

Kentucky

Analysis

People living with HIV (PLHIV) engaging in sex work or solicitation may face felony charges.

It is a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, if a PLHIV (1) knows or has been informed that they have tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) commits, offers, or agrees to commit prostitution by engaging in sexual activity “in a manner likely to transmit HIV.”¹ Neither the intent to transmit HIV nor actual transmission is required for conviction. Neither disclosing HIV status to sexual partners nor the use of protection are defenses to prosecution.

Kentucky’s prostitution laws penalize individuals for their HIV status, regardless of whether they engage or plan to engage in activities that expose others to a significant risk, or even any risk at all, of HIV infection. Under Kentucky law, “prostitution” is defined as “engaging, agreeing to engage, or offering to engage” in “sexual conduct” in return for a fee.² “Sexual conduct” is defined as “sexual intercourse or any act of sexual gratification involving the sex organs.”³

It is also a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, if a PLHIV (1) knows or has been informed that they have tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) procures another to commit prostitution.⁴ Procurement laws often punish “pimping” as opposed to solicitation of prostitution, but this provision is presumably a solicitation law targeting PLHIV who seek out or hire sex workers. In April 2016, a woman living with HIV was charged under this prostitution statute.⁵

PLHIV are prohibited from donating organs, skin, or other human tissues.

It is a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine for (1) a PLHIV who knows their HIV status and (2) has been informed that they may transmit HIV through organ, skin, or tissue donations to provide any such donations.⁶ Neither the intent to transmit HIV nor actual transmission is required for conviction, and prosecution is possible regardless of whether the donor receives compensation

¹ KY. REV. STAT. ANN. §§ 529.090(3), 532.060(2)(d), 534.030(1) (2016).

² § 529.020(1) (2016).

³ § 529.010(9) (2016).

⁴ §§ 529.090(4), 532.060(2)(d), 534.030(1) (2016).

⁵ *Woman infected with HIV arrested again for prostitution*, WAVE3 NEWS, April 15, 2016, available at <http://www.wave3.com/story/31736205/woman-infected-with-hiv-arrested-again-for-prostitution>.

⁶ KY. REV. STAT. ANN. §§ 311.990(24)(b), 532.060(2)(d), 534.030(1) (2016).

PLHIV have been prosecuted under Kentucky's general criminal laws.

Kentucky has used general criminal laws to prosecute PLHIV for transmitting HIV, not disclosing HIV status to sexual partners, and otherwise exposing others to HIV infection. These prosecutions often disregard whether defendants actually exposed others to a significant risk of HIV transmission or if there was even a scientific possibility that HIV could be transmitted.

Kentucky's "wanton endangerment" law is one example of a general criminal law that has been used to prosecute PLHIV for alleged HIV exposure. In Kentucky, the crime of first-degree wanton endangerment, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, requires that, "under circumstances manifesting extreme indifference to the value of human life," an individual wantonly engages in "conduct which creates a substantial danger of death or serious physical injury to another person."⁷

In *Hancock v. Commonwealth*, Kentucky's first case determining whether HIV exposure could be prosecuted under the state's wanton endangerment law, a PLHIV was charged for having a two-year sexual relationship with a woman, allegedly without disclosing his HIV status.⁸ Although the man testified that his partner knew his HIV status, he later pled guilty to second-degree wanton endangerment.⁹ He received a 120-day suspended sentence plus one year of probation.¹⁰

On appeal, the Court of Appeals of Kentucky rejected the argument that Kentucky's wanton endangerment statute could not apply to HIV exposure, finding the charge valid on its face "in light of the deadly nature of HIV."¹¹ The court also found that the defendant's contention that his partner knew of his HIV status had no bearing on the issue of whether the charges should have been dismissed.¹² According to the court, this was an issue of fact that the defendant needed to raise before the jury as a defense to prosecution.¹³

Neither the intent to transmit HIV nor actual transmission is required for prosecution for wanton endangerment. Because the defendant in *Hancock* pled guilty, the court never turned to a discussion regarding how the use of condoms or other protection during sexual intercourse or evidence of a defendant's low viral load would factor into a prosecution for wanton endangerment, although those factors arguably reduce the risk of transmission to below that of the statutory "substantial danger" standard.

In another case from 2008, a 29-year-old PLHIV was charged with attempted murder when she allegedly bit a store clerk on the chest during a robbery, and then shouted that she has AIDS.¹⁴ She later pled guilty to robbery and wanton endangerment and was sentenced to 12 years imprisonment.¹⁵

⁷ §§ 508.060(1), 532.060(2)(d), 534.030(1) (2016).

⁸ *Hancock v. Commonwealth*, 998 S.W.2d 496, 497 (Ky. Ct. App. 1998).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 498.

