

CHALLENGING KASPER WARRANTS

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March, 2010, the Court decided the case of *Commonwealth of Kentucky, Cabinet for Health and Family Services v. Bartlett, Judge, Kenton Circuit Court and Cole, Cox and Young (Real Parties in Interest)*, 311 S.W.3d 224 (2010). In this case, Cole and Young shared a residence which was searched pursuant to a warrant. The warrant was, in part, supported by information obtained through KASPER, which suggested that Cole was involved in drug trafficking. In discovery, Cole requested his own report, as well as those of his two co-defendants, and also moved to suppress the warrant (and the fruits of the search), arguing that it “contained false and misleading information about the KASPER report on Young.” The trial court granted the discovery motion.

The Cabinet, invoking KRS 218A.202, which strictly limited disclosure of KASPER reports, requested the trial court vacate the order. After a hearing, the trial court denied that request and noted that Cole had shown that the requested records might contain “relevant or exculpatory” information. The trial court ordered that the KASPER reports be produced to the court for an in-camera review. The order noted that the trial court “had the authority to order production of these documents because, according to *Com. v. Barroso*, 122 S.W.3d 554 (Ky. 2003), Cole’s constitutional rights to exculpatory evidence and due process prevailed over any statutory bar against disclosure.”

The Cabinet filed a petition of prohibition and mandamus, in which it sought to prevent the enforcement of a trial court’s order. The Kentucky Court of Appeals denied the writ and the Cabinet further appealed. (During the pendency of the appeal, the Kenton County criminal case was stayed.)

The Supreme Court of Kentucky agreed that KRS 218A.202 specifically prohibits the disclosure of KASPER reports to anyone not listed in the statute. Criminal defendants, defense counsel and trial court judges are not on the list, and, the Court noted, neither

When the Kentucky All Schedule Prescription Electronic Reporting system was unveiled in 1999, it quickly became a valuable tool used across the commonwealth to investigate and prosecute drug-related crimes. Over the past 10 years, the KASPER system has been improved and upgraded, and the ability for real-time data access for most law enforcement and medical professionals has become almost universal. KASPER now is overseen by the Cabinet for Health and Family Services, Office of the Inspector General, Drug Enforcement and Professional Practices Branch.

Once data collection began, however, it became sought after for reasons other than its original purpose. In 2010, cases reached the Supreme Court of Kentucky that illustrated two sides of this issue. In

are prosecutors. The Court noted, however, that this “overlooks the unique constitutional considerations that arise in criminal cases.”

Specifically, no statute may infringe on the rights a criminal defendant enjoys under the U.S. or Kentucky Constitution.

The Court continued: “It is well established that a criminal defendant has a constitutional right to discover exculpatory documents, even if these documents are confidential or if their disclosure is prohibited by rule or statute.”

However, the Court agreed that a criminal defendant was not permitted to engage in a “fishing expedition” in confidential records, without at least some showing that exculpatory information might be found there. As such, in *Barroso*, the Court developed a two-step process to evaluate the records. First, the requesting defendant must produce enough information to “establish a reasonable belief that the records contain exculpatory evidence.” Second, the trial court is required to conduct an in-camera review of the records to determine if they do contain such information. Only then does the trial court order that the records be produced to the defendant. The trial court, in *Bartlett*, followed this process precisely. The Court denied the writ and ordered the disclosure of the potentially relevant and exculpatory reports to the defendants.

Just two months later, the case of *Com. of Kentucky, Cabinet for Health and Family Services v. Hon. Chauvin, Baumler and Warner (Real Parties in Interest)*, 316 S.W.3d 279 (Ky. 2010) came before the Supreme Court of Kentucky. This case also began with a discovery request for a KASPER report, but rather than a criminal case, the case involved a civil lawsuit between Baumler (the plaintiff) and Warner, the defendant. The trial court noted a conflict between the prohibitions in KRS 218A.202 and the Kentucky Rules of Civil Procedure, 26.02(1), which permits discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” The Jefferson Circuit Court approached the matter as one in which the statute violated the separation of powers, finding that it “affected the practice and procedure of the courts, which falls within the exclusive rulemaking power of” the Court. The Cabinet again sought a writ of prohibition, which was partially denied, with the Court of Appeals ordering that the trial court conduct the required in-camera review of the requested records. The Cabinet appealed the issue to the Supreme Court of Kentucky. The Court agreed that the General Assembly clearly intended to “create a privilege when it prohibited disclosure of KASPER records” even though it did not use that word. And, in fact, the very “essence of a privilege is to prohibit disclosure, and thus also discovery.” The General Assembly also provided for limited exceptions to discovery and further, emphasized the seriousness of unauthorized disclosure by providing for a criminal penalty.

The Court looked back to *Bartlett* and reemphasized that “no statute can defeat a criminal defendant’s constitutional rights to exculpatory evidence or to confront witnesses against him.” However, as “to civil matters, there is a lesser constitutional protection.” Unlike a criminal case, there is no general “due process right to get all possible evidence

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in the civil context.” Instead, “unlike in the criminal context, no constitutional bar precludes courts from applying the KASPER privilege in civil disputes.” In this case, the Court agreed that parties in a civil action would “still be able to get information about a person’s prescription drug history from more direct sources,” such as opposing party, their physician or their pharmacist. They simply cannot “get the more convenient compilation of records the Cabinet has.” The Court then denied the discovery order.

The relevance of the above decisions to law enforcement is clear. In a criminal case that uses information from a KASPER report to support a search warrant or arrest, the defendant may, and probably will, request a copy of the KASPER report through discovery. They might then seek to challenge whether the information in the KASPER report does, in fact provide sufficient probable cause to support the search or arrest. In addition, the report itself will not be provided to the judge as an attachment to the search warrant affidavit, since the statute does not permit that disclosure. Instead, the judge must depend upon the characterization of the information provided by the affiant officer, and if that characterization is deceptive or incomplete, the defendant may use the report to attack the warrant through a Franks hearing.

In a *Franks* hearing (pursuant to the case of *Franks v. Delaware*, 438 U.S. 154 (1978)), the defendant attacks the underlying probable cause of a search warrant that appears, on its face, to be valid. In a case involving a KASPER report, a defendant might obtain the report, via discovery, and then compare its contents to the affidavit. If the officer has materially misrepresented the report to the judge, the fruits of the search warrant may be suppressed. (And, if the misrepresentation is proved to be deliberate, the officer might be considered to have committed perjury.)

KASPER has proven itself a valuable tool to Kentucky law enforcement. However, it is important to remember that the source document — the actual data and the report generated from that data — no longer is considered completely privileged in criminal cases and in certain circumstances, may be used effectively, to challenge the search warrant. J