PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

AUGUST 1, 2020 to AUGUST 31, 2020

I. CRIMINAL LAW

A. ***Bloyer v. Commonwealth***

2019-CA-000890 08/28/2020 2020 WL 5079333

Opinion by Judge Caldwell; Judge L. Thompson concurred; Judge Dixon concurred in result only.

Appellant, who was a youthful offender (a minor prosecuted and sentenced in circuit court as an adult), was convicted of certain sex offenses for which probation is barred under KRS 532.045(2). At his age-eighteen hearing, appellant did not seek and was not granted probation. However, he did seek, and was allowed, to remain in the care of the Department of Juvenile Justice. KRS 640.075(1) lets DJJ and the Department of Corrections agree to let a youthful offender denied probation at an age-eighteen hearing remain with DJJ until turning twenty-one. Such youthful offenders are permitted to seek "reconsideration of probation" later under KRS 640.075(4). But because appellant was not eligible for probation initially under KRS 532.045(2), the Court of Appeals held that he continued to remain ineligible for probation, and there is no exception under KRS 532.045(2) for youthful offenders.

B. ***Clark v. Commonwealth***

2018-CA-001307 08/14/2020 2020 WL 4722830

Opinion by Judge Acree; Judges Jones and K. Thompson concurred.

After the circuit court denied a motion to dismiss for failure to conduct a speedy trial, the Court of Appeals vacated the order and remanded the matter to allow the circuit court to analyze the motion pursuant to *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The opinion describes the reasons circuit courts are required to engage in this analysis and summarizes the major considerations of that analysis.

II. IMMUNITY

A. ***Commonwealth ex rel. Putnam v. Polston***

2018-CA-001902 08/21/2020 2020 WL 4910136

Opinion by Judge Taylor; Judges Combs and Dixon concurred.

The Commonwealth challenged a judgment awarding $5,000 to Matthew Polston, Executor of the James E. Polston Estate. The award stemmed from an incident in which Doug Polston was arrested for contempt of court for his failure to pay child support. His father, James E. Polston, posted a $5,000 cash bond for Doug's release from jail. Doug appeared in the circuit court for a hearing, but the circuit court retained the cash bond. After Doug passed away, James wrote a letter informing the Lyon County Attorney of this fact and seeking the release of the $5,000 cash bond. Shortly thereafter, the Commonwealth filed a notice of review that was mailed to Doug at James' home address. In the notice, it stated that the case would be "brought on for a review of [Doug's] child support obligation and bond monies being held, on Monday, April 6, 2015." James appeared in court that day and sought release of the $5,000 cash bond he had posted, in light of Doug's death. However, the circuit court directed the circuit court clerk to pay the bond to the Lyon County Child Support Office to apply to Doug's child support obligation, and the money was subsequently dispersed to the custodial parent. James then filed a motion arguing that such forfeiture was improper as the Commonwealth did not file a motion for bond forfeiture and he was denied due process. The circuit court agreed, vacated its earlier order, and directed the Commonwealth to pay James the $5,000 cash bond. In so doing, the circuit court cited to KRS 431.545, RCr 4.48, and RCr 4.52, and concluded that James was entitled to notice of bail forfeiture and an opportunity to be heard. The Court of Appeals affirmed. On appeal, the Commonwealth argued that the doctrine of sovereign immunity barred the monetary judgment in the amount of $5,000. However, the Court held that while sovereign immunity operates to bar monetary claims against the state absent a waiver thereof, through enactment of KRS 45A.245, the Commonwealth has expressly waived immunity as to any claim based upon a written contract - including a bail bond. Thus, as the Estate's claim sounded in contract, the Commonwealth was not imbued with immunity against the claim nor was the $5,000 monetary judgment barred by immunity. The Court further held that the mandates of RCr 4.42 were not complied with by the Commonwealth or by the circuit court during the April 2015 hearing. While the Commonwealth mailed a notice of review to Doug in February 2015, it did not mail such notice to James, and the notice made no reference to a bond forfeiture hearing. Moreover, the circuit court failed to render written findings to support its bond forfeiture, thereby violating RCr 4.42. The Court also rejected the Commonwealth's argument that compliance was "impossible" because the

$5,000 was paid to the custodial parent, and such funds were no longer in the possession of the Commonwealth. The Court noted that the circuit court did not order the Commonwealth to recoup the $5,000 paid to the custodial parent. Rather, the circuit court entered a final judgment for $5,000 against the Commonwealth. It was not impossible for the Commonwealth to pay this judgment.

