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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000832-MR

M.K.J.

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 02-CI-00236

BOURBON COUNTY BOARD OF
EDUCATION

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM, SENIOR
JUDGE.¹

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BUCKINGHAM, SENIOR JUDGE: M.K.J. was expelled as a student from Bourbon County High School by the Bourbon County Board of Education in May 2002. In August 2002 he filed an action in the Bourbon Circuit Court seeking to have the expulsion set aside and seeking damages for violation of 42 U.S.C. § 1983, 20 U.S.C. § 1402 *et seq.*, 707 KAR 1, and Article 2 of the Kentucky Constitution.² When the circuit court denied M.K.J.'s motion to have the expulsion set aside, he appealed to this court. A panel of this court rendered an opinion that determined the Board's action was arbitrary, reversed the circuit court's decision, and remanded the case to that court with directions to remand the matter to the Board to vacate its decision expelling M.K.J. *See M.K.J. v. Bourbon County Board of Education*, 2004 WL 1948461 (Ky. App. Sept. 3, 2004) (2003-CA-000352-MR).

Following this court's decision, M.K.J. sought to pursue the remaining causes of action in the circuit court. The circuit court denied him that right, holding that this court had limited its jurisdiction in the case to remanding the matter to the Bourbon County Board of Education. This appeal by M.K.J. followed. Concluding that the circuit court erred, we reverse and remand.

The incident that led to this litigation occurred while M.K.J. was a student at Bourbon County High School. On May 16, 2002, the school received a bomb threat, leading school administrators to send for explosive-detection dogs. One of the dogs brought by the canine handlers was trained to detect contraband

² The action was filed on M.K.J.'s behalf by his parents.

substances. This dog indicated that such substances might be present in M.K.J.'s car, which was parked in the school parking lot.³

The canine handler informed the school principal, who called M.K.J. from class. M.K.J. and the handler went to the car, while the principal remained in the building. After M.K.J. consented to a search of the car, the handler found marijuana and prescription drugs. The school's special law enforcement officer and an assistant principal arrived at the scene after the contraband had been found.

M.K.J. was suspended from school that day, and a letter was sent to his parents notifying them that the Board would hold an expulsion hearing on May 23, 2002. After evidence and testimony were presented at the hearing, the Board voted to expel M.K.J.

On August 21, 2002, M.K.J. filed a civil complaint in the Bourbon Circuit Court. The complaint contained the following counts: that the Board had violated his due process rights under 42 U.S.C. § 1983, that the Board had failed to comply with 20 U.S.C. § 1402 *et seq.* and 707 KAR 1, and that the actions of the Board in expelling M.K.J. were arbitrary because the search of his vehicle violated the school's vehicle search policy and because the expulsion hearing violated Kentucky's Open Meetings Act. M.K.J. requested the court to enter an injunction prohibiting the Board from denying him attendance at Bourbon County High School, to find that the Board had violated his rights and that he had suffered harm,

³ This dog was not one of the explosive-detection dogs. Rather, she was a dog that the handler had released for a break from her kennel because she had been confined during the bomb search.

to grant him a jury trial, and to award him any and all relief to which he might be entitled.

M.J.K. also filed a motion to set aside his expulsion. The court found that the motion was actually a de facto appeal of the Board's actions regarding him. The court reviewed the actions under the standard set forth in *American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964), and held that the actions of the Board were not arbitrary. Thus, the court denied M.K.J.'s motion to set aside his expulsion. The court's order, which contained finality language, made no mention of M.K.J.'s remaining claims for damages.

M.K.J. appealed to this court from the circuit court's order. A panel of this court rendered an opinion on September 3, 2004, in which it held that the marijuana and drugs were found in violation of a Board policy that mandates the school principal or a designee of the principal must be present when student searches are conducted. This court held that the Board's decision to expel M.K.J. was arbitrary because it was based solely upon the incompetent evidence seized in the improper search. In reversing the circuit court's decision, this court's opinion further stated that "[o]n remand, the circuit court is directed to remand this matter to the Bourbon County Board of Education to vacate its decision expelling appellant." No mention was made of the remaining causes of action in M.K.J.'s complaint.

Thereafter, based on this court's determination that the Board's action in expelling M.K.J. was arbitrary, M.K.J. filed a summary judgment motion on his remaining claims on the issue of the Board's liability for his wrongful expulsion. He also requested the circuit court to schedule a hearing on damages..

