

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
No. 08-CI-856**

**DAVID L. WILLIAMS, in his
official capacity as President of the
Senate of the Commonwealth of Kentucky**

PETITIONER

v.

FINAL JUDGMENT

**TREY GREYSON, in his official capacity as
Secretary of State of the Commonwealth of
Kentucky, et al**

RESPONDENTS

This action is before the Court on the motion of the Petitioner, David L. Williams, President of the Kentucky State Senate, for summary judgment. Senator Williams requests that this Court enter a judgment declaring that House Bill 79, from the 2008 General Assembly, was validly enacted as law. Senator Williams seeks declaratory and injunctive relief requiring the Respondent, Governor Steven L. Beshear, to comply with H.B. 79, which Senator Williams maintains constitutes the duly enacted “six (6) year road plan” under KRS 176.420. Senator Williams argues that H.B. 79 controls executive branch spending on highway construction projects during the current 2008-10 budget biennium. Although Governor Beshear vetoed H.B. 79, Senator Williams argues that the Governor's veto was not timely. Finally, Senator Williams argues that if H.B. 79 is not valid (either because of the Governor's veto, or because it was not enacted or delivered to the Governor prior to the legislature's *sine die* adjournment), then the Governor is bound by the provisions of the 2006-08 six year road plan, because it was incorporated by reference in the 2008-10 budget (and he argues the 2008 budget contains no

validly enacted superseding road plan).

The Governor has filed a cross-motion for summary judgment seeking a declaration that the H. B. 79 was not validly enacted. The Governor further argues that H.B. 79, even if validly enacted, was the subject of a timely gubernatorial veto, and thus has no legal effect. Finally, the Governor asserts that he has executive authority to adopt, and to amend, the six year road plan in the absence of legislative action. The Governor further asserts that he may implement his own six year road plan, adopted after the adjournment of the legislature and his veto of H.B. 79.

This Court, in an Opinion and Order entered on July 31, 2008, held that H.B. 79 was not validly enacted because of the failure of the legislature to deliver the bill to the Governor before its *sine die* adjournment as a matter of law at midnight on April 15, 2008. Senator Williams has filed a motion to reconsider that ruling, which is also before the Court and ripe for decision.

For the reasons stated below, the Court DENIES Senator Williams motion for summary judgment on the validity of H.B. 79. The Court GRANTS the Governor's cross-motion for summary judgment to the extent that it seeks a declaration of rights that H.B. 79 is invalid and that the Governor has legal authority to implement the six year road plan as submitted to the 2008 General Assembly under KRS 176.420 and KRS 176.440. The Court DENIES the Governor's summary judgment motion to the extent that it seeks authorization to implement executive changes in the six year road plan adopted unilaterally after the adjournment of the 2008 legislature. Senator Williams' motion for injunctive relief is GRANTED IN PART to the extent that it seeks to enjoin the implementation of the changes to the six year road plan adopted

unilaterally by the executive branch after the adjournment of the 2008 General Assembly. Finally, Senator Williams' motion to reconsider the Court's partial summary judgment of July 31, 2008 is DENIED, although the Court further holds that the provisions of H.B. 79 are invalid because the legislation was not enacted prior to the adjournment of the 2008 General Assembly, in addition to its failure to comply with the requirements of Section 56 of the Kentucky Constitution for immediate presentment to the Governor.

DISCUSSION

1. The Validity of H. B. 79 and Senator Williams Motion to Reconsider.

Senator Williams has requested reconsideration of this Court's ruling that H.B. 79 is invalid because it failed to comply with the requirements of Section 56 of the Kentucky Constitution for immediate presentation to the Governor. This Court, in its July 31, 2008 Opinion and Order, reasoned that the presentation of the bill to the Governor was a legislative act, and the constitution clearly forbids any legislative action in regular legislative session after April 15 of even numbered years. It is undisputed that H.B. 79 was not delivered to the Governor's office until 12:30 p.m. on April 16, 2008.

Senator Williams argues that the delivery of the bill to the Governor is merely a “ministerial act” and that such mandatory, non-discretionary clerical duties may be discharged after the adjournment of the legislative body. He further argues that many other bills have been presented to the Governor after adjournment, and such a holding may bring into question their validity.

While Senator Williams asserts that presentation to the Governor is a mandatory, ministerial, and therefore non-discretionary act, his argument is undermined by the uncontested facts of this case. Here it is undisputed that the Clerk did not deliver the bill to the Governor until a day after the legislature had adjourned. Thus, the Clerk exercised *discretion* by deciding to deliver H.B. 79 in the afternoon of the day following adjournment, rather than "immediately" as plainly required by Section 56 of the Constitution.