B. ***O'Connell v. Thieneman***

2019-CA-000593 08/21/2020 2020 WL 4910125

Opinion by Chief Judge Clayton; Judge Dixon concurred in result only; Judge Maze concurred and filed a separate opinion.

Appellee brought suit against Michael O'Connell, the Jefferson County Attorney, in his official capacity, alleging defamation and defamation *per se* in connection with remarks O'Connell made about appellee while speaking publicly at a Law Day event in May 2018. In reaction to a nearby billboard sponsored by appellee which urged viewers to vote out O'Connell as "Louisville's Sexual Predator Protector," O'Connell described appellee twice as a "sexual predator," which he later corrected to "domestic violence perpetrator," as a danger to the community, and as an abuser of women. The remarks were made in reference to the County Attorney's successful prosecution of appellee in 2015 for wanton endangerment. After the circuit court denied O'Connell's motion to dismiss the complaint on the grounds of sovereign, qualified official, and qualified governmental immunity, he brought an interlocutory appeal. The Court of Appeals affirmed. Although the complaint named O'Connell in his official capacity only, which entitled him to absolute immunity, the Court liberally construed the allegations of the complaint, in accordance with *McCollum v. Garrett*, 880 S.W.2d 530 (Ky. 1994) and *Edmonson County v. French*, 394 S.W.3d 410 (Ky. App. 2013), as being brought against him in his individual capacity as well. The Court held that O'Connell was acting in a discretionary capacity when he made the remarks about appellee and was entitled to qualified official immunity unless appellee could show that the remarks, in addition to being false, were uttered maliciously. The concurrence, while agreeing with the reasoning and result of the majority opinion, argued on public policy grounds that absolute prosecutorial immunity should be extended under the facts of this case. The concurrence characterized O'Connell's remarks as public statements concerning the facts of a prosecution and conviction which were reasonably attendant on the prosecutorial function and expressed concern that not affording absolute immunity under these circumstances would have a devastating and chilling effect on public officials.

III. JUDGMENT

A. ***Cooper v. Pulaski County Fiscal Court***

2019-CA-001290 08/07/2020 2020 WL 4555519

Opinion by Judge Goodwine; Chief Judge Clayton and Judge McNeill concurred.

Appellants filed a petition to declare a road that passed through their property as their own private roadway. The circuit court first entered summary judgment ruling against appellants, but the Court of Appeals reversed and remanded. On remand, the circuit court granted summary judgment in favor of appellants. This time their neighbors appealed, but the Court of Appeals affirmed. However, the circuit court subsequently granted the neighbors' CR 60.02 motion for relief from judgment, granted intervenors' motion to intervene, and granted summary judgment in favor of the neighbors. The decision was again challenged on appeal, and the Court of Appeals reversed and remanded. The Court first held that the circuit court was bound by the law-of-the-case doctrine on remand from the previous appeals and could not grant the neighbors' CR 60.02 motion based on evidence they had uncovered showing that the road was a county road. The Court concluded that the exception to the law-of-the-case doctrine carved out by the Supreme Court of Kentucky in *Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010), applied only to the "extraordinary nature" provision of CR 60.02(f), rather than all of the rule's provisions. Because the claims raised by appellants fell within CR 60.02(b), the law-of-the case doctrine still applied and barred relief. Second, the Court held that the circuit court failed to conduct the proper analysis under CR 24.01 before granting intervenors' motion to intervene.

IV. PROPERTY

A. ***Kroger Limited Partnership I v. Boyle County Property Valuation Administrator***

2019-CA-000935 08/14/2020 2020 WL 4722042

Opinion by Judge Maze; Judges Taylor and K. Thompson concurred.