The Board moved the court to dismiss M.K.J.'s remaining causes of action. On January 16, 2007, the circuit court issued a final judgment stating in pertinent part as follows:

The Kentucky Court of Appeals has determined this Court's jurisdiction in this matter and has limited it to one final act, that being remanding this matter to the Bourbon County Board of Education to vacate its decision expelling Plaintiff. All other matters in this case at this point are outside of the scope of this Court's jurisdiction, and therefore, authority. *Pieck v. Carran*, 289 Ky. 110, 157 S.W.2d 744 (1941).

This appeal by M.K.J. followed.

Before addressing M.K.J.'s arguments, we must first address an issue raised by the Board. The Board argues that neither the circuit court nor this court ever had subject matter jurisdiction over this case because M.K.J.'s appeal to the circuit court was untimely under Kentucky Revised Statutes (KRS) 13B.140(1).⁴ Thus, the Board contends that both the circuit court's first order and this court's 2004 opinion are void.

⁴ The Board did not raise this issue when the case first came before the circuit court. Rather, it raised the issue for the first time in response to M.K.J.'s efforts to prosecute his claims in the circuit court following remand from this court. The circuit court did not address this argument by the Board. Rather, it refused to entertain M.K.J.'s claims based on its claim that it lacked jurisdiction due to this court's mandate in its opinion.

KRS 158.150 governs the suspension or expulsion of pupils. It states

in pertinent part:

(6) The superintendent, principal, assistant principal, or head teacher of any school may suspend a pupil but shall report the action in writing immediately to the superintendent and to the parent, guardian, or other person having legal custody or control of the pupil. The board of education of any school district may expel any pupil for misconduct as defined in subsection (1) of this section, but the action shall not be taken until the parent, guardian, or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the board. The decision of the board shall be final.

KRS 158.150(6). The statute does not provide for an appellate process.

The Board contends that it is an agency of the state government.

Because there is no specific statutory authorization for an appeal of a student's expulsion, the Board contends that KRS 13B.140(1), which relates to appeals from administrative agencies, is applicable. That statute provides in part that:

All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service.

Id.

KRS 13B.140(1) requires the order of the agency to be mailed or delivered by personal service and for an appeal of such an order to be filed within 30 days thereafter. M.K.J. acknowledges that the Board complied with the statute and that he did not appeal the expulsion within 30 days as required by the statute.

Rather, M.K.J. maintains that the Board is not an agency subject to the provisions of KRS Chapter 13B and that his circuit court action was not time-barred as asserted by the Board. In support of this argument, M.K.J.'s counsel referred in his oral argument before this court to the definition of "administrative agency" and "agency" in KRS 13B.010(1).

It is not necessary for us to resolve this particular issue because even if the provisions of KRS Chapter 13B were applicable, the Board waived any jurisdictional defect by not objecting until after the circuit court and this court decided the issues.

"Jurisdiction is a term too often used in a loose fashion." *Milby v. Wright*, 952 S.W.2d 202, 205 (Ky. 1997).⁵ Kentucky courts have recognized three separate categories of "jurisdiction": (1) personal jurisdiction involving authority over specific persons; (2) subject-matter jurisdiction involving authority over the nature of a case and the general type of controversy; and (3) jurisdiction over a particular case involving authority to decide a specific case. *See Nordike v. Nordike*, 231 S.W.3d 733, 737-38 (Ky. 2007). "'Subject-matter jurisdiction cannot be born of waiver, consent or estoppel,' but it is absent 'only where the court has not been given any power to do anything at all in a case.'" *Id.* at 738, *quoting Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970).

Jurisdiction over a particular case, however, "refers to the authority and power of the court to decide a specific case, rather than the class of cases over

⁵ Kentucky cases dealing with jurisdiction and waiving jurisdiction sometimes seem confusing and appear inconsistent.

which the court has subject-matter jurisdiction.” *Milby*, 952 S.W.2d at 205.

Particular-case jurisdiction “often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts, such as that an action was begun before a limitations period expires.” *Nordike*, 231 S.W.3d at 738. Lack of particular-case jurisdiction merely renders a judgment voidable rather than void. *See Dix v. Dix*, 310 Ky. 818, 822, 222 S.W.2d 839, 841 (1949). *See also In re J.J.*, 855 N.E.2d 851, 854 (Ohio 2006); *Maryland Board. Of Nursing v. Nechay*, 701 A.2d 405, 410 (Md. 1997).

In *Collins v. Duff*, 283 S.W.2d 179 (Ky. 1955), the court stated, “where a court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived.” *Id.* at 182. Further, in *Commonwealth v. Griffin*, 942 S.W.2d 289 (Ky. 1997), the court held that the defendant could waive the statutory five-year limit on duration of probationary supervision because it involved particular-case jurisdiction rather than subject-matter jurisdiction. *Id.* at 291.

