

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

I. CRIMINAL LAW

A. KENNETH LAMONT BOONE JR. V. COMMONWEALTH OF KENTUCKY

[2019-CA-0966](#) 08/13/2021 2021 WL 3572864

Opinion by THOMPSON, KELLY; ACREE, J. (CONCURS) AND DIXON, J. (CONCURS)

A jury found Kenneth Lamont Boone, Jr. guilty of theft of identity and being a persistent felony offender in the first degree (PFO I). The jury recommended a one-year sentence, enhanced to ten years due to the PFO I conviction. After the Fayette Circuit Court sentenced Boone in accordance with the jury's recommendation, he filed this appeal challenging the trial court's decisions to deny his two suppression motions arising from a February 2016 traffic stop and to decline to give him a requested lesser-included offense instruction. In his first motion to suppress, Boone argued the traffic stop was improperly extended because the officer diverted working on the citation to do other things, including looking up the criminal history of Boone and his passenger, calling the canine unit, explaining the situation to another officer upon his arrival, and assisting in removing Boone and his passenger from the vehicle prior to the dog sniff. On appeal, the Court agreed that the time that elapsed during his detention for a minor traffic violation was excessive; however, the Court affirmed the trial court's denial of the motion to suppress on the alternative ground that the detective had reasonable suspicion to detain Boone and his passenger. In his second motion to suppress, Boone argued that it was improper for the officers to search his person after no drugs were found in the vehicle. The Court found no error in the trial court's denial of this motion to suppress because it is logical and proper to search the driver who was occupying the vehicle shortly before the sniff, as the dog's alert provides probable cause for such a search and because the existence of the prior driver did not eliminate the "fair probability" that the drugs to which the dog alerted were on Boone's person. The Court agreed with Boone that the trial court erred by failing to give a jury instruction on giving a peace officer false identifying information as a lesser-included offense of theft of identity. Theft of identity and giving false information to a police officer are so remarkably similar under these facts that the trial court should have submitted both charges to the jury, which then has the discretion to determine which (if either) best applies to the defendant's conduct. Because Boone was entitled to the requested lesser-included offense instruction, the Court reversed Boone's conviction for theft of identity.

B. JAMES RIDENOUR V. COMMONWEALTH OF KENTUCKY

[2020-CA-1052](#) 08/06/2021 2021 WL 3437964

Opinion by ACREE, GLENN E.; CALDWELL, J. (CONCURS) AND LAMBERT, J. (CONCURS)

A criminal investigation led to charges against Ridenour for stealing auto parts with a value of \$20,129.45. He was charged with theft by unlawful taking over \$10,000, a Class C felony. He agreed to plead guilty to theft by unlawful taking less than \$10,000, a Class D felony. The plea agreement required “[r]estitution to be set at final sentencing.” Evidence that the value of the stolen goods was \$20,129.45 was included in the discovery file the Commonwealth gave Ridenour before entering into the plea agreement. On appeal, Ridenour argued his plea agreement was unenforceable because it did not meet his reasonable expectation that, by pleading to the Class D felony, his restitution obligation was capped at \$10,000. He did not ask the Court to set aside the plea agreement. Instead, he requested the Court to enforce the agreement in accordance with his expectation. Finding the plea agreement to be an enforceable contract and applying contract interpretation principles, the Court rejected Ridenour’s argument, holding Ridenour received the benefit of his bargain. The Court further held that the restitution hearing complied with the requirements of due process. The Court was not persuaded by Ridenour’s argument that *Commonwealth v. Morseman*, 379 S.W.3d 144 (Ky. 2012) compelled the outcome he sought. Explaining that Ridenour misinterpreted *Morseman*, the Court cited *Hughey v. United States*, 495 U.S. 411 (1990) for the proposition that restitution is not measured by the specific charge to which he pleaded. Rather, it is the loss caused by the conduct underlying the offense of conviction that establishes the outer limits of a restitution order.