¹² *Id.*

¹³ *Id.*

¹⁴ *Bite Robbery Suspect Facing Attempted Murder Charges*, WKYT.COM, Sep. 18, 2007, available at <http://www.wkyt.com/home/headlines/9841647.html>.

¹⁵ *HIV positive Robber Receives 12 Year Prison Sentence*, WKYT.COM, Apr. 8, 2008, available at <http://www.wkyt.com/home/headlines/17382524.html>.

The store clerk tested negative for HIV.¹⁶ Two years of her prison sentence arose from the wanton endangerment charge, based solely on her HIV status, despite the fact the CDC has concluded that there exists only a “negligible” risk that HIV could be transmitted through a bite.¹⁷

Other prosecutions of PLHIV under general criminal laws include:

- In August 2015, a 27-year old woman was charged with wanton endangerment after she allegedly failed to disclose her HIV status to a sexual partner.¹⁸
- In February 2013, a 22-year-old PLHIV was charged with attempted murder for throwing urine on a corrections officer.¹⁹
- In December 2008, a 47-year-old PLHIV was charged with wanton endangerment, among other charges, for allegedly having a sexual encounter with a 15-year-old without disclosing his HIV status or using protection.²⁰
- In November 2008, a PLHIV who also had Hepatitis C was convicted of two counts of first-degree wanton endangerment for spitting at a police officer and a nurse while in an emergency room.²¹

Another Kentucky case considered HIV status as a factor during sentencing for sexual assault.²² In *Torrence v. Commonwealth*, a PLHIV appealed his conviction for first-degree rape and sodomy, arguing that it would violate his due process rights to introduce evidence of his HIV status during the sentencing phase of his trial.²³ At trial, the assault complainant had testified that she learned of the defendant’s HIV status following the rape, took medication to prevent infection, and suffered emotional damage due to her fears of HIV infection and belief that her family was treating her differently.²⁴ The Supreme Court of Kentucky found no error in admitting this evidence during sentencing because it directly related to physical and psychological harm the victim suffered and the impact of a crime on a victim may be validly considered during sentencing.²⁵ The court also noted that the defendant’s HIV status magnified his victim’s suffering beyond that of a “typical” rape victim.²⁶

¹⁶ *Id.*

¹⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Risk Behaviors, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (December 4, 2015) available at <http://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (last visited October 27, 2016).

¹⁸ Charles Gazaway, *Woman arrested for not disclosing HIV positive status*, KPLC, Aug. 17, 2015, available at <http://www.kplctv.com/story/29804875/woman-arrested-for-not-disclosing-hiv-positive-status>.

¹⁹ *HIV positive inmate talks about attempted murder charge after throwing urine*, WAVE3.COM, Dec. 2, 2013, available at <http://www.wave3.com/story/21080171/exclusive-hiv-positive-man-talks-about-attempted-mu>.

²⁰ *Police: Pastor Charged With Sexual Abuse Has HIV*, WLKY.COM, Jan. 5, 2009, available at <http://www.wlky.com/Police-Pastor-Charged-With-Sexual-Abuse-Has-HIV/9816740>.

²¹ *Davis v. Commonwealth*, 2015 Ky. App. Unpub. LEXIS 407 (Ky. Ct. App. June 5, 2015).

²² *Torrence v. Commonwealth*, 269 S.W.3d 842 (Ky. 2008).

²³ *Id.* at 843.

²⁴ *Id.* at 845-46.

²⁵ *Id.* at 846.

²⁶ *Id.*

Engaging in prostitution with an STD is a misdemeanor

It is a Class A misdemeanor, punishable by up to 12 months in jail and a \$500 fine, if a person (1) knows or has been informed that they have tested positive for a sexually transmitted disease²⁷, (2) is aware or has been informed that the disease can be transmitted through sexual activity, and (3) commits prostitution, defined as “engaging, agreeing to engage, or offering to engage” in “sexual conduct” in return for a fee,²⁸ which includes a wide range of activities that pose no risk of disease transmission. Neither the intent to transmit an STD nor actual transmission is required for conviction.

The Cabinet for Health and Family Services has broad authority to use restrictive measures in order to control communicable disease.

The Cabinet for Health and Family Services has broad authority to enforce rules and regulations that it “deems efficient in preventing the introduction or spread” of infectious or communicable diseases, including through the use of isolation and quarantine.²⁹ A local health department has the same power to institute and maintain quarantine or isolation measures to prevent the spread of disease in the state.³⁰ Infectious or communicable diseases that meet the threshold for use of isolation or quarantine are not specifically defined,³¹ suggesting that the law could be expansively interpreted to include conditions such as HIV and other STDs. Guidance distributed to Kentucky judges has stressed that isolation and quarantine are measures that should only be used in response to serious diseases that are easily transmitted from person to person.³² However, there are no procedural safeguards explicitly outlined for individuals “implicated as a possible reservoir or possible source of infection of any communicable disease.”³³

The Cabinet for Health and Family Services or local health department may mandate treatment for certain STDs.

