PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
OCTOBER 1, 2024 to OCTOBER 31, 2024

Note to practitioners: These are the Opinions designated for publication by the Kentucky Court of Appeals for the specified time period. Practitioners should Shephardize all case law for subsequent history prior to citing it.

I. CRIMINAL LAW

A. CORNETT v. COMMONWEALTH OF KENTUCKY (Ky. App. 2024).

2023-CA-0680-MR 10/11/2024 2024 WL 4469176

Opinion Affirming by ACREE, JUDGE; EASTON, J. (CONCURS AND FILES SEPARATE OPINION) and GOODWINE, J. (CONCURS)
DISCRETIONARY REVIEW GRANTED 03/12/2025

Before a jury convicted Cornett of first-degree possession of a controlled substance, the circuit court denied his motion for a directed verdict. Cornett argued that although he was in possession of lysergic acid diethylamide (LSD), he thought he bought and was in possession of (unprescribed) Suboxone. He argues that because he did not know he was in possession of LSD, the Commonwealth failed to satisfy the "knowledge" element of the crime and, therefore, the circuit court should have directed an acquittal. The Court of Appeals disagreed. Examining the applicable statute, KRS 218A.1415, the Court noted the legislature defined the crime as "possession of a controlled substance." Citing the statutory definition of "knowledge," the Court held "possession of a controlled substance" is the "circumstance described by [the applicable] statute defining [the] offense" and the defendant need only be "aware that his conduct is of that nature or that the circumstance exists." KRS 501.020(2). Additionally, the Court noted the statute is part of Kentucky's version of the Uniform Controlled Substances Act which aspires "to make uniform the law . . . among States enacting it." Examining other jurisprudence, the Court concluded its interpretation was consistent with the overwhelming majority of jurisdictions that considered the question. Judge Easton concurred but wrote separately, noting his conclusion the evidence was sufficient to support the jury's inference that Cornett knew he was in possession of LSD. Judge Easton also expressed a concern that the majority created a new rule of law that differed from longstanding practice of utilizing specific model jury instructions.

B. ERIC LAMONT ADAMS v. COMMONWEALTH OF KENTUCKY (Ky. App. 2024).

2023-CA-1415-MR 10/25/2024 2024 WL 4575681

Opinion Affirming by THOMPSON, CHIEF JUDGE; ACREE, J. (CONCURS) and CALDWELL, J. (CONCURS)

The Court of Appeals affirmed an order of the circuit court which denied a motion to suppress evidence collected after a traffic stop. Appellant argued that the traffic stop was impermissibly prolonged when the officer patted down Appellant as soon as the stop was initiated. The Court held this pat down was proper because Appellant exited his car without permission from the officer and refused to get back in after being ordered to do so. A pat down for officer safety was reasonable under the circumstances. The Court also held that the use of a search dog, which arrived a few minutes after the stop began, around the perimeter of the car did not impermissibly prolong the stop because the officer was inside his vehicle diligently working on the traffic citation while the dog performed its sniff search.

II. FAMILY LAW

A. LISA BENTLEY AND GERALD BENTLEY v. SCARLETT ETHERTON AND TASHA BENTLEY (Ky. App. 2024).

2023-CA-0560-MR 10/18/2024 2024 WL 4521512

Opinion Affirming by ACREE, JUDGE; EASTON, J. (CONCURS) AND GOODWINE, J. (CONCURS)

A child's mother shot and killed his father, and later pleaded guilty to murder. The child's maternal great aunt was awarded temporary custody in a dependency, neglect, and abuse (DNA) action. The child's paternal grandparents filed a separate action, the instant action, seeking visitation. The grandparents also sought to intervene in the DNA action. In the DNA action, the family court never expressly ruled on the grandparents' motion to intervene, but awarded them visitation and did rule on various motions filed by the grandparents. The great aunt filed a motion for permanent custody in the DNA action, which was granted after a hearing without the grandparents' participation. This was in 2018. In 2021, the grandparents filed a motion for custody in the instant action. After a hearing, the family court maintained the status quo, with the child remaining in the great aunt's custody and the grandparents receiving visitation. The grandparents appealed, arguing: (1) their due process rights were violated as the family court never "officially" granted their motion to intervene and then adjudicated the great aunt's motion for permanent custody without their participation; and (2) the court appointed friend of the court (FOC) failed to perform a sufficient investigation. The Court concluded the grandparents' first argument was not properly before it, as the grandparents had not appealed any orders in the DNA action, and the record was "unrefuted" that their counsel of record had received notice of the hearing on the great aunt's motion for permanent custody. The Court agreed with the family court the grandparents' objections regarding the DNA action were "untimely" and "filed in the wrong action." Regarding the grandparents' second argument, the Court observed the grandparents