C. JAMES K. BURCHFIELD V. COMMONWEALTH OF KENTUCKY

[2020-CA-0644](#) 08/20/2021 2021 WL 3698868

Opinion by KRAMER, JOY A.; COMBS, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

James Keith Burchfield appealed a final judgment of the Bell Circuit Court sentencing him consistently with a guilty plea he entered in this criminal matter after denying Burchfield’s motion to withdraw his plea. The issue on appeal involved Burchfield’s contention that he was not provided exculpatory evidence relating to one of the offenses to which he pled guilty until shortly after he had already moved to enter his guilty plea and shortly before he was sentenced. He argued his counsel was ineffective for failing to inform him about the evidence in question (consisting of the results of a blood test that is not part of the record on appeal); failing to adequately explain the substance of his plea to him; and, primarily, for failing to advocate for him while he endeavored to withdraw his guilty plea. Upon review, the Court of Appeals agreed Burchfield’s counsel had at best stood silent and refused to act upon his client’s decision to withdraw his guilty plea. Consequently, Burchfield’s right to counsel at a critical stage in the proceedings had been violated. The record, for example, provided no indication Burchfield’s counsel communicated with him about the underpinnings of any motion he wished to file to withdraw his guilty plea or that Burchfield’s counsel filed any such motion on Burchfield’s behalf, despite having promised to do so on the record. Moreover, during the hearing on Burchfield’s motion, Burchfield’s counsel did nothing to assist him in arguing his motion or to otherwise advocate his position. Instead, Burchfield’s attorney apparently learned the specifics of Burchfield’s motion for the first time as that hearing progressed. His participation was mostly limited to questioning Burchfield about why Burchfield wished to withdraw his guilty plea and warning Burchfield about the consequences of doing so. Furthermore, during the hearing, rather than advocating that Burchfield’s non-receipt of

discovery served as a basis for withdrawing his client's guilty plea, Burchfield's counsel instead blamed him for not speaking up about it earlier, and he undercut his client's position that a "blood test [that] came back negative" would be particularly convincing evidence in a jury trial. Consistent with *Commonwealth v. Tigue*, 459 S.W.3d 372 (Ky. 2015), the Court of Appeals vacated the trial court's final judgment, but not Burchfield's guilty plea, and remanded for further proceedings as required.

II. WORKERS' COMPENSATION

A. ANGELA R. HUFF INDIVIDUALLY, ET AL. V. SOUTHERN STATES SOMERSET COOPERATIVE, INCORPORATED

[2019-CA-1524](#) 08/13/2021 2021 WL 3572862

Opinion by COMBS, SARA W.; KRAMER, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

David W. Huff was employed by Southern States Cooperative, Inc. ("Southern States"). He was killed on his employer's premises in Harrodsburg while operating a front-end loader, which overturned. His wife, individually, and as executrix of his estate, asserted claims of product liability, breach of warranty, failure to warn, and negligence against various entities. She later filed an amended complaint, alleging Southern States Somerset Cooperative, Incorporated ("Somerset"), which was the original purchaser of the front-end loader, was negligent in maintaining the front-end loader. Somerset filed a motion to dismiss, arguing the claims against it were barred by up-the-ladder immunity under the Kentucky Workers' Compensation Act, KRS Chapter 342. In support of its motion, Somerset stated that Southern States had relationships with sixty member-owned local cooperatives, including Somerset, and those relationships were governed by management agreements. Pursuant to the management agreements, Southern States managed the business affairs of the local cooperatives, providing services including management supervision, training, assistance with local meetings and membership relations, publicity, engineering, marketing, the payments of dividends, and the procurement of supplies and commodities. Southern States also obtained workers' compensation insurance for the local cooperatives. The trial court entered an order granting Somerset's motion, finding that Mr. Huff's employer had secured the payment of workers' compensation benefits and that Somerset met the definition of a "contractor" entitled to up-the-ladder immunity. The Court reversed the trial court based upon the reasoning in *McMillen v. Ford Motor Co.*, No. 3:07-CV-309-S, 2009 WL 5169871 (W.D. Ky. Dec. 20, 2009), which states that Kentucky law limits the up-the-ladder defense to injuries sustained during work performed in the service of the entity seeking to assert the defense. Somerset was not entitled to up-the-ladder immunity because at the time of his death, Mr. Huff was not working for Somerset.

Instead, he was working for his “own and only” employer, Southern States, on his employer’s premises.