The Cabinet for Health and Family Services or local health department may investigate a person known or reasonably suspected of having been infected with a sexually transmitted disease to confirm whether or not disease is present, including through laboratory testing.³⁴ Reasonable suspicion of infection may be established if a person is identified as a sexual contact of someone with an STD during an interview.³⁵ If found to be infected or incubating disease, a person can be required to undergo treatment to

²⁷ KY. REV. STAT. ANN § 529.090(2) (2016). Pursuant to § 214.410(2), this includes syphilis, gonorrhea, chancroid, granuloma inguinale, genital herpes, nongonococcal urethritis, mucopurulent cervicitis, acquired immunodeficiency syndrome (AIDS), human immunodeficiency virus (HIV) infection, chlamydia trachomatis infections, and any other sexually transmitted disease designated by the cabinet under the provisions of KRS Chapter 13A.

²⁸ KY. REV. STAT. ANN § 529.020(1) (2016).

²⁹ § 214.020 (2016).

³⁰ 902 KY. ADMIN. REGS. 2:030, § 1(2)(b), 2:050 § 2 (2016). KY. REV. STAT. ANN § 212.370 (2016).

³¹ Certain diseases are designated as “subject to supervision” of the local health department or Cabinet for Human Resources, including cholera, amoebic dysentery, bacillary dysentery, diphtheria, typhoid, and paratyphoid fever. 902 KY. ADMIN. REGS. 2:040.

³² U. LOUISVILLE CTR. PUBLIC HEALTH LAW PARTNERSHIPS, PUBLIC HEALTH LAW JUDICIAL REFERENCE GUIDE FOR KENTUCKY COURTS 69 (2006) (the authors are unable to determine whether Kentucky courts continue to rely on this document as current guidance).

³³ 902 KY. ADMIN. REGS. 2:050 § 2 (2016).

³⁴ 902 KY. ADMIN. REGS. 2:080 (2016).

³⁵ *Id.*

render him or her non-infectious or prevent the onset of disease.³⁶ Although there is no specific penalty outlined for refusal to comply with mandatory treatment, any health officer is empowered to pursue mandatory injunction proceedings in the appropriate Circuit Court in response to “nuisances that are menacing to the health of the people of the state.”³⁷

Important note: *While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.*

³⁶ *Id.*

³⁷ KY. REV. STAT. ANN § 214.256(6) (2016).

Code of Kentucky

Note: Provisions imposing punitive restrictions or listing criminal sentences are denoted with ** and are generally listed first. Thereafter, provisions within a particular title are listed numerically.

TITLE L, PENAL CODE

KY. REV. STAT. ANN. § 529.090 (2016) **

Person convicted required to submit to screening for HIV infection; prostitution or procuring prostitution with knowledge of sexually transmitted disease or HIV

(1) Any person convicted of prostitution or procuring another to commit prostitution under the provisions of KRS 529.020 shall be required to undergo screening for human immunodeficiency virus infection under direction of the Cabinet for Health and Family Services and, if infected, shall submit to treatment and counseling as a condition of release from probation, community control, or incarceration.

Notwithstanding the provisions of KRS 214.420, the results of any test conducted pursuant to this subsection shall be made available by the Cabinet for Health and Family Services to medical personnel, appropriate state agencies, or courts of appropriate jurisdiction to enforce the provisions of this chapter.

(2) Any person who commits prostitution and who, prior to the commission of the crime, had tested positive for a sexually transmitted disease and knew or had been informed that he had tested positive for a sexually transmitted disease pursuant to KRS 214.410 and that he could possibly communicate such disease to another person through sexual activity is guilty of a Class A misdemeanor. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution.

(3) Any person who commits, offers, or agrees to commit prostitution by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive for human immunodeficiency virus and knew or had been informed that he had tested positive for human immunodeficiency virus and that he could possibly communicate the disease to another person through sexual activity is guilty of a Class D felony. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution.

(4) Any person convicted of procuring another to commit prostitution in a manner likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive for human immunodeficiency virus and knew or had been informed that he had tested positive for human immunodeficiency virus and that he could possibly communicate the disease to another person through sexual activity is guilty of a Class D felony.

KY. REV. STAT. ANN. § 532.060 (2016) **

Sentence of imprisonment for felony; postincarceration supervision

(2) Unless otherwise provided by law, the authorized maximum terms of imprisonment for felonies are:

(d) For a Class D felony, not less than one (1) year nor more than five (5) years.

