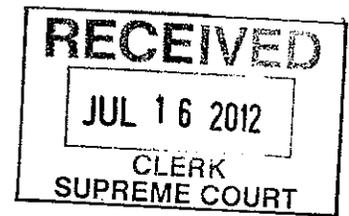


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 2011-SC-000227-DG



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v. Court of Appeals Nos. 2009-CA-0949 and 2009-CA-00950  
Knox Circuit Court Nos. 08-CR-00141 and 08-CR-00155  
Hon. Gregory A. Lay, Circuit Judge

**FRANK D. HAMILTON and**  
**HEATHER COLE**

**APPELLEES**

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**Reply Brief for Commonwealth**

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**Submitted by,**

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***CERTIFICATE OF SERVICE***

I certify that the record on appeal has not been checked out from Office of the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been served July 16, 2012 as follows: by mailing to the trial judge, Hon. Gregory A. Lay, Judge, P.O. Box 1209, London, KY 40743-1209; by sending electronic mail to Hon. Jackie Steele, Commonwealth Attorney; and by delivery through United States Mail to Hon. D. Randall Jewell, Jewell and Hall Law Offices, PLLC, P.O. Drawer 670, Barbourville, KY 40906.

  
James C. Shackelford  
Assistant Attorney General

## **INTRODUCTION**

The Commonwealth will not repeat the arguments it made in its principal brief but will focus on those issues or authorities newly raised by the Appellees.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth previously requested oral argument.

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## ARGUMENT

The Commonwealth respectfully refers the Court to its principal brief for a complete Statement of the Case. The Commonwealth will note additional facts, as necessary, in this argument. This reply brief will only discuss erroneous assertions the Appellees make in their brief and will not address other issues which the Commonwealth addressed in its principal brief.

### **I. The Appellees attacked the constitutionality of a statute and failed to give the Attorney General notice.**

KRS 218A.020 provides for two procedures to allow the Cabinet for Health and Family Services to adopt, delete, or reschedule a controlled substance. Under subsections (1) and (2), the Cabinet may independently study and consider specific factors in doing so. Subsection (3) of the statute specifically allows the Cabinet to do the same based upon scheduling under federal law. The Appellees recognized this in a hearing on the matter in circuit court. Portions of the attorneys' opening statements to the trial court are attached as Appendix 1 to this reply brief and show the constitutionality of the KRS 218A.020(3) was at issue and that Appellees were required to notify the Attorney General before judgment pursuant to KRS 418.075(1).

The Appellees continued their attack on the constitutionality of the statute in the Court of Appeals, "If this Court affirms the Trial Court, KRS

218A.020(3) is unconstitutional." Brief for the Appellants, No. 2009-CA-949-MR, p. 8; copies of quoted pages included in Appendix 2 hereto. They also argued to the Court of Appeals:

In this case, the Commonwealth argued and the Trial Court agreed that KRS 218A.020(3) does not require the findings set forth in KRS 218A.080. If so, KRS 218A.020(3) is unconstitutional as an impermissible delegation of authority without adequate standards in violation of § 28 of the Kentucky Constitution.

*Id.* at p. 10.<sup>1</sup>

The Appellees have attacked this statutory delegation of authority under subsection (3) but claim to this Court they are attacking the constitutionality of the regulation. Perhaps the trial prosecutor, the circuit judge, and the Court of Appeals somehow misunderstood their argument or perhaps it was something the Appellees said:

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master - - that's all."

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<sup>1</sup> Section 28 of the Kentucky Constitution speaks to the separation of powers doctrine while Section 29 actually vests the legislative power in the General Assembly.

Carroll, Lewis. *Through the Looking Glass*, Chpt. 6.

The Appellees would not only have words mean what they choose but to give them different meanings at different times. Elsewhere in their brief to this Court, Appellees quoted from the Commonwealth's description of the issue and agreed with it:

[T]he issue actually raised and addressed at the trial court level deal with the *constitutional* authority of the *General Assembly* to delegate authority. As such, it is not clear that KRS 13A.140 provides authority for requiring the Cabinet be made a party.

(Commonwealth's Br. at 17) (emphasis in original).  
Appellees' [sic] agree with the Commonwealth's analysis of KRS § 13A.140.

Brief for the Appellees, p. 14.<sup>2</sup> Curiouser and curiouser.

As described in the Commonwealth's principal brief, the Appellees only notified the Attorney General they were challenging the scheduling of buprenorphine and not the constitutionality of the statute. Appellant argues the Attorney General waived this argument by not raising it at the trial court level, but the Attorney General could not have done so since he was unaware of it. Moreover, an appellate court in this state "reverses or affirms *judgments* rather than *issues* ...." *Fischer v. Fischer*, 348 S.W.3d 582, 592 (Ky. 2011):

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<sup>2</sup> The Attorney General argued there other reasons that made the Cabinet an indispensable party.

