PUBLISHED OPINIONS

KENTUCKY COURT OF APPEALS

SEPTEMBER 1, 2019 to SEPTEMBER 30, 2019

I. CHILD CUSTODY AND RESIDENCY

A. ***S.T. v. Cabinet for Health and Family Services***

2018-CA-001840 09/13/2019 2019 WL 4382994

Opinion by Judge Nickell; Judges Goodwine and Spalding concurred.

The Cabinet filed juvenile petitions seeking the removal of two half-siblings from their parental home. No relative placement was suggested by either parent. Ultimately, Mother named a couple ("the J's") she had met through a ministry and considered to be family friends. Father named no one. After a temporary removal hearing, the family court awarded temporary custody to the J's. Nearly one year after the filing of the juvenile petitions, S.T. and J.T. ("the T's") sought to invoke KRS 620.110, which allows "any person aggrieved by the issuance of a temporary removal order" to petition for immediate entitlement to custody and to receive an expeditious hearing. S.T. was Father's aunt and great-aunt of one of the children. While laying no claim to the other sibling, the T's urged that the girls be placed together. Relying on *C.K. v. Cabinet for Health and Family Services*, 529 S.W.3d 786 (Ky. App. 2017), the family court found that the T's lacked standing because neither was the "natural parent of either child." The Court of Appeals deemed this an erroneous reading of *C.K.*, which focused entirely on a parent invoking KRS 620.110 because it was ruling on a petition filed by an unwed father. The Court held that *C.K.* did not rewrite KRS 620.110 to exclude non-parents and to allow only "any parent aggrieved" to petition for immediate custody. However, the Court further held that while the family court erroneously applied KRS 620.110, reversal was not mandated because of errors made by the T's. Their brief included no statement of preservation; they failed to designate in the record a recording, transcript, or narrative statement of the hearing on the petition to intervene, making it impossible to determine whether the arguments alleged on appeal were raised below; and, claiming they were denied a full hearing, they offered no avowal of testimony that they wanted to offer. The greatest obstacle for the T's was lack of any proof that they were "aggrieved" by the family court's removal of the children and placement with the J's. While "aggrieved" is not statutorily

defined, the Court held that it must mean more than mere disagreement with the family court's ruling and that some connection to the child must be demonstrated.

II. CONSTITUTIONAL LAW

A. ***Department of Corrections v. Mitchem***

2018-CA-000654 09/20/2019 2019 WL 4556907

Opinion by Judge Lambert; Judges Maze and Taylor concurred.

Appellee was convicted of second-degree escape, in violation of KRS 520.030 and sentenced to one year's imprisonment. Upon his release, appellee was informed that he would be subjected to a year's post-conviction supervision (PIS) pursuant to KRS 532.400(1)(b), a fact of which he had not been made aware up until that point. Appellee violated the terms of his PIS and was returned to custody; he was subsequently given a serve-out date of a full year's incarceration. Appellee filed an action for declaratory and injunctive relief in the Franklin Circuit Court, challenging the constitutionality of KRS 532.400(1)(b) and seeking immediate release. The circuit court agreed that the statute was unconstitutional as violative of due-process and separation-of-powers protections. Appellee was ordered released, and the Department of Corrections appealed. The Court of Appeals affirmed, holding that the circuit court properly granted summary judgment to appellee. The Court noted that the statute provided for no notice, no hearing, and no right to counsel at a critical stage in the proceedings. It was also unconstitutionally vague and allowed "the DOC, an executive agency, to encroach on powers expressly enumerated to the judicial branch by issuing a criminal sentence resulting in incarceration without judicial review."