KY. REV. STAT. ANN. § 532.090 (2016) **

Sentence of imprisonment for misdemeanor

(1) For a Class A misdemeanor, the term shall not exceed twelve (12) months.

KY. REV. STAT. ANN. § 534.030 (2016) **

Fines for felonies

(1) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1,000) and not greater than ten thousand dollars (\$10,000) or double his gain from commission of the offense, whichever is the greater.

KY. REV. STAT. ANN. § 534.040 (2016) **

Fines for misdemeanors and violations

(2) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any offense other than a felony shall be sentenced, in addition to any other punishment imposed upon him, to pay a fine in an amount not to exceed:

(a) For a Class A misdemeanor, five hundred dollars (\$500).

TITLE XXVI, OCCUPATIONS AND PROFESSIONS

KY. REV. STAT. ANN. § 311.990 (2016) **

Penalties

Any person who has human immunodeficiency virus infection, who knows he is infected with human immunodeficiency virus, and who has been informed that he may communicate the infection by donating organs, skin, or other human tissue who donates organs, skin, or other human tissue shall be guilty of a Class D felony.

TITLE XVIII, PUBLIC HEALTH

KY. REV. STAT. ANN. § 214.020 (2016)

Cabinet to adopt regulations and take other action to prevent spread of disease

When the Cabinet for Health and Family Services believes that there is a probability that any infectious or contagious disease will invade this state, it shall take such action and adopt and enforce such rules and regulations as it deems efficient in preventing the introduction or spread of such infectious or contagious disease or diseases within this state, and to accomplish these objects shall establish and strictly maintain quarantine and isolation at such places as it deems proper.

KY. REV. STAT. ANN. § 214.410 (2016)

Definitions

"Sexually transmitted disease" means syphilis, gonorrhea, chancroid, granuloma inguinale, genital herpes, nongonococcal urethritis, mucopurulent cervicitis, acquired immunodeficiency syndrome

(AIDS), human immunodeficiency virus (HIV) infection, chlamydia trachomatis infections, and any other sexually transmitted disease designated by the cabinet under the provisions of KRS Chapter 13A.

Kentucky Administrative Regulations

TITLE 902, CABINET FOR HEALTH AND FAMILY SERVICES DEPARTMENT FOR PUBLIC HEALTH

902 KY. ADMIN. REGS. 2:030 (2016)

Inspections and control procedures

(2) Control procedures. Local health departments or the Cabinet for Human Resources shall:

(b) Establish and maintain quarantine, isolation or other measures as required by law or administrative regulations of the Cabinet for Human Resources relating to communicable disease control.

902 KY. ADMIN. REGS. 2:050 (2016)

Control procedures; application

Section 2: Persons.

Whenever any person has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection.

902 KY. ADMIN. REGS. 2:080 (2016)

Sexually transmitted diseases

Section 1. Definitions

(4) "Reasonably suspected of being infected with a sexually transmitted disease" means any person named in a controlled interview with a second person infected with an STD, as a sexual contact of that second person within the incubation period for the STD, or who has a laboratory test result consistent with an STD infection.

(5) "Sexually transmitted diseases" or "STD" means syphilis, gonorrhea, chancroid, granuloma inguinale, genital herpes, human immunodeficiency virus (HIV) infection, nongonococcal urethritis, mucopurulent cervicitis, chlamydia trachomatis infections including lymphogranuloma venereum, and human papillomavirus (HPV).

(6) "Sexually transmitted diseases for which a treatment exists to render them noninfectious" means syphilis, gonorrhea, chancroid, granuloma inguinale, nongonococcal urethritis, mucopurulent cervicitis and Chlamydia trachomatis infections including lymphogranuloma venereum.

Section 2. Medical Examination and Treatment of Sexually Transmitted Diseases for Which a Treatment Exists to Render them Noninfectious.

(1) Any person infected with, or reasonably suspected of being infected with, a sexually transmitted disease shall undergo such medical examination as is necessary, including such laboratory testing

procedures deemed advisable by the examining physician to reasonably determine the existence or nonexistence of the diagnosed or suspected sexually transmitted disease.

(2) If there is the potential that the person is incubating the disease, he shall undergo such treatment or follow-up as may be determined adequate by the examining physician to render the person noninfectious or to prevent the onset of disease.

(3) This section shall apply only to sexually transmitted diseases as defined by Section 1(4) of this administrative regulation.³⁸

Section 3. Investigation and Enforcement.

(4) This section shall apply only to sexually transmitted diseases as defined by Section 1(4) of this administrative regulation.³⁹

³⁸ The reference to Section 1(4) of the administrative regulation appears to be a drafting error, as it does not define sexually transmitted diseases. The authors believe it is meant to be Section 1(6).

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