PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
JUNE 1, 2021 to JUNE 30, 2021

I. CORRECTIONS

A. ***KENNETH GOBEN VS. KATHLEEN M. KEENEY***

2020-CA-0878 06/04/2021 2021 WL 2274279

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

Prisoner challenged a change in the calculation of his parole eligibility upon his subsequent conviction of a Class B felony for which he was sentenced to life imprisonment as a PFO I offender. The Department of Corrections argued that a person convicted of a Class B felony who is sentenced to life imprisonment based upon being a PFO I must wait twenty years before being first eligible for parole consideration under 501 KAR 1:030§3(1)(e)(4) because they were sentenced to life as if they had committed a Class A felony. In reversing the dismissal of the prisoner's declaratory judgment action by the circuit court, the Court of Appeals held that the appellant was not subject to the twenty-year waiting period for parole eligibility under 501 KAR 1:030§3(1)(e)(4) because he did not commit any of the offenses enumerated therein. In other words, the Court reasoned that the fact that PFO I offenders who commit a Class B felony, even a non-violent one, are sentenced as if they committed a Class A felony does not change the fact that the offender actually only committed a Class B felony. The Court concluded that it was not free to add language to the regulation stating that it applies to persons sentenced as if they committed a Class A felony, when in fact the regulation as written did not provided for that result.

II. CRIMINAL LAW

A. ***PERRY BELL VS. COMMONWEALTH OF KENTUCKY***

2019-CA-1260 06/04/2021 2021 WL 2274313

Opinion by COMBS, SARA W.; K. THOMPSON, J. (CONCURS) AND LAMBERT, J. (DISSENTS AND DOES NOT FILE SEPARATE OPINION)

This is a criminal case in which the defendant had attempted to conceal drug evidence under his thigh and in the passenger-door compartment of a car. He was indicted and tried on several charges, but he appeals only his conviction for tampering with physical evidence. He argues that under the precedent of *Commonwealth v. James*, 586 S.W.3d 717 (Ky. 2019), his furtive act did not constitute the statutory elements of tampering because the evidence at issue was not destroyed, mutilated, or so well concealed as to amount to evasion since it remained readily retrievable and even visible

to plain view when police officers removed him from the car. We agreed that *James* governs and reversed his conviction on the tampering charge.

B. ***CHASITY SHIRLEY VS. COMMONWEALTH OF KENTUCKY***

2020-CA-0373 06/04/2021 2021 WL 2272814

Opinion by THOMPSON, KELLY; CLAYTON, C.J. (CONCURS) AND L. THOMPSON, J. (DISSENTS AND FILES SEPARATE OPINION)

Shoplifting by scanning the wrong bar code at a self-checkout register does not violate the "effective consent" given by a store for all customers to use these registers. Therefore, such an action cannot constitute unlawful access to a computer in the first degree pursuant to KRS 434.845.

III. IMMUNITY

A. ***G. KEITH GAMBREL ET. AL. VS. PAUL CROUSHORE, IN HIS CAPACITY AS NEXT FRIEND OF EACH SOPHIA VILLAREAL, A MINOR AND SPENCER VILLAREAL, A MINOR***

2020-CA-0881 06/25/2021 2021 WL 2614496

Opinion by ACREE, GLENN; DIXON, J. (CONCURS) AND MCNEILL, J. (CONCURS)

Through their Next Friend, two minor children brought a legal malpractice action against their Guardian *ad litem* ("GAL") appointed in an underlying custody dispute between the children's parents. The GAL moved to dismiss the complaint pursuant to CR 12.02(f) for failure to state a claim upon which relief may be granted, claiming absolute quasi-judicial immunity. The circuit court denied the motion holding immunity was not available to the GAL because his function to represent the children was "vastly different" from that of the family court. In this case of first impression, the Court of Appeals reversed the circuit court. The Court held the court-appointed GAL was entitled to absolute quasi-judicial immunity and noted, among other things, that the GAL's duty pursuant to KRS 387.305 to represent the children's best interest is precisely the function of the court that appointed the GAL; a GAL's satisfaction of that statutory duty is a function integral to the judicial process.

IV. MUNICIPAL EMPLOYEES AND OFFICERS

A. ***MICHAEL SCHELL VS. TROY L. YOUNG, ET. AL.***
ROBERT T. HUME VS. TROY L. YOUNG, ET. AL.

2020-CA-0282, 2020-CA-0300 06/04/2021 2021 WL 2283865

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

The mayor of Lawrenceburg, Kentucky terminated without cause the employment of the Lawrenceburg Chief of Police (Schell) and the Lawrenceburg City Clerk (Hume). Schell and Hume brought separate suits contesting their terminations in the Anderson Circuit Court. The circuit court dismissed each case for failure to state viable claims upon which relief may be granted. The Court of Appeals reversed in part, reasoning that because Lawrenceburg city ordinances gave its Chief of Police and City Clerk two-year terms, the holders of those offices were exempt from the mayor's otherwise broad discretionary ability to terminate city employees. Despite the Kentucky Supreme Court's holding in *St. Luke Hospital, Inc. v. Straub*, 354 S.W.3d 529 (Ky. 2011) that KRS 446.070 does not authorize a cause of action for violations of municipal ordinances because ordinances are not statutes, the Court held that private citizens may still seek declaratory relief under KRS 418.040 and 418.045 for violations of municipal ordinances. Thus, the circuit court erred to the extent that it dismissed Schell's and Hume's declaratory judgment claims based upon an erroneous conclusion that no private right of action may *ever lie* for alleged violations of ordinances. However, the Court of Appeals affirmed in part because some of the other claims brought by Schell and Hume were not viable.

V. WORKERS' COMPENSATION

A. ***TRACTOR SUPPLY COMPANY VS. PATRICIA WELLS, ET. AL.***

2021-CA-0296 06/25/2021 2021 WL 2614063

Opinion by THOMPSON, LARRY E; CALDWELL, J. (CONCURS) AND DIXON, J. (CONCURS)

The Court of Appeals affirmed an award of permanent partial disability benefits. The Court also held that the administrative law judge in this case did not err when it awarded Patricia Wells the three-multiplier found in Kentucky Revised Statutes (KRS) 342.730(1)(c)1. The ALJ held that because Ms. Wells could not return to the type of work she performed before her workplace injury, she was entitled to the three-multiplier. Tractor Supply argued that she wasn't entitled to the three-multiplier because she was later fired for misconduct. Tractor Supply relied on the holding in *Livingood v. Transfreight, LLC*, 467 S.W.3d 249 (Ky. 2015), which stated that an employee who is terminated for "conduct shown to have been an intentional, deliberate action with a

reckless disregard of the consequences either to himself or to another[,]" is not entitled to the two-multiplier found in KRS 342.730(1)(c)2. The Court in this case determined that the holding in *Livingood* did not apply to the three-multiplier. The Court concluded that the two-multiplier only applied when an employee left his or her employment and restricting the multiplier when an employee is terminated for reckless misconduct is reasonable. The Court further held that the three-multiplier only concerns the physical ability to return to the type of work done pre-injury and has nothing to do with an employee leaving employment; therefore, an employee's termination for misconduct is irrelevant.