

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002122-MR

RANDALL COPE

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00266

SARAH KIRK JACKSON;
GOLDEN KIRK; AND
CHARLES EDWARDS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Randall Cope, pro se, has appealed from an order entered by the Marshall Circuit Court on August 15, 2001, which dismissed his complaint against the appellees, Sarah Kirk Jackson, Golden Kirk, and Charles Edwards, with prejudice. Having concluded that the allegations raised by Cope in his complaint are barred by the doctrine of collateral estoppel and

that the appellees are entitled to a judgment as a matter of law, we affirm.

This case presents an unfortunate and rather unique set of facts. Cope and Jackson were romantically involved, until problems developed in their relationship. On May 8, 1998, Cope was arrested on federal charges stemming from a complaint filed against him by Jackson. Cope posted bond and was released on May 11, 1998. As a condition of his release, Cope was ordered to avoid any contact with Jackson.¹ On May 20, 1998, Cope was indicted by a grand jury for the United States District Court for the Eastern District of Kentucky on the charges filed by Jackson. In sum, the indictment alleged that between April 12 and April 14, 1998, Cope accessed Jackson's Internet account without her permission and sent several disparaging electronic messages to her colleagues and friends. The indictment charged Cope with 15 counts of sending annoying and harassing electronic messages in violation of 47 U.S.C. § 223(a)(1)(C).

On December 23, 1998, Charles Edwards found a nude photograph of Jackson near the edge of Golden Kirk's driveway in Marshall County, Kentucky.² Edwards took the photograph to Kirk and told Kirk that he saw Cope drive Cope's truck up to the edge

¹ Cope was also ordered to refrain from committing any offenses in violation of federal, state, or local law.

² Kirk is Jackson's father. Edwards and Kirk are friends and neighbors.

of Kirk's driveway earlier that afternoon. Edwards claimed that he found the photograph after Cope drove away. Later that afternoon, Jackson found a second photograph near the edge of her father's driveway. Jackson contacted the Marshall County Sheriff's office and accused Cope of leaving the pictures. Cope was arrested on December 26, 1998, and charged with harassing communications.³ On December 28, 1998, Cope entered a plea of not guilty in the Marshall District Court and he was released on a \$500.00 cash bond. As a condition of Cope's release, he was ordered to avoid any contact with Jackson and her father.

Jackson informed the United States Attorney's Office for the Eastern District of Kentucky of the pending state charge that had been filed against Cope in Marshall County. On December 30, 1998, the United States filed a motion in the United States District Court for the Eastern District of Kentucky requesting the Court to issue a show cause order. Consequently, on January 4, 1999, a show cause hearing was held for the purpose of determining whether Cope's federal bond should be revoked.

At the hearing, Edwards testified on behalf of the United States. Edwards claimed that he saw Cope pull Cope's truck up to the edge of Kirk's driveway early in the afternoon on December 23, 1998. Edwards further claimed that he found a

³ Kentucky Revised Statutes (KRS) 525.080.

nude photograph of Jackson lying on the ground near the edge of Kirk's driveway shortly after Cope drove away. Marshall County Sheriff Terry Anderson also testified on behalf of the United States. Sheriff Anderson stated that he met with Jackson on the afternoon of December 23, 1998, and that Jackson had told him that she believed Cope was the one who had left the photograph. Sheriff Anderson also testified that Jackson called later that afternoon and informed him that she had found a second photograph. Both Edwards and Sheriff Anderson were subject to cross-examination by Cope's counsel. Cope did not testify at the bond revocation hearing and he did not call any witnesses to testify on his behalf.

Based on the aforementioned testimony, the Magistrate Judge concluded that Cope had violated the terms of his bond. The transcript of the show cause hearing reads, in relevant part, as follows:

The Court: Mr. Cope, I'm afraid there is not much leeway that I have in this case from the testimony I just heard. [Your attorney] makes a decent argument about the communication factor, because there is no testimony that you had communications with Miss Jackson on December 23rd of this year. But what bothers me is that this apparently was an attempt to get around the Court order that I imposed in this case, and communications can take many different forms, they don't always have to be verbal. And the reason I said that, I can see [your attorney's] argument. And the first issue that he raised is that Mr. Edwards

testified, and I have to accept his testimony, that this picture was placed in the driveway. I didn't hear any testimony about the second picture, but what really bothers me is that this second picture was apparently found by Miss Jackson, and it's similar to the first picture, and I think that you have tried to make an end-around way of avoiding the order that I imposed that you not communicate with her. I consider these photographs to be a form of communication and I consider what happened here to be a violation of an order of the court. Normally, and this is not a normal case, I wouldn't revoke the bond except for the fact that I did have an extensive, an extensive bond hearing on this case and I think I specifically warned you not to have any communications.

