

RENDERED: DECEMBER 10, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000755-MR

THOMAS PUGH, INDIVIDUALLY,
AND IN HIS OFFICIAL CAPACITY AS A
LOUISVILLE/JEFFERSON COUNTY
METRO POLICE OFFICER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NOS. 08-CI-000204, 08-CI-000251, AND 08-CI-000533

LaTONYA RANDOLPH,
ADMINISTRATRIX OF THE ESTATE
OF DEMETRA BOYD; JUNENEAN
HUSTON, AS PARENT, NEXT
FRIEND AND ON BEHALF OF
DEMETRICK BOYD, JR., A MINOR;
TOSCA BELL, AS PARENT, NEXT
FRIEND AND ON BEHALF OF
LYNN-ASIA BELL, A MINOR;
TOSCA BELL, AS PARENT, NEXT
FRIEND AND ON BEHALF OF KEI-VONTEZ
BELL, A MINOR; TOSCA BELL, AS
PARENT, NEXT FRIEND AND ON
BEHALF OF CORTEZ MOORE, A
MINOR; LYNN TILLMAN AND
DARNELL BOYD, AS PARENTS AND
NEXT FRIENDS AND ON BEHALF
OF DEMETRIUS BOYD, A MINOR;
DEMETRICK BOYD; AND
AIRECA SMITH, INDIVIDUALLY
AND AS PARENT AND NEXT
FRIEND OF LOUIS SIMMONS III,
A MINOR

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Thomas Pugh, individually and in his official capacity as a Louisville/Jefferson County Metro Police Officer, has filed an interlocutory appeal from the Jefferson Circuit Court's order determining that Pugh was not entitled to the defense of qualified official immunity. After a careful review of the record, we reverse the circuit court's determination that he was not entitled to the qualified

immunity defense because that determination was prematurely made. We remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening in question, Pugh was working as an on-duty Louisville Metro Police Officer when, according to his affidavit, he heard police dispatch call out a purse snatching over the radio. He responded to the call by going to the “Fourth Street Live” area of Louisville. Pugh attested that the victim appeared “frantic” when she flagged him down, that she then approached Pugh, told him she was “just glad to be alive,” and stated she “just got robbed.” The victim began to describe the perpetrator when a red vehicle drove by and she told Pugh “that’s him, that’s him, that’s the car that he got into.” Pugh asked her if she was certain, and she said “yeah that’s the one because it has the damage on the side of it.” Pugh later learned the driver of the red car was Donta Jones.

Pugh then followed the red car and stopped it. Pugh attested that he climbed out of his car and as he reached the rear bumper of the red car, the red car “took off.” Pugh then turned on the lights and siren on his police car and pursued the red car through Louisville. In his affidavit, Pugh alleged that at one intersection, the red car “started picking up speed,” and then, at another intersection, the red car failed to stop at a red traffic light, and collided with another vehicle. The other vehicle was driven by Demetrick Boyd, Sr. Pugh’s vehicle was not involved in the collision. According to the complaint filed in the

circuit court, as a result of the collision, tragically, Demetra¹ Boyd was killed. Additionally, Demetrick Boyd, Sr.; Demetrick Boyd, Jr.; Lynn-Asia Bell; Keivontez Bell; Cortez Moore; Demetrius Boyd; and Louis Simmons, III, were injured. It appears that Demetrick Boyd, Sr., was the only adult in the vehicle, as the other seven people in the vehicle with him were children, including the decedent.

Demetrick Boyd, Sr., as well as the passengers in his vehicle, or the parents of those minor passengers, as their representatives, filed actions² in the circuit court. They claimed, *inter alia*, that Pugh, both in his official and individual capacities, acted negligently in driving his police vehicle and in pursuing Donta Jones and that the Louisville/Jefferson County Metro Government and its police department were negligent in failing to properly train Pugh regarding techniques, policies and procedures concerning police pursuits and stops.

