PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JUNE 1, 2023 to JUNE 30, 2023

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I. CASEY'S LAW

A. ***B.D.P. v. J.P., ET. AL.***

2022-CA-1123-DG 6/09/2023 2023 WL 3907021
Opinion by KAREM, ANNETTE; McNEILL, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

The Court of Appeals granted discretionary review of a Henderson Circuit Court order affirming the Henderson District Court's committal of the Appellant, B.D.P., into involuntary residential substance abuse treatment pursuant to Casey's Law, Kentucky Revised Statutes (KRS) 222.430-222.437. B.D.P., whose parents filed the petition initiating the proceedings, argued that the district court lacked subject matter jurisdiction to enter the order. Specifically, B.D.P. argued that the district court failed to comply with KRS 222.433(2)(c), which provides that if, upon reviewing the petition for involuntary treatment, the district court believes there is probable cause to order the respondent to undergo treatment, the district court "shall . . . [c]ause the respondent to be examined no later than twenty-four (24) hours before the hearing date by two (2) qualified health professionals, at least one (1) of whom is a physician." The district court ordered B.D.P. to be examined by an Advanced Practice Registered Nurse and a certified drug and alcohol counselor, neither of whom was a physician. B.D.P. objected to this procedure for the first time in his appeal to the circuit court who affirmed the district court. The Court of Appeals stated that the issue on appeal was not one of jurisdiction but whether the district court exercised its powers correctly under the statute. It held that the district court's failure to comply with the clear, unambiguous, and unequivocal directive of KRS 222.433(2) meant that its findings had to be set aside. It reversed the order of the circuit court and remanded the case for the district court to hold a hearing in compliance with the statute mandating examination of B.D.P. by at least one physician if the petitioners still wished to proceed.

II. CIVIL PROCEDURE

A. ***BETHANY WHITCHER v. HOUSING AUTHORITY OF HENDERSON***

2021-CA-0609-DG 6/23/2023 2023 WL 4140279
Opinion by ACREE, GLENN E.; CETRULO, J. (CONCURS) AND THOMPSON, C.J. (CONCURS)

The Court of Appeals granted discretionary review from the Henderson Circuit Court's affirmance of the Henderson District Court's denial of her motion to proceed *in forma pauperis* during proceedings to evict her from public housing. In 2017, the General Assembly amended Kentucky Revised Statute

(KRS) 453.190(2) to add an objective test for determining indigency while retaining the existing subjective test. The new language of the statute says: "A 'poor person' means [1] a person who has an income at or below one hundred percent (100%) on the sliding scale of indigency established by the Supreme Court of Kentucky by rule . . . ." KRS 453.190(2). The Court of Appeals reversed the district court's denial of Whitcher's motion to proceed *in forma pauperis*. When ruling on Appellant Bethany Whitcher's motion to proceed *in forma pauperis*, the Court determined that the circuit court appeared to have considered on the subjective test because the record showed no evidence contradicting Whitcher's affidavit that her "income [is] at or below one hundred percent (100%) on the sliding scale of indigency[.]" Because the district court failed to utilize the objective test, the Court determined it exceeded its sound discretion in applying the law to the uncontradicted facts, amounting to clear error.

III. CRIMINAL LAW

A. ***BRANDON BLAIR v. COMMONWEALTH OF KENTUCKY***

2021-CA-0490-MR 6/02/2023 2023 WL 3767202
2021-CA-0535-MR
2021-CA-0536-MR
2021-CA-0537-MR

Opinion by McNEIL, J. CHRISTOPHER; DIXON, J. (CONCURS) AND TAYLOR, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 12/06/2023

Appellant appealed four separate judgments of the Johnson Circuit Court convicting him of four counts of first-degree bail jumping and sentencing him to ten years' imprisonment. Citing KRS 505.020(1)(c), Appellant argued multiple bail jumping convictions resulting from one missed court appearance violated the prohibitions against double jeopardy. More specifically, Appellant argued the unit of prosecution for bail jumping is based on each missed court appearance and cited the language in KRS 520.070(1) which punishes a defendant who is released "upon condition that he will subsequently appear at a specified time and place" and then "fails to appear at that time and place." The Court of Appeals affirmed the convictions and stated, "[t]he plain language of the statute clearly indicates that the unit of prosecution for first-degree bail jumping is each felony charge for which a defendant fails to appear." The Court further stated the statute intended to punish not just the act of failing to appear but also failing "to appear to answer *a specific charge*." (Emphasis in Original.) The Court concluded Appellant's interpretation would lead to incongruous results. Under Appellant's rationale, the Court reasoned that "a defendant who had both a felony and a misdemeanor case scheduled for court on the same day and missed their court appearance could be convicted of two counts of bail jumping, one first-degree under KRS 520.070 and one second-degree under KRS 520.080" while simultaneously "a defendant who had two felony cases could only be convicted of one count of bail jumping."

