PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

JANUARY 1, 2019 to JANUARY 31, 2019

I. CRIMINAL LAW

A. ***Jackson v. Commonwealth***

2017-CA-000806 01/04/2019 2019 WL 97386

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

Appellant challenged an order denying his RCr 11.42 post-conviction motion. The Court of Appeals affirmed in part, vacated in part, and remanded for an evidentiary hearing. The Court rejected appellant's argument that his trial counsel was ineffective for failing to raise a claim of prosecutorial misconduct in response to statements made during the Commonwealth's closing argument. However, the Court agreed with appellant that an evidentiary hearing was required as to his claim that his appellate counsel on direct appeal was ineffective for failing to raise a claim of juror misconduct. This claim was documented in the trial video and reflected that the bailiff, who was later sworn to sequester the jury, approached the trial judge and reported having a familial relationship with one of the jurors. This happened outside the parties' hearing, at the bench on the last day of the four-day trial. The judge thanked the bailiff and did not forward the information to any of the parties. The Court held that it was likely that trial counsel would have investigated this information if he was aware of it because he had asked the *venire* about relationships with people in "law enforcement" and had followed up when some jurors mentioned having relatives in the police department and prosecutor's office. The Court noted that the juror's initial silence as to the relationship prevented discovery of any potential bias or prejudice and that there were no facts in the record to discern which juror was related to the bailiff who sequestered the jury, whether the juror intentionally concealed the juror's familial relationship, how close the relationship was, or if the juror was excused as an alternate. An exploration of these questions was necessary to determine if the juror's failure to disclose his relationship reached the level of juror misconduct or, ultimately, whether appellant's right to a fair and impartial jury was compromised. In light of this, the Court held that the trial court abused its discretion in ruling that appellant's juror misconduct allegations did not warrant an evidentiary hearing.

B. ***Madden v. Commonwealth***

2017-CA-001055 01/18/2019 2019 WL 254585

Opinion by Chief Judge Clayton; Judge Acree concurred; Judge Taylor dissented without filing a separate opinion.

Appellant was convicted of third-degree assault, first-degree criminal mischief, and being a first-degree persistent felony offender. On appeal, he argued: (1) that the circuit court had not provided him with a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), upon his request to proceed *pro se*; (2) that he suffered undue prejudice when the circuit court denied his motion for a continuance on the eve of trial; (3) that the circuit court erred when it denied his motion for a directed verdict after the Commonwealth's case-in-chief; and (4) that the circuit court's denial of a missing evidence instruction was unduly prejudicial. In a 2-1 vote, the Court of Appeals affirmed. As to the *Faretta* issue, the Court held that appellant's requests to proceed *pro se* had either not been unequivocal or had not been at a critical stage of his prosecution. Regarding appellant's argument that the circuit court had erred in denying his motion for a continuance, the Court held that there was no abuse of discretion in the circuit court's finding that appellant did not meet the factors set out in *Snodgrass v. Commonwealth*, 814 S.W.2d 579 (Ky. 1991), in denying his motion for a continuance. Next, the Court agreed with the circuit court that a directed verdict after the Commonwealth's case-in-chief would not have been proper, as the evidence was sufficient to submit the case to the jury. Finally, the Court held that the circuit court did not err in failing to issue a missing evidence instruction because appellant did not prove that the evidence's destruction was intentional or that the evidence was exculpatory. Thus, the Court affirmed on all issues.

II. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. ***Castle v. Castle***

2018-CA-000019 01/25/2019 2019 WL 321067

Opinion by Judge Nickell; Judge Taylor concurred; Judge Jones dissented and filed a separate opinion.

