

PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
NOVEMBER 1, 2015 to NOVEMBER 30, 2015

I. CONVERSION

A. Watts v. Henry

[2013-CA-001729](#) 11/13/2015 2015 WL 7059486

Opinion by Judge Thompson; Judges Combs and Stumbo concurred. In an appeal from a final judgment following a jury trial on conversion and denial of a motion for a judgment notwithstanding the verdict, the Court of Appeals affirmed. This case concerned Son's alleged conversion of the proceeds of a \$100,000 certified check taken from his elderly mother (Mother). \$81,000 of this amount was used by appellant, a realtor, to purchase a house in his own name; Son then lived in the house. The proof at trial was made difficult by the prior deaths of both Son and Mother and questions about whether and what type of gift Mother may have made to Son and when Mother became incompetent to make a gift. The Court of Appeals determined the two-year limitation period of KRS 413.125 applied to the conversion claim and was tolled by the adjudication of Mother's disability in 2008 until her death. The Court further determined that a conspiracy between appellant and Son did not need to be established to prove conversion and the jury instructions did not need to contain an interrogatory on conversion. The Court affirmed the damage award (which was for less than the amount of the check) based on evidence appellant converted only a portion of the check. The Court also held that while some hearsay evidence concerning Mother and Son's statements of memory and belief were improperly admitted under KRS 803(3), other statements they made were properly admissible as to their then-existing states of mind regarding Mother's plans to buy and move into the house and Son's fear that appellant would steal the house from him. Therefore, in light of all of the admissible evidence, which included very suspicious circumstances (including appellant depositing the check in his real estate escrow account and then using proceeds from it to purchase the house for himself), the admission of some improper statements was harmless. The Court also held that expert opinion evidence that Mother was disabled in 2006, where there was a contradictory finding by the jury during a disability trial, was not wrongfully admitted where this information was relevant, the jury was fully informed about the outcome in the

disability trial, and the burdens differed in each trial. The Court also affirmed the punitive damage award, determining the punitive damage instructions were proper.

II. CORRECTIONS

A. *Cole v. Warren County*

[2014-CA-000778](#) 11/13/2015 2015 WL 7052758

Opinion by Judge VanMeter; Judges Maze and Nickell concurred. On review from an order granting summary judgment in a case brought by former prisoners of the Warren County Jail against Warren County and the South Central Bank of Bowling Green, Inc., the Court of Appeals affirmed in part, reversed in part, and remanded. The Court first held that the circuit court properly interpreted KRS 441.265 - under which county jails are permitted to confiscate cash and checks belonging to prisoners at booking, deposit and retain those proceeds, and automatically deduct required fees without an order of a sentencing court. The Court agreed with the circuit court that KRS 441.265 did not violate the appellant prisoners' due process rights since they were never truly deprived of their property. All funds confiscated from an inmate were used to pay required jail fees, and the remainder was kept in an inmate account at a local bank for the inmate's use at the jail commissary. Furthermore, the inmates were given proper notice of the jail's rules and grievance procedures and chose not to avail themselves of those procedures. Next, the Court held that the bank at which the Warren County Jail was depositing the prisoners' unendorsed checks was not liable for conversion because the jail constituted a "person entitled to enforce" the checks for purposes of the Uniform Commercial Code. Specifically, the Court held that the jail becomes a "nonholder in possession of the instrument who has the rights of a holder" under KRS 355.3-301(2) when the jail legally acquires the inmate's rights pursuant to KRS 441.265. Because the jail is entitled to enforce the inmates' unendorsed checks, the bank cannot be liable for accepting deposits of the checks. Therefore, the circuit court's order enjoining the bank from accepting future deposits was reversed. Lastly, the Court held that the appellant prisoners were not entitled to any monetary damages since the bank was not liable to them for conversion. Since the appellant prisoners' claims lacked legal merit, the Court affirmed the circuit court's order denying the appellants class certification.

III. CRIMINAL LAW

A. *Burdette v. Commonwealth*

[2014-CA-001909](#) 11/06/2015 2015 WL 6760124 DR Pending

Opinion by Judge Taylor; Judges Maze and Stumbo concurred. Following a conditional guilty plea entered after the denial of her motion to suppress, appellant was convicted of theft by unlawful taking under \$500 and promoting contraband in the first degree. On appeal, appellant argued that the arresting officer should have issued a citation pursuant to KRS 431.015 rather than arrest her for the misdemeanor charge of shoplifting under \$500. Appellant contended that because the arrest was unlawful, the evidence seized from her purse at the department store and from her person at the detention center should be suppressed. The Court of Appeals rejected this argument and affirmed, holding that when an individual has committed larceny in a retail or wholesale store, a police officer may effectuate an arrest of such individual under KRS 433.236, which governs the detention and arrest of shoplifting suspects. Because KRS 433.236 is a more specific statute than KRS 431.015, it is controlling in cases of shoplifting.