III. CONTRACTS

A. *Aries Entertainment, LLC v. Puerto Rican Association for Hispanic Affairs, Inc.*

2018-CA-001104 09/27/2019 2019 WL 4724764

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

Aries, a talent agent based in Harlan, Kentucky, represented four celebrities hired to appear at a weekend scholarship fundraiser in Florida. Aries drafted four personal appearance contracts and emailed them to the Association, a Florida 501(c)(3) non-profit corporation sponsoring the event. Each contract contained a choice of forum clause specifying that Harlan Circuit Court would resolve all disputes using Kentucky law. Knowing each contract contained a choice of forum clause, Association signed all contracts without hesitation. When a dispute arose, Aries filed suit in Kentucky for breach of contract and tortious interference with contract. Association moved to dismiss due to a lack of jurisdiction, arguing that it would be a "terrible hardship" to require it to defend suit in Kentucky, a fact it must have known prior to signing the contracts. The circuit court declined to enforce the choice of forum clause, finding that it would be "unreasonable" to do so because the fundraiser was a "single transaction" not rising "to the level of 'transacting business in this Commonwealth'" and "Kentucky has only a minimal interest in this action." In dismissing the action without prejudice, the circuit court said enforcing the clause would be "unreasonable," but did not explain why. The Court of Appeals reversed and remanded for an evidentiary hearing and findings. The Court determined that the circuit court erroneously applied portions of Kentucky's long-arm statute when the parties had freely consented to the choice of forum clause. The Opinion notes that Kentucky has a strong public interest in ensuring parties abide by bargains and that the circuit court's role is not to save a party from what it perceives to be a bad bargain. It also clarifies that the test for determining whether to enforce a choice of forum clause is whether doing so is "unfair or unreasonable" - not merely inconvenient - and reiterates that inconvenience is a factor to consider, but it must be so serious as to deprive the complainant of his opportunity for a day in court.

IV. CORRECTIONS

A. ***Greene v. White***

2018-CA-000592 09/13/2019 2019 WL 4383000

Opinion by Judge K. Thompson; Judges Dixon and Jones concurred.

Appellant challenged an order dismissing his petition seeking a declaration of rights for failure to state a claim on which relief could be granted. The circuit court determined that appellant failed to exhaust his administrative remedies in challenging a finding of guilt in a prison disciplinary matter, which resulted in a restriction of his visitation privileges with his wife and adult daughter. The Court of Appeals agreed with appellant that the circuit court erred in dismissing for failure to exhaust administrative remedies. However, it still concluded that dismissal was appropriate. The Court held that appellant had no right to receive procedural due process before visitation with his wife and adult daughter could be restricted on grounds that they had conspired with him to introduce dangerous contraband into the facility. Denying access to specific visitors is well within the terms of confinement ordinarily contemplated by a prison sentence. Despite the use of mandatory language in Kentucky's Corrections Policies and Procedures (CPP), exclusion of specific visitors is not an atypical and significant hardship compared to the ordinary incidents of prison life, and prison officials are granted wide discretion in excluding visitors both temporarily and permanently. Therefore, the CPP does not provide an inmate with a right to due process before specific visitors can be excluded. Visitors may be excluded without proof that the inmate they came to visit did anything wrong.

V. CRIMINAL LAW

A. ***Commonwealth ex rel. Logan County Attorney v. Williams***

2018-CA-000304 09/20/2019 2019 WL 4559354

Opinion by Judge Nickell; Judge Maze concurred and filed a separate opinion; Judge K. Thompson dissented and filed a separate opinion.

The Commonwealth appealed a circuit court order denying its petition for a writ of prohibition to prevent enforcement of a suppression order. The underlying issue was whether the district court properly suppressed a blood alcohol concentration (BAC) result collected from Eladio Ortiz, a Spanish-speaking person suspected of drunk driving who was read Kentucky's implied consent law in English before submitting to a blood draw. The ultimate question was how law enforcement officers inform suspected drunk drivers of the right to refuse blood, breath, or urine testing and the consequences of submitting to and refusing such testing as required by KRS 189A.105. The district court found that Ortiz did not have sufficient command of the English language to be "informed" of his rights under Kentucky's implied consent law by an officer's reading of the warning to him in English and suppressed the BAC result, a decision with which the circuit court agreed and denied the Commonwealth's petition for a writ of prohibition. By a 2-1 vote, the Court of Appeals disagreed with both lower courts and reversed and remanded for further proceedings. The Court held that Ortiz was statutorily "informed" of Kentucky's implied consent law by the officer reading the warning to him in English. The Court noted that there is no statutory requirement that the suspect understand the warning and no requirement that the warning be provided to the suspect in his native tongue. The Court further noted that body-cam footage showed the following: Ortiz never said he did not understand the officer's directives; Ortiz communicated in English; and there was no way that the officer could distinguish between Ortiz not understanding his instructions due to a language barrier and not understanding due to extreme inebriation. The Court also concluded that the circuit court erroneously took judicial notice of the availability of electronic devices and cell phone apps to translate foreign languages because such translations have not been verified for accuracy. Judge Maze's concurring opinion primarily discussed *Mitchell v. Wisconsin*, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019), which addressed a similar implied consent statute in the context of an unconscious DUI suspect incapable of revoking consent for a blood draw. In dissent, Judge Thompson recognized that the DUI prosecution could proceed on probable cause for the stop and arrest, but he opined that the district court's findings should have been upheld because they were supported by substantial evidence. He further argued that implied consent laws do not grant actual consent for the warrantless taking of a drunk driving suspect's blood; that reading an implied consent warning in English does not always "inform" a

