PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
SEPTEMBER 1, 2024 to SEPTEMBER 30, 2024

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I. FAMILY LAW

A. W.H.J. v. J.N.W.; CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; J.A.W.; AND N.H.J., N/K/A N.H.W., A MINOR CHILD (Ky. App. 2024).

2023-CA-1474-ME 9/27/2024 2024 WL 4311292

Opinion Affirming by ECKERLE, JUDGE; GOODWINE, J. (CONCURS) AND McNEILL, J. (CONCURS)

Father lost custody of Child and was ordered to have no contact with Child when he failed to comply with the family court's directions ordering him to complete substance abuse and mental health assessments and attend parenting clinics. Instead, Father turned to crime. He was ordered to pay child support and failed to regularly do so. Mother was re-married, and Stepfather filed a petition to adopt Child, which was granted by the family court. Father appealed the adoption judgment, claiming he had never been advised of any right to appointed counsel. We reversed due to the family court's inadequate explanation of the right of an indigent person to appointed counsel. On remand, the family court denied Father's petition for appointed counsel as he made $70,000 per year and was not indigent under KRS Chapter 31. A second trial took place over Father's motion for a continuance, and the family court granted the adoption a second time. Father again appealed. Father first argued the family court denied him due process by declining to appoint counsel because there is a difference in appointing counsel in adoption and termination of parental rights proceedings; however, his argument was because termination of parental rights and adoption proceedings allow for appointed counsel for indigent parties if they can show they are indigent. On review for manifest injustice only, we found none, because Father was not eligible for the appointment of counsel in the adoption proceeding as he did not qualify as an indigent person. Additionally, the family court's findings of fact, conclusions of law, and judgment of adoption were supported by the evidence presented at trial. We affirmed the family court.

II. CRIMINAL LAW

A. HAWTHORNE v. COMMONWEALTH (Ky. App. 2024).

2023-CA-1468-MR 9/06/2024 2024 WL 4094550

Opinion Vacating and Remanding by CETRULO, JUDGE; L. JONES, J. (CONCURS) AND McNEILL, J. (CONCURS)

Appellant was charged with the offense of first-degree unlawful transaction with a minor and first-degree sexual abuse. At trial, the court ruled that the sexual abuse charge would be a lesser included offense for the charge of unlawful transaction with a minor. The jury returned a verdict of guilty of first-degree sexual abuse. The court polled the jury, and each affirmed his/her verdict. The court proceeded to the truth-in-sentencing phase, and a probation officer informed the jury of parole eligibility requirements. During its second deliberation, the jury informed the court that it improperly signed the jury instructions and wanted to change the verdict to guilty of unlawful transaction with a minor. The court permitted the jury to change its verdict and repeated the truth-in-sentencing phase for the new conviction. However, Kentucky statute and precedent require a bifurcated trial process (guilt/innocence *then* penalty), and a jury may only correct clerical errors, not substantive changes, after the verdict is complete and the penalty phase has begun. Thus, this Court vacated the conviction for unlawful transaction with a minor and remanded with directions to enter a new judgment with the original jury verdict of first-degree sexual abuse and to conduct a new penalty phase in accordance with that conviction.

B. CALLOWAY v. COMMONWEALTH (Ky. App. 2024).

2023-CA-0143-MR 9/13/2024 2024 WL 4206034

Opinion Affirming by ACREE, JUDGE; CETRULO, J. (CONCURS) AND TAYLOR, J. (CONCURS)

Michael Calloway was convicted of first-degree rape and first-degree sexual abuse of a child. The Kentucky Supreme Court affirmed his rape conviction, but vacated his sexual abuse conviction. Calloway then challenged his rape conviction in a collateral attack, moving the circuit court to vacate his conviction due to ineffective assistance of counsel. Calloway argued: 1) both his trial counsel and appellate counsel had failed to challenge a jury instruction that called into question the unanimity of the verdict; 2) his appellate counsel was ineffective for failing to raise the issue of the circuit court overruling for-cause juror challenges; and 3) his trial counsel was ineffective for failing to call Calloway or an expert witness to testify at trial. The circuit court rejected Calloway's arguments and denied his motion. In reviewing Calloway's first argument, we observed the Kentucky Supreme Court offered clarity on the issue of unanimous verdicts in *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013), and later *Johnson v. Commonwealth*,

676 S.W.3d 405 (Ky. 2023), and has outlined three types of jury instruction that violate the requirement of a unanimous verdict. They include the type of instruction at issue in Calloway's trial: a single instruction involving one count of an offense that may be satisfied by multiple criminal acts over time. However, although our jurisprudence is clearer today, ineffective assistance of counsel claims must be evaluated in the context of contemporaneous jurisprudence. As Calloway's trial and direct appeal predated this jurisprudence, we concluded his trial counsel and appellate counsel were not ineffective for failing to challenge the jury instruction, as there was no contemporaneous jurisprudence that clearly stated such an instruction violated the requirement of a unanimous verdict. We also rejected that Calloway's appellate counsel was ineffective for failing to request palpable error review of the issue, given the prevailing palpable error standard at that time. In evaluating Calloway's second argument, we determined that although Calloway's appellate counsel filed a deficient brief with respect to the for-cause juror challenges, his appellate counsel was not ineffective, as Calloway had not shown requisite prejudice. Finally, in evaluating Calloway's third argument, we determined that Calloway's trial counsel had informed him of his right to testify, with Calloway choosing not to, and that his trial counsel's decision not to call an expert witness to testify fell squarely within the realm of trial strategy. As such, his trial counsel's decision not to call either Calloway or the expert witness did not constitute ineffective assistance. Having rejected Calloway's arguments, we affirmed the circuit court's denial of Calloway's motion.