These constitutional questions about the timing of the Governor's veto, the discharge of the clerk's mandatory duty to "immediately present" all bills upon enactment, signing and enrollment, and the stopping of the legislative clock, would all be unnecessary if the legislative branch of government strictly complied with Section 56 of the Kentucky Constitution. Section 56 defines the legislative action required for a bill to become a law. Presentment to the Governor is a legislative action, and this Court believes it must be completed before adjournment because the legislature has no power to act or to force its subordinate officers to comply with their mandatory duties after adjournment.

Senator Williams presents a parade of horrors regarding the impact of this ruling on other unrelated legislation that may also be challenged under the Court's ruling. This Court declines to base its ruling on the effect it may have in cases that are not before it. Nevertheless, because the factual record is now completely undisputed that H.B. 79 was not signed by the presiding officers, nor was it enrolled, prior to midnight on April 15, 2008, this Court now holds that the invalidity of H.B. 79 rests on two separate grounds: a) the failure to complete the

legislative process of signing and enrolling the bill prior to midnight on April 15, 2008; and b) the failure to immediately deliver the bill to the Governor as required by Section 56 of the Constitution. The question of whether there may be some circumstances, not presented in this case, in which the presentment to the Governor may be made after midnight on April 15 in an even numbered year, consistent with constitutional requirements, is a question that should be reserved for another day and another case.

Thus, the Court reaffirms its holding that H.B. 79 is unconstitutional, and that its presentment to the Governor over 12 hours after *sine die* adjournment violates Section 56 of the Kentucky Constitution. However, to the extent that the Opinion and Order of July 31, 2008 held that presentment to the Governor must be made in all cases prior to adjournment, that portion of the Court's ruling is unnecessary to the holding in this Final Judgment, and the Court's prior ruling is modified to reflect this finding.

A. H.B. 79 and KRS 176.420: Can the six year road plan be severed from the Budget Memorandum?

Senator Williams places great weight on the fact that the legislature authorized continued expenditure of funds on road projects included in the 2006-2008 biennial highway construction plan. *See* Subsection I(L)(4)(6) of H.B. 406. He argues that if H.B. 79 is invalid, the executive branch is limited to expending funds on the 2006 road plan. Under his reasoning, if H.B. 79 is invalid, then there is no validly enacted road plan for the 2008-10 biennium, other than the continuation of the 2006-08 plan. This argument simply ignores the plain language of KRS

176.420, which makes the drafting and implementation of the six year road plan an executive function, which can be accepted, rejected, or amended by the legislature. Moreover, KRS 176.419(2), the *legislative* definition of “six year road plan” provides that the plan must set forth “projects with phases scheduled for funding during the ensuing biennium” which “*shall be enacted in the budget memorandum* and the projects with phases in the last four (4) years of the plan *shall be enacted in a joint resolution....*” Senator Williams' reading of the statute would completely obliterate the legislature's own requirement that the six year road plan be enacted in the budget memorandum, and thus that it be subject to the Governor's line item veto in Section 88 of the Constitution.

Reviewing the state budget bill as a whole, there can be no doubt that the legislature *at the time it enacted the budget* appropriated funding for the Administration's new road plan for the 2008-2010 biennium to control highway expenditures for this budget cycle. *See e.g.*, Subsection I(L)(1) of H.B. 406 (“The Secretary of Transportation shall produce a single document that contains two separately identified sections, as follows: Section 1 shall detail the enacted fiscal biennium 2008-2010 Biennial Highway Construction Program and Section 2 shall detail the Highway Preconstruction Program Plan for fiscal year 2008-2009 through fiscal year 2013-2014 as identified by the 2008 General Assembly.”).

It is worth noting that the state budget bill, H.B. 406, was fully enacted and delivered to the Governor on April 2, 2008, according to the *Legislative Record*. On that date, H.B. 79 was still “An Act relating to the operation of taxicabs and limousines.” H.B. 79 was not amended in

the Senate until April 15, when it was completely gutted and rewritten to omit its original provisions, reconstituted, and re-titled as “An Act relating to road projects and declaring an emergency.” See *2008 Legislative Record, (Final Legislative Action), H.B. 79*. If the legislature contemplated incorporating the provisions of H.B. 79 at the time it enacted the budget, it would have no road plan at all, but only the original H.B. 79, an "Act relating to the operation of taxicabs and limousines." Whether such a House Bill, unrelated to appropriations and revenue, can be gutted, amended, and completely re-written in the Senate on the last day of the legislative session to encompass an entirely foreign subject matter controlling hundreds of million dollars of highway expenditures with less than *one day's consideration* in both legislative bodies combined, and still pass constitutional muster under Sections 47 and 51 need not be addressed at this time.

