

Commonwealth of Kentucky
Supreme Court
No. 2013-SC-000120

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Ohio Circuit Court
Hon. Ronnie C. Dortch, Judge
Indictment No. 07-CR-00033

CHARLES FARMER

APPELLEE

Reply Brief for Commonwealth

Submitted by,

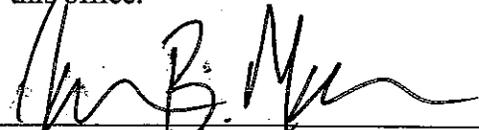
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CERTIFICATE OF SERVICE

I certify that the record on appeal has not been checked out from the Clerk of this Court and that a copy of the Reply Brief for Commonwealth has been this 29th day of July, 2013, mailed via U.S. mail to Hon. Vernon Miniard, Jr., Judge, Russell Circuit Court, 109 N. Main St., P. O. Box 530, Jamestown, Ky. 42629; and to Hon. R. Burly McCoy, and Hon. Nick Nicholson, Stoll Keenon Ogden PLLC, 300 W. Vine St., Suite 2100, Lexington, Ky. 40507 and Hon. Ralph E. Meczyk and Hon. Robert White, Meczyk and Assoc., 111 W. Washington St., Ste. 1025, Chicago, IL 60602, counsels for Appellee; and via electronic mail to Hon. Matthew Leverage, Commonwealth's Attorney. I further certify that the record was not checked out by this office.



Jason B. Moore
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PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's brief. Any failure to respond to any particular argument should not be taken as a waiver of an issue or argument.

ARGUMENT

I.

MERELY BECAUSE A PRE-TRIAL ORDER ADJUDICATES A CLAIM OF "IMMUNITY", SUCH AN ORDER IS NOT AUTOMATICALLY REVIEWABLE BY INTERLOCUTORY APPEAL

In his brief, appellee argues the Court of Appeals properly found that it had jurisdiction to consider his interlocutory appeal because it arises from the denial of a claim of immunity which he appears to argue is reviewable by interlocutory appeal under any circumstance. He further asserts that, even if not reviewable under any circumstance, the order in this matter is reviewable despite not being final because it satisfies the elements of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Appellee's arguments lack merit, however.

A. Not all pre-trial denials of immunity claims are subject to interlocutory appeal under *Cohen*

As set forth in the Commonwealth's opening brief, in *Cohen*, the United States Supreme Court created what has become known as the

“collateral order” doctrine as an exception to the rule that appeals are taken only from final judgments or orders. The Court made clear, however, that the doctrine was only applicable to “that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Id.* at 546. Later, the Court restated that, for review under *Cohen*, the order must “[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) (brackets original).

In *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), the Court held the collateral order doctrine was applicable to allow an immediate appeal of a denial of absolute Presidential immunity, and in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Court held the doctrine was applicable when a public official was asserting a defense of “qualified immunity.” This Court then relied upon the holdings of these cases in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), and held that the Court of Appeals properly had jurisdiction to consider an interlocutory appeal from a circuit court’s denial of the school board’s motion to dismiss the complaint or for

summary judgment on the basis it was “absolutely immune from damages claims brought in court, as opposed to the Board of Claims.” *Id.* at 885.

From these cases, appellee draws the conclusion that “because the order appealed-from is an order denying immunity, the case falls within the *Cohen* doctrine.” Appellee Br., p. 11. Appellee’s conclusion paints the holdings of these cases with too broad of a brush. In all of the cases above, the defendant making the claim of immunity was a public official. Appellee cites to no cases wherein an interlocutory appeal has been allowed on the basis of a claim of immunity made by a non-public official.¹ In fact, in *Will v. Hallock*, 546 U.S. 345, 353 (2006), the Court reviewed the cases wherein it had found the collateral order doctrine applicable, and concluded that, in addition to violating a claimed right not to stand trial, an order must “imperil a substantial *public* interest” in order to fall within the parameters of the collateral order doctrine.

¹ Appellee attempts to diminish the fact that interlocutory appeals from the denial of immunity claims have only been granted when the claim was raised by a public official (*Mitchell* - qualified official immunity; *Nixon* - absolute Presidential immunity) or involved a claim of sovereign immunity (*Prater; Puerto Rico Aqueduct and Sewer Authority*) by asserting “[i]nterlocutory appellate jurisdiction has been extended to individuals in criminal cases.” In support of that assertion, appellee cites to *Abney v. United States*, 431 U.S. 651 (1977). Of course, as noted in the Commonwealth’s opening brief, *Abney* does not involve a claim of immunity from original prosecution, but rather involves a claimed violation of the right to be free from double jeopardy. In other words, *Abney* does not involve a claimed right to be free from a first trial, but a second one.