III. CONSTITUTIONAL LAW

A. JOHN DOE v. TED DEAN, IN HIS OFFICIAL CAPACITY (Ky. App. 2024).

2023-CA-0844-MR 9/20/2024 2024 WL 4244766

Opinion Affirming by EASTON, JUDGE; CALDWELL, J. (CONCURS) AND COMBS, J. (CONCURS)

This appeal deals with the constitutionality of the "anti-grandfathering clause" of Kentucky's Sex Offender Registry residence restrictions. Kentucky Revised Statute ("KRS") 17.545(3)(b). In 2007, Doe pled guilty to one felony count of possession of matter portraying a sexual performance by a minor and was required to register as a sex offender for twenty years. KRS 17.520(3). In 2022, Doe and his wife purchased a home in Mercer County. At the time, it was located outside of the 1,000 feet restriction imposed by KRS 17.545(1). Later in 2022, a daycare opened within 1,000 feet of Doe's home, and he was told to move. Doe filed this action and asserted that KRS 17.545(3)(b) was unconstitutional because: (1) the application of the anti-grandfather clause to him results in violation of the takings clause pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Section 13 of the Kentucky Constitution; (2) it violates his right to acquire and protect property under

Section 1 of the Kentucky Constitution; (3) it is an arbitrary state action in violation of Section 2 of the Kentucky Constitution which is also inconsistent with due process; (4) it is a prohibited *ex post facto* law in violation of Article 1, Section 9 of the United States Constitution and Section 19 of the Kentucky Constitution; (5) it is a prohibited bill of attainder in violation of Article 1, Section 9 of the United States Constitution; and (6) it is void for vagueness. The trial court dismissed Doe's petition, concluding the statute is not unconstitutional.

This Court first determined that KRS 17.500(7)'s definition of "reside" is not vague and applies to a place a person sleeps. The anti-grandfather clause is also not a bill of attainder. Doe could not be convicted of violating the residency restrictions provided by the legislature without the opportunity for a judicial determination, which would include Doe's right to challenge the validity of the law—the bill of attainder clause does not provide a basis for a challenge to the anti-grandfather clause. Furthermore, the statute does not violate Doe's due process rights under either the Kentucky Constitution or the United States Constitution. This is a substantive due process claim which is scrutinized under rational basis review. Residency restrictions are rationally related to a legitimate state interest of protecting children and does not offend due process. Additionally, the anti-grandfather clause is not an *ex post facto* law. Doe was aware of the requirements of the statute when he pled guilty, and his restrictions have not substantively changed since then. Doe has always known it was possible he would have to move due to the statutory requirements, and that does not constitute a punishment. Finally, the impact on Doe's property because of the statute's residency restrictions is not a taking under the Fifth or Fourteenth Amendments to the United States Constitution or Section 1 of the Kentucky Constitution. The fair market value of Doe's home has not necessarily been diminished as Doe can sell or rent the residence, and there has been no significant interference with his investment-backed expectations. Therefore, the trial court is affirmed.

IV. TORTS

A. LAURA HELMBRECHT, IN HER INDIVIDUAL CAPACITY AND AS ADMINISTRATRIX OF THE ESTATE OF CESAR E. MARQUEZ CHAVEZ (Ky. App. 2024).

2023-CA-1033-MR 9/27/2024 2024 WL 4311287

Opinion Affirming in Part, Reverisng in Part, and Remanding by ACREE, JUDGE; EASTON, J. (CONCURS) AND GOODWINE, J. (CONCURS)

This appeal involves the death of decedent, Chavez, who choked during a donut eating contest and was unable to be revived. The trial court granted Appellees summary judgment on all claims, as the claims were barred by the waiver Chavez signed when

he entered the contest. It concluded that Helmbrecht's claim of wilful or wanton negligence was not waived but failed as a matter of law. On appeal, Helmbrecht alleges the negligent, grossly negligent, and wanton and willfully negligent "provision of emergency medical services." The Court concluded that the waiver Chavez signed is enforceable as to negligence as it satisfies the first prong of the *Hargis* test because it "explicitly expresses an intention to exonerate by using the word 'negligence.'" Additionally, negligence encompasses "gross negligence." The waiver was therefore enforceable as a bar to Helmbrecht's claim of gross negligence. However, the trial court erred when it concluded that Helmbrecht's claim of willful or wanton negligence was barred by the waiver, as the trial court failed to construe the waiver in a light most favorable to Helmbrecht. The waiver also cannot be construed as evidence of care. A warning that you might be harmed willfully or wantonly is not evidence of care, and the Kentucky Supreme Court has held that exculpatory contracts are unenforceable as to claims of willful or wanton negligence. Therefore, the trial court's order granting summary judgment is reversed as to Helmbrecht's claim of willfull or wanton negligence and is otherwise affirmed. The matter is remanded for further proceedings consistent with this Opinion.