

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 01, 2021 to OCTOBER 31, 2021

I. CRIMINAL LAW

A. KEVIN NIGEL STANFORD V. COMMONWEALTH OF KENTUCKY

[2019-CA-0764](#) 10/15/2021 2021 WL 4805142

Opinion by McNEILL, J. CHRISTOPHER; CLAYTON, C.J. (CONCURS) AND DIXON, J. (CONCURS)

Appellant Kevin Nigel Stanford was convicted by a Jefferson County jury in 1982 of murder, sodomy, first-degree robbery, and receipt of stolen property exceeding \$100 in value. He was sentenced to a total of forty-five years in prison for the robbery, sodomy, and theft convictions. He was sentenced to death for the murder conviction. Stanford was seventeen years, four months old at the time he committed these crimes. In 2003, his sentence was commuted by Governor Paul Patton to life without the possibility of parole. This appeal arises from the trial court's denial of his most recent post-conviction motions pursuant to RCr 11.42 and CR 60.02. On appeal, Stanford argued he was entitled to resentencing because: 1) Section 77 of the Kentucky Constitution does not authorize the Governor to impose a sentence greater than the maximum sentence authorized by the legislature; and 2) his life without the possibility of parole sentence is constitutionally excessive under recent case law. The Court of Appeals affirmed the trial court, concluding there is nothing contained in Section 77 that limits a governor's authority to commute a sentence to only a statutorily authorized sentence in existence at the time of the underlying offense. The Court further determined that while sentences imposed under Section 77 are not impervious to judicial oversight when a specific case implicates constitutional safeguards, Stanford's Eighth Amendment rights were not violated.

B. BUDDY LONGWELL V. COMMONWEALTH OF KENTUCKY

[2020-CA-0652](#) 10/15/2021 2021 WL 4805097

Opinion by MAZE, IRV; GOODWINE, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellant Buddy Longwell was pulled over for suspicion of DUI. He admitted he had taken prescription narcotic medication earlier that day. After failing field sobriety tests, police arrested Longwell and transported him to the hospital for a blood test. Police advised Longwell of his rights under KRS 189A.105 to contact an attorney before agreeing to submit to the blood test. Longwell was unable to reach his attorney, and the officer did not allow him to contact his wife who Longwell claimed worked for the attorney. Longwell refused to submit to the blood test and was charged with DUI - fourth or subsequent offense, being a persistent felony offender in the first degree, operating on a suspended license, reckless driving, and failure to produce insurance. Before trial, Longwell moved to suppress his arrest and refusal to submit to the blood test. The trial court denied his motion. The jury found Longwell guilty on all counts, and he was sentenced to fifteen years' imprisonment. On appeal, Longwell argued: 1) the trial court erred by allowing evidence of his refusal to submit to a blood test; 2) the trial

court erred by allowing the police officer to testify regarding the effects of prescription drugs on his alleged impairment; 3) the trial court gave improper instructions to the jury; and 4) the cumulative effect of the trial court's errors deprived him of his constitutional rights. The Court of Appeals affirmed. The Court concluded that the police officer's Google search on his own phone for Longwell's attorney's phone number reasonably facilitated Longwell's rights under KRS 189A.105(3) even though the officer did not provide Longwell a phone book or allow Longwell to call his wife. Longwell never raised the issue of the admissibility of his refusal to submit to a blood test under *Birchfield v. North Dakota* or *Commonwealth v. McCarthy*, so the issue was not before the Court, and it would have been harmless error because Longwell testified and explained his refusal to the jury. The Court also concluded that the trial court did not err by allowing the police officer to testify based upon his training and experience regarding Longwell's impairment. The Court further determined that Longwell's argument regarding the trial court's use of a DUI instruction based upon the DUI statute in effect before 1991 was not preserved below, and no manifest injustice resulted in this case from its use. Last, the Court stated that the cumulative error doctrine did not apply because the trial court did not error, and the cumulative error doctrine applies only where the individual errors were themselves substantial and bordering on the prejudicial.

II. TORTS

A. **MARK JOSEPH SMITH V. HERITAGE HILL GOLF CLUB**

[2019-CA-1442](#) 10/15/2021 2021 WL 4805098

Opinion by TAYLOR, JEFF S.; COMBS, J. (CONCURS) AND DIXON, J. (CONCURS)

