

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2018 to SEPTEMBER 30, 2018

I. CRIMINAL LAW

A. *Adams v. Commonwealth*

[2017-CA-001075](#) 09/28/2018 2018 WL 4649984

Opinion by Judge Dixon; Judge Smallwood concurred; Judge Kramer concurred and filed a separate opinion.

Appellant was convicted of second-degree assault following a drunk-driving automobile crash that severely injured the driver of the other vehicle. Appellant entered into a civil settlement agreement with the victim, and his insurer paid her the policy limit of \$300,000. At the restitution hearing, the victim testified that her medical bills were \$1,000,000, and she explained that she had to pay her civil attorney's fees out of the settlement proceeds. Following the hearing, the circuit court found that the civil settlement and release of liability did not preclude the imposition of criminal restitution, and it ordered appellant to pay the victim \$100,000 in restitution. The Court of Appeals affirmed, holding that the release of liability in the civil case did not preclude an award of criminal restitution. The Court concluded that the restitution amount ordered to be paid by appellant would repay the victim \$100,000 in funds to which she would have been legally entitled but for the necessity that she pay her own attorney's fees out of her settlement. The Court also held that no palpable error occurred when the circuit court belatedly entered the restitution order more than ten days post-judgment. The record established that appellant clearly acquiesced to the circuit court's exercise of particular-case jurisdiction and waived any alleged error.

B. *Applegate v. Commonwealth*

[2016-CA-001293](#) 09/14/2018 2018 WL 4369364

Opinion by Judge Nickell; Chief Judge Clayton and Judge Johnson concurred.

In separate indictments, appellant was charged with firearm-enhanced

trafficking in methamphetamine, possession of a handgun by a convicted felon, possession of matters portraying a sexual performance by a minor, and two counts of being a persistent felony offender (PFO), second degree. Appellant moved to suppress all evidence seized, alleging that the search warrants were invalid and that police officers exceeded the scope of the warrants. After the motion was denied, appellant entered a conditional guilty plea to the charges related to child pornography and unconditional guilty pleas to the trafficking and handgun charges; the PFO charges were dismissed. A subsequent motion to withdraw the guilty pleas on the trafficking and handgun charges was denied. The Court of Appeals affirmed in part and reversed in part. Of particular note, the Court rejected appellant's arguments relating to the denial of his motion to withdraw his guilty pleas on the trafficking and handgun charges; the arguments were wholly different from those made before the circuit court, so the Court refused to consider them for the first time on appeal. Next, the Court rejected appellant's contention that he was not a convicted felon and, therefore, his conviction of being a felon in possession of a handgun was improper. The Court noted that appellant entered an unconditional plea to the charge, thereby waiving all defenses except that the indictment did not charge an offense. The Court also noted that although appellant ultimately succeeded in having the underlying felony conviction overturned, that conviction was not void *ab initio* and was valid at the time he armed himself with a handgun, thereby making him guilty of the charged offense. Finally, the Court rejected appellant's challenges relating to the search warrants. In the portion of the opinion reversing in part, the Court held that the circuit court committed three errors in sentencing when it sought to impose special conditions on appellant's parole, ordered him to pay court costs, and levied public defender fees.