. . .

So Mr. Cope, based on the testimony I have heard, I find that you have violated the terms of my release order, which could not have been clearer, so I'm going to revoke your bond.

Cope was then remanded to the custody of the United States Marshal's Office.

On January 22, 1999, ten days before Jackson was scheduled to testify against Cope regarding the federal charges pending against him in the Eastern District of Kentucky for sending annoying and harassing electronic messages, there was a shooting at Jackson's residence in Florence, Kentucky. Although Cope was incarcerated at the time, he was immediately identified as a suspect. On March 1, 1999, Cope pled either guilty or nolo

contendere to the various federal charges pending against him.⁴

The following colloquy took place in open court between Cope's attorney, Harry Hellings, and the trial judge:

The Court: . . . The court is satisfied the plea is voluntary and there's a factual basis for the plea and will accept your plea of guilty to the counts indicated and the plea of nolo contendere to the counts indicated and overrule the objection of the United States to the nolo contendere plea.

Now, I believe you wanted to make a motion for release on bond.

. . .

Mr. Hellings: Your honor, at this time, on behalf of Mr. Cope, I would move the court to admit him to bond. Depending on how the guidelines are calculated and how many victims there is, if there is just one victim, the guidelines would be zero - anywhere from 0 to 6 months to 8 to 14 months depending on any additional departures the court may make. This matter, he was admitted to bond, he violated a condition of bond, was put in jail.

The Court: Which was the condition of bond?

Mr. Hellings: The condition was no contact with Miss Jackson, and actually there was no contact with Miss Jackson, but there was a communication through some pictures, not to Miss Jackson but to Miss Jackson's father. Judge Wehrman found that that was a violation and incarcerated him at that time[.]

⁴ Cope pled guilty or nolo contendere to 13 counts of sending annoying and harassing electronic messages in violation of 47 U.S.C. § 223(a)(1)(C).

On April 24, 2000,⁵ the United States District Court for the Eastern District of Kentucky entered its final judgment and sentence on the 13 convictions for sending annoying and harassing electronic messages. The Court sentenced Cope to a prison term of 24 months.

On May 3, 1999, a grand jury for the Eastern District of Kentucky indicted Cope on several additional charges, all of which stemmed from Cope's alleged role in the January 22, 1999, shooting that occurred at Jackson's residence and a subsequent murder for hire scheme targeting Jackson.⁶ Cope pled not guilty to each count contained in the indictment. The case proceeded to trial and on February 3, 2000, the jury convicted Cope on all but two of the counts contained in the indictment.⁷ On June 8, 2000, the Court entered its final judgment and sentenced Cope to a prison term of 567 months.

Shortly thereafter, the harassing communications charge that had been filed against Cope in Marshall County was dismissed. On June 18, 2001, Cope filed a pro se complaint against Jackson, Kirk, and Edwards in the Marshall County Circuit Court. In sum, Cope alleged that Jackson, Kirk, and

⁵ It is unclear from the record if the sentencing was delayed for more than one year because of the other pending charges.

⁶ For a more detailed description of the various federal charges filed against Cope and the events leading up to those charges, see United States v. Cope, 312 F.3d 757 (6th Cir. 2002).

⁷ Jackson, Kirk, and Edwards all testified at Cope's trial on behalf of the United States.

Edwards had conspired against him in an effort to get his federal bond revoked by falsely accusing him of placing nude photographs of Jackson in Kirk's driveway. Cope's complaint appears to set forth several theories of tort liability, namely, intentional infliction of emotional distress, battery, assault, defamation, invasion of privacy, malicious prosecution, and abuse of process.