suspect as required by KRS 189A.105(2)(a); and that the circuit court properly took judicial notice of technology allowing translation of English into other languages.

B. ***Commonwealth v. Garrett***

2017-CA-001144 09/27/2019 2019 WL 4724827

Opinion by Judge Acree; Judge Dixon concurred; Judge Spalding concurred in result only.

After the circuit court entered an order suppressing evidence seized by law enforcement from a vehicle pursuant to a warrantless search, the Commonwealth appealed. The Court of Appeals affirmed, holding: the initial interaction between the police and appellee was not a stop justified by observing a traffic or other violation but merely a consensual encounter; when the officer walked away from appellee in possession of his license, appellee was seized for Fourth Amendment purposes; because there was no reasonable articulable suspicion that appellee was engaged, or about to engage, in criminal activity, the seizure was unlawful; prolonging appellee's detention for twenty minutes because of an administrative glitch in the civil warrant determination process was unreasonable and unjustified; physically pulling appellee's passenger from the vehicle thirty minutes after the initiation of the encounter solely because her movement became "erratic" without further articulation of the officers' suspicion was an unlawful seizure; the warrantless search of the vehicle lacked probable cause and, therefore, violated appellee's Fourth Amendment rights; the contraband seized as a result of the unlawful search was "fruit of the poisonous tree"; and each of the three factors of the "attenuation doctrine" favored suppression because (1) the evidence was seized only minutes after these Fourth Amendment violations occurred, (2) there were no intervening circumstances to dissipate the taint of the violations, and (3) the violations were sufficiently flagrant that suppression was justified to deter the repetition of the unlawful police conduct.

C. ***Dale v. Commonwealth***

2018-CA-000563 09/06/2019 2019 WL 4229737

Opinion by Judge Goodwine; Judge Nickell concurred; Judge Spalding dissented and filed a separate opinion.

Appellant challenged an opinion and order of the Jefferson Circuit Court affirming the Jefferson District Court's order of restitution. Appellant was cited for failure to maintain required insurance following a car accident that resulted in the death of another motorist. Appellant pleaded guilty, and the district court later ordered him to pay restitution in the amount of $100,000 for the value of the motorcycle damaged in the accident and the decedent's lost wages. The circuit court affirmed the district court's order, finding that appellant agreed to pay restitution as part of his plea agreement. The Court of Appeals reversed the circuit court's opinion and order with instructions to vacate the district court's order of restitution. In so doing, the Court held that: (1) appellant did not agree to pay restitution; he merely agreed to a restitution hearing; (2) appellant's right to due process was violated because the Commonwealth did not provide advance notice of the amount and nature of restitution sought and failed to meet its burden of proving the validity of its claim for restitution; and (3) KRS 304.99-060 does not provide for the imposition of restitution and the Commonwealth did not prove that the restitution sought directly resulted from appellant's failure to maintain required insurance. In dissent, Judge Spalding indicated that he would reverse the order and remand for a new restitution hearing, opining that while the district court should have upheld appellant's right to due process, appellant's failure to maintain insurance could have resulted in a direct loss to the victim.

D. ***Hiles v. Commonwealth***

2018-CA-000471 09/13/2019 2019 WL 4383005

Opinion by Judge Goodwine; Judges Combs and Taylor concurred.