Pugh filed a motion to dismiss or, alternatively, for summary judgment, claiming that he was entitled to the defense of qualified official immunity and that his actions were not the proximate cause of any of the plaintiffs' injuries or the resulting claims. Pugh attached his affidavit to the motion. The affidavit incorporated by reference a transcribed oral statement Pugh gave at the police department concerning the events leading up to the collision. This statement was given within hours of the collision.

¹ In the pleadings filed in the circuit court, Demetra's name is sometimes spelled "Demetria." She was the daughter of Demetrick Boyd, Sr., who was driving the other vehicle.

² It appears that those actions were subsequently consolidated.

The circuit court, relying on *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), found that Pugh’s act of driving a police cruiser in pursuit of Donta Jones was not discretionary, but ministerial and, therefore, held that Pugh was not entitled to qualified official immunity. The court then stated that “[w]hether Officer Pugh was negligent in operating his police cruiser, with due regard being given to all the facts and circumstances, is a question for resolution by the trier of fact.” Consequently, the court denied Pugh’s motion for summary judgment.

Pugh now appeals, claiming as follows: (a) he is entitled to file this interlocutory appeal; (b) he is entitled to have the claims against him dismissed based upon qualified official immunity; (c) he is entitled to have the claims made against him in his official capacity dismissed; (d) the *Jones v. Lathram* case that the circuit court relied upon is inapposite; and (e) his pursuit of Donta Jones was “legally authorized,” and it was consistent with the standard operating procedures (S.O.P.s) of the Louisville Metro Police Department.

II. ANALYSIS

A. CLAIM REGARDING INTERLOCUTORY APPEAL

Pugh first contends that he is entitled to file this interlocutory appeal. Pursuant to *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009), “orders denying claims of immunity . . . should be subject to prompt appellate review.” In *Prater*, the Kentucky Supreme Court explained its reasoning for this holding:

[I]mmunity entitles its possessor to be free from the burdens of defending the action, not merely . . . from liability. . . . Obviously such an entitlement cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action. For this reason, the United States Supreme Court has recognized in immunity cases an exception to the federal final judgment rule codified at 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court reiterated its position that “the denial of a substantial claim of absolute immunity is an order appealable before final judgment.” . . . We find the Supreme Court’s reasoning persuasive, and thus agree with the Court of Appeals that an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.

Prater, 292 S.W.3d at 886-87 (internal quotation marks and citations omitted).

Therefore, Pugh is entitled to bring this interlocutory appeal concerning the denial of his claim of qualified official immunity.

B. CLAIM REGARDING DENIAL OF QUALIFIED OFFICIAL IMMUNITY

Pugh next alleges that he is entitled to have the claims against him dismissed based upon qualified official immunity. A recent case by the Kentucky Supreme Court explained under what conditions a public official is entitled to qualified immunity.

[W]hen an officer or employee of the state or county (or one of its agencies) is sued in his or her individual capacity, that officer or employee enjoys qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. Application of the defense, therefore, rests not on the status or title of the

officer or employee, but on the [act or] function performed.

Indeed, the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial. Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature. Discretionary acts are, generally speaking, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment. It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. On the other hand, ministerial acts or functions – for which there are no immunity – are those that require only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.

In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the dominant nature of the act. For this reason, [the Kentucky Supreme Court] has observed that an act is not necessarily taken out of the class styled “ministerial” because the officer performing it is vested with a discretion respecting the means or method to be employed. Similarly, that a necessity may exist for the ascertainment of those [fixed and designated] facts does not operate to convert the [ministerial] act into one discretionary in its nature. Moreover, a proper analysis must always be carefully discerning, so as to not equate

the act at issue with that of a closely related but differing act.

Haney v. Monsky, 311 S.W.3d 235, 240-41 (Ky. 2010) (internal quotation marks and citations omitted; emphasis removed).

In denying Pugh's claim of qualified official immunity, the circuit court relied on the *Jones* case. In *Jones*, the Kentucky Supreme Court held that "the act of safely driving a police cruiser, even in an emergency, is not an act that typically requires any deliberation or the exercise of judgment. Rather, driving a police cruiser requires reactive decisions based on duty, training, and overall consideration of public safety." *Jones*, 150 S.W.3d at 53. Therefore, the *Jones* Court found the act of safely driving a police cruiser in responding to an emergency call from a fellow officer was a ministerial act and, thus, the officer in that case was not entitled to qualified official immunity.