B. Embry v. Commonwealth

[2014-CA-001666](#) 11/13/2015 2015 WL 7051109

Opinion by Judge Nickell; Judges Dixon and Taylor concurred. Appellant admitted to engaging in sexual relations with a minor over a period of time. He pled guilty to three felony sex crimes and received a sentence of three concurrent five-year terms for which he was shock probated after serving just ninety days. Under KRS 17.520(2)(a)(4), being convicted of two felonies involving a minor results in mandatory lifetime registration as a sex offender. At sentencing, and again at a subsequent shock probation hearing, the circuit court advised appellant he was subject to lifetime registration, which appellant neither balked at nor questioned. Years after the plea had been entered, the sentence imposed, and a portion served and probated, appellant filed an RCr 11.42 motion alleging ineffective assistance of counsel because his attorney had supposedly told him he would have to register for just ten years. Appellant claimed that had he known lifetime registration was required, he would not have pled guilty and would have demanded trial. Despite an evidentiary hearing being scheduled by the circuit court on its own motion on six different dates, no evidence was ever heard, leaving the only basis on which the court could rule the existing record - which was devoid of any proof of defense counsel's actual advice on the plea - and the motion to vacate, which both appellant and post-conviction counsel signed. The circuit court denied the RCr 11.42 motion, finding: (1) that a rational person would not have rejected the Commonwealth's guilty plea offer; (2) due to the passage of time that had occurred, the alleged error was not well taken; and (3) appellant never proved his contention. The Court of Appeals affirmed, holding that a movant seeking RCr 11.42 relief must offer some proof of his claims to justify relief; bare allegations in the motion will not justify granting the extraordinary relief afforded by the rule. The Court further held that flaws in trial counsel's advice may be cured by the circuit court's provision of accurate information, and that any failure to advise appellant of the lifetime registration requirement for a sex offender who pleads guilty to two or more felonies against a minor does not constitute ineffective assistance of counsel because the registration requirement is nonpunitive and designed to protect the public.

C. *Wigginton v. Commonwealth*

[2013-CA-000931](#) 11/06/2015 2015 WL 6760190 DR Pending

Opinion by Judge Kramer; Judges Dixon and J. Lambert concurred. After entering a conditional guilty plea to reckless homicide, appellant appealed the denial of her motion to dismiss, asserting that the Commonwealth failed to establish probable cause that her use of deadly force against her former spouse was unlawful and that she was immune from prosecution pursuant to KRS 503.085. The record indicated that the deceased had over a decade-long history of alcohol-induced intimidation and domestic violence. The acts included, but were not limited to, multiple threats that the deceased would kill appellant; the deceased shooting at appellant with a gun; the deceased threatening to kill appellant with a screwdriver; and the deceased setting a car on fire with appellant in it. On the night of his death, the deceased was again intoxicated and he had threatened to kill both appellant and her mother over the course of several hours. Given the facts of the case, the Court of Appeals reversed the trial court's denial of appellant's motion to dismiss, holding that the Commonwealth had not met its burden to establish probable cause that appellant's use of deadly force was not legally justifiable.

IV. CUSTODY

A. *Jones-Swan v. Luther*

[2015-CA-000133](#) 11/20/2015 2015 WL 7348959

Opinion by Judge Jones; Judges D. Lambert and Thompson concurred. Appellants challenged an order overruling their petition to be declared *de facto* custodians of two minor children born to appellees. The Court of Appeals first agreed with appellants that the circuit court improperly denied their petition on the basis that they did not have physical custody of the children at the time they filed their petition. KRS 403.270 does not require a *de facto* custodian petitioner to have physical possession of the child at the time the motion is filed so long as the petitioner can establish that the child resided with him/her for the required period of time, and that during such time he/she was the primary caregiver for, and financial supporter of, the child. Ultimately, however, the Court affirmed the circuit court's decision. The Court held that appellants could not include, in determining whether the children resided with them for the statutorily-required time, the periods during which appellees were seeking custody of the children as part of their dissolution action and in a separate EPO proceeding. *See* KRS 403.270(1)(a).

B. Lambert v. Lambert

[2015-CA-000584](#) 11/13/2015 2015 WL 7050748

Opinion by Judge VanMeter; Judges Combs and D. Lambert concurred. On review from an order denying a mother's motion to alter, amend, or vacate a judgment granting custody of her two children to their maternal grandfather, the Court of Appeals affirmed in part, reversed in part, and remanded. Pursuant to KRS 403.822, the Court determined that the circuit court had jurisdiction to hear the child custody petition because Kentucky qualified as the children's home state per KRS 403.800(7), and the grandfather had standing to bring the custody action since he qualified as a "person acting as a parent" as defined in KRS 403.800(13). The Court noted that under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), *de facto* custodian status is no longer necessary for a nonparent to have standing to bring a child custody petition. Next, the Court held that the circuit court properly entered a custody decree in favor of the grandfather, despite the fact that the mother had yet to put on evidence, when the mother appeared intoxicated in court, failed a drug screen, and failed to object to the court's resulting decree. The evidence presented by the grandfather proved by clear and convincing evidence that the mother engaged in conduct similar to activity that could result in the termination of parental rights by the state, satisfying the standard for a nonparent seeking custody under the UCCJEA. *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010). The admission of hearsay evidence concerning a Pennsylvania Child Protective Services investigation of the mother was held to be harmless error, and taking judicial notice of the record from the district court dependency, abuse, and neglect proceedings against the mother was deemed appropriate. Lastly, the Court reversed the circuit court's imputation of minimum wage to the mother for child support purposes. Since at the time of trial the mother was caring for her two other children under the age of three, who were not subject to this custody action, KRS 403.212(2)(d) prohibited the court from imputing income to her. The Court remanded with orders to enter a child support order reflecting the mother's income as zero.