On July 16, 2001, the appellees filed a motion to dismiss Cope's complaint. The appellees claimed the allegations raised in Cope's complaint were barred by the doctrine of collateral estoppel as a result of the findings made by the Magistrate Judge at Cope's federal bond revocation hearing. The appellees further contended that the statements made by Cope's attorney at his plea hearing constituted a judicial admission.⁸ A hearing was held on August 6, 2001, after which the trial court entered an order dismissing Cope's complaint, with prejudice. On August 23, 2001, Cope filed a motion for reconsideration, which was summarily denied on September 6, 2001.⁹ This appeal followed.

⁸ The appellees attached several exhibits to their motion to dismiss, including a transcript of Cope's federal bond revocation hearing, a transcript of his plea hearing, a letter from a U.S. Probation Officer, and the verdict from his federal trial.

⁹ The order denying Cope's motion for reconsideration reads, in relevant part, as follows:

The Court has reviewed the pleadings and is of the opinion that defendant's motion certainly has a legal

Cope raises three issues on appeal. He contends (1) the trial court erred as a matter of law by dismissing his complaint; (2) the trial court violated his due process rights by dismissing his complaint "without a jury determination on the merits of the claim"; and (3) the trial court violated his Fifth and Sixth Amendment rights by "refus[ing] to allow [] his representatives to speak at the dismissal hearing."

We begin by setting forth the proper standard of review. Since the trial court apparently considered matters outside of the pleadings, i.e., the various exhibits attached to the appellees' motion to dismiss, in arriving at its decision to dismiss Cope's complaint, we must treat the motion as one for summary judgment.¹⁰ The standard of review governing an appeal of a summary judgment entered in this Commonwealth is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a

basis under the theory of *res judicata*, and the Court is of the opinion that based upon the legal arguments set out in defendant's memorandum in support of [its] motion to dismiss, the plaintiff has no cause of action.

¹⁰ See, e.g., Pearce v. Courier-Journal & Louisville Times Co., Ky.App., 683 S.W.2d 633, 635 (1985). See also 6 Kurt A. Philipps, Jr., Kentucky Practice, CR 12.02, cmt. 9 (5th ed. 1995). "On a motion to dismiss on this ground the Rule recognizes that matters outside the pleadings may be presented by affidavit or otherwise. It is within the discretion of the court whether or not this extraneous matter shall be considered, but if the court does not exclude it, the motion shall be treated as one for summary judgment under Rule 56." Id.

matter of law.¹¹ Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹² In Paintsville Hospital Co. v. Rose,¹³ the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."¹⁴

We will first address the issue of whether the doctrine of collateral estoppel can be applied to a bond revocation hearing.¹⁵ In Gossage v. Roberts,¹⁶ this Court stated that "under proper circumstances a criminal conviction may be

¹¹ Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

¹² Kentucky Rules of Civil Procedure (CR) 56.03.

¹³ Ky., 683 S.W.2d 255, 256 (1985).

¹⁴ Steelvest Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

¹⁵ The doctrine of collateral estoppel is frequently confused with its counterpart, res judicata. It is important to distinguish the two concepts because res judicata and collateral estoppel apply in different circumstances with different consequences to the individual litigants involved. Collateral estoppel, or issue preclusion as it is sometimes referred to, is viewed as a subdivision of res judicata in Kentucky. The effect of collateral estoppel,

used for purposes of collateral estoppel in later civil proceedings[.]”¹⁷ The Gossage Court went on to hold that “to be so utilized the criminal judgment must of necessity finally dispose of the matters in controversy.”¹⁸ In Moore v. Commonwealth, Cabinet for Human Resources,¹⁹ the Supreme Court of Kentucky listed the essential elements of collateral estoppel as follows: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a

as distinguished from res judicata, was recently explained by this Court in Napier v. Jones By & Through Reynolds, Ky.App., 925 S.W.2d 193, 195-96 (1996):

Although collateral estoppel and res judicata are cut from the same cloth, the effect of collateral estoppel is different from that of res judicata:

The basic distinction between the doctrines of res judicata and collateral estoppel, . . . has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment “on the merits” in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit [citations omitted].

¹⁶ Ky.App., 904 S.W.2d 246 (1995).