B. ***DAVID ANTHONY VINCENT v. COMMONWEALTH OF KENTUCKY***

2022-CA-0989-MR 6/09/2023 2023 WL 3906750

Opinion by ECKERLE, AUDRA JEAN; COMBS, J. (CONCURS) AND EASTON, J. (CONCURS AND FILES SEPARATE OPINION)

DISCRETIONARY REVIEW GRANTED 12/06/2023

The Court of Appeals affirmed the Metcalfe Circuit Court's denial of a motion to suppress evidence resulting from a warrantless search following a traffic stop for a traffic law that was not effective for another 11 days. After receiving a non-anonymous tip that two people were behaving as though they were high on drugs, an officer noticed the vehicle the suspects were driving had red front lights, which was in violation of a newly passed traffic law that the officer mistakenly believed was already in effect. Following a traffic stop, the officer arrested the passenger on an active arrest warrant and Appellant David Vincent for driving on a suspended license. The officer also searched the vehicle after Vincent admitted there were some Lortab pills under the front seat and found a baseball-sized quantity of methamphetamine in the trunk.

The principal issue on appeal was whether the initial stop for a law not yet in effect was an objectively reasonable mistake of law. The Court of Appeals formally adopted the holding of *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014), wherein the United States Supreme Court held that reasonable suspicion for a traffic stop could be justified by an objectively reasonable mistake of law. In Vincent's case, the calculation of a newly passed legislation's effective date was ambiguous and unclear, as the Kentucky Constitution's method for calculating the effective date of legislation involves an inherently complex calculus that results in different effective dates every year. Indeed, the General Assembly recently sought to amend the Constitution and make all non-emergency legislation effective on July 1 of the year in which it was passed (the voters subsequently rejected the proposed amendment). Moreover, the officer's mistake of law was objectively reasonable as he initiated the traffic stop around the time that one would expect newly enacted legislation to be effective. Following the stop, the subsequent search of the automobile was held to be justified pursuant to the automobile exception to the warrant requirement. The car was readily mobile, and there was probable cause to believe drugs would be found in the vehicle due to Vincent's admission that there were drugs under the front seat of the car, the information from the non-anonymous tipster, and Vincent's passenger's admission that she possessed needles from a needle exchange.

Judge Kelly Mark Easton filed a concurring opinion finding the officer had reasonable cause on a differing basis than that reasoned by the majority opinion and expressing concern "about the limitations of the 'mistake of law' doctrine applied in *Heien*." Judge Easton noted that the underlying facts of *Heien* did not concern the effective date of an enforced statute, but rather, concerned a reasonable interpretation of confusingly written statutes already in effect. Judge Easton further wrote that the law of the Commonwealth was sufficiently clear as to when newly enacted statutes took effect.

C. ***MELZENA LULABELL MOORE v. COMMONWEALTH OF KENTUCKY***

2021-CA-1349-MR 6/23/2023 2023 WL 4139883
Opinion by CALDWELL, JACQUELINE M.; GOODWINE, J. (CONCURS) AND McNEIL, J. (CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION)

DISCRETIONARY REVIEW GRANTED 02/07/2024

Appellant pled guilty to first-degree manslaughter while under an extreme emotional disturbance and received an eighteen-year sentence. Appellant motioned the Laurel Circuit Court for application of the domestic violence exemption to KRS 439.3401's requirement that violent offenders serve a minimum of 85% of their sentence before parole eligibility. The request was denied on the rationale that, while Appellant was a domestic violence victim, she was not actively being victimized the moment she shot the decedent, and as a result, the exception was inapplicable. The circuit court additionally found that Appellant returned to the decedent's home while armed with a gun before the shooting and was thus motivated by something other than domestic violence.