Appellant challenged her conviction for criminal facilitation to incest and being a second-degree persistent felony offender. She argued: (1) that the Commonwealth failed to meet its burden of proving beyond a reasonable doubt that she knew and aided in the crime committed; (2) that the Commonwealth introduced irrelevant and unduly prejudicial evidence; and (3) that the circuit court erroneously instructed the jury on the law of facilitation. The Court of Appeals affirmed, first holding that from the evidence it was reasonable to conclude that appellant knew her husband was committing, or intended to commit, incest with appellant's daughter, and that she had provided the means or opportunity to do so. Appellant participated in and was aware of ongoing investigations into sexual misconduct between her husband and daughter; she took photographs of her daughter and husband sleeping together, sent the photographs to her friend, and instructed her friend to send them to a social worker; and after appellant sent the photographs to her friend, she still allowed her husband and daughter to sleep under the same roof and left them alone together on more than one occasion. As to appellant's second argument, the Court held that evidence that appellant had a black eye and blamed her daughter for it, when upon further investigation it was discovered that appellant's husband in fact hit her, was relevant to show appellant's state of mind for covering for her husband and to show that she was more concerned about her relationship with her husband than with her daughter. The Court further held that testimony relating to appellant being intimate with her husband just before he confessed to committing incest with her daughter was relevant to show either that appellant had no knowledge of her husband's actions or that she cared more for her husband than her daughter, and that she would cover for her husband at her daughter's expense. Finally, the Court held that the jury instruction on facilitation was not erroneous because the facilitation statute does not require reference to a specific act of conduct.

VI. FAMILY LAW

A. ***Robison v. Pinto***

2019-CA-000435 09/27/2019 2019 WL 4724761

Opinion by Judge Spalding; Judges Dixon and Maze concurred.

Grandparents appealed a decision of the circuit court determining that the most recent revisions to the Kentucky grandparent visitation statute, KRS 405.021(1)(b) and (c), were unconstitutional because they interfered with parents' rights by creating a rebuttable presumption that visitation is in the child's best interest under certain circumstances. The Court of Appeals reversed and remanded, holding that the provisions were constitutional because they only applied in situations where the grandparent sought visitation after the death of the parent of the child and further required the grandparent to establish a viable pre-existing relationship with the child prior to that parent's death. The Court held that the statutory procedures requiring the grandparent to prove a viable and pre-existing relationship with the subject child provided a sufficient safeguard to protect the constitutional presumption that a fit parent acts in the best interest of the child. Therefore, the decision of the circuit court to hold KRS 405.021(1)(b) and (c) unconstitutional was held to be erroneous and the matter was remanded for a hearing.

VII. TORTS

A. ***Johnson v. Basil as Next Friend of Johnson***

2017-CA-000986 04/12/2019 2019 WL 1579654 Released for Publication

Opinion by Judge Taylor; Judges Maze and Nickell concurred.

Appellants Donna Johnson and Robert Johnson, Jr., co-administrators for the Estate of Steven Paul Johnson, challenged an order directing motor vehicle insurance proceeds to be distributed *in toto* to Victoria Basil, as guardian and next friend of two minor children, for their claims of loss of parental consortium. After Steven was struck and killed by an automobile, Basil - the mother of his children - filed suit against the driver and the Johnsons' underinsured motorist carrier for loss of parental consortium. The Johnsons - Steven's parents - subsequently filed a separate suit to assert a wrongful death claim. Viewing the available motor vehicle insurance proceeds as insufficient to fully compensate the parties' claims, Basil argued that the insurance proceeds should be allocated to the loss of parental consortium claims to the exclusion of the wrongful death claim. Basil further pointed out that funeral expenses, administrative costs, and recovery costs are not deducted from the insurance proceeds in a loss of parental consortium claim. The circuit court ultimately agreed with Basil and ordered the insurance proceeds to be distributed *in toto* as compensation for the loss of parental consortium claims. The Court of Appeals concluded that this was error and reversed. The Court held that the claims of loss of consortium were derivative of the wrongful death claim insofar as both derived from the same injury - the wrongful death of Steven. While there were multiple parties and claims, the minor children were the only beneficiaries. Under these unique circumstances, the Court concluded that the claims of loss of consortium were merely an item of damage recoverable for the wrongful death of Steven. Consequently, all recoverable damages had to be distributed in accord with the requirements of KRS 411.130. Therefore, the Court reversed and remanded for the circuit court to disburse the insurance proceeds to the minor children after payment of funeral expenses, costs of administration, and costs of recovery per KRS 411.130.