However, *Jones* is highly distinguishable from the present case. First, *Jones* involved the officer's adherence to standards for driving. In the present case, the issue revolves around adherence to S.O.P.s for police pursuits and whether Pugh's actions under those S.O.P.s were purely ministerial, discretionary, or a combination of the two.

Second, the underlying facts giving rise to the accidents in *Jones* and the present case are highly distinguishable. In the present case, according to Pugh's affidavit, when the victim approached him at Fourth Street Live, the victim told him she was "just glad to be alive" and she "just got robbed." In its order

denying Pugh's claim of qualified official immunity, the circuit court stated that Pugh had initiated the pursuit of the red car driven by Donta Jones "upon suspicion of assault and theft." Based upon what the victim had told him, Pugh attested that he initiated a pursuit of the red car through downtown Louisville at approximately 11:00 at night. Pugh's affidavit stated that during the pursuit, his police cruiser traveled at speeds of forty to forty-five miles per hour, and the perpetrator's car initially traveled at speeds of forty to forty-five miles per hour, but reached a speed of approximately sixty-five miles per hour before the collision. Additionally, Pugh attested that part of the pursuit occurred through parking lots. Thus, this police pursuit is distinguishable from the facts of *Jones*, where the police officer drove a police vehicle to respond to a call for assistance from another officer. The officer in *Jones* was not in pursuit of a perpetrator, as occurred in the present case. *Jones* involved a head-on collision between the officer's vehicle and a motorist, which was a circumstance not present here because Pugh's vehicle was not involved in the accident at issue. Furthermore, the accident in the present case does not appear to be a result of Pugh's negligent driving. Consequently, *Jones* is distinguishable.

As previously mentioned, in *Haney*, the Court stated that "discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240. However, the Court also explained that "ministerial acts or functions – for which there are no immunity – are those that require only obedience to the orders of

others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Haney*, 311 S.W.3d at 240.

Based on the evidence in the record, the Louisville Metro Police Department has an S.O.P. concerning police pursuits. The S.O.P. includes procedures for determining when an officer should not pursue a vehicle and when a pursuit should be terminated. Those determinations were based on various factors, including the dangers created by the pursuit and the seriousness of the offense.

In the present case, it is not proper at this juncture to determine whether Pugh's decision was primarily discretionary or ministerial, in order to decide whether he is entitled to qualified official immunity. The circuit court referred to the offense as "assault and theft," but Pugh's affidavit stated that the victim told him she was "glad to be alive" and she had just been "robbed."

According to the S.O.P., whether a pursuit should be initiated depends, in part, on the seriousness of the perpetrator's offense. Rather than deciding this matter under *Jones*, further discovery should take place regarding Pugh's adherence to the S.O.P.s. Thus, we reverse the circuit court's denial of Pugh's claim of qualified official immunity and remand for further discovery and proceedings concerning his qualified official immunity claim.

C. CLAIM REGARDING ALLEGATIONS AGAINST PUGH IN HIS OFFICIAL CAPACITY

Pugh next asserts that he is entitled to have the claims made against him in his official capacity dismissed. Pugh acknowledges that this claim “is not ‘officially’ before this court,” but he argues that “in the interest of judicial economy, this court’s pronouncement to the lower court on this issue might well expedite disposition of it promptly.” While a resolution by this Court “might well expedite” this case, as a general rule we cannot decide a matter until the circuit court has had the opportunity to rule on it. Hence, this issue is not properly before us at this time.

Accordingly, the order of the Jefferson Circuit Court determining that Pugh was not entitled to the defense of qualified official immunity is reversed, and the claim is remanded to the circuit court with instructions for discovery to be conducted and further proceedings held regarding whether Pugh is entitled to this defense.

ALL CONCUR.

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