The Court of Appeals reversed. The Court determined that the case presented an issue of statutory construction relating to KRS 439.3401(5)'s exception that is to apply to domestic violent victims "with regard to the offenses" they commit involving death or serious physical injury. Citing *Commonwealth v. Vincent*, 70 S.W.3d 422 (Ky. 2002), and *Holland v. Commonwealth*, 192 S.W.3d 433 (Ky. App. 2005), the Court stated an "'over-technical reading'" reading of the statute was to be avoided, and it was not required to find that the domestic violence occurred contemporaneously with the perpetration of the offense. The Court noted that the circuit court erroneously disregarded a domestic violence expert witness with 35 years of experience who testified that it "was not at all unusual for an abused person to leave and return to their abuser multiple times." The Court further determined the circuit court "conflated the exemption for domestic violence victims from the implications of being a 'violent offender' and the defense of self-protection." While the act of returning to her abuser's home while armed could be relevant in determining a valid assertion of self-protection, the Court stated it was "not instructive" for purposes of applying the domestic violence exception. Lastly, the Court held that the circuit court's finding that Appellant was under extreme emotional disturbance could not be reconciled with its refusal to apply the domestic violence exception based on the underlying facts. Citing *Commonwealth v. Crowe*, 610 S.W.3d 218, 226-27 (Ky. 2020), Judge J. Christopher McNeill concurred in a separate opinion which stated that "the proximity and preponderance of" the decedent's acts of abuse were "sufficient to arrive at our destination without detour."

IV. FAMILY LAW

A. ***TODD ROSS TURNER v. WENDI NICOLE TURNER***

2022-CA-0422-MR 6/02/2023 2023 WL 3767776
Opinion by CALDWELL, JACQUELINE M.; COMBS, J. (CONCURS) AND LAMBERT, J. (CONCURS)

Father shared joint custody of two children, Older Child and Younger Child, with Mother who was primary residential parent pursuant to a settlement agreement incorporated into their divorce decree. The agreement noted Father previously had supervised visits but contained a stated intention to shift

toward unsupervised visits under local co-parenting guidelines. In early 2020, both parties filed motions with the Warren Circuit Court seeking to modify timesharing, and Mother sought an order compelling participation in co-parenting counselling. Father argued for roughly equal time while Mother contended Father engaged in inappropriate behavior which put the children's safety and well-being at risk. An initial evidentiary hearing was held during which Mother furnished testimony from the children's guidance counsellors and the family therapist, Dr. Sarah Light, which supported Mother's assertions in pretrial compliance documents that the children's relationship with Father was deteriorating. Proof was not concluded on the day of the initial hearing due to Father's need for additional time to cross-examine, and the circuit court entered an interim order allowing visits with Older Child in a therapeutic setting and supervised visits with Younger Child at Dr. Light's discretion.

Prior to the next hearing, Mother filed updated pretrial compliance documents. Mother included a letter from Dr. Light indicating Younger Child was uncomfortable with having visits outside her office and that Father was recording therapy sessions and refused to stop when asked. Father filed an emergency motion seeking to lift the interim order for supervised visits and argued there should not be further sessions with Dr. Light due to alleged unprofessionalism and unethical behavior, but the motion was denied. At the next hearing, Dr. Light testified that the children were concerned about the potential for unsupervised visits with Father and this was one factor amongst other factors which motivated Older Child to attempt suicide. Dr. Light further testified Father was uncooperative with therapy and recommended his visits be suspended until he underwent individual therapy. Father testified that he believed both parents needed to communicate better and undergo individual and family therapy. He further testified he needed an opportunity to spend time with and listen to his children without outside interference and believed Dr. Light's assessments were not fair or accurate nor was her treatment benefiting the children. Upon conclusion of proof, the circuit court expressed concerns about Older Child's suicide attempt and noted it had a duty to protect the children from harm but took the matter under advisement. The circuit court entered a written order weeks later suspending all of Father's visits and therapy sessions with the children for three months and ordered he seek individual therapy. The circuit court entered findings that the Father was uncooperative with family therapy and there had been a breakdown in communication with the children. The circuit court further ordered Father to pay for Dr. Light's appearance at the additional hearing noting that Mother paid for her appearance at the initial hearing. Lastly, Father's request for unsupervised equal timesharing was denied as not in the children's best interests. Father filed a CR 59.05 motion to vacate the order which was summarily denied for failure to clearly and particularly state grounds or the relief sought. Father appealed the circuit court's order suspending visitation with his children for three months, requiring him to attend individual therapy, and providing that visitation would not resume until his therapist determined Father was ready to constructively participate in family therapy. Father additionally challenged the circuit court's requirement he financially cover the court appearance of a family therapist and summary denial of his CR 59.05 motion to vacate.