C. *Martin v. Commonwealth*

[2017-CA-001187](#) 09/07/2018 2018 WL 4261864

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

Following entry of a conditional guilty plea, appellant was convicted of DUI, fourth offense within a ten-year period, and sentenced to four years of imprisonment. Prior to this current DUI charge, appellant had been convicted of DUI in 2007, 2015, and 2016. On April 9, 2016, certain amendments to KRS 189A.010 went into effect, including a change that extended the look-back period for enhancement of DUI penalties from a period of five years to ten years. Because appellant's 2016 offense occurred after the effective date of the amendment to KRS 189A.010, he was charged with DUI fourth due to the inclusion of his 2007 DUI conviction in calculating his prior offenses. Appellant argued that the application of the ten-year look back violated his rights under contract law, *i.e.*, his plea agreement in 2007; his rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); and his constitutional right to be free from the application of *ex post facto* laws. The Court of Appeals affirmed, first holding that in accordance with *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), contract principles did not preclude an application of the amended statute to appellant's current offense. The language in appellant's DUI plea agreement was not intended to immunize him from the 2016 changes to the DUI statute. The Court also rejected appellant's argument regarding his *Boykin* rights. While subsequent legislative measures may unforeseeably alter the consequences and effects of a criminal conviction, *i.e.*, the penalties for future offenses, this does not serve to retroactively render an otherwise valid plea as involuntarily entered. The Court also rejected appellant's final argument. A conviction for DUI fourth was subject to the same penalty before and after the 2016 amendment to the look-back period. The amendment did not impose additional punishment; instead, it merely changed the manner in which the penalty was calculated by enlarging the look-back period. Because appellant was charged with a DUI after the effective date of the amendment to the look-back provision, *ex post facto* principles did not bar application of the new period in this case.

II. DOMESTIC VIOLENCE/PROTECTIVE ORDERS

A. Clark v. Parrett

[2018-CA-000507](#) 09/21/2018 2018 WL 4517002

Opinion by Judge Thompson; Judges Combs and J. Lambert concurred.

The Court of Appeals vacated and remanded a domestic violence order for a new evidentiary hearing because no evidence of domestic violence was presented during the original hearing. The Court held that because both parties are entitled to a full evidentiary hearing with appropriate notice in domestic violence cases, where the party currently protected by a domestic violence order does not appear after service by mail at a hearing on a motion to alter, amend, or vacate the order, the hearing should be delayed until personal service is made on that party.

III. EDUCATION

A. *Miracle v. Duncan*

[2017-CA-001737](#) 09/21/2018 2018 WL 4515945

Opinion by Judge Nickell; Judges Acree and Smallwood concurred.

The Trimble County Board of Education and Steve Miracle, in his official capacity as Superintendent, appealed from the dismissal of a petition for a writ of prohibition to foreclose entry of a final order in an administrative action initiated by Tammy Duncan. A high school math teacher, Duncan requested a tribunal hearing pursuant to KRS 161.790(4) after receiving notice that her continuing contract was being non-renewed. Claiming that the contract signed by Miracle and Duncan was signed in error and therefore invalid, Miracle and the Board alleged that the hearing officer lacked subject matter jurisdiction to convene the hearing and that a writ should have been issued to prohibit entry of the hearing officer's final order reinstating Duncan as a Trimble County teacher. The circuit court disagreed, and the Court of Appeals affirmed, holding that the circuit court properly exercised its discretion in dismissing the petition for a writ of prohibition. The Court held that Miracle and the Board had failed to demonstrate that the hearing officer lacked jurisdiction or that judicial review of the hearing officer's final order would be an inadequate remedy. If Miracle and the Board disagreed with the final order, they could pursue judicial review under KRS 13B.140. If the tribunal exceeded its authority, Miracle and the Board could move the circuit court, pursuant to KRS 13B.150(2)(b), to set aside the final order. The Court also noted that Duncan had given timely notice of her "intention to answer the charge," entitling her to the requested tribunal hearing; moreover, because Duncan had what appeared to be a fully executed continuing contract, she had to comply with KRS 161.790 to pursue her grievance and to exhaust all available administrative remedies. Attacking the validity of the underlying contract could not defeat this requirement.

B. Travis v. State Evaluation Appeals Panel

[2017-CA-001018](#) 09/28/2018 2018 WL 4650102

Opinion by Judge Dixon; Chief Judge Clayton and Judge Jones concurred.