Accordingly, when the legislature enacted H.B. 406 and sent it to the Governor for signature, it could not have possibly contemplated that H.B. 79 separately set forth the six year road plan for the 2008-2010 biennium. H.B 406 authorized the expenditure of hundreds of millions of state tax dollars, specifically referencing a 2008-2010 road plan, and the only such plan in existence at that time was the plan that was timely submitted to the legislature by the executive under the provisions of KRS 176.420 and KRS 45.245. Accordingly, it is this plan, as submitted to the legislature by the executive that controls highway expenditures during the 2008-2010 biennium.

The legislature had the opportunity to change the executive's six year road plan in the

budget bill, but declined to exercise that power. When the legislature, on the last legislative day, sought to change the six year road plan by separate legislation apart from the state budget by amending an unrelated House Bill awaiting action in the Senate, it did so at its own peril. Its failure to enact changes in the six year road plan within the state budget bill, and its subsequent failure to enact a different six year road plan within the time allotted by the Constitution, does not result in the nullification of the six year road plan timely submitted by the executive branch under KRS 176.420 and KRS 45.245. That six year road plan submitted by the Department of Highways to the General Assembly became effective when the budget bill and the budget memorandum were adopted without any legislative changes to the executive branch's plan, and the appropriation was made for implementation of that plan in H.B. 406.

B. Can the legislature “stop the clock”?

Governor Beshear has submitted for the record a number of affidavits, and public records from Kentucky Educational Television, that conclusively establish that H.B. 79 was not signed by both presiding officers, nor was it enrolled, until after midnight on April 15, 2008. Based on this factual evidence, which is unrefuted in the record, this Court makes a specific factual finding the H.B. 79 was not signed by the presiding officers of each house, nor was it properly enrolled, nor was it delivered to the Governor, prior to midnight on April 15, 2008.

Senator Williams does not meaningfully dispute these factual assertions. Rather, he argues that the courts cannot consider the mountain of evidence presented because of the ancient doctrine that a public body may speak only through its records, and that the courts are bound by

the Senator Williams' self-serving assertion that the legislature's temporary journals recite that all legislative action on this bill was concluded before midnight on April 15, 2008 (although it should be noted that the temporary journals of the House and the Senate contain contradictory factual assertions with regard to the timing and signing of the bill). This legal fiction, the “enrolled bill” doctrine, was squarely rejected and overruled by the Kentucky Supreme Court over twenty-five years ago. D. & W. Auto Supply v. Department of Revenue, 602 S.W.2d 420 (Ky. 1980).

Senator Williams' argument essentially concedes, as he must, that the legislature cannot “stop the clock” to extend its constitutionally limited time to enact laws, but he asserts the ancient legal fiction of the “enrolled bill doctrine” to prevent any judicial examination of the underlying facts. He argues that if the legislature violates its constitutional duty, but then covers its tracks with a journal entry, no one can question its action. This argument undermines the separation of powers provisions of Sections 27 and 28 of the Kentucky Constitution. But more importantly, it shows a complete lack of respect for the institutional integrity of both the courts and the legislative process required by the Constitution. Such a lack of respect can only undermine public confidence in government.

There is no Kentucky case directly on point, but the New Mexico Supreme Court, confronting a similar set of circumstances, with a similar constitutional limitation on the time in which its legislature can enact bills, has addressed the issue of “stopping the clock” in persuasive terms:

There is not the slightest doubt that the legislators are duty bound to comply with this constitutional directive [to adjourn within the constitutionally prescribed time]. Their frequent failure to do so breeds disrespect for our law and institutions. Ignoring this constitutional mandate reflects no credit upon the legislative branch of government for having indulged in such a course, or upon the judicial branch for having condoned it.

Dillon v. King, 529 P.2d 745, 751 (N.M. 1974).

While no Kentucky case directly addresses the issue of “clock stopping”, Kentucky law is abundantly clear that the “enrolled bill” doctrine is no longer the law, and courts are not barred from considering extrinsic evidence in determining whether the legislature has complied with its constitutional duties in enacting legislation. D. & W. Auto Supply, *supra*. Senator Williams argues that the D. & W. Auto Supply case says more than it means, because there the Court merely considered evidence from the legislative records to establish the failure of the bill to pass by a constitutional majority, and such a failure merely recognized the binding effect of legislative journals. He surmises that the legislative journals were conclusive in that case.