V. EMPLOYMENT

A. *Hicks v. Kentucky Unemployment Insurance Commission*

[2014-CA-001061](#) 11/20/2015 2015 WL 7351398

Opinion by Judge Jones; Judge Stumbo concurred; Judge Taylor concurred in result only. Appellant's employment was terminated after she was unable to return to in-office, full-time employment after exhausting her Family Medical Leave Act benefits while undergoing breast cancer treatment. Appellant subsequently filed for unemployment benefits. The Kentucky Unemployment Insurance Commission determined that appellant was not entitled to unemployment benefits because she had left her employment voluntarily due to a health condition. After exhausting her administrative remedies, appellant appealed to the circuit court. The circuit court affirmed the denial. The Court of Appeals held that appellant had demonstrated that she desired to remain employed and was willing to work with accommodations until she was medically cleared to return to work in the office. The Court further noted that while appellant's employer had a right to terminate her, the employment choice was made by the employer - appellant did not voluntarily quit. Accordingly, the Court reversed the circuit court and held that appellant was entitled to unemployment benefits under KRS 341.370(1)(c).

VI. IMMUNITY

A. *Parking Authority of River City, Inc. v. Bridgefield Casualty Insurance Company*

[2014-CA-001610](#) 11/06/2015 2015 WL 6761026

Opinion by Judge Dixon; Judges D. Lambert and Thompson concurred. The Court of Appeals affirmed an order of the Jefferson Circuit Court denying PARC's motion to dismiss and finding that it was not entitled to immunity in a personal injury lawsuit brought by an individual injured while on PARC's premises. The Court analogized the facts to those presented in *Transit Authority of River City v. Bibelhauser*, 432 S.W.3d 171 (Ky. App. 2013), wherein another panel addressed the issue of whether TARC was entitled to immunity from an underlying negligence action filed by an individual injured when he was struck by a TARC bus. The Court compared the statutes governing PARC - KRS 67A.914 and KRS 67A.920 - with those governing TARC - KRS 67C.101(2)(e) and KRS 96A.020 - and concluded that the legislative language and intent is the same in both. The Court held that like TARC, PARC's authority and actions are more corporate than governmental; thus, it is not entitled to sovereign immunity. Further, although PARC met its burden of showing that it qualifies as a government entity as it is an agency of Louisville Metro (which is immune from suit), it cannot demonstrate that it fulfills a function integral to state government. Thus, it also does not meet the second prong of the test set forth in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), and is not immune from liability.

VII. PROPERTY

A. *Paisley v. Talley*

[2014-CA-000590](#) 11/13/2015 2015 WL 7051307 Rehearing Pending

Opinion by Judge Stumbo; Judges Clayton and Kramer concurred. The Court of Appeals reversed and remanded an order which found that a couple who were cohabitating, but unmarried, should sell the property they held as joint tenants with right of survivorship and divide the proceeds equally. The Court noted that appellant had contributed more funds to the property in the form of mortgage payments and insurance; therefore, as a joint tenant, he was entitled to be proportionately reimbursed for the mortgage payments and other expenses. The Court further noted that an agreement between the joint tenants for this type of reimbursement is not required.

B. *Putnam & Sons, LLC v. Paducah Independent School District*

[2014-CA-001782](#) 11/20/2015 2015 WL 7351393

Opinion by Judge Jones; Judges D. Lambert and Thompson concurred. In a condemnation action brought under Kentucky's Eminent Domain Act, the parties disputed the amount of just compensation owed to the property owner for the taking. Following a bench trial, the circuit court awarded the property owner \$115,000. The Court of Appeals held that the method employed by the circuit court to determine just compensation was incorrect and reversed and remanded for further proceedings. On remand, the Court directed the circuit court to first determine whether the subject property should be valued separately or as an integral part of the property owner's three-tract holding. In so doing, the circuit court was further directed to consider the ownership, location, and best use of the property, remembering that current use is not dispositive of the use issue. If the circuit court determined that the subject property is unified with the remaining property, it should use the "before and after" method of valuation. The "before" value, however, must be based on the fair market value immediately prior to the taking. If the circuit court rejected the unity approach, it should value the property as a standalone piece of real estate. The Court of Appeals emphasized that "fair market value" meant the fair market value of the parcel at the time of the taking.