This appeal arises from a golf cart accident in which the golf cart in front of Appellant Mark Joseph Smith (Smith) flipped over in front of him. While trying to avoid it, Smith also flipped his golf cart and sustained injuries including a broken arm. He filed a lawsuit in Bullitt Circuit Court and asserted a negligence claim against Appellee Heritage Hill Golf Club (Heritage), alleging its golf carts were defective and that the golf course was negligently designed. After the trial court granted Heritage's motion to disqualify Smith's expert witness from testifying as a discovery sanction, Heritage renewed its motion for summary judgment. The trial court granted the motion and dismissed Smith's claims against Heritage. The Court of Appeals affirmed. On appeal, Smith argued there were genuine issues of material fact as to whether the golf carts were defective and whether the golf course was negligently designed; however, Smith provided no evidence that the golf carts were defective. Speculation and conjecture about an alleged defect does not create a genuine issue of material fact. The Court further concluded that nothing in the record indicated licensed professionals were involved in the design or construction of the golf course. Therefore, Smith's lack of an expert witness would not have warranted summary judgment on the standard of care or liability issues. The Court, however, determined Smith's claim for injuries while playing golf was essentially a premises liability negligence action and that summary judgment was still proper under applicable Kentucky law.

B. BRADWELL SCOTT CHANEY, ET AL. V. HEATHER FIELDS

[2020-CA-0254](#) 10/29/2021 2021 WL 5021579

Opinion by LAMBERT, JAMES H.; CETRULO, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Appellants Bradwell Scott Chaney and Pikeville Foot Care Center, Inc. appeal from an order granting Appellee Heather Fields a judgment in the amount of \$17,330.37, plus 6% interest, for funds withheld from her paycheck and converted to Appellant Chaney's benefit. On appeal, Appellants argued that actions regarding the liability of an employer to deduct and withhold taxes are procedurally barred by 26 USC § 3403 and that the trial court lacked jurisdiction to hear the case. The Court of Appeals affirmed, concluding that 26 USC § 3403 and the associated caselaw bar taxpayers from bringing suit to restrain the withholding of funds by employers from their paychecks, which was not an issue in this case. Instead, the Court agreed with Appellee that she was not statutorily barred from bringing her suit for conversion and that she had proven the elements of the tort. The Court further concluded that Appellants' jurisdictional argument was also without merit because the trial court had subject matter jurisdiction to decide Appellee's common law claim of conversion.

III. CIVIL RIGHTS

A. COMMONWEALTH OF KENTUCKY COMMISSION ON HUMAN RIGHTS V. FINCASTLE HEIGHTS MUTUAL OWNERSHIP CORP.

[2020-CA-0447](#) 10/01/2021 2021 WL 4484981

Opinion by LAMBERT, JAMES H.; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS)

This is an appeal from the Jefferson Circuit Court's dismissal of a housing discrimination claim by a resident of Fincastle Heights who had requested to keep an emotional support dog in her home despite a no pet policy. Fincastle Heights asked the claimant to provide additional information about her diagnosis, and it provided her a temporary accommodation while it made its decision. The Commission alleged Fincastle Heights discriminated against her by requesting additional information and for taking too long to grant her request for an accommodation. The Court of Appeals affirmed the trial court's dismissal of the complaint. On appeal, the Court agreed with the Commission that its failure under KRS 344.625 to make a probable cause determination (or notify the claimant of reasons for delay) within 100 days of the complaint being filed is not jurisdictional in nature unless the impracticability of making the determination has not been proven and a showing of substantial prejudice has been made. The Court further stated that KRS 344.625 does not require the Commission's impracticability letter to be mailed prior to expiration of the 100-day period. In affirming the trial court's dismissal, the Court found that Fincastle Heights property requested additional information about the claimant's disability because it was not readily apparent, and it did not take too long to consider her request for an accommodation in light of how long it took the Commission to consider her discrimination claim.

IV. EMPLOYMENT LAW

A. **ROGER SMITH V. DOUG BENNETT IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE LAUREL COUNTY SCHOOLS, ET AL.**

[2020-CA-0625](#) 10/29/2021 2021 WL 5021598

Opinion by ACREE, GLENN E.; GOODWINE, J. (CONCURS) AND JONES, J. (CONCURS)

Appellant Roger Smith (Smith) is a teacher who previously established tenure in the Lincoln County Schools. He executed a Limited Probationary Contract of Employment (Portable Tenure Contract) for him to teach in the Laurel County Public Schools for the 2017-2018 school year. He satisfactorily performed the probationary contract, and, on July 1, 2018, the parties agreed to a Continuing Contract of Employment for the 2018-2019 school year. The contract stated it “shall be continued from year to year” On May 1, 2019, Smith was informed his contract would not be renewed. He sought administrative review in a tribunal of the Kentucky Board of Education, which concluded that he “had a ‘continuing service contract’ (tenure)” with the Appellee Board of Education of Laurel County, Kentucky (the Board). The Board then sought relief in circuit court. The Laurel Circuit Court held that the continuing service contract between Smith and the Board was unenforceable because, although Smith clearly attained continuing service status (tenure) at his first school, he lost that status before entering into the continuing service contract with the Board. The reason, said the circuit court, was that his employment at one of the intervening school districts lasted only 139 days, and that did not constitute a full school year as defined by KRS 161.720. Therefore, his tenure terminated. The Court of Appeals reversed the trial court, concluding that the teacher tenure portability provision, KRS 161.740(1)(c), alone defined tenure portability, and the trial court had based its ruling upon the wrong statute. Applying the correct statute, KRS 161.740(1)(c), the Court determined that Smith’s continuing service status (tenure) never terminated because as he transferred from one district (where he had continuing service status) to the next, there was never a lapse of more than seven (7) months during which, by operation of the statute, he retained continuing service status. The Court concluded there was no evidence the Board was unsatisfied with Smith’s performance or that he engaged in conduct to justify his termination during his probationary year, so he was entitled to continuing contract status. Smith and the Board had entered into an enforceable continuing service contract for the second year, which the Board breached by refusing to employ Smith for the third year.