¹⁷ Id. at 248 (citing Roberts v. Wilcox, Ky.App., 805 S.W.2d 152 (1991)).

¹⁸ Id.

¹⁹ Ky., 954 S.W.2d 317 (1997).

prior losing litigant.²⁰ Since the courts of this Commonwealth have not passed on the question of whether the disposition of a bond revocation hearing constitutes a final decision or judgment on the merits, we have reviewed the case law from other jurisdictions for guidance.

In State v. Chase,²¹ the Supreme Court of Rhode Island noted that "[t]he doctrine of collateral estoppel does not require a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment, but includes many dispositions which, though not final in that sense, have nevertheless fully litigated the issue."²² In People v. Kondo,²³ the Court stated that "[i]t is not the form that the prior adjudication assumes, but the substance of the prior adjudication which is determinative of whether collateral estoppel may be properly applied." The Court continued by stating that "[g]enerally, so long as an issue of ultimate fact has been finally and conclusively determined on its merits, collateral estoppel will bar the relitigation of that issue

²⁰ Id. at 319. See also Yeoman v. Commonwealth of Kentucky, Health Policy Board, Ky., 983 S.W.2d 459, 465 (1998).

²¹ 588 A.2d 120 (R.I. 1991).

²² Id. at 122-23 (quoting 46 Am.Jur.2d Judgments § 457 (1969)).

²³ 366 N.E.2d 990, 992 (Ill. 1977).

based on the same evidence."²⁴ In Trepanier v. Getting Organized, Inc.,²⁵ the Supreme Court of Vermont noted that "the critical inquiry is whether the party to be bound has had a full and fair opportunity to contest an issue resolved in an earlier action so that it is fair and just to refuse to allow that party to relitigate the same issue."

In Kondo, the State elected to first prosecute the defendant by way of a probation revocation hearing but failed to convince the judge by a preponderance of the evidence that the defendant had carried a weapon that properly functioned. Since the judge made a factual finding at the probation revocation hearing as to the only disputed question of fact and found that the weapon was in a non-functioning state, the State was barred from relitigating at a criminal trial the issue that had been conclusively determined on its merits.²⁶ In the case sub judice, the only disputed question of fact was whether Cope put, or assisted in putting, pictures of Jackson in her father's driveway. The Magistrate Judge found that he did and revoked

²⁴ Id. (citing People v. Heil, 364 N.E.2d 966 (Ill. 1977)(motion for discharge on speedy trial grounds); People v. Williams, 322 N.E.2d 461 (Ill. 1975) (motion to suppress a confession); People v. Armstrong, 306 N.E.2d 14 (Ill. 1973)(cited in People v. Grayson, 319 N.E.2d 43 (Ill. 1974) and involving a motion to suppress evidence); People v. Taylor, 277 N.E.2d 878 (Ill. 1971)(involving a motion to suppress evidence); People v. Quintana, 223 N.E.2d 161 (motion for discharge on speedy trial grounds); and People ex rel. MacMillian v. Napoli, 219 N.E.2d 489 (Ill. 1966)(involving motion to suppress evidence)).

²⁵ 583 A.2d 583, 588 (Vt. 1990).

²⁶ Id. at 992-93.

his bond based on this finding. Thus, after an evidentiary hearing was held, this disputed factual question was found by the judge adversely to Cope's position. This adverse factual finding collaterally estops Cope from proving a required element of his cause of action; he cannot demonstrate that he was not responsible for the placement of the pictures of Jackson on her father's driveway. Accordingly, summary judgment was properly entered for the appellees.

Cope's final claim is that the trial court denied him due process by refusing to appoint him a guardian ad litem and by refusing to allow his father and his sister, who had powers of attorney, to speak for him at the hearing on the motion to dismiss. CR 17.04 provides for the appointment of a guardian ad litem for an adult prisoner who is a defendant, but not a plaintiff. As to Cope's claim that he had given his father and his sister a general power of attorney to act on his behalf, the record does not include any such document. We will not speculate as to what authority, if any, an absent document may have given to Cope's father and sister.

Based upon the foregoing reasons, the order of the Marshall Circuit Court dismissing Cope's complaint is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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