In fact, as is evident from Senator Williams Reply, filed December 2, 2008, the trial court record in the D. & W. Auto Supply case does not appear to include either the House or the Senate Journal entries, but rather it does include the hand-marked vote tally sheets from the House and the Senate. The Kentucky Supreme Court could not have been more clear in rejecting the "enrolled bill" doctrine: “We believe a more reasonable rule is the one which Professor Sutherland described as the 'extrinsic evidence' rule. Other jurisdictions have embraced this rule, which we hereby adopt as the law of this case and future cases. Under this approach there is a prima facie presumption that an enrolled bill is valid, but such presumption

may be overcome by clear, satisfactory and convincing evidence establishing that constitutional requirements have not been met.” D. & W. Auto Supply, 602 S.W.2d at 424-25. The extrinsic evidence submitted by the Governor concerning the post-midnight signing, enrolling and presentment of H.B. 79 is “clear, satisfactory and convincing evidence establishing that constitutional requirements have not been met.” *Id.* Indeed this evidence is overwhelming and it is simply uncontested on the merits.

Like New Mexico, West Virginia's highest court has also been presented with a challenge to a bill that was “passed after the legislative session had terminated by operation of law” in State ex rel. Heck's Discount Centers v. Winters, 132 S.E.2d 374 (W. Va. 1963). There, the West Virginia Supreme Court held that “[i]n the light of the constitutional provisions referred to above [the time limits for legislative action], the legislature had no constitutional right, power or authority to pass, and was inhibited by the Constitution from passing any law after midnight of the sixtieth day of its session, except enactments related to the budget.” *Id.* at 378. The Court went on to explain:

It is common knowledge that over a period of years the legislature has undertaken from time to time to circumvent the constitutional provision which limits the length of a regular session, and that on occasions it has undertaken to prolong its session by the mere expedient of stopping the clock.... Doubtless it is a fact that the legislature of this state is not unique in having indulged in that practice. It is a fact, nevertheless, that when a regular session ends by operation of law by reason of the expiration of the period fixed by the Constitution for its duration, the legislature becomes *functus officio* and ceases to have the legislative power accorded to it while in lawful, constitutional session.

Id. at 378-79.

The result must be the same here. After midnight on April 15, 2008, the legislature had

no power to enact legislation. H.B. 79 had not been signed by the presiding officers, enrolled or delivered to the Governor by midnight on April 15, 2008, as conclusively established by the affidavits of David Hadley, Shae Hopkins, Joe Meyer, Debbie Rodgers, and the verified tapes maintained by KET showing the proceedings of the House and Senate, with the Time Code Generator displaying the precise times of each event. Accordingly, H.B. 79 failed to comply with the constitutional requirements of Section 56 of the Kentucky Constitution before the legislature adjourned *sine die* by operation of Section 42 of the Kentucky Constitution, which forbids legislative action after April 15, 2008. *See also* Legislative Research Commission v. Brown, 664 S.W.2d 907, 915 (Ky. 1984) (General Assembly “ceases to exist at the moment of its adjournment”). Accordingly, H. B. 79 was never enacted and has no legal effect.

2. What law governs the executive in the absence of a legislatively enacted six year road plan?

KRS 176.420(2) provides that the six year road plan is an executive act, subject to legislative revisions. The statute provides that “[t]he Department of Highways shall submit the six (6) year road plan to the General Assembly within ten (10) days of submission of the executive budget by the Governor to each even-numbered-year regular session of the General Assembly pursuant to KRS 48.100.” Under this statute, it is clear that the drafting of the applicable six year road plan is to be done by the Department of Highways. The legislature retains the authority to make any changes its sees fit to the planning document of the Department of Highways.

In fact, another statute specifically addresses the legislature's power to amend the executive's plan: “[t]he six (6) year road plan presented to the General Assembly for approval and funding as provided in KRS 45.245, the budget memorandum, and KRS 176.420 may be amended by the General Assembly.” KRS 176.440(2). Here, the General Assembly chose to enact the budget without amending the plan submitted by the Department of Highways. The legislature has further provided for a very specific procedure for any legislative amendments to the submitted plan. Any legislative changes "with phases scheduled for funding during the ensuing biennium shall be enacted in the budget memorandum and the projects with phases in the last four (4) years of the plan shall be enacted in a joint resolution...” KRS 176.419(2). No such action was taken by the 2008 General Assembly.

