PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
MARCH 1, 2014 to MARCH 31, 2014

I. CHILD SUPPORT

A. ***N.J.S. v. C.D.G.***

2013-CA-001110 03/21/2014 2014 WL 1133442 Rehearing Denied

Opinion by Judge Combs; Judge Clayton concurred; Judge Nickell concurred by separate opinion. The Court of Appeals vacated and remanded an order permitting father's child support obligation to be offset by the Social Security dependent benefit to which the child was entitled. The Court held that while the provisions of KRS 403.211(15) provide for a credit against the child support obligation for dependent benefits payable as a result of a parent's disability, the statute does not provide for a similar credit against the child support obligation for dependent benefits payable as a result of a parent's qualification for retirement benefits.

II. CONTRACTS

A. ***Buridi v. Leasing Group Pool II, LLC***

2011-CA-001808 03/21/2014 2014 WL 1133428 DR Pending

Opinion by Judge Nickell; Judges Combs and Lambert concurred. Lessor brought an action against lessee and guarantors alleging breach of three commercial equipment and furniture leases, two unconditional guaranties, and one corporate guaranty. The circuit court granted summary judgment in favor of lessor regarding the enforceability of the guaranties. On appeal, the Court of Appeals held that the guaranties were enforceable. The guaranties related to commercial equipment and furniture leases and provided guarantors, who were doctors, with sufficient detail to know the breadth of the obligation they were accepting; therefore, the guaranties were enforceable. Even though guarantors signed the guaranties without having seen the leases, they were aware of the equipment and furniture that was included in the leases. Moreover, there was no suggestion that there was any confusion about the purpose of the magnitude of the leases; none of the 30 guarantors requested more information, balked at signing, or refused to sign the guaranties; and the guaranties were executed during final negotiation of the leases. The Court further held, in an issue of first impression, that the circuit court did not abuse its discretion in denying appellants' motion to withdraw matters deemed admitted under CR 36.02. The Court held that while appellees would not have been prejudiced if withdrawal were permitted, the presentation of the merits would not have been advanced by allowing withdrawal.

III. COUNTIES

A. ***Carroll v. Reed***

2011-CA-002151 03/14/2014 425 S.W.3d 921

Opinion by Judge Stumbo; Judges Combs and Nickell concurred. Appellant, the Edmonson County Clerk, refused to comply with a newly-enacted ordinance that required all net income and net fees from the Offices of the Edmonson County Sheriff and Edmonson County Clerk to be paid to the County Treasurer every month. The ordinance also required that the expenses and expenditures of the Sheriff and County Clerk be pre-approved and paid by the County Treasurer. Appellant sought declaratory and injunctive relief from the circuit court and argued that the ordinance gave complete financial control of the County Clerk's office to the Fiscal Court, thereby impermissibly expanding the powers of the Fiscal Court. The circuit court upheld the validity of the ordinance. Citing to *Sheffield v. Graves*, 337 S.W.3d 634 (Ky. App. 2010), the Court of Appeals affirmed, holding that the General Assembly gave fiscal courts the authority to collect excess fees from county clerks and to determine the expenditures of the clerk's office via KRS Chapter 64.

IV. CRIMINAL LAW

A. ***Carter v. Commonwealth***

2012-CA-001253 03/14/2014 2014 WL 988780 Rehearing Pending

Opinion by Chief Judge Acree; Judges Jones and VanMeter concurred. Appellant sought review of the trial court's refusal to suppress evidence obtained by a warrantless search. In affirming, the Court of Appeals first held that the warrantless search did not fit within the parameters of the "protective sweep" exception to the Fourth Amendment, as the trial court initially ruled. Appellant was outside his own threshold when officers approached him and when they arrested him. Moreover, while the officers heard a radio playing inside, they indicated that they had no reason to believe anyone was present but appellant, who was in their custody. This was tantamount to an acknowledgement that they had no basis to fear danger from inside the residence. However, the Court then held that the trial court's alternative basis for denying appellant's suppression motion - the inevitable discovery of the evidence - was well-founded. Appellant acknowledged that he was a convicted felon and that he had a 12-gauge shotgun inside the residence. Moreover, while the subsequently-produced affidavit and search warrant included additional facts learned only by means of the warrantless search, all the evidence would have been discovered in the course of lawfully recovering the shotgun, and such a lawful search would have put the officers in the same position, discovering evidence in plain sight, as if there had been no prior unlawful search.

B. ***Commonwealth v. Gilliam***

2012-CA-001986 03/07/2014 425 S.W.3d 918

Opinion and Order dismissing by Judge Taylor; Judges Stumbo and Thompson concurred. The Commonwealth appealed from a judgment of acquittal rendered pursuant to RCr 10.24 following a mistrial. The Court of Appeals dismissed the appeal as barred by double jeopardy. The Court held that where a circuit court renders a judgment of acquittal under RCr 10.24 due to insufficient evidence after the jury fails to return a verdict, the constitutional prohibition against double jeopardy is triggered, and the Commonwealth may not appeal the merits of such a judgment.

