

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001915-MR

JOSEPH MULLINS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 07-CI-00185

REDFORD TWP; OFFICER BRIAN
GREENSTIEN; OFFICER TODD METCALF;
JOHN DOE (UNKNOWN); OTHER REDFORD
TWP POLICE OFFICERS;
AND WEST BLOOMFIELD TWP

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Joseph Mullins appeals pro se from an order of the Letcher Circuit Court granting summary judgment in favor of Redford Township and West Bloomfield Township, located in Michigan, and Officers Brian Greenstien and

Todd Metcalf, employed by Redford Township and West Bloomfield Township respectively (hereinafter collectively referred to as “Appellees”). For the following reasons, we affirm.

Mullins filed the underlying action against Appellees, alleging that Officers Greenstien and Metcalf abducted him at his home in Letcher County, Kentucky, on the night of September 25, 2006, assaulted him, and forcibly transported him to his residence in Michigan where he was arrested on the morning of September 26, 2006.¹ Appellees concede that Mullins was arrested at his residence in Michigan on September 26, but deny that Officers Greenstien and Metcalf traveled to Kentucky and abducted him.

Appellees filed a motion for summary judgment, in which they presented incident reports, work logs, transcripts of telephone calls, and affidavits demonstrating that Officers Greenstien and Metcalf were in Michigan at the time Mullins claimed to be abducted. Appellees also presented phone records of a cellular phone owned by Mullins which depicted calls made and received on September 25 and 26, which occurred in transit from Kentucky to Michigan, in an effort to prove Mullins drove to Michigan under his own volition.

Having determined that the evidence presented by Appellees supported their motion for summary judgment, the trial court directed Mullins to set forth any evidence which would create an issue of material fact regarding his claim. Mullins directed the court to the following evidence which he argued supported his claim: (

¹ The record reveals that Mullins maintains a residence and operates an insurance business in Michigan.

1) a Redford Township police report, indicating that “another jurisdiction” was involved with his arrest; (2) evidence that Mullins renewed his driver’s license in Letcher County, Kentucky, on the morning of September 25; (3) evidence that Mullins faxed a statement to Redford Township on the morning of September 25; (4) a receipt for a new pair of glasses dated on October 11, the day after which Mullins was released from a Michigan jail; (5) recorded statements of Sara Rushing, Vernon Mullins, Jessica Riddle, and John Kozlowski, some of whom claimed were made to have seen Mullins abducted by the Michigan police officers;² (6) evidence that Mullins’ bond was denied by a Michigan court; and (7) a subpoena issued by a Michigan court, which listed an incorrect address for Mullins. The trial court determined that such evidence did not refute Appellees’ evidence that the officers were not in Kentucky during the time of the alleged abduction and granted the Appellees’ motion for summary judgment. Mullins appealed.

Summary judgment shall be granted only 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.” Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service*

² These statements were ruled to be inadmissible hearsay.

Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991)(citations omitted). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482 (citations omitted).

On appeal from a granting of summary judgment, our standard of review is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004)(citations omitted).

On appeal, Mullins argues the trial court erred by finding that he failed to present affirmative evidence to create a genuine issue of material fact regarding his claim that he was abducted in Kentucky by Appellees. We disagree.

Upon a careful review of the record, we believe the evidence set forth by Mullins does not tend to prove that he was abducted by Appellees in Kentucky. At the summary judgment hearing, Mullins argued that his allegations, as well as the recorded statements of witnesses, supported his cause of action; however, the statements Mullins referenced were ruled to be inadmissible hearsay, and the witnesses were excluded from testifying at trial. The remaining documents Mullins presented to support his claim only demonstrate that he was in Kentucky

on the morning of September 25 and purchased new eye glasses a day after being released from jail in Michigan. We fail to appreciate how these documents tend to prove that Officers Greenstien and Metcalf were not in Michigan at the time of Mullins' alleged abduction. Mullins' allegations, alone, do not constitute affirmative evidence sufficient to defeat a properly supported motion for summary judgment. *Educ. Training Systems, Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003). Thus, the trial court did not err by finding the evidence on record did not create a genuine issue of material fact and granted Appellees' motion for summary judgment accordingly.

Next, Mullins argues the trial court abused its discretion by determining that the recorded statements of Sara Rushing, Vernon Mullins, Jessica Riddle, and John Kozlowski were inadmissible hearsay and by excluding each as a potential witness for trial. We disagree.

Mullins contends the recorded statements were admitted into evidence at a pre-trial hearing; however, our review of the record indicates the trial court specifically ruled that the statements would not be admitted into evidence because Mullins failed to place the witnesses under oath and no court reporter was present when the statements were made. *See* CR 43.13(1), "[a]ffidavits [must be] sworn to or affirmed [by] an officer authorized to take depositions." Further, the trial court excluded each as a potential witness at trial because Mullins failed to comply with a court order requiring him to produce the witnesses for deposition. *See Primm v. Isaac*, 127 S.W.3d 630, 639 (Ky. 2004) (a trial court may exclude a witness from

testifying who does not provide complete and unequivocal answers to deposition questions); *See also* CR 37.02(2) (when a party fails to comply with a discovery order, the court may prohibit such party from presenting certain evidence to support a claim). Since the recorded statements were deemed inadmissible at the summary judgment hearing, and the witnesses were prohibited from testifying at trial, the trial court properly excluded such evidence from being introduced at the summary judgment hearing.

Next, Mullins asserts the trial court erred by finding that the cellular phone records provided by Appellees conclusively established that Mullins drove from Kentucky to Michigan. We disagree.

As an initial matter, Mullins failed to object to the introduction of the phone records, and thus this argument is not properly preserved for our review. *See Price v. Com.*, 474 S.W.2d 348, 349 (Ky. 1971) (the failure to object to the admission of evidence constitutes a waiver). Unpreserved claims will only be reviewed for palpable error which results in a manifest injustice. *Martin v. Com.*, 207 S.W.3d 1, 4 (Ky. 2006). Here, Mullins asserts that he was not in possession of the cell phone during the time period reflected in the phone records; however, his claim is without evidentiary support. Further, in granting summary judgment to Appelles, the trial court primarily relied upon the affidavits, recorded phone conversations, work timesheets and shift rosters, and completed incident reports which showed that Officers Greenstien and Metcalf were in Michigan during the time of the alleged

abduction. As we stated earlier, Mullins provided no evidence to refute Appellees' evidence on this matter. Accordingly, we find no merit to Mullins' claim of error.

Finally, Mullins argues the trial court erred by refusing to consider evidence regarding matters occurring outside the state of Kentucky. We disagree.

We find nothing in the record to support Mullins' argument. During the hearing on the motion for summary judgment, Mullins attempted to discuss events not related to the alleged abduction in Kentucky, but rather, those which occurred during his arrest in Michigan. Mullins relies on CR 18.01 to now argue that all matters occurring outside of Kentucky were properly before the trial court; however, such reliance is mistaken. The trial court refused to consider evidence of alleged procedural flaws occurring during Mullins' arrest in Michigan, which he presented to refute Appellees' evidence demonstrating that Officers Greenstien and Metcalf were in Michigan at the time of the alleged abduction. Given the limited scope of the hearing on Appellees' motion for summary judgment, evidence regarding his arrest in Michigan was not relevant. Thus, we find no error by the trial court in this regard.

The order of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joseph Mullins
McRoberts, Kentucky

BRIEF FOR APPELLEES:

Melissa A. Wilson
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