Because the plan submitted by the Department of Highways was not altered or amended by the budget memorandum (for the 2008-2010 projects) or by joint resolution (for the 2010-2014 projects), the six year road plan in effect is the plan submitted by the Department of Highways to the 2008 General Assembly. The efforts of Senator Williams to alter or amend that plan through H.B. 79 have been declared unconstitutional by this Court, and there is no provision in KRS Chapter 176 that allows the Secretary of Transportation or the Department of Highways to make unilateral changes to the plan after the adjournment of the General Assembly.

If the General Assembly adjourns without making changes to the plan submitted by the Department of Highways, that plan takes effect by operation of law, so long as the General Assembly has provided funding for it, as it did here. To allow the executive branch to change

the six year plan unilaterally after the legislature has adjourned would permit “bait and switch” tactics that would alter the terms and conditions under which the legislature made the appropriations. Such a procedure would violate Section 230 of the Kentucky Constitution, and allow the expenditure of tax dollars on road projects that had never been reviewed or approved by the General Assembly. Accordingly, the Governor and the Secretary of Transportation must implement the plan submitted by the Department of Highways to the 2008 General Assembly until such time as the legislature enacts a law that would alter or amend that plan.

Senator Williams seeks in this lawsuit to have the courts impose on the executive branch his own view of the validity of the six year road plan to govern the current budgetary biennium. His remedy, however, lies not with the judicial branch, but rather, under Sections 27 and 28 of the Kentucky Constitution, it lies with his colleagues in the legislature: pass a law that complies with all constitutional requirements.

CONCLUSION

This Court holds that H.B. 79 is constitutionally invalid and has no legal force or effect. H.B. 79 was not enacted within the mandatory time frame allotted by the Constitution for legislative action under Section 42 of the Kentucky Constitution, and it was not immediately presented to the Governor as required by Section 56 of the Kentucky Constitution. Accordingly, this Court declares H.B. 79 to be invalid, without reaching the validity of the Governor's veto. This Court further finds that the legislature's enactment of a six year road plan separate from the state budget and the budget memorandum violates KRS 176.419(2), KRS 176.420(2), and

KRS176.440(2). Finally, this Court finds and declares that the executive branch's six year road plan, as submitted to the 2008 General Assembly under KRS 176.420(2), became effective upon the adjournment of the General Assembly in the absence of changes enacted in the budget memorandum as required by KRS 176.419(2). The appropriations made by the General Assembly for expenditure on the six year road plan may therefore be lawfully expended on the plan submitted by the Department of Highways to the General Assembly for the 2008 legislative session. The executive branch, however, may not unilaterally alter or amend the six year road plan after the adjournment of the legislature unless and until such changes are enacted into law by the General Assembly.

Accordingly, for the reasons stated above, IT IS ORDERED AND ADJUDGED as follows:

1. Senator Williams' motion to reconsider the July 31, 2008 Opinion and Order is DENIED.

However, the Court's July 31, 2008 Opinion and Order is modified to reflect that the Court's analysis of whether all enacted bills must be presented to the Governor prior to *sine die* adjournment is unnecessary to the holding that H.B. 79 is unconstitutional by virtue of the rulings set forth in this Final Judgment;

2. Senator Williams' motions for summary judgment seeking declaratory relief finding that H.B. 79 is a validly enacted law, and injunctive relief requiring Governor Beshear and Secretary Prather to comply with H.B. 79 are DENIED;
3. Governor Beshear's motion for summary judgment seeking declaratory relief holding that H.B. 79 is unconstitutional for failure to comply with Sections 56 and 42 of the Kentucky

Constitution is GRANTED;

4. Senator Williams' motion for injunctive relief regarding the Governor's implementation of the six year road plan is GRANTED insofar as it seeks to enjoin the Governor and his agents from implementing changes to the six year road plan that were unilaterally enacted by the Secretary of Transportation and the administration after the adjournment of the 2008 legislature. Senator Williams' request for injunctive relief is DENIED insofar as it seeks to enjoin the Governor from implementing the six year road plan that was submitted to the 2008 General Assembly by the Department of Highways under KRS 176.420.
5. All parties shall bear their own costs, including attorneys' fees.
6. This is a final and appealable order and there is no just cause for delay.

DATED: January 21, 2009

/s/Phillip J. Shepherd
PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1