Mother petitioned for an emergency protective order (EPO) for herself and her twin teenage daughters based on one girl accusing Stepfather of having an uncomfortable conversation of a sexual nature with her while alone in the car and wanting to see and touch her breasts. The child testified that no touching occurred that day and that she did not fear imminent harm, only that something could happen in the future. The same child alleged that Stepfather had "grabbed my boob" six months earlier. Mother did not seek an EPO after the first incident and waited six days after the uncomfortable car conversation to seek protection. A hearing was held and a domestic violence order (DVO) was entered on a finding that "sexual assault" had occurred and may recur. In a 2-1 decision, the Court of Appeals reversed and directed entry of a new judgment. Citing to *Thurman v. Thurman*, 560 S.W.3d 884 (Ky. App. 2018), the Court noted that the circuit court had failed to make any written findings in support of its decision and that it had rejected Stepfather's request for such. Because of this, the DVO had to be struck down. The Court then addressed the distinctions between DVOs (KRS Chapter 403) and Interpersonal Protective Orders (IPOs) (KRS Chapter 456). The Court held that "sexual assault," defined in KRS 456.010(6) as requiring "some degree of rape, sodomy, sexual abuse under KRS Chapter 510 or incest under KRS 530.020," applies to IPOs but not to DVOs. Thus, while a victim of sexual assault may apply for an IPO (KRS 456.030(1)(c)), there is no authority permitting a victim of sexual assault to apply for and receive a DVO. In this case, the circuit court specifically found - in the context of entering a DVO - that Stepfather had committed an act of "sexual assault" and that it could happen again. However, there was no proof that rape, sodomy, sexual abuse, or incest had occurred - and would likely recur. Given the evidence presented, the Court held that there was not a preponderance of evidence to support entry of a DVO. The Court concluded that a "touching" of the child's breast some six months earlier was too tenuous to qualify as "sexual abuse" to support a DVO, especially when there was no proof - or even an attempt to establish - that the touching occurred for purposes of sexual gratification. Moreover, Mother testified that Stepfather had told her that any touching was accidental, and the child was not asked at the hearing to describe how Stepfather had touched her. The Court emphasized that while there may well have been facts sufficient to establish sexual gratification, they were not revealed during the hearing. An alleged touching - without proof of more - cannot support entry of a DVO based on sexual assault, especially when a DVO

must be based on "domestic violence and abuse," which does not encompass "sexual assault."

III. EMPLOYMENT

A. ***Wilson v. Askew***

2017-CA-000551 01/25/2019 2019 WL 320515

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

This administrative appeal (the second involving these parties and this case) arose from the dismissal of appellant's employment as an Attorney Senior with the Lexington-Fayette Urban County Government (LFUCG) by the Civil Service Commission (CSC). The Court of Appeals affirmed. Of note, the Court rejected appellant's argument that the Court - in the first appeal - did not have the authority to remand the matter with directions for the circuit court to direct the CSC to enter findings of fact to support its decision. The Court also rejected appellant's arguments: (1) relating to the hiring of an attorney to draft the findings of fact and conclusions of law for the CSC on remand and his attempts to depose the attorney; (2) that the trial judge should have recused; and (3) relating to the summary judgment dismissing his claims of discrimination and misfeasance because he had only appealed the administrative ruling.

IV. IMMUNITY

A. ***Carucci v. Northern Kentucky Water District***

2017-CA-000941 01/18/2019 2019 WL 254518

Opinion by Judge Maze; Judges Kramer and D. Lambert concurred.

Appellant tripped over a water meter owned by appellee, a water district created pursuant to KRS Chapter 74. Appellant then filed suit against the water district for negligence. The water district moved for summary judgment, arguing that it was entitled to governmental immunity. The circuit court granted the motion based on *South Woodford Water District v. Byrd*, 352 S.W.3d 340 (Ky. App. 2011), which held that water districts are entitled to such immunity. However, on appeal the Court of Appeals concluded that *Byrd* had been implicitly overruled by the Supreme Court of Kentucky in *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015), which held that sanitation districts providing similar services are not entitled to governmental immunity. Based on *Coppage*, the water district's provision of clean water for private consumption and use could not be considered a function integral to state government. Accordingly, governmental immunity did not protect the district from appellant's negligence claims, and the circuit court's order granting summary judgment was reversed.

B. ***Hicks v. Young***

2017-CA-000925 01/25/2019 2019 WL 321069

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

This interlocutory appeal concerned whether certain employees of the Louisville/Jefferson County Metro Government (Louisville Metro) were entitled to qualified official immunity in a negligence action. The claim arose from a car accident that was allegedly caused by overgrown trees obstructing signage in an intersection. The plaintiffs alleged that Louisville Metro, Louisville Metro's Department of Public Works and Assets, and the employees were negligent in failing to maintain the trees and signage in a safe and reasonable manner, in failing to warn of the hazardous condition, and in failing to supervise and train employees to counteract hazardous roadway conditions to comply with Kentucky law. The Court of Appeals affirmed the denial of summary judgment in favor of the Louisville Metro employees, holding that there existed genuine issues of material fact as to whether the employees were entitled to qualified official immunity. In affirming, the Court interpreted KRS 179.070's use of the term "county engineer" to impose the ministerial duties of that position on any official who performs the same functions if a county engineer has not been employed. In other words, the duties of the county engineer are delegable. The Court agreed with the circuit court that factual issues remained as to which of the subject employees assumed the duties and responsibilities of the county engineer prior to the accident.