were confusing the duties of a court-appointed friend of the court in custody actions, whose duties are governed by KRS 403.290 and 403.300, with a fiscal court created friend of the court appointed pursuant to KRS 403.090. The Court concluded the grandparents had not alleged the FOC failed to satisfy any mandatory duty and had also failed to assign any error to the family court relative to the FOC's report. Finding no reversible error, the Court affirmed the family court's order maintaining the status quo.

B. ***BLAINE VAN GANSBEKE v. BRIDGET F. VAN GANSBEKE (Ky. App. 2024).***

2023-CA-0942-MR	10/25/2024	2024 WL 4575708

Opinion Vacating and Remanding by ACREE, JUDGE; EASTON, J. (CONCURS) AND GOODWINE, J. (CONCURS)

Following their divorce, the parents of twin girls repeatedly clashed over custody and parenting time of the children. The father sought to revisit those issues, particularly a requirement that his visitation be supervised, and the family court appointed a friend of the court (FOC) to investigate and make a report. A hearing was scheduled, and the father requested the children's therapist furnish him with dates for a deposition. The therapist claimed deposing her would not be in the best interest of the children. Ten days before the hearing, the FOC filed his report, identifying the therapist among those he interviewed. Prior to the hearing, the family court entered a protective order disallowing the father from cross-examining the therapist "by deposition or otherwise," citing the best interest of the children. Following the hearing, the father filed a motion to strike the FOC's report and testimony because he was denied a meaningful opportunity to challenge the FOC's sources. The family court denied the motion and declined to remove the requirement the father's visitation be supervised. The father raised a number of issues on appeal, but the Court focused on the family court's decision to prohibit father from cross-examining the children's therapist. As the Court explained, KRS 403.300 contains a number of due process protections related to the admission of reports by court-appointed investigators (such as the FOC) into evidence. Although the Court rejected the father's arguments related to the timely disclosure of the report and underlying information, the Court concluded the family court's protective order precluding cross-examination of the children's therapist contravened KRS 403.300(3), as that provision provides a due process right to cross-examine an investigator's sources. The Court went on to reject the argument the father waived his right to cross-examine the therapist, as KRS 403.300(3) makes clear the right cannot be waived prior to the hearing. The Court also found no waiver after the hearing commenced because a waiver "cannot be presumed from a silent record" and because the father challenged the FOC's report and testimony during and after the hearing. The Court concluded the family court erred in denying the father's challenges. Given the family court's error, the Court concluded additional arguments were moot and vacated and remanded for a new hearing.

III. JURISDICTION

A. ***SUPERASH REMAINDERMAN, LP v. ASHLAND, LLC, ET AL. (Ky. App. 2024).***

2023-CA-0427-DG 2023-CA-0566-DG 2023-CA-0578-DG	10/18/2024	2024 WL 452191

Opinion REVERSING AND REMANDING by ECKERLE, JUDGE; EASTON, J. (CONCURS) and LAMBERT, J. (CONCURS)