The Court of Appeals affirmed an order granting the motion of the State Evaluation Appeals Panel (SEAP) and the Jefferson County Board of Education to dismiss appellant's claims stemming from her demotion from assistant principal to a teacher position. The Court concluded that neither KRS 156.557 nor 704 KAR 3:370 includes any provision permitting a teacher to seek judicial review of a SEAP decision. The SEAP cannot adjudicate a teacher's legal rights, duties, privileges, or immunities because, as set forth in KRS 156.557(7), it does not have jurisdiction to review the "judgmental conclusions of [a] personnel evaluation[]." Rather, the SEAP is charged solely with determining whether "the local school district failed to properly implement the evaluation system." KRS 156.557(7); 704 KAR 3:370 §12(2)(a). Accordingly, because a SEAP proceeding is not an adjudication of a teacher's legal rights and the result of the proceeding has no substantive impact on the teacher, the SEAP is not an administrative agency under KRS Chapter 13B. The Court also noted that in addition to the review process in place for an evaluation, KRS Chapter 161 provides procedures by which a teacher can contest adverse employment actions; these include a Chapter 13B hearing before the local board of education, as well as judicial review of any decision. The Court concluded that had the General Assembly intended for certified school personnel to receive judicial review of a SEAP decision, it would have explicitly provided such mechanism in the statute. Finally, the Court held that any delegation of authority to the Kentucky Board of Education to implement the evaluation system did not result in a violation of the non-delegation doctrine simply because SEAP decisions are not subject to judicial review.

IV. INSURANCE

A. *Mosley v. Arch Specialty Fire Insurance Company*

[2017-CA-001252](#) 09/28/2018 2018 WL 4649846

Opinion by Chief Judge Clayton; Judges Dixon and Jones concurred.

Appellants Crystal Mosley, individually and as administratrix of her husband's estate, and Rhett Mosley, Jr., her son, brought bad faith claims against Arch Specialty Insurance Company and National Union Fire Insurance Company arising out of a wrongful death action filed after Rhett Mosley was killed while driving a truck at a surface coal mine. Appellees were insurance companies for various parties involved in the underlying wrongful death suit. The bad faith claims were based on appellees' conduct during the pendency of the litigation, specifically during two mediations in 2013. Appellants also asserted civil conspiracy claims. The circuit court granted Arch's motion for judgment on the pleadings and National Union's summary judgment motion. The Court of Appeals affirmed. The Court noted that appellants' bad faith claims rested entirely on confidential settlement offers and appellees' conduct during mediation sessions. Citing to *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846 (Ky. 2016), *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643 (Ky. App. 1995), *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), KRE 408, and Model Mediation Rule 12, the Court held that because mediation is confidential, the bad faith claims failed because none of appellees' conduct during the mediation sessions was admissible. The Court further held that there was insufficient proof to support the civil conspiracy claims.

V. OPEN RECORDS

A. *University of Kentucky v. Lexington H-L Services, Inc.*

[2017-CA-001423](#) 09/14/2018 2018 WL 4368680

Opinion by Judge Maze; Judges Combs and Dixon concurred.

The University of Kentucky appealed from an opinion and order that affirmed an opinion by the Attorney General on an Open Records Act request by the Lexington Herald-Leader. The Herald-Leader sought records from an audit conducted by the University following its acquisition of a heart clinic in Hazard. The audit found that the clinic's medical record documentation was inadequate and likely resulted in overpayments. Rather than determining the precise amount of the overpayments, the University elected to refund all payments received for the period in question. The University subsequently terminated its affiliation with the clinic. The University's outside counsel presented a summary of this information to the University's Board of Trustees. The University later denied the Herald-Leader's open records request for the audit records, as well as documents presented to the Board of Trustees. With respect to the audit documents, the University argued that they retained their status as preliminary since they were never formally adopted into a final action. The University also asserted that the records were covered by attorney-client and work-product privilege. The Attorney General found, and the circuit court agreed, that the audit documents lost their preliminary status after the University took the final action of refunding all of the overcharges. The Attorney General and the circuit court also rejected the University's privilege claims. The Court of Appeals affirmed. The Court first noted the established precedent that preliminary records may lose that status once they are adopted into final agency action. It then concluded that the Open Records Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action. In addition, the Court concluded that any public policy considerations against disclosure of the audit records must yield to the express policy set out in the Act. The Court also rejected the University's privilege claims, first noting that there was no evidence that the audit records were intended to be disclosed only to counsel for the purposes of preparing legal advice. Thus, the records were not protected by attorney-client privilege. The Court also determined that the audit records were primarily factual in nature and were prepared during the University's normal business oversight of the clinic's operation, and only remotely in anticipation of potential litigation. Therefore, those records were not subject to the work-product privilege. Consequently, the Court held that the audit records were subject to disclosure.