B. WASTE MANAGEMENT V. JEFFREY MADDOX ET. AL.

[2020-CA-1492](#) 08/27/2021 2021 WL 3817561

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

In November 2018, Jeffrey Maddox brought a claim for cumulative trauma disability occurring within the scope of his employment as a garbage tipper for Waste Management. The disability manifested following a work-related accident in December 2016. However, he had been treated for back pain going back to 2013, and he continued to work for Waste Management until April 2018. The primary issue before the ALJ concerned the timeliness of his notice of the disability to Waste Management. Maddox has a significant intellectual disability and could not recall being told by a physician that his cumulative trauma was caused by work activities. In addition, his medical records did not specify when he was told the disability was work-related. Nevertheless, the ALJ found that Maddox was most likely told by a physician that his condition was work-related no later than May 2018. The ALJ found that his notice in November 2018 was untimely. The ALJ also determined that the untimely notice was not excused because Maddox understood the obligation to timely report injuries.

On appeal, the Board reversed. The Board found that the ALJ disregarded Maddox’s uncontested testimony and relied on speculation to determine that he had been informed that the cumulative trauma was work-related in May 2018. The Board also found that the ALJ failed to properly consider Maddox’s intellectual disability in considering whether any untimely notice was excused. Consequently, the Board remanded the matter to the ALJ for additional findings in accord with the proper standard of proof.

On Waste Management’s petition for review, the Court of Appeals affirmed in part and reversed in part. Regarding the factual finding concerning when Maddox was informed by a physician that his cumulative trauma was work-related, the Court noted that the ALJ was entitled to draw reasonable inferences from the evidence of record. The Court also pointed out that the ALJ was entitled to disregard Maddox’s uncontested testimony as long as the ALJ gave substantial reasons for doing so. The Court held that the ALJ could draw a reasonable inference that Maddox’s physician informed him that the cumulative trauma was work-related once the physician had recorded that determination in his notes. The Court also held that the ALJ set forth substantial reasons for discounting Maddox’s lack of memory about when he was informed of that determination. As a result, the Court held that the Board improperly substituted its judgment on this factual determination.

However, the Court affirmed the Board’s holding that the ALJ applied an improper standard to determine whether Maddox’s delay in giving notice was excused. The evidence was uncontested that Maddox has a significant intellectual disability, which limits his understanding of common concepts. While Maddox had given timely notice of prior work-related injuries, the Court pointed out the trigger for notice of cumulative trauma may have been beyond Maddox’s comprehension. Consequently, the Court agreed with the Board that the ALJ failed to properly consider the impact of Maddox’s intellectual deficiencies concerning his ability to understand the necessity for giving notice and to understand what his physicians might have told him. As

a result, the Court remanded the matter to the ALJ for a new determination of whether Maddox's failure to provide timely notice to Waste Management was excusable under KRS 342.200.

III. TORTS

A. **CHRIS ARMSTRONG V. THE ESTATE OF STAR IFEACHO BY AND THROUGH THE ADMINISTRATOR OF HIS ESTATE, ET AL. and PEACE IFEACHO INDIVIDUALLY, ET AL. V. CODY BEGLEY IN HIS INDIVIDUAL CAPACITY**

[2020-CA-0435](#), [2020-CA-0436](#)

08/20/2021

2021 WL 3686336

Opinion by CLAYTON, DENISE G.; K. THOMPSON, J. (CONCURS) AND L. THOMPSON, J. (CONCURS)

