PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2015 to SEPTEMBER 30, 2015

I. APPEALS

A. ***Black Forest Coal, LLC v. GRC Development, LLC***

2014-CA-000613 09/11/2015 2015 WL 5301554

Opinion and Order dismissing by Judge Taylor; Judges Combs and D. Lambert concurred. Appellant brought this appeal from a judgment granting appellees' CR 60.02 motion to vacate an order dismissing the action. The Court of Appeals dismissed the appeal as being taken from an interlocutory order. The general rule is that an order granting a CR 60.02 motion to set aside a judgment is nonappealable. However, appellant argued that the exception to the general rule set forth in *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007) applied and permitted the appeal to proceed. That exception applies where: (1) the "disrupted" judgment is more than one year old, and (2) the reason offered by the circuit court for vacating the judgment is an "extraordinary circumstance" under CR 60.02(f). The Court held that the exception was not applicable in this case because the motion to set aside the judgment was filed only eight months after the judgment was entered, and the circuit court granted relief based on fraud, rather than an extraordinary circumstance. Therefore, dismissal was mandatory.

II. CRIMINAL LAW

A. ***Commonwealth v. Alberhasky***

2014-CA-001167 09/11/2015 2015 WL 5299613 Rehearing Pending

Opinion by Judge J. Lambert; Judges Combs and VanMeter concurred. The Commonwealth brought an appeal from an order granting appellees' motion to suppress evidence found in their vehicle following a search. During a traffic stop, the arresting officer requested and was granted verbal consent from one of the appellees to search the vehicle and its trunk. The officer testified that he did not force or threaten appellee in order to obtain that consent; he believed that appellee understood the request to search; and he did not detect the presence of any alcohol or drugs which would have affected appellee's reasoning or judgment. The resulting search uncovered chemicals and equipment for the manufacture of methamphetamine. Appellees sought to suppress the evidence and, during the suppression hearing, the arresting officer admitted that he did not obtain written consent to search the vehicle as required by the Louisville Metro Police Department's standard operating procedures regarding a consent search. Because of this, the circuit court ruled that the warrantless search was invalid. The Court of Appeals reversed and remanded, holding that the decision to disregard the internal police policy regarding consent searches did not render the resulting evidence subject to exclusion under the Fourth Amendment, absent any findings that the consent was not given or that it was coerced. In this case, the evidence reflected, without contradiction, that verbal consent to search had been given to police, and there was no finding that appellees' constitutional rights had been violated; therefore, the search was valid and the circuit court erred by applying the exclusionary rule. While the state can create regulations that concern the behavior of its personnel, those regulations cannot be used to expand the scope of the Fourth Amendment. Thus, where there is evidence from a police officer that a defendant gave verbal consent to a search, and the defendant does not deny giving consent or suggest that the consent was extracted by coercion or deception, the consent is voluntary and the search is not unconstitutional.

B. ***Commonwealth v. Goff***

2013-CA-000345 09/25/2015 2015 WL 5634662

Opinion and Order vacating and remanding by Judge Nickell; Chief Judge Acree and Judge Taylor concurred. At issue in this appeal was the purely legal question of whether a trial court may call a probationer before it to answer alleged probation violations, and modify his sentence, all without notice to and participation by the Commonwealth's Attorney and defense counsel. The circuit court judge scheduled an arraignment on probation violations detailed in a supervision report prepared by a probation officer. The Commonwealth's Attorney received neither a copy of the supervision report, nor notice of the scheduled arraignment. When the matter was called on the docket, the probationer appeared alone - without counsel - and the circuit court engaged him in a conversation in which he essentially admitted to violating the terms of his release. Without advising the probationer of his minimal due process rights, and without hearing any testimony, the circuit court modified his sentence, giving him credit for the three days he had just served, and released him. When the Commonwealth received a copy of the order modifying the probated sentence the next day, it filed a motion to revoke and urged the circuit court to reconsider having modified appellee's probation without conducting a hearing. The court eventually granted the Commonwealth a hearing on whether it should have received a hearing, but never heard the three original violations for which it had entered the modification. At the hearing that eventually occurred - with the probationer, defense counsel and two representatives from the Commonwealth's Attorney present - the circuit court interpreted KRS 533.050(2) to mean that a prosecutor has no right to a probation revocation hearing and no right to attend a court-initiated probation revocation hearing unless specifically invited to attend by the circuit court. On appeal, the Court of Appeals vacated and remanded the modification order. The Court held that a Commonwealth's Attorney is entitled to receive proper notice of every court-initiated probation hearing, to attend all such hearings, and to participate therein. In reaching this conclusion, the Court rejected the circuit court's position that because the legislature did not explicitly assign a role to the Commonwealth in KRS 533.050(2), it cannot play a role in probation revocation and modification proceedings. The Court noted that the statute cannot be read in isolation, but must be read as part of an entire body of law. Moreover, courts have long required the Commonwealth to prove a probation violation by a preponderance of the evidence - a task that can be performed only if it is aware of the hearing and in the courtroom. The Court also determined that the arraignment, as conducted, was not the "hearing" envisioned by KRS 533.050(2) because appellee was without counsel and the alleged violations were not presented to appellee prior to the arraignment - a function normally

performed by the prosecutor's filing of a motion to revoke with a copy of the supervision report attached. Here, no motion to revoke was filed until after the modification had been ordered. Additionally, the way the arraignment was conducted did not afford appellee minimal due process.