VI. STANDING

A. *Marshall v. Marshall*

[2017-CA-001755](#) 09/07/2018 2018 WL 4261836

Opinion by Judge Combs; Chief Judge Clayton and Judge Jones concurred.

Appellants were the mother and sister of a decedent who re-married his former wife shortly before his death. Appellants complained that the couple failed to comply strictly with statutory marriage license requirements (the marriage having occurred prior to the couple obtaining, signing, and filing a marriage license), so they challenged the validity of the marriage. The decedent's wife moved to dismiss the action due to a lack of standing, and the motion was granted. The Court of Appeals affirmed, upholding long-established precedent that third parties lack standing to challenge the validity of a marriage.

VII. WORKERS' COMPENSATION

A. Conley v. Super Services, LLC

[2018-CA-000709](#) 09/07/2018 2018 WL 4261727

Opinion by Judge Combs; Chief Judge Clayton and Judge Jones concurred.

Appellant challenged an opinion of the Workers' Compensation Board affirming the denial of proposed caudal epidural steroid and sacroiliac injections. The Court of Appeals affirmed in part, vacated in part, and remanded. The Administrative Law Judge disallowed coverage for the epidural injection on the basis that it failed to provide "improved functioning." The Court held that the ALJ applied an erroneous standard and that the proper standard had been met according to the testimony of the injured worker - namely, that the injection contributed to the "cure and relief" of the effects of his work-related injury. However, the Court affirmed the denial of the sacroiliac injection, holding that the ALJ reasonably inferred from the medical evidence presented that the procedure was unproductive or outside the type of treatment generally accepted by the medical community.

B. Holcim v. Swinford

[2018-CA-000414](#) 09/07/2018 2018 WL 4261757 Rehearing Pending

Opinion by Chief Judge Clayton; Judges Kramer and Nickell concurred.

The employer appealed from a Workers' Compensation Board opinion affirming an award of permanent partial disability benefits to an employee, aged 75, who injured his neck while operating a bulldozer. The Court of Appeals affirmed. The employer argued that the employee, who had cervical surgery approximately 20 years before the accident, had a pre-existing and active impairment not resulting from the accident. The Court agreed with the Board that the ALJ properly relied on the claimant's testimony that he worked twelve-hour shifts five days per week for years prior to the accident without difficulty, as well as the opinion of one medical expert who diagnosed a disc herniation caused by the bulldozer accident. Additionally, none of the medical experts assessed a pre-existing active impairment. The Court also addressed the applicability of KRS 342.730(4). The version of the statute in effect at the time of the injury terminated workers' compensation benefits for employees, like the claimant, qualifying for old-age Social Security retirement benefits. This provision was subsequently held unconstitutional in *Parker v. Webster Cty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). In response, the General Assembly amended the provision, while this appeal was pending, to terminate benefits upon the date the employee reaches the age of 70 or four years after the injury, whichever last occurs. The Court held that this provision could not be applied retroactively to limit the duration of the employee's benefits here because, although retroactivity language was included in the text of the House Bill, the legislature chose not to include it in the amended statute. The Court also agreed with the Board that the Administrative Law Judge's application of the 1994 version of KRS 342.730(4) was erroneous.