Star Ifeacho was a sophomore at Paul Laurence Dunbar High School when he attended an after school basketball "open gym." During the open gym, he complained to other students that he was having trouble breathing. He went to the athletic trainer's office to speak to Cody Begley, who was an athletic trainer. As he was leaving Begley's office, Star collapsed. Begley began applying CPR and instructed a student to find a coach. Chris Armstrong, a teacher and the assistant boys' basketball coach, then entered the office and was asked by Begley to remain with him and assist, if necessary. Star was eventually transported to the emergency room but was unable to be revived and passed away. Star's mother, individually, and in her capacity as administrator of Star's estate, filed a negligence action against various coaches and administrators, including Armstrong and Begley, who filed motions for summary judgment on the ground they were entitled to either qualified official immunity or statutory immunity under KRS 411.148 or KRS 311.668. The trial court denied Armstrong's motion and granted Begley's motion. On appeal, the Court determined the trial court erred in denying Armstrong's motion for summary judgment. At issue was whether the language contained in certain protocols imposed a ministerial duty or a discretionary duty upon Armstrong to retrieve an Automated External Defibrillator (AED). The Court concluded it was mandatory and ministerial that certain basic tasks required by the policy be completed; however, the exact manner or timeline for how long these tasks were to be completed was discretionary. The Court reversed the trial court's order denying Armstrong's motion for summary judgment, finding that Armstrong was entitled to qualified official immunity because he made a judgment call when determining it was more appropriate for him to remain with Begley to assist him in any manner requested rather than seeking out an AED when a student at Begley's direction had already left to obtain one. As to Begley, the Court affirmed the trial court's order granting Begley summary on the ground he was entitled to qualified immunity. Although Begley's actions in administering medical care were ministerial, it was not his rendering of medical care that was the basis of the negligence claim. Instead, the claim was based upon Begley's decision-making process in determining how to retrieve the AED in this emergency situation. His decision-making process included instructing others present on how to proceed, assigning the responsibility for retrieving the AED to others, and deciding how long to wait before designating

other individuals to retrieve a different AED. These actions were discretionary in nature, entitling him to qualified immunity.

IV. PUBLIC PROCUREMENT

A. **KENTUCKY RETIREMENT SYSTEMS, BY AND THROUGH THE BOARD OF TRUSTEES OF KENTUCKY RETIREMENT SYSTEMS, ET AL. V. WESTERN KENTUCKY UNIVERSITY**

[2020-CA-0793](#) 08/20/2021 2021 WL 3698856

Opinion by CLAYTON, DENISE G.; DIXON, J. (CONCURS) AND MAZE, J. (CONCURS)

Western Kentucky University (WKU) entered into an agreement with Sodexo Management Inc. (Sodexo) pursuant to which Sodexo would recruit, hire, and supervise employees to provide facilities services to WKU. 148 out of 164 WKU maintenance employees were terminated by WKU but transitioned to employment with Sodexo. Kentucky Retirement Systems (Systems) argued the transitioning employees were required to continue their participation in the Kentucky Employees Retirement System (KERS). WKU disagreed and filed a declaratory judgment action against Systems in Franklin Circuit Court, claiming, among other things, the transitioning employees were not employees of WKU, and it was no longer obligated to remit employer and employee contributions to KRS. The trial court granted WKU summary judgment. On appeal, the Court disagreed with Systems argument that it had exclusive authority to determine who is a qualifying employee and found the trial court had jurisdiction under KRS 418.040 (the Declaratory Judgement Act) to determine if the transitioning employees were still employees of WKU for pension purposes. The Court also determined that although Systems is required to comply with IRS statutes and regulations, its decision to apply the IRS's 20 Factors Test and to not use the clear definition of "employer" in KRS 61.510(6) was erroneous. The Court also rejected Systems' argument that summary judgment was improper because material issues of fact remained. Systems pointed to no facts that would support a finding that WKU retained the power to appoint or select an employee in the maintenance department. The Court also affirmed the trial court's protective order limiting the discovery Systems could take while allowing WKU to take discovery regarding an employee privatization effort at Eastern Kentucky University. Regarding Systems' argument that WKU violated various provisions in KRS Chapter 45A, the Court affirmed the trial court, stating the issue in the case was not whether the parties complied with KRS Chapter 45A, but whether the employees in question remained employees of WKU for purposes of contributing to KERS. Systems also argued that WKU's actions violated KRS 61.520 and KRS 61.522, which require participating departments to collect and remit KERS contributions for their employees. The Court disagreed, stating that neither KRS 61.520 nor KRS 61.552 prevents state agencies from terminating employees, that WKU's decision to privatize its facility maintenance did not hinder any clearly-stated legislative goals, and that WKU's actions were well within its statutory authority. Last, the Court determined the trial court did not err in considering how Systems handled a similar outsourcing contract at another university, as it highlighted the potential arbitrariness that characterized Systems' decision-making regarding WKU's contract with Sodexo.