C. *Guinn v. Commonwealth*

2012-CA-000825 03/28/2014 2014 WL 1260479 DR Pending

Opinion by Judge Nickell; Judges Thompson and VanMeter concurred. Appellant entered a conditional guilty plea to multiple charges, including fleeing or evading in the first degree, operating a motor vehicle (an ATV) under the influence of alcohol or drugs (third offense), and driving while license suspended for DUI (second offense). An officer's attention was drawn to a loud ATV. He pursued the vehicle, lost it, and spotted it parked behind a home. Upon knocking on the door, the officer was admitted and, while searching the premises, discovered appellant hiding in a back room. Appellant did not live at the residence but was related to the owners and frequently visited the location. Without receiving a *Miranda* warning, appellant admitted to driving the ATV and consuming alcohol. Because the officer could not identify appellant as the operator of the ATV, the only evidence connecting appellant to the vehicle was his own words. Appellant requested a breathalyzer test and was subsequently administered a sobriety test and a portable breathalyzer test. At the police station, appellant refused to submit to a blood test. The Court of Appeals unanimously affirmed the trial court's denial of Guinn's suppression motion. The Court held that appellant lacked standing to challenge the search of the home because he did not claim ownership, did not live there at the time of the search, and had no reasonable expectation of privacy in the home. The Court also concluded that appellant's confession was not the result of an illegal interrogation because it was not made while he was in custody; therefore, a *Miranda* warning was not required. The Court further held that under *Helton v. Commonwealth*, 299 S.W.3d 555 (Ky. 2009), a search warrant was not required to draw and test appellant's blood due to the exigent circumstances of blood alcohol dissipation. The Court noted that the continued viability of *Helton* is questionable in light of *Missouri v. McNeeley*, ___ U.S. ___, 133 S.Ct. 152, 185 L.Ed.2d 696 (2013), but concluded that *McNeeley* did not require reversal here because appellant's refusal to submit to a blood test was cumulative of overwhelming proof of guilt, making the alleged error harmless.

D. ***Lawson v. Commonwealth***

2012-CA-000472 03/07/2014 425 S.W.3d 912

Opinion by Judge VanMeter; Judge Nickell concurred; Judge Thompson dissented without separate opinion. In a case where appellant was convicted of failure to register as a sex offender, the Court of Appeals held that appellant's unsupported and conclusory assertion that he thought he was not required to register his change of address until he received a new form in the mail was insufficient to establish a mistaken belief of law negating the knowledge element of the offense of failure to register as a sex offender. Appellant had received a form on two occasions prior to his change of residence that advised him of the requirement to pre-register, had signed a form that notified him of his obligation to pre-register, and was told by his probation officer that he was required to pre-register.

E. ***Stull v. Commonwealth***

2012-CA-001973 03/14/2014 2014 WL 988781 DR Pending

Opinion by Judge Combs; Judge Caperton concurred; Judge Thompson concurred and filed a separate opinion. The Court of Appeals held that a defendant who is convicted of first-degree sexual abuse qualifies as a violent offender and is ineligible for probation pursuant to KRS 532.047 and KRS 439.3401.

V. CUSTODY

A. ***B.D. v. Com., Cabinet for Health and Family Services***

2013-CA-001138 03/14/2014 2014 WL 988798 Released for Publication

Opinion by Judge Clayton; Judges Jones and Taylor concurred. Appellant's children were removed from her custody following two separate dependency, neglect, and abuse ("DNA") proceedings. Appellant then filed a "petition for immediate entitlement" to custody of her children pursuant to KRS 620.110. The family court dismissed the petition, finding that KRS 620.110 is intended for appellate review of district court rulings in DNA proceedings and does not apply when a family court has made the rulings. The Court of Appeals reversed and remanded. The Court held that KRS 620.110, which provides that any person aggrieved by the issuance of a temporary removal order may file a petition in circuit court for immediate entitlement to custody, does not refer to an appeal of a temporary custody order but instead refers to an original action. Since the jurisdiction of family courts now encompasses DNA proceedings, family court is the proper forum to hear a KRS 620.110 petition. The case was remanded to the family court for a hearing.

B. ***Crews v. Shofner***

2013-CA-001268 03/07/2014 425 S.W.3d 906

Opinion by Judge Stumbo; Judges Lambert and Thompson concurred. The Court of Appeals held that the trial court abused its discretion when it modified child custody by granting a paternal grandmother a default judgment on her motion for custody of her grandchildren. The Court noted that pursuant to KRS 403.270, a full evidentiary hearing to determine the best interests of the children was a necessary prerequisite to the entry of a default judgment in a custody proceeding. No such hearing was held in this case. The Court also expressed a strong preference against the use of default judgments in custody matters.