V. FAMILY LAW

A. **ROBERT E. JAMES V. KIMBERLY B. JAMES (NOW WOODS), ET AL.**

[2020-CA-1357](#) 10/22/2021 2021 WL 4929409

Opinion by MAZE, IRV; ACREE, J. (CONCURS) AND COMBS, J. (CONCURS)

Appellant Robert E. James (Robert) appeals from post-decree orders of the Boyd Circuit Court relating to the sale of the marital residence. The trial court entered these orders as part of a

sale of the parties' real property following remand from a prior opinion of this Court, which stated the trial court lacked jurisdiction to modify the provisions of its prior decree except under the provisions of CR 60.02. In this appeal, Robert argued that the trial court improperly denied his motion to recuse; however, he failed to direct the Court to any properly supported motion or the order denying the motion, so the issue was not properly raised on appeal. Robert also argued the trial court erred on remand by ruling that the sale proceeds were subject to a mortgage issued to Kimberly following entry of the decree. The Court concluded that the trial court acted within its jurisdiction when it allowed the mortgage holder to intervene to assert a claim to the sale proceeds. It also concluded the trial court did not err in finding that the mortgage holder was entitled to priority to the sale proceeds. The Court noted that neither party had filed a CR 60.02 motion to address the collateral effects of the mortgage holder's claims on the decree's distribution order, and the Court's role in a subsequent appeal following remand was limited to determining whether the trial court properly construed and applied its mandate. The Court concluded that the trial court erred by failing to treat the mortgage and associated litigation costs as Kimberly's non-marital debts because they arose after the decree. Last, the Court concluded that the trial court did not err in its calculation of the other credits to which Kimberly was entitled because of her payment of marital debts from the mortgage proceeds. The Court affirmed in part, reversed in part, and remanded the matter to the Boyd Circuit Court with directions to allocate the sale proceeds between Robert and Kimberly as directed in this Opinion.

B. ANITA BOND V. JIMMY BOND

[2020-CA-1446](#) 10/01/2021 2021 WL 4484960

Opinion by JONES, ALLISON E.; COMBS, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Appellant Anita Bond (Anita) appeals from the Carter Circuit Court's order denying her motion to classify Appellee Jimmy Bond's (Jimmy) medical malpractice settlement proceeds as marital property. Jimmy and Anita were divorced in 2015. At the time the dissolution decree was entered, Jimmy had a personal injury claim pending. He alleged certain medical providers performed unnecessary medical procedures on him during the marriage. The divorce decree reserved judgment on what portion, if any, of a future award to Jimmy would be classified as marital property. Jimmy's claim was consolidated with approximately 125 similar claims, and a global settlement was reached. The settlement was distributed to the claimants in two phases. Phase 1 compensated claimants for each unnecessary procedure performed upon them. There was no accounting for medical bills or lost wages in Phase 1. Applicants could apply for Phase 2 damages, which included disability and lost wages. Jimmy did not apply for Phase 2 damages. The excess funds not dispersed from Phase 2 were reallocated proportionately to all claimants. Jimmy received \$357,415.50 from the settlement fund. The trial court found his award was non-marital property because it was for pain and suffering. The Court of Appeals affirmed. In doing so, the Court noted that pursuant to *Weakley v. Weakley*, 731 S.W.2d 243, 245 (Ky. 1987), pain and suffering awards are nonmarital property. *Weakley*, however, did not address the proper procedure for allocating between marital and nonmarital property when the settlement is silent on what portion of an award for an injury sustained during marriage is for pain and suffering and what portion applies to earning capacity. The Court rejected that the *Weakley* Court intended all proceeds from a settlement that is silent on this issue to be

classified as marital property. The Court stated the burden is on the spouse receiving the settlement to prove the award is nonmarital, which he or she may do by presenting additional evidence. In this case, the Court concluded that Jimmy met his burden of proof that the settlement funds he received were in the nature of pain and suffering compensation, and Anita failed to present any contradictory evidence.