PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

APRIL 1, 2018 to APRIL 30, 2018

I. CORRECTIONS

A. ***Kordenbrock v. Kentucky Department of Corrections***

2017-CA-000059 04/13/2018 2018 WL 1769316

Opinion by Judge D. Lambert; Judges Combs and Johnson concurred.

Appellant, an inmate of the Kentucky State Penitentiary, appealed from an order dismissing his declaration of rights petition. Appellant sought to void certain internal memoranda issued by the Department of Corrections. According to appellant, the memoranda, which addressed inmate pay raise freezes, violated KRS 13A.130 as well as his constitutional due process rights. The Court of Appeals affirmed. Appellant argued that he was entitled to a $0.10 pay raise each quarter pursuant to institutional policies and procedures and 501 KAR Chapter 6. The Court held, however, that these authorities did not mandate a $0.10 pay raise for every inmate, every quarter. On the contrary, the policies merely guided the Department's discretionary authority in the event a pay raise was awarded. Such guidance is precisely the type of administrative latitude granted to the Department under KRS 13A.010(2)(c) and did not conflict with 501 KAR Chapter 6 simply because it added flesh to a regulatory skeleton. Moreover, as the nature of appellant's entitlement to a pay raise was a subjective expectancy at best, the internal memoranda were properly issued without offending his constitutional rights.

II. CRIMINAL LAW

A. ***Commonwealth v. Albright***

2016-CA-001352 04/13/2018 2018 WL 1770328

Opinion by Judge D. Lambert; Judges Combs and Johnson concurred.

The Commonwealth appealed an order dismissing an indictment against appellee for murder and first-degree assault based on a finding of immunity pursuant to KRS 503.085. The charges against appellee stemmed from a shooting that resulted in the death of Cameron Pearson and the serious injury of Kyle Pearson. At issue was whether the circuit court properly ruled that appellee lawfully acted in self-defense or in defense of others and, therefore, was entitled to immunity. The Court of Appeals affirmed, holding that the circuit court had a substantial basis for its determination. During an argument between the brothers in front of a shopping center, Kyle fired a pistol into the ground, which drew the attention of several people in the area, including appellee, who owned a gun store located in the shopping center. Appellee approached the victims with a handgun and demanded that Kyle drop the pistol, or he would shoot. Kyle threatened to shoot himself and pointed the gun at his own head. According to two witnesses, he also pointed the gun at appellee. Cameron reached to disarm him, and a struggle ensued. During the struggle, the brothers rolled around on the ground, and several witnesses gave statements that the gun discharged in the general direction of appellee. Though not visible to appellee, the gun in Kyle's possession jammed as that round was discharged, rendering it incapable of firing again until cleared. Appellee then opened fire and continued firing until the brothers stopped moving. The Court concluded that although the objective reasonableness of appellee's belief that deadly force was necessary to protect third parties was questionable, the fact that Kyle pointed the weapon at appellee prior to the struggle and that a shot was fired in his direction during the struggle were sufficient to demonstrate self-defense and to merit immunity.

B. ***Embry v. Commonwealth***

2017-CA-001085 04/27/2018 2018 WL 1974453

Opinion by Judge J. Lambert; Judges Combs and Johnson concurred.

In 2005, appellant entered a plea of guilty to flagrant nonsupport for child support arrearages from 1993 to 2005. His sentence of four years was probated for five years on the condition that he satisfy the arrearage (which by the time of sentencing totaled over $7,500). His probation was twice continued (in 2007 and 2010) after hearings on violations for failure to pay arrearages. Appellant was again arrested in 2017 (by which time arrearages were in excess of $14,000). The circuit court revoked appellant's probation after holding an evidentiary hearing and making the requisite findings of fact. On appeal, appellant argued that the evidence was insufficient to prove that he could not be managed in the community and that he posed no danger to the victim or the community, necessitating that lesser sanctions be imposed. The Court of Appeals affirmed, holding that each of appellant's claims was refuted by the record; that appellant failed in his burden of proving that he had made bona fide efforts to comply with payment conditions but was unable to do so through no fault of his own; and that appellant failed in his burden of proving that the circuit court erred in failing to impose lesser sanctions.

C. ***Grady v. Commonwealth***

2016-CA-001079 04/27/2018 2018 WL 1973471

Opinion by Judge Thompson; Judges Combs and D. Lambert concurred.

Appellant challenged an order denying his CR 60.02 motion alleging that a sentence imposed in 2013 was illegal because it exceeded the statutory maximum. In affirming, the Court of Appeals first disagreed with the circuit court's conclusion that the motion was procedurally improper because appellant did not first seek relief from his alleged illegal sentence pursuant to RCr 11.42. The Court noted that because illegal sentences cannot go uncorrected, relief from such a sentence is available through four separate avenues: (1) direct appeal; (2) writ; (3) RCr 11.42; or (4) CR 60.02. Because the imposition of an illegal sentence is so fraught with constitutional infirmities, an aggrieved defendant may seek relief through any one of those avenues. Despite disagreeing with the circuit court on this point, the Court of Appeals nonetheless affirmed because appellant's sentence was not illegal.

III. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Dunn v. Thacker***

2017-CA-000129 04/13/2018 2018 WL 1770228

Opinion by Judge Johnson; Judges Combs and D. Lambert concurred.

Dunn and Thacker are the separated parents of a minor child. Dunn's boyfriend allegedly committed domestic violence against the child, evidenced primarily by text messages sent from Dunn to Thacker and shown to the circuit court. The court granted Thacker's petition for a DVO against Dunn - on behalf of their minor child - based on a finding that "[Dunn] knew or should have known or allowed or permitted [Boyfriend] to be a threat of physical injury to [Child] as evidenced by the texts she sent to [Thacker]." The circuit court also awarded temporary custody of the child to Thacker. On appeal, Dunn argued that since her boyfriend had committed the actual violence against her child and not her, the DVO improperly named her as the offending party and could not stand. In affirming the decision of the circuit court, the Court of Appeals concluded that Dunn's inaction in the face of harm inflicted on her child - or any child under her care - was tantamount to abuse. Relying on KRS 620.010 and *Lane v. Commonwealth*, 956 S.W.2d 874 (Ky. 1997), the Court held that parents, those acting *in loco parentis*, or even the public at large have an affirmative duty to prevent or report physical injury to a child. In this case, Dunn was aware of the abuse, and under the statutory and case law of the Commonwealth, entering a DVO against her was wholly appropriate in light of her failure to stop the abuse or to report it to the proper authorities.

B. ***Matehuala v. Torres***

2017-CA-001572 04/13/2018 2018 WL 1769915

Opinion by Judge Nickell; Judges Dixon and Thompson concurred.

Appellant challenged the entry of a domestic violence order (DVO) in favor of his estranged wife. Upon receiving a DVO against appellee, appellant vacated the parties' marital residence. Appellee subsequently moved out. Appellant later visited the home and, based on its dilapidated condition, concluded that the residence was abandoned. Without contacting appellee, appellant removed her personal belongings from the residence and began renovations. Two days later, appellee saw her belongings piled near the street and called police. The officers observed that the residence was uninhabitable, and appellant told them that the items were ruined before he removed them. The following day, appellee filed for a DVO. Following a hearing, the circuit court found that disposing of appellee's personal property without contacting her was "a statement" and constituted domestic violence. As a result, the court entered a DVO against appellant. The Court of Appeals reversed, concluding that the evidence was insufficient to support a finding of domestic violence as that term is defined in KRS 403.720(1). The Court noted that no evidence was presented of violence, harm, or infliction of fear of imminent injury, abuse, or assault. Although appellant's actions may have been unreasonable, they did not rise to the level of domestic violence.

IV. EMPLOYMENT

A. ***Marshall v. Montaplast of North America, Inc.***

2017-CA-000345 04/27/2018 2018 WL 1973461

Opinion by Judge Dixon; Judges Johnson and Taylor concurred.

Appellant challenged an order dismissing her wrongful discharge complaint pursuant to CR 12.02. Appellant informed some of her coworkers that one of their supervisors was a registered sex offender; shortly thereafter, Montaplast terminated her employment. Appellant subsequently filed a complaint in which she asserted that her termination was contrary to the public policy that citizens should be able to freely access information regarding registered sex offenders, as evidenced by Kentucky's sex offender registration statutes. The complaint was dismissed pursuant to CR 12.02(f) for failure to state a claim, and the Court of Appeals affirmed. Appellant argued that KRS 17.510 and KRS 17.580 require a sex offender to submit certain information to be displayed "for public dissemination" on the registry website. She further pointed out that KRS 17.580(5)(b) provides immunity from criminal and civil liability for "any person" who, in good faith, disseminates information from the registry website. According to appellant, these statutes prohibited Montaplast from terminating her for exercising her right to disseminate sex offender registry information to her coworkers. The Court disagreed and held that private employers and employees are not included within the provisions of KRS 17.500 *et seq.* Consequently, appellant could not establish that the registration statutes are directed at providing "protection to the worker in his employment situation."

V. FAMILY LAW

A. ***Hillard v. Keating***

2017-CA-001176 04/13/2018 2018 WL 1769313

Opinion by Judge J. Lambert; Judges Combs and Johnson concurred.

Hillard challenged a post-decree order modifying a settlement agreement and permitting her former husband to claim the dependent-child tax exemptions for their younger two children. The Court of Appeals affirmed. The Court held that the circuit court did not abuse its discretion because the original allocation was by agreement of the parties and the decision represented an equitable and reasonable method to balance the equities between the parties based upon the ruling that the oldest child could not be claimed and the large portion of the unusually high healthcare costs of the children that would be borne by the husband.