VI. DAMAGES

A. ***City of Hillview v. Truck America Training, LLC***

2012-CA-001910 03/07/2014 2014 WL 891478 Rehearing Denied

Opinion by Judge Dixon; Judges Combs and VanMeter concurred. In affirming a jury award of damages for breach of a land purchase contract, the Court of Appeals held that the circuit court did not abuse its discretion by admitting evidence of damages from the purchaser's chief financial officer and expert witnesses, as the evidence was not unduly speculative or unforeseeable. The CFO testified as to how the purchaser intended to use the land to expand its tractor-trailer driver training program, the enrollment numbers of students during the two years it had possession of the land, the amount of student loans it would have been able to collateralize with the land, and how the purchaser was forced to sell equipment intended for its expanded program at a loss. The expert witness testified as to the amount of students who could have enrolled in the expanded program.

VII. INSURANCE

A. ***Kiphart v. Bays***

2012-CA-002218 03/21/2014 2014 WL 1133435 Rehearing Pending

Opinion by Judge Dixon; Judge Caperton concurred; Judge VanMeter dissented by separate opinion. The Court of Appeals reversed a decision awarding husband a dower interest in the proceeds of his deceased wife's life insurance policies. The wife, shortly before her death and unbeknownst to her husband, changed the beneficiaries on two policies of life insurance from the husband to a trust established for the parties' minor child. The trial court determined that such acts were fraudulent *inter vivos* transfers and declared that the insurance proceeds were personalty of the wife's estate for the purposes of calculating husband's statutory share. The Court held that the trial court's characterization of the life insurance proceeds as personalty ignored the fact that upon an insured's death, the proceeds are automatically paid to the named beneficiary. Those proceeds do not become part of the decedent's estate unless the estate is the named beneficiary. Moreover, when the owner of a life insurance policy reserves to himself the power to change beneficiaries, he may do so without permission of any prior designee. A beneficiary, even a spouse, has only an inchoate right to the proceeds of a life insurance policy, subject to being divested at any time during the lifetime of the insured. In dissent, Judge VanMeter contended that the trial court had properly analyzed wife's actions as a fraud on husband's statutory share.

B. ***Neighborhood Investments, LLC v. Kentucky Farm Bureau Mut. Ins. Co.***

2013-CA-000375 03/28/2014 2014 WL 1260480 Released for Publication

Opinion by Judge Moore; Chief Judge Acree and Judge Jones concurred. Landlord filed a breach of contract and declaratory action against appellee for a determination of whether the terms of an insurance policy it had purchased from appellee covered decontamination expenses occasioned by tenant's production of methamphetamine on leased premises. In an issue of first impression, the Court of Appeals held that the circuit court correctly granted summary judgment in favor of appellee because the insurance policy in question excluded such coverage. Specifically, the policy excluded losses caused by a dishonest or criminal act committed by "anyone" "entrust[ed]" with "the property for any purpose." Contrary to appellant's argument, the Court held that "anyone" was not ambiguous, simply indicated an exclusion drafted in broad terms, and therefore included tenants. Also contrary to appellant's argument, the Court held that the word "entrust" encompassed a lessor-lessee relationship. The word "entrust" was not defined by the contract at issue, but the plain and ordinary meaning of the word conveyed the idea of the delivery or surrender of possession of property by one to another with a certain confidence regarding the other's care, use or disposal of the property. The Court held that a lessee-lessor relationship falls under this definition because such a relationship involves delivery and surrendering possession of property and, at minimum, the lessor's expectation that the lessee will not destroy the property or use it in furtherance of a criminal enterprise. The Court further held that the use of the word "property" encompassed real property (specifically the leased premises at issue), not simply personal property, because the insurance contract specifically defined the word "property" to include the leased premises.

VIII. ROADS

A. ***Sproul v. Kentucky Properties Holding, LLC***

2012-CA-000842 03/07/2014 2014 WL 891279 Rehearing Pending

Opinion by Judge VanMeter; Judges Lambert and Stumbo concurred. Landowners brought an action against a neighbor who used a passway over their land to access his property for damages allegedly sustained from the neighbor's refusal to comply with restrictions on the use of the passway. Judgment was entered in favor of the landowners, but the Court of Appeals reversed and remanded. The Court held that the passway was an open public road pursuant to *Bailey v. Preserve Rural Roads of Madison County, Inc.*, 394 S.W.3d 350 (Ky. 2011) and KRS 178.116 because it had never been formally adopted as a county road, because the county had at one time performed maintenance on the entire length of the passway, and because the passway provided necessary access for a private person. Consequently, the landowners were required to keep the road open for public use.

IX. SUMMARY JUDGMENT

A. ***Alcorn v. Deutsche Bank Nat. Trust Co. ex rel. Bosco Credit II Trust Series 2010-1***

2012-CA-002083 03/14/2014 2014 WL 988786 Released for Publication

Opinion by Judge Stumbo; Judges Taylor and Thompson concurred. The Court of Appeals reversed and remanded an order of summary judgment entered in favor of appellee upon holding that there were still genuine issues of material fact. Appellee alleged to be the holder of a promissory note signed by appellant; however, the Court determined that appellee was not the original holder of the note, that the note had not been endorsed over to appellee, and that appellee did not have the authority to enforce the note as the facts stood at the time of summary judgment. Therefore, there was still a genuine issue of material fact as to who owned the note.