The Sixth Circuit, in *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944, 948-949 (6th Cir. 2006), relied upon this requirement of a “substantial public interest” in concluding that an order denying a motion to dismiss on the basis of absolute witness immunity was not immediately appealable under the collateral order doctrine. In doing so, the court rejected the contention that in *Will* the Supreme Court had stated “that denials of all forms of absolute immunity, regardless of the function that the invoking litigant served, were immediately appealable.” *Id.* at 948. The court in *Kelly* noted that, “[a]bsolute witness immunity strengthens the substantial public interest of having witnesses come forward and testify truthfully, but lack of interlocutory appeal from denials of witness immunity does not ‘imperil [this] substantial public interest.’” *Id.* at 949 (quoting *Will*, 546 U.S. at 353) (internal citation omitted; alteration original).

In this matter, immunity under KRS 503.085 serves no *public* interest whatsoever. The public interest, to the contrary, is in the functioning of the constitutionally mandated system of resolving criminal charges - trial by jury. The interest served by immunity under KRS 503.085 is entirely personal to the defendant. Given that there is no *public* interest served or strengthened by KRS 503.085 immunity, it goes without saying that lack of an interlocutory appeal from the denial of such a claim does not “imperil” a substantial public interest. As with a claim of witness immunity,

the denial of a claim of immunity under KRS 503.085 should not be subject to an interlocutory appeal under *Cohen*.

B. The denial of a claim of immunity under KRS 503.085 does not satisfy the requirements for review under the collateral order doctrine.

As set forth above, under *Cohen*, the Supreme Court has established three requirements that must be met before an order becomes subject to interlocutory appellate review under the collateral order doctrine. In *Johnson v. Jones*, 515 U.S. 304 (1995), the Court discussed how those elements “help qualify for immediate appeal classes of orders in which the considerations that favor immediate appeal seem comparatively strong and those that disfavor such appeals seem comparatively weak.” *Id.* at 311. The Court further stated:

The requirement that the issue underlying the order be “‘effectively unreviewable’” later on, for example, means that failure to review immediately will cause significant harm. The requirement that the district court’s order “conclusively determine” the question means that appellate review is likely needed to avoid that harm. The requirement that the matter be separate from the merits of the action itself means that review *now* is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending).

Id. (italics original; internal citations omitted).

The Court in *Johnson*, the determined that the “portion of a district court’s summary judgment order that, though entered in a ‘qualified

immunity' case, determines only a question of 'evidence sufficiency,' *i.e.* which facts a party may, or may not be able to prove at trial" was not reviewable by an interlocutory appeal under *Cohen*. *Id.* at 313. In so holding, the Court recognized that its decision in *Mitchell*, *supra*, "explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'geniune,' but the purely legal issue what law was 'clearly established.'" *Id.* Further, the Court stated that it was difficult to find a "separate" question when "a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact." *Id.* at 314.

Finally, the Court stated as follows:

[T]he close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about by the trial testimony) to require it, once again to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision.

Id. at 316-317. The Court's concern here is particularly relevant to the issue in this matter.

Appellee seeks review of a trial court's determination that probable cause existed to believe his use of force was unlawful. By its nature, this is a very fact sensitive determination that is closely connected to the factual matter that will be contested at trial. If interlocutory appeal is permitted following the denial of an immunity claim, in the many instances in which the decision to deny immunity is upheld, the appellate court will then be faced with nearly the same factual issue again on direct appeal (assuming the defendant is convicted) when the defendant claims the evidence was insufficient to support his conviction beyond a reasonable doubt or that he was entitled to a directed verdict on the basis of his self-defense claim.

Denying interlocutory review under the collateral order doctrine in this matter is appropriate. The trial court's order denying immunity essentially determined nothing more than that the pre-trial record sets forth a "triable" issue of fact an issue that is not reviewable under the collateral order doctrine as limited in *Johnson*. Although denied immunity from prosecution, appellee still has the full panoply of rights to exercise against the prosecution and the ability to raise his claims of self-defense and defense of property before a jury of his peers. Then, if convicted, this Court (or the Court of Appeals) can review any issue regarding evidence sufficiency under the established precedents with a fully developed record.

CONCLUSION

Based upon the foregoing, the Court must reverse the opinion and order rendered by the Court of Appeals finding that it has jurisdiction to consider appellee's interlocutory appeal in this matter and remand this matter to that Court for entry of an order dismissing appellee's appeal. Neither Section 111 of the Kentucky Constitution, KRS 22A.020, nor KRS 503.085 confer jurisdiction on that Court to consider such an interlocutory appeal. Further, the order denying appellee's claim of immunity does not meet the conditions required for immediate review under the collateral order doctrine.

Respectfully submitted,

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