for the records to the Cabinet's Drug Enforcement and Professional Practices Branch, the custodian of those records.

⁵ Kentucky Revised Statutes.

jurisdiction over Cole's criminal case, it had the authority under RCr⁶ 7.24 to order the Cabinet to produce to the court records that are under its control for the court's review *in camera*. The court relied on *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003).

In this original action, the Cabinet argues that the trial court acted outside its jurisdiction because no court has the authority to order the disclosure of KASPER records except as specified in KRS 218A.202(6). It notes that the General Assembly provided for the limited dissemination of the records in specific criminal cases under subsections 6(b), (d) and (h) and under subsection (8)(a) of that statute. It contends that the issue before this Court is not one of discovery, but rather, one of constitutional magnitude. That issue, it asserts, relates to the General Assembly's prerogative to create a KASPER statute and to limit the persons and entities to whom/which a court has the authority to disclose those records and should focus on whether the trial court's decision "flies in the face" of the mandatory and exclusionary language set forth in the statute, which the General Assembly made even more restrictive when it amended it effective June 26, 2007.

At oral argument,⁷ the Cabinet further argued that *Barroso* supports its petition because KASPER information is a compilation of raw data without any

⁶ Kentucky Rules of Criminal Procedure.

⁷ A videotaped recording of the argument has been ordered filed in the record of this original proceeding.

assurance of accuracy, which calls into question whether the preliminary burden of showing that it contains articulable evidence raising a reasonable inquiry, which is mandated by *Barroso*, may be met and whether “fishing expeditions” could ever be precluded.

In response to this original action, Cole first asserts that the trial court acted as a court of competent jurisdiction presiding over criminal prosecution. Cole goes on to argue that, since the court acted within its jurisdiction, the Cabinet had to demonstrate its entitlement to extraordinary relief by showing irreparable harm, which it failed to do.

On the merits, Cole posits that the Cabinet’s literal interpretation of the restrictions to disclosure set forth in KRS 218A.202(6) would bar a court of competent jurisdiction from ever ordering that KASPER reports be disclosed to it for any purpose in a criminal case before entry of judgment, even if they included information that would be exculpatory and/or material to the claims pending before it. With such interpretation, he advances, the statute would contravene a criminal defendant's rights to due and compulsory process, and would contravene the doctrine of separation of powers. However, Cole asserts that, as shown in *Barroso*, those rights take precedence over any evidentiary or statutory privilege, all the more so when the documents at issue are in the possession of government, as they are in this case.

But Cole further argues that there is a way for this Court to avoid

focusing on the constitutional aspects of the case and to hinge its decision upon a construction of the statutory provisions that would determine that the discovery limitations set forth in KRS 218A.220(6), as amended June 26, 2007, do not apply to the disclosure of KASPER reports in criminal cases. Cole sees language in Subsection 6, as well as in some other subsections of KRS 218A.220, that suggests to him that the discovery limitations only apply to civil cases, which do not have the constitutional implications arising in criminal cases.

Proceeding with its review of this matter, the Court makes the preliminary determination that the Cabinet is entitled to a review of the merits of its original action. While the Court believes that it failed to demonstrate that the trial court acted outside its jurisdiction and failed to demonstrate that it would suffer irreparable injury if extraordinary relief is not granted, which is normally a prerequisite to an appellate court's review when the proper argument to be made is whether the trial court is proceeding erroneously within its jurisdiction,⁸ the Court is of the opinion that the matter at hand qualifies for its review as one of those “certain special cases” where review is desirable in the interest of the orderly administration of justice. *See, e.g., The Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 616-17 (Ky. 2005). This is especially appropriate as we have determined that the Cabinet satisfies the one prerequisite for review under that exception, which is the lack of an adequate remedy by appeal. *Id.* at 617. As

⁸ *See, e.g., Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

stated in *Bender v. Eaton*, 343 S.W.2d 799, 802 (Ky. 1961), “[o]nce the information is furnished it cannot be recalled.” However, having considered the parties' written and oral arguments on the merits, as well as the partial record provided in support thereto, and being sufficiently advised, the Court decides that the extraordinary relief sought by the Cabinet must be denied.

KRS 218A.202(6), as amended in 2007, reads in pertinent part:

The Cabinet for Health and Family Services shall only disclose data to persons and entities authorized to receive that data under this section. Disclosure to any other person and entity, including disclosure in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence, is prohibited unless specifically authorized by this section.