C. ***Fugate v. Commonwealth***

2014-CA-001467 09/18/2015 2015 WL 5460710

Opinion by Judge Nickell; Judges Clayton and Thompson concurred. Appellant was charged with operating a motor vehicle while his license was revoked or suspended for driving under the influence, third offense, as well as being a persistent felony offender ("PFO"). The PFO charge was dropped in return for appellant's conditional guilty plea to the Class D felony. Defense counsel moved to suppress the two 2012 driving on a suspended license convictions - both misdemeanors and both first offenses due to timing - claiming they were infirm because appellant, who appeared both times without counsel, was never asked whether he was pleading guilty; never said he was guilty; and the records of the district court guilty pleas were silent as to whether he knew his constitutional rights and knew pleading guilty would waive those rights. Appellant never swore in writing in the suppression motion, nor from the witness stand during the suppression hearing, that he did not know his rights in 2012, did not know entering a guilty plea would waive those rights, or that he had no intention of pleading guilty to either misdemeanor in 2012. The Court of Appeals held that, pursuant to *Conklin v. Commonwealth*, 799 S.W.2d 582, 584 (Ky. 1990), counsel's bare allegation of constitutional infirmity was insufficient to require suppression of the two misdemeanor convictions regardless of what the record actually showed. This was especially true since appellant was a career criminal and had probably heard his constitutional rights numerous times. However, upon reviewing the district court recordings of the court's explanation of rights to defendants as a group on two separate occasions, and appellant 's two guilty plea colloquies, the Court concluded that it was clear on those two dates the district court did not satisfactorily mention the three federal rights for which *Boykin v. Alabama*, 395 U.S. 236, 89 S.Ct.1709, 23 L.Ed.2d 274 (1969), directs waiver will not be presumed from a silent record - the right to remain silent, to have a jury trial, and to confront one's accusers. Also missing from the district court's explanation on both occasions was the effect of entering a guilty plea - waiver of those constitutional rights - another critical element stressed in *Boykin*. Consequently, the Court vacated the felony conviction and remanded it for resolution as a misdemeanor. While recognizing the sheer volume of cases handled by district courts, the Court of Appeals cautioned those courts to exercise extreme caution - especially when defendants appear without counsel - when explaining constitutional rights to defendants and when accepting guilty pleas to ensure the rights of each person accused are protected and reflected on the record.

III. CUSTODY

A. ***S.E.A. v. R.J.G.***

2014-CA-001544 09/11/2015 2015 WL 5299882

Opinion by Judge Jones; Judges Dixon and Nickell concurred. In this child custody action, the family court awarded permanent sole custody to the Father without an evidentiary hearing and based its factual findings almost exclusively on written reports filed by the *guardian ad litem* ("GAL"), whom the Mother was never allowed to question or cross-examine. On appeal, the Court of Appeals concluded that the family court should have conducted an evidentiary hearing and provided both parties an opportunity to present testimony. The Court first noted, citing to *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), that if a trial court relies on a GAL report, due process demands that the other parties must be afforded an opportunity to question/cross-examine the GAL. The Court then explained that the fact that a temporary custody hearing had been conducted earlier in a separate dependency, neglect, and abuse ("DNA") action did not satisfy the requirement to conduct a full evidentiary hearing in the custody action. That hearing pre-dated two of the GAL reports the family court relied upon in its findings, as well as a report filed by the Cabinet and a psychiatric evaluation of Mother, both of which the family court referenced in its order. Accordingly, the Court vacated the family court's decision and remanded with instructions to conduct a full evidentiary hearing and to make findings based on the evidence presented pursuant to KRS 403.270(2).

IV. JUDGMENT

A. ***Faller v. Goess-Saurau***

2012-CA-001912 09/04/2015 2015 WL 5173444 Rehearing Pending

Opinion by Judge VanMeter; Judge Thompson concurred; Judge D. Lambert dissented and filed a separate opinion. On review from an order granting Goess-Saurau's motion for default judgment, the Court of Appeals vacated and remanded. The Court held that when a plaintiff files a timely amended complaint, and the defendant has not yet answered the original complaint, CR 15.01 permits the defendant to file an answer to the complaint/amended complaint "within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." In this case, the plaintiff filed an amended complaint three days after service of the original complaint, at which time the defendant had not yet filed an answer to the original complaint. The defendant was not served with the amended complaint until the date of the hearing on the plaintiff's motion for default judgment. The Court concluded that the original complaint was superseded by the amended complaint, and default judgment against the defendant for failure to timely respond to the original complaint was an abuse of discretion when the time for response prescribed by CR 15.01 had not yet expired. In dissent, Judge D. Lambert disagreed with the majority's reading of CR 15.01 and also disagreed that the original complaint had been superseded by the filing of an amended complaint