Kroger owns a supermarket in Danville, Kentucky. Beginning in 2014, the Boyle County Property Valuation Administrator assessed the property for tax purposes at $5.5 million. Kroger contested that assessment through the local board of tax appeals to the Kentucky Claims Commission (formerly the Kentucky Board of Tax Appeals). At the evidentiary hearing, Kroger presented expert testimony valuing the property at $2.8 million. The PVA relied upon a summary report prepared by an individual in the Revenue Cabinet valuing the property at $5.5 million. The hearing officer recommended adoption of the value determined by Kroger's expert. However, the Commission accepted the PVA's value, finding that Kroger's expert failed to rebut the statutory presumption of validity by proving that the PVA's valuation was incorrect. The circuit court affirmed this determination. The Court of Appeals reversed, holding that the Commission misapplied the statutory presumption of validity. The Court concluded that KRS 49.220(5) merely creates a presumption that the PVA's valuation is correct. Once the property owner presents contrary evidence, the burden shifts to the PVA to present competent evidence supporting its valuation. In this case, the PVA relied upon hearsay evidence with no foundation to show how the assessment methodology was applied. Such hearsay evidence alone is not sufficient to support an agency's findings unless it would be admissible over objections in civil actions. KRS 13B.090(1). Consequently, the Court held that the PVA failed to meet its burden of going forward with sufficient evidence. The Court went on to hold that since Kroger retains the ultimate burden of proof, the Commission may refuse to accept even uncontradicted evidence in the record. But in such cases, the fact-finder must state its reasons for rejecting the only admissible evidence in the record. Since the Commission failed to set forth any reasons for rejecting the valuation provided by Kroger's expert, the Court concluded that the Commission's decision was clearly erroneous. Therefore, the Court remanded the matter to the Commission with directions to adopt the valuation provided by Kroger's expert.

V. TERMINATION OF PARENTAL RIGHTS

A. ***A.R.D. v. Cabinet for Health and Family Services***

2019-CA-000177 07/02/2020 2020 WL 4555471

Opinion by Judge Caldwell; Judges Acree and K. Thompson concurred.

The Court of Appeals affirmed the termination of Father's parental rights. Of note, the Court discussed Father's incarceration and concluded that while Kentucky case law does not favor termination of parental rights based solely on an isolated instance of incarceration, incarceration is clearly something to be considered among all other factual circumstances. The Court determined that the circuit court's written findings indicated that Father's parental rights were not terminated solely due to his incarceration. However, the Court emphasized that Father had not just been incarcerated for an isolated, minor criminal offense but had committed multiple serious criminal offenses, including at least two instances of a violent felony (robbery). Despite Father's contentions that this criminal history was not relevant considering that he was not in prison for murder or voluntary manslaughter of a sibling, half-sibling, or other child in the home, his repeated criminal history (including at least two violent felonies and use of drugs in violation of conditions of his supervised release) was a relevant factor to consider. This was particularly true given that Father was likely to remain incarcerated and would be unable to actively take care of Child or provide for his needs for a substantial time in the future.

VI. TORTS

A. ***Willow Grande, LLC v. Cherokee Triangle Association, Inc.***

2019-CA-000208 08/21/2020 2020 WL 4910127

Opinion by Judge Maze; Chief Judge Clayton and Judge Dixon concurred.

Willow Grande sought to build a condominium tower in the Cherokee Triangle area of Louisville. The adjoining property owners objected to the project based on the tower's size. The Neighborhood Association and the adjoining property owners pursued appeals from the approvals of each significant step of the project: the granting of demolition and construction permits; Louisville Metro's ordinance granting the re-zoning; and the Planning Commission's granting of waivers and variances for the project. The circuit court affirmed each of these actions and the Court of Appeals upheld those rulings. Following these appeals, Willow Grande filed an action against the Association, its members, and counsel, asserting claims for abuse of process, wrongful use of civil proceedings, and interference with a prospective economic advantage. The defendants filed a motion to dismiss, arguing that they had statutory and constitutional rights to appeal the adverse zoning decisions. The circuit court agreed and granted the motion to dismiss. The appeal focused on the application of the *Noerr-Pennington* doctrine, which bars federal or state causes of actions arising from the exercise of citizens' rights to association and to petition for redress of grievances. Willow Grande argued that the *Noerr-Pennington* doctrine did not apply here because it does not provide absolute immunity where the challenged action is a mere sham to cover an attempt to interfere with business relationships of a competitor. However, the Court concluded that although the Association's underlying litigation was ultimately unsuccessful, Willow Grande failed to identify any ground on which it was so objectively baseless that no reasonable litigant could have realistically expected to secure favorable relief. The Court went on to note that Willow Grande failed to plead sufficient facts to establish the subjective element of the test. There was no allegation that the Association brought the appeals with an anti-competitive purpose or to secure a collateral advantage in the negotiations with Willow Grande. The Association's efforts to delay the project to influence governmental approval of the size and scope of the development were not objectively baseless as a matter of law. Therefore, the Court affirmed the circuit court's dismissal of Willow Grande's complaint.