Initially, we dispose of Cole's argument that the restrictions to disclosure set forth in the statute violate the doctrine of separation of powers. In another original action styled as *Cabinet v. Chauvin*, 2008-CA-000027-OA, which is rendered contemporaneously with the instant matter, this Court determined that the portion of KRS 218A.202(6) prohibiting “disclosure in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence . . .” directly conflicts with the express provisions set forth in CR 26.02(1) and that this conflict implicates said doctrine in civil actions because the statute articulates a legislatively prescribed rule of practice and procedure for those actions that purports to encroach on a function that is exclusively assigned to

the Judicial Branch by the Kentucky Constitution. However, the Court specified that it did not construe the prohibition against the disclosure of KASPER records for discovery or evidentiary purposes as set forth in the statute to also apply to criminal actions. Indeed the Court notes that the Cabinet advised the trial court in its motion to vacate the disclosure order that the 2007 amendments to KRS 218A.202(6) were a direct response to “a profusion of orders from Circuit Courts” ordering it to produce KASPER reports “in civil cases, most of which involved bodily injury claims and/or custody issues.”

But, the Court is of the opinion that, as a whole, KRS 218A.202(6) is nonetheless a cause for concern in criminal cases because it does not spell out any instance or circumstance under which the Cabinet may be authorized to disclose KASPER data to a criminal defendant, not even the defendant's own record and not even pursuant to a court order. The Court believes that this concern is not lessened by KRS 218A.202(8), which limits the release of the data by “[a] person who receives data or any report of the system” pursuant to the order of a court of competent jurisdiction “only to a person or entity authorized to receive the data or the report under this section” The Cabinet argues that “[n]o one has a fundamental or constitutional right to KASPER data.” However, the Court is of the opinion that the Cabinet's argument overlooks the constitutional considerations that are unique to criminal matters. The respondent trial court correctly recognized those considerations when it applied the reasoning crafted by the

Kentucky Supreme Court in *Barroso* to the discovery issue that has been raised in the instant case.

Barroso stands for the principle that the constitutional rights afforded to a criminal defendant by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and by Section 11 of the Kentucky Constitution take precedence over an evidentiary privilege created by a statute or a rule. As stated by the Kentucky Supreme Court, “[a]s a general proposition, constitutional rights prevail over conflicting statutes and rules.” 122 S.W.3d at 558. Further, *Barroso* cites *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, L.Ed.2d 40 (1987), and its emphasis on the obligation of government pursuant to the Due Process clause to disclose records in its possession that may contain evidence “both favorable to the accused and material to guilt or punishment.” *Id.* at 559.

In *Barroso*, the psychotherapist-patient privilege was at issue and the documents needed by a criminal defendant were in the possession of a non-government third party. With regard to KRS 218A.202, however, we discern an intent by the General Assembly to confer a highly confidential status to KASPER data, but not to elevate it to a privileged status.⁹ And, as was the case in *Ritchie*, *supra*, the data requested by Cole is in the possession of government. It should be axiomatic that if the *Barroso* concept applies in a criminal case where a privilege

⁹ The reader is referred to *Cabinet v. Chauvin*, *supra*, wherein the Kentucky Attorney General, intervening petitioner, argued to the contrary, for additional reasoning in support of the Court's determination in that regard.

is clearly involved and where the discovery pertains to documents that are in non-government custody, there should be little obstacle to apply the concept to a criminal case where no clear privilege is involved and where the discovery pertains to documents that are in government custody.

Therefore, we conclude that the respondent trial court correctly determined, in accordance with *Barroso*, that Cole's rights to due and compulsory process took precedence over any conflicting language included in KRS 218A.202

and that it had the authority to order the Cabinet¹⁰ to produce the requested KASPER information for discovery purposes.¹¹

In addition, we are of the opinion that the trial court also proceeded correctly in accordance with the *Barroso* guidelines when it ordered the disclosure of the documents upon the finding that Cole had made a sufficient showing that “those records may contain information which is relevant or exculpatory to the Defense.” The preliminary determination of relevancy and materiality of that which is sought in discovery comes within the exclusive province of a trial court. Whether the “raw” nature of KASPER information may impinge a party's burden of showing that it contains articulable evidence raising a reasonable inquiry is a

¹⁰ The Court notes that there is evidence in the record that Cole could also obtain the KASPER information from the Commonwealth's Attorney. At oral argument, the Cabinet questioned why the trial court did not order the prosecution, rather than the Cabinet, to release the information to Cole. However, such method would not be a substitute for discovery directly obtained from the Cabinet since it is the original source of the documents.

¹¹ The issue of admissibility of the KASPER records is not before the Court at this time and this Opinion and Order should not be construed to extend to it.

concern for a trial court, and only a trial court, to appraise. In fact, the Cabinet is not arguing that the trial court's finding in the instant case is in error.

This Court is of the further opinion that the trial court also proceeded correctly within *Barroso* guidelines when it ordered the documents produced to it under seal and for its review *in camera* before deciding whether copies of those documents should be provided to the parties' counsel. The Court believes that, when a trial court fully proceeds within the *Barroso* guidelines, the appropriate concerns that the Cabinet expressed with regard to protecting the confidentiality of the KASPER information and with regard to the potential for “fishing expeditions” are properly and affirmatively recognized.

ALL CONCUR.

ENTERED: June 13, 2008

/s/ William L. Knopf
SENIOR JUDGE, COURT OF APPEALS

BRIEF AND ORAL ARGUMENT
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