V. MUNICIPAL CORPORATIONS

A. ***Kuhnhein v. Northern Kentucky Area Planning Commission***

2014-CA-000468 09/11/2015 2015 WL 5300389 DR Pending

Opinion by Judge Thompson; Judge Maze concurred; Judge D. Lambert dissented and filed a separate opinion. A county resident filed a declaratory judgment action challenging the assessment and collection of *ad valorem* taxes by the Northern Kentucky Area Planning Commission and the Northern Kentucky Planning Council (collectively "NKAPC"). Appellant argued that the NKAPC is no longer an area planning commission as defined by statute because Campbell County had withdrawn from the commission, leaving Kenton County as the only remaining member. The circuit court entered summary judgment in favor of the commission, and the Court of Appeals affirmed. The Court held that: (1) the withdrawal of one county as a member of an area planning commission formed by two adjoining counties did not automatically dissolve the commission, and (2) the city of Covington's drop in population below 50,000 also did not dissolve the commission. Like the dissolution of a municipal corporation, the dissolution of an area planning commission is no less the exercise of a political power and must be exercised by the legislative department of the government; it is not a matter of judicial cognizance. Consequently, dissolution may only occur by adherence to the requirements of KRS 147.620 and only by petition and vote by the fiscal court or referendum. In dissent, Judge D. Lambert argued that because KRS 147.610 does not contemplate an area planning commission with only one county member, the NKAPC ceased to legally exist when Campbell County withdrew as a member.

VI. SUMMARY JUDGMENT

A. ***Cromity v. Meiners***

2013-CA-002117 09/25/2015 2015 WL 5634420

Opinion by Judge VanMeter; Judges Clayton and Kramer concurred. On review from an order granting summary judgment in favor of Meiners and his employer, Clear Channel Communications, Inc., on appellant's defamation and false light claims, the Court of Appeals affirmed, holding that since Meiners had fully disclosed the facts underlying his allegedly defamatory statements, such statements were non-actionable expressions of opinion. In this case, Meiners, a radio personality, was stopped and cited for speeding by Cromity, a Louisville police officer. Meiners later told the story of the incident on air, calling Cromity an "out and out liar." The Court found that Meiners had given a complete account of the facts supporting his statement and held that the provided facts, namely Meiners' assertion that he was not speeding at the time of the traffic stop, were not provable as false. Accordingly, Meiners' statements were protected opinion speech and thus not actionable for defamation. Next, the Court held that whether a statement qualifies for protection under the constitutional "pure opinion" privilege is a legal question to be decided by the court, not a question for the jury. Finally, the Court concluded that the circuit court's failure to address Cromity's false light claims in its summary judgment order was harmless error given the Court's determination that Meiners' statements could not be proven false and thus a reckless disregard for the truth would be impossible to prove.

VII. TAXATION

A. ***Department of Revenue, Finance and Administration Cabinet v. Shinin' B Trailer Sales, LLC***

2014-CA-001097 09/04/2015 2015 WL 5173168

Opinion by Judge Maze; Judges D. Lambert and Thompson concurred. The Department of Revenue appealed an order of the Board of Tax Appeals concluding that horse trailers with living quarters fell within the statutory exemption from sales tax for gross receipts from the sale of a semi-trailer or trailer. The circuit court upheld the order, and the Court of Appeals affirmed. The Court first agreed with the Board that horse trailers with living quarters were "intended for the carriage of freight or merchandise" and, thus, constituted "semi-trailers" or "trailers" within the meaning of the statute providing a sales tax exemption for such items (KRS 189.010(12) & (17)). The Department of Revenue argued that the presence of living quarters made it impossible for the horse trailers to be used only or primarily for carrying freight or merchandise. However, the Court noted that the term "intended," as used in KRS 189.010, focused on the purpose for which the trailers were designed, and there was no question that the horse trailers were intended to transport horses and that the presence of living quarters furthered that purpose. The Court further held that the carriage of horses constituted "carriage of freight or merchandise" for purposes of the statutory exemption. The Department of Revenue contended that the presence of living quarters indicated that the horse trailers were designed for recreational, rather than commercial, carriage of horses. However, the Court concluded that although "merchandise" had a commercial connotation, "freight" could include non-commercial goods. The General Assembly's use of both terms demonstrated intent that they have different meanings. The Court further noted that the General Assembly did not specify that the definitions applied to only certain uses of horse trailers, or only when the trailers are purchased and used by a commercial carrier. Consequently, the horse trailers fell within the plain meaning of the statutory exemption.