The Court of Appeals was free to consider an issue not raised below if favorable to the prevailing party at the trial court level. *Id.*, citing *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 812 n. 3 (Ky. 2010); see also *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006). Since the Court of Appeals considered the issue, this Court can likewise do so but apply the proper remedy and dismiss the Appellees' appeals rather than remanding.

**II. The General Assembly did not unlawfully delegate its authority because a state agency retained control over the scheduling of controlled substances and the General Assembly could have revoked the discretionary authority of the Cabinet to adopt federal standards.**

The facts and legal issues in this case differ from those in *Dawson v. Hamilton*, 314 S.W. 532 (Ky. 1958). In that case a statute provided that the standard time within the Commonwealth would be prescribed "by Act of Congress or by order of the Interstate Commerce Commission shall apply to and govern all laws, regulations and rules ..." of the Commonwealth and any local governmental unit. *Id.* at 534, quoting Ky. Acts 1958, Section 2.160.

The court in that case recognized the authority to adopt federal law but held the *automatic* adoption of future federal law was an unlawful

delegation of authority to the *federal government*: "Thus the Act before us is not unconstitutional to the extent that it adopts an Act of Congress and/or regulations of the I. C. C. *effective as of the time the legislation was enacted....* But future acts of Congress or orders of the I. C. C. are in a different category." *Id.* at 535 (emphasis by the court).

Here, there is no automatic adoption of future federal laws. Instead, the legislature gave a *state agency* the *discretionary* authority to adopt federal rules on scheduling of substances. This addressed the two primary concerns of the court in *Dawson*, that the *state* and not the federal government make the actual decisions of what is in the interests of Kentucky and that the regulations actually at issue in *Dawson* were inimical to state interests. *Id.* at 536. In the instant case, it is the state which makes the final decision of what is in the interest of the state and there can be no doubt that it is in the best interests of the Commonwealth to protect its citizens from abusive drug use.

Moreover, the holding in *Dawson* was later severely criticized and severely limited by *Commonwealth v. Associated Industries of Ky.*, 370 S.W.2d 584 (Ky. 1963). The court noted that *Dawson* had relied upon the expression that the legislature cannot delegate its authority. *Id.* at 587. There is no explicit prohibition contained in the Kentucky Constitution while there is implicit authority to do so. *Id.* at 586. The prescription against

delegation of authority had apparently originated with John Locke. *Id.* at 586-587. Experience in governing showed the wisdom in allowing some leeway in the delegation of authority:

So, if Locke was the fountainhead of the thesis that power could not be delegated, we feel sure that the experience of the last several centuries would have caused him to repudiate this idea. Experience has demonstrated some of the power must be invested in other bodies so that the government may function in a world that progressively is becoming more complex. *There is nothing wrong with this so long as the delegating authority retains the right to revoke the power.* The wrong (and the hypocrisy) lies in affirming the truth of the catch phrase while at the same time denying its existence by a devolution of the power.

*Id.* at 588 (emphasis added).

The court considered the specific statute at hand which allowed the Commissioner for Unemployment Insurance to enter into reciprocal agreements with the federal government and other state governments whereby rights and benefits of those seeking unemployment could be determined by or in combination with the laws of other states or the federal government. *Id.* at 589. The court upheld the authority of the General Assembly to delegate this authority to a state administrative agency and said the possibility of change in the federal law or the laws of other states was a reason to support the lawfulness of such delegation:

By passing that act the General Assembly has expressed its opinion about the necessity and desirability of investing in another the power to carry out the terms of the policy embodied in the enactment. The ephemeral qualities of each session of the legislature are such the desirable and beneficial purpose of the act could not be fulfilled if complete detailed laws were required for each case presented. By delegation it will accomplish the goal desired which otherwise could not be attained. *The fact that the laws of other states may change is additional reason why the commissioner should be granted flexible power.*

*Id.* at 589 (emphasis added).

In the case now before the Court, the Commonwealth of Kentucky retains control of its own laws by allowing the Cabinet discretionary authority to rely upon the federal government's fact-finding and rule-making on the scheduling of controlled substances. That is important in today's rapid pace, designer drug of the month world in which we live. At the same time, the General Assembly retains the authority to take this discretion away from the Cabinet. Accordingly, the General Assembly did not unlawfully delegate its authority to the Cabinet or to the federal government.

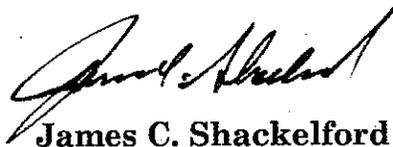
## CONCLUSION

For all of the foregoing reasons, this Court should vacate the opinion of the Court of Appeals and affirm the convictions of Appellees.

Respectfully Submitted

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# APPENDIX

<i>Description</i>	<i>Appendix No.</i>
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