Here, the circuit court had subject-matter jurisdiction over appeals from decisions of administrative agencies pursuant to KRS 13B.140(1). Assuming, as argued by the Board, that the Board was an administrative agency as defined in KRS 13B.010(1) and that the circuit court did not have particular-case jurisdiction because M.K.J. did not timely file his circuit court action, the Board waived the 30-day requirement of KRS13B.140 by not objecting until after both the circuit court and this court had decided the issues of the case. Therefore, we

reject the Board's argument that the circuit court's original order and this court's prior opinion are void.

Turning to M.K.J.'s arguments, he argues that the circuit court's reliance on *Pieck v. Carran* was erroneous and that he has viable claims that remain to be litigated. He argues that because this court held that the actions of the Board were arbitrary, he is entitled to pursue his claim for damages against the Board for its wrongful conduct. He contends that otherwise he will be left without a remedy. On the other hand, the Board contends that M.K.J.'s claims were effectively dismissed as moot by the circuit court when it initially upheld the Board's action in expelling M.K.J. and that "it is the law of the case that those claims are now gone" since this court's panel that decided the case made no mention of the claims when it rendered its opinion on September 3, 2004.

The initial circuit court order that denied M.K.J.'s motion to set aside his expulsion made no mention of M.K.J.'s due process claims. Further, the order contained finality language. The parties treated the order as effectively dismissing the due process claims, whether it did so or not. In fact, when the case was before a panel of this court in the first appeal, one of the issues was whether the circuit court had erred by dismissing the claims without allowing M.K.J. the opportunity for discovery.

In this Court's 2004 opinion, the panel made no mention of the claims other than to state that it would not reach the issue of "whether the circuit court erred by denying appellant an opportunity to conduct discovery" on the claims

because it had found that the Board's decision to expel M.K.J. was arbitrary and had reversed the circuit court on that basis.

In *Hutson v. Commonwealth*, 215 S.W.3d 708 (Ky.App. 2006), this court stated

The scope of a lower court's authority on remand of a case is not measured in terms of its jurisdiction, but by the direction or discretion contained in the appellate court's mandate. An appellate court might direct a trial court, such as by ordering a new trial or the dismissal of charges. With such a mandate, the trial court's authority is only broad enough to carry out that specific direction. Alternatively, and as is very often the case when the appellate court reverses a trial court, it simply grants the trial court the discretion to conduct further proceedings not inconsistent with the opinion. In such cases, including *Hutson I*, the general principle is stated as follows:

The trial court may take such action, not inconsistent with the decision of the appellate court, as in its judgment law and justice require, where the case has been remanded generally without directions, or for further proceedings, or for further proceedings in accordance, or not inconsistent, with the opinion.

5 C.J.S. *Appeal and Error* § 978 at 481-83 (1993) citing *Pieck v. Carran*, 289 Ky. 110, 157 S.W.2d 744 (1941).

Id. at 714.

We conclude that although this court made no specific mention of M.K.J.'s due process claims in its opinion, it clearly did not affirm any dismissal of those claims by the circuit court. In fact, this court plainly stated that it found it unnecessary to address M.K.J.'s appeal as it related to those claims because it had

determined that the expulsion was arbitrary. The implication that the claims were alive is clear.

The Board argues that the law of the case doctrine is applicable. To the extent the law of the case doctrine may otherwise be applicable, the exception to the rule should be applied here. *See Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998). In *Gossett v. Commonwealth*, 441 S.W.2d 117 (Ky. 1969), the appellate court stated as follows:

Where the law of the case rule is applicable, it has sufficient flexibility to permit the appellate court to admit and correct an error made in the previous decision where substantial injustice might otherwise result and the former decision is clearly and palpably erroneous.

Id. at 118. *See also White v. Commonwealth*, 360 S.W.2d 198, 202 (Ky. 1962).

Under these circumstances, we believe the claims are viable and that the circuit court erred in not allowing M.K.J. to proceed in the prosecution of the claims. To the extent this Court's prior opinion may have been deficient in that it failed to reverse the circuit court's dismissal of the due process claims, we apply the aforementioned exception to the law of the case doctrine.

Therefore, the order of the Bourbon Circuit Court, wherein the court held it had no jurisdiction to act on M.K.J.'s remaining claims after remand from this court, is reversed, and this case is remanded for the purpose of allowing M.K.J. to pursue those claims.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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NO ORAL ARGUMENT GIVEN
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