DISCRETIONARY REVIEW GRANTED 08/06/2025

We granted discretionary review to Appellant, SuperAsh Remainderman, LP ("SuperAsh") from orders of the Fayette, Jefferson, and Harrison Circuit Courts. Those orders affirmed the orders of the Fayette, Jefferson, and Harrison District Courts (the "District Courts"), dismissing SuperAsh's forcible detainer complaints against Appellees, Ashland, LLC ("Ashland"), and its sub-lessee, Speedway, LLC ("Speedway"). This appeal involved litigation commenced first in Ohio. The Ohio Court made factual and legal findings that the lower courts interpreted as binding upon them. This Court reversed the Circuit Courts' summary orders affirming, because the District Courts did not make their own findings as to jurisdiction, did not adequately analyze crucial issues, and applied incorrect factual and legal standards even where they did have jurisdiction over the dispute. The Court remanded back to the District Courts for further adjudication as the District Courts may conduct forcible detainer proceedings, but they must confine themselves jurisdictionally to addressing matters of law and not equity, except where authorized to do so.

IV. TORTS

A. ***MASONIC HOMES OF KENTUCKY, INC. D/B/A MASONIC HOMES OF LOUISVILLE D/B/A SAM SWOPE CARE CENTER v. ESTATE OF RAYMOND LEIST, JR. BY AND THROUGH CO-EXECUTORS, ANN "CISSY" LEIST AND THOMAS LESIT (Ky. App. 2024).***

2024-CA-0054-MR	10/11/2024	2024 WL 4469214

Opinion Affirming by KAREM, JUDGE; THOMPSON, CHIEF JUDGE (CONCURS) and EASTON, J. (CONCURS)

Following the death of a resident of a long-term care facility, his estate and his beneficiaries filed suit alleging negligence and wrongful death; additionally, a claim for loss of consortium was made on behalf of the decedent's wife. The facility moved to stay the proceedings and compel arbitration of the negligence claim. The trial court

denied the motion, finding that the Durable Power of Attorney did not give the decedent's agent the power to enter into an arbitration agreement on behalf of the principal. The facility appealed.

The Court affirmed the trial court finding the Durable Power of Attorney in question gave the agent power solely over the principal's property rights which do not include the power to agree to arbitration.

V. WORKERS COMPENSATION

A. GENERAL MOTORS v. BRANDI WOODS; HONORABLE GRANT STEWART ROARK, ADMINISTRATIVE LAW JUDGE; AND WORKERS; COMPENSATION BOARD (Ky. App. 2024).

2024-CA-0091-WC 10/11/2024 2024 WL 4469265

Opinion Affirming by CALDWELL, JUDGE; CETRULO, J. (CONCURS) and ECKERLE, J. (CONCURS IN PART, DISSENTS IN PART, FILES SEPARATE OPINION)

Woods filed a workers' compensation claim in May 2022. At the final hearing on Woods' claim in April 2023, the ALJ found that Woods reached maximum improvement on November 7, 2022, and that Woods would be permanently partially disabled with an impairment rating of 21%. GM argued the ALJ improperly included a payment for "Vacation PR Payoff" in GM's records when calculating Woods' average weekly wage. KRS 342.140 governs the calculation of an employee's average weekly wage, and the parties agreed that the quarter preceding Woods' injury was her most favorable. In the week ending January 23, 2022, GM paid Woods a total of $2,915.00, but crossed out a payment of $1,384.32 marked as "Vacation PR Payoff" and another $120 for "overtime paid." Woods argued to include the amount GM took off. The ALJ accepted Woods' argument, and calculated Woods' average weekly wage to be $972.53. The Board affirmed the ALJ's decision. We determined there was no reversible error in the Board's affirming the ALJ's calculation of Woods' average weekly wage. The ALJ's calculation of Woods' average weekly wage was a realistic assessment of Woods' earnings, and the ALJ could have reasonably inferred that the $1,384.32 payment noted on GM's wage records as some type of vacation payoff was to make up for other times in the 13-week quarter in which Woods received $0 in wages. With no error committed by the Board when it supported the ALJ's decision, we affirmed. We also declined to address GM's constitutional challenge to KRS 342.040 because GM did not show that it provided the Attorney General with notice of the response to its petition for review in contravention of RAP 49(G)(3).

Judge Eckerle concurred with the majority's conclusion that the Court should not address the constitutional issue because GM did not comply with the Rules of Appellate

Procedure. However, she dissented from the ruling on the merits that Woods met her burden of proving her average weekly wage.