VI. NEGLIGENCE

A. ***Gonzalez v. Johnson***

2016-CA-001911 04/06/2018 2018 WL 1659759

Opinion by Judge Thompson; Chief Judge Kramer and Judge Combs concurred.

The issue presented was whether police officers could be liable for appellant's death after a fleeing suspect crashed into the vehicle he occupied. The Court of Appeals held that pursuant to *Chambers v. Ideal Pure Milk Co*., 245 S.W.2d 589 (Ky. 1952), the officers' actions were not, as a matter of law, the proximate cause of appellant's death and, therefore, they could not be found liable. The Court noted that *Chambers* remains the law despite the adoption of the substantial factor test for proximate cause or comparative negligence. The Court further held that even if the police vehicle's sirens were not functioning during the pursuit as required by KRS 189.940, under *Chambers* there was no proximate cause. The Court urged the Supreme Court of Kentucky to review the issue, noting that a majority of jurisdictions no longer followed the *per se* "no proximate cause rule" followed in *Chambers*. The Court then concluded that until the Supreme Court overrules that decision or the General Assembly states otherwise, *Chambers* is controlling in Kentucky.

B. ***Pearson v. Pearson***

2016-CA-001391 04/06/2018 2018 WL 1659682 Rehearing Pending

Opinion by Judge D. Lambert; Judge Combs concurred; Judge Clayton concurred in result only.

Appellant suffered respiratory injuries after being sprayed in the face by a motion-sensing air freshener device placed by his wife on a shelf above the parties' toilet. Appellant subsequently sued his wife for negligence and the manufacturer of the device in strict liability. The circuit court determined that the wife was entitled to summary judgment on the negligence claim because no argument could be made that the harm suffered by appellant was generally foreseeable by his wife, who installed a device that functioned in the manner in which it was designed to function. The Court of Appeals reversed and remanded. The Court noted that the instructions and the warnings included with the air freshener device directed against placing the device where it could spray individuals in the face. The wife admitted that she did not read the instructions or warnings on the packaging or on the device itself. Moreover, she did not place the device as intended by its designers; instead, she placed it in a manner directly contradicted by the manufacturer's safety warnings. The Court held that the consequences of misusing a product are within the natural range of effect of that misuse. Both the manufacturer's warnings and common sense cautioned users against spraying the device directly into someone's face, and an "injury of some kind" flows naturally from that. Therefore, the Court concluded that the circuit court erred in its conclusion that appellant's injury was not foreseeable.

VII. PROPERTY

A. ***Gaddie v. Benaitis***

2016-CA-001660 04/27/2018 2018 WL 1973469

Opinion by Judge J. Lambert; Judges Acree and D. Lambert concurred.

The parties share a common boundary line on one side of property located in Taylor County, Kentucky. A dispute arose in 2012, after appellees cleared a thicket and made improvements near the shared boundary line. In March 2013, appellant filed a complaint to quiet title and for injunctive relief regarding 0.002 acres of contested property; her theories of recovery were adverse possession, trespass, parol boundary line agreement, timber cutting, and acquiescence. After several years of litigation, the circuit court granted appellees' motion for summary judgment. Appellant argued on appeal that summary judgment was improper because there were material issues of fact regarding "the true boundary line as shown by [her] surveyor" and "regarding any parol boundary line agreement." She also contended that there were issues of fact concerning equitable estoppel and acquiescence. The Court of Appeals affirmed, holding that appellant failed to present at least some affirmative evidence showing that there was a genuine issue of material fact for trial.

VIII. ZONING

A. ***City of Richmond v. Spangler Apartments, LLC***

2016-CA-000804 04/06/2018 2018 WL 1659457

Opinion by Judge Nickell; Chief Judge Kramer and Judge Johnson concurred.

Appellants challenged a partial summary judgment entered in favor of appellees in a zoning case. The parties disputed whether certain real property was subject to a land use restriction on multifamily development. The circuit court found that the zoning ordinance at issue did not create a land use restriction and ordered the chairman of the city planning commission to execute a development plan and minor plat. The Court of Appeals reversed and remanded, holding that the zoning ordinance must be interpreted in conjunction with the statutory framework for zoning changes. The Court held that the ordinance was ineffective because the city commission did not comply with the procedures laid out in KRS 100.211. Specifically, the city commission did not wholly approve or vote to override the zoning commission's recommendation. Pursuant to KRS 100.211(8), the time period for the city commission to take appropriate final action lapsed and the zoning commission's recommendation took effect instead. This recommendation explicitly included a land use restriction on multifamily development and, thus, the subject real property was so encumbered. The Court further concluded that material issues of fact existed on appellees' claims of equitable estoppel and application of the "honest error" doctrine. Therefore, the case was remanded for factual determinations on those claims.