V. OPEN RECORDS

A. LINCOLN TRAIL GRAIN GROWERS ASSOCIATION, ET AL. V. MEADE COUNTY FISCAL COURT

[2020-CA-0892](#) 08/06/2021 2021 WL 3437971

Opinion by MAZE, IRV; CLAYTON, C.J. (CONCURS) AND DIXON, J. (CONCURS)

From 2014 to 2019, Consolidated Grain and Barge (CGB) operated a grain elevator on riverfront property owned by the Meade County-Brandenburg Industrial Development Authority (Industrial Authority) and leased by Meade County Riverport Authority (Riverport Authority). Beginning in early 2019, the Meade County Fiscal Court (Fiscal Court) and the Industrial Authority engaged in negotiations with Nucor Corporation (Nucor) to build a steel mill on the property. The project required removal of the grain elevator. Eventually, Nucor agreed to pay CGB the sum of \$12 million for the closing and removal of the grain elevator. However, the project required the Riverport Authority to execute the lease termination agreement.

At a special meeting of the Fiscal Court on October 1, 2019, the Fiscal Court voted to replace two members of the Riverport Authority. Immediately following that meeting, the Riverport Authority voted to approve the execution of the lease termination agreement. Thereafter, the Lincoln Trail Grain Growers Association and several individual members (Lincoln Trail) filed an action alleging the actions taken by the Fiscal Court and the Riverport Authority violated the Open Meetings Act. The two former members of the Riverport Authority, Hardesty and Bewley, joined the action, alleging the Fiscal Court's vote to replace them violated the Open Meetings Act and was otherwise without statutory authority.

In lieu of an answer, the Meade County Defendants and Nucor filed a motion to dismiss, arguing that Lincoln Trail lacked constitutional standing to assert the claims. The trial court granted the motion, concluding that none of the plaintiffs, including Hardesty and Bewley, had asserted a concrete interest in the subject matter of the actions by the Fiscal Court or the Riverport Authority. The Court of Appeals reversed, holding the Open Meetings Act grants standing to "any person" to enforce the Act, and the plaintiffs had shown distinct and palpable injuries under the Act to establish constitutional standing.

The question on appeal concerned the application of "constitutional standing," as adopted by the Kentucky Supreme Court in *Commonwealth, Cabinet for Health and Family Services, Department for Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185 (Ky. 2018) and *Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020). In those cases, the Kentucky Supreme Court held that for a party to sue in Kentucky, the initiating party must have the constitutional standing, which is defined by three requirements: (1) injury; (2) causation; and (3) redressability. The Supreme Court concluded the absence of any of the elements precludes a trial court from exercising jurisdiction. The Supreme Court also held the existence of statutory standing does not necessarily confer constitutional standing upon a plaintiff. Rather, a court exercising original jurisdiction must always conduct the constitutional standing analysis.

In applying these elements to this case, the Court of Appeals held that Hardesty and Bewley had clearly alleged an actual and direct injury resulting from the violations of the Open

Meetings Act. They alleged the Fiscal Court's vote to remove and replace them was conducted without proper notice and in violation of the terms of their appointment. The remedy for such violations would be voiding the illegal actions by the Fiscal Court and reinstating them to their positions on the Riverport Authority.

With respect to the Lincoln Trail plaintiffs, the Court of Appeals likewise found constitutional standing. The Court held that the holding in *Sexton* did not abolish the concept of statutory standing. In the case of a statutory cause of action, the legislature must define a concrete interest that is affected by the deprivation of a statutory right. The Court held that the Open Meetings Act does not merely create a procedural right. Rather, it specifies all citizens have a direct interest in public agencies' compliance with the requirements of the Act. The particularized injury arises from the agency's violation of the Act itself, not specifically from the action taken. The Court concluded this injury was sufficiently distinct to establish the injury-in-fact element for constitutional standing.

The Court recognized that the remedy element was more difficult to establish for the Lincoln Trail plaintiffs because Nucor and CGB acted in reasonable reliance upon the lease termination agreement. Because the grain elevator had already been removed and because construction had commenced on Nucor's steel mill, restoration of the prior status quo may be impossible. Even so, the Court noted the Act allows the plaintiffs to recover its attorney fees and costs incurred in bringing the action. The availability of this remedy meets the redressability requirement for constitutional standing. Therefore, the Court vacated the trial court's dismissal of the complaint and remanded the matter for additional proceedings on the merits of the plaintiffs' claims.