V. INSURANCE

A. ***Auto-Owners Insurance Company v. Spalding***

2017-CA-001474 01/18/2019 2019 WL 254517

Opinion by Judge Dixon; Judges Combs and Taylor concurred.

Appellee was allegedly told by her insurance agent that she had no underinsured motorist (UIM) coverage after she had been injured in an accident. However, after appellee settled her claim with the other driver's insurance company, she learned that UIM coverage did exist. Because appellee was unaware of the UIM coverage, no notice of settlement was given to appellant, her UIM insurer, as required by *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993) and KRS 304.39-320(3). As a result, appellant filed a declaratory judgment action seeking a ruling that it did not owe appellee UIM coverage. The circuit court ultimately entered summary judgment in favor of appellee, ruling that: (1) the inquiry made to the agent regarding whether appellee had UIM coverage was a simple question of fact rather than law; (2) the agent's erroneous answer constituted non-feasance; (3) the agent was acting on behalf of appellant when she made the misstatement; (4) the non-feasance was attributable to appellant; and (5) the non-feasance was sufficient to trigger a waiver and estoppel of the requirements of KRS 304.39-320(3) and *Coots*. The Court of Appeals reversed and remanded on grounds that a material issue of fact existed as to whether the conversation in which appellee was allegedly told that she did not have UIM coverage had actually occurred. However, the Court then held - agreeing with the circuit court - that where an insurer has initially denied coverage, whether the denial is based upon an erroneous coverage determination or, as in this case, a misrepresentation that a policy providing coverage even exists, the insurer cannot be allowed to subsequently assert a defense to liability based upon a provision requiring the insured to notify it prior to settlement, regardless of whether that provision is statutory or contractual.

VI. SUMMARY JUDGMENT

A. ***Commonwealth ex rel. Landrum v. Dolt, Thompson, Shepherd & Conway, P.S.C.***

2018-CA-000467 01/25/2019 2019 WL 320510

Opinion by Judge Nickell; Judges Jones and Taylor concurred.

The Office of the Attorney General (OAG) hired a private law firm (Dolt) on a contingency fee basis to assist with OxyContin litigation filed in 2007. Dolt was to front all litigation costs and was to receive a specified percentage of any settlement, plus reimbursement of expenses. The case settled for $24 million in December 2015. While the OAG may have had three separate contracts with Dolt covering the period from June 2014 to June 2016, the record contained only one fully executed two-week agreement, which expired before settlement was reached. The Finance and Administration Cabinet (FAC) filed a complaint in October 2017 to determine whether a valid state contract was in place during critical times of the litigation and sought recovery of $4.2 million from Dolt. The OAG simultaneously filed its own suit seeking a declaration of rights and permanent injunction. The record contained two dueling affidavits and three purported contracts but little else, *i.e.*, no depositions, no interrogatories or answers, no stipulations, no admissions, and no pretrial discovery order. Less than a month after the complaints were filed, and before the FAC answered the OAG's complaint, Dolt moved for summary judgment and to stay discovery until the summary judgment motion was resolved. The OAG moved for summary judgment three days later. The circuit court granted Dolt's motion to stay and subsequently entered summary judgment in favor of Dolt and the OAG without allowing any discovery. The Court of Appeals vacated the grant of summary judgment and remanded for further proceedings, holding that summary judgment cannot be granted until a party has been given ample opportunity to complete discovery and then fails to offer controverting evidence. In this case, since no discovery had been allowed, there was no ample opportunity to complete discovery. Therefore, summary judgment was inappropriate.

B. ***Embry v. Mac's Convenience Stores, LLC***

2016-CA-001047 01/25/2019 2019 WL 321074

Opinion by Judge Lambert; Judges Maze and L. Thompson concurred.

The circuit court entered summary judgment in favor of appellee in a personal injury action after the court deemed admitted requests for admission that appellant failed to answer. The Court of Appeals reversed and held that the circuit court abused its discretion in deeming the requests to be admitted. The discovery requests were served the same day the circuit court permitted appellant's counsel to withdraw and provided him with 45 days to retain new counsel. Appellant's new counsel was unaware of the discovery request until appellee filed its motion for summary judgment and to deem the requests to be admitted. The Court further noted that the circuit court's order failed to reflect that new counsel had filed a response to the discovery requests, albeit late, despite the fact that the response appeared in the certified record prior to the entry of summary judgment.