RENDERED: JULY 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001425-MR

JOHN ROYALTY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NOS. 98-CI-00349 AND 98-CI-00359

DR. HARRY SPALDING, MAYOR OF THE CITY OF BARDSTOWN; BARDSTOWN POLICE DEPARTMENT; AND CITY OF BARDSTOWN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND LAMBERT, JUDGES.

LAMBERT, JUDGE: John Royalty appeals from the Nelson Circuit Court's entry of summary judgment in favor of Appellees, Dr. Harry Spalding, the City of Bardstown, and the Bardstown Police Department. After careful review of the record and the applicable law, we affirm.

This case involves an administrative appeal to the Nelson Circuit Court brought by John Royalty against his former employer, Bardstown City Police Department, the City of Bardstown, and its former Mayor, Dr. Harry Spalding (hereinafter Mayor Spalding). Royalty appealed to the circuit court