The Court of Appeals affirmed in part and reversed in part. The Court reasoned it could not review and provide relief for the circuit court's denial of the CR 59.05 motion to vacate because such orders are interlocutory. The Court instead "construe[d] the attempt to appeal from the denial of CR 59.05 relief as an appeal from the underlying judgment." The Court further reasoned that the circuit court's order regarding visitation and therapy, despite not appearing final and appealable on its face, was

"appealable as a decision impacting the custody and care of the minor children" and pursuant to the holding in *Anderson v. Johnson*, 350 S.W.3d 453, 455-56 (Ky. 2011).

Turning to the merits, the Court held that Father's claim concerning the circuit court's directive he pay for Dr. Light's court appearance was unpreserved and not palpable error. The Court rejected Father's argument this claim was preserved by virtue of his filing of a CR 59.05 motion because it contained no mention of the issue. Father further failed to request palpable error review, and the Court determined the claim did not rise to such a standard because there was no clear indication as to the amount of cost owed or that he was unable to cover it. The Court reasoned the findings of the circuit court used to support its rulings on visitation and therapy were not clearly erroneous. The Court was unpersuaded by Father's position that the absence of a prior court ruling forbidding his recording of therapy sessions precluded the circuit court from considering Dr. Light's testimony regarding this behavior's effect on the children. However, the Court reversed the circuit court's three-month suspension of Father's visitation due to its failure to identify what legal standard it applied in reaching its ruling. The Court reasoned that, while afforded broad discretion, family courts cannot modify prior timesharing or visitation orders to totally deny any visitation for extended periods without "first determining that visitation would otherwise result in serious endangerment." The Court remanded with instructions to the circuit court to "make a proper determination under the KRS 403.320 serious endangerment standard."

B. ***MARSHA SWAN V. GEORGE GATEWOOD, ET. AL.***

2022-CA-0202-MR 6/09/2023 2023 WL 3909425
Opinion by ECKERLE, AUDRA JEAN; COMBS, J. (CONCURS) AND EASTON, J. (CONCURS)

Mother and Father are the parents of Child who was born in August 2015. Following the filing of a custody action, they were awarded joint custody of Child with equal parenting time. However, they continued to disagree about custody and visitation matters. Mother raised Child to be bilingual in English and French. Although both Mother and Father lived in Lexington, Mother wanted Child to attend an elementary school in Louisville with a French Immersion Program. Father objected to the additional driving time and the effect on his timesharing.

While these disputes were ongoing, Mother and Father entered into an agreed order, which provided, among other things, that the parties would make joint decisions on all major decisions regarding Child's life, but Mother would have "final decision-making power" regarding educational choices. Following entry of this agreed order, Mother enrolled Child at the Louisville school over Father's objections. Mother also rented an apartment in Louisville, where she and Child would stay while school was in session.

In response, Father filed an emergency motion arguing that Mother's choice of the Louisville school was unreasonable and that it amounted to a *de facto* relocation in violation of his joint-custody and timesharing rights. During a hearing at the end of the fall semester, the school's assistant principal

testified that the French Immersion Program ended shortly after Child began attending due to lack of staff. The assistant principal further testified that all students attending the school must be residents of Jefferson County. Father introduced evidence of the school's low-test scores and disciplinary issues. Mother testified that she still wanted Child to attend the school, taking the position that the agreed order gave her the absolute right to make educational decisions for Child.

Following the hearing, the Fayette Family Court granted Father's motion to enforce the Agreement. The family court found that the agreed order did not authorize Mother to make unreasonable decisions or risk fundamentally changing the parties' relationship with Child. The family court concluded that Mother's decision to send Child to a school in Louisville was objectively unreasonable and amounted to a *de facto* relocation in violation of that judicial circuit's rules. Consequently, the family court ordered Mother to enroll Child at a school in Fayette County by the beginning of the spring semester. In a separate order, the family court awarded attorney fees to Father.

On appeal, Mother argued that her "final decision-making power" regarding educational choices was not subject to judicial review for "reasonableness." The Court of Appeals disagreed, concluding that the family court was entitled to construe that language considering other provisions in the agreed order. Based on the additional language, the Court concluded that the order did not give Mother unlimited discretion in educational decisions. Rather, her decisions must be reasonable and not in derogation of Father's custody and timesharing rights. The Louisville school no longer offered the desired French Immersion Program and did not offer any unique benefit to Child that could not be obtained in Lexington. Furthermore, the Court agreed that Mother's actions amounted to a relocation, which required prior approval of the family court. Thus, the family court did not err by limiting Mother's educational decisions to Fayette County schools. The Court separately affirmed the family court's award of attorney fees to Father, concluding that the family court properly considered the resources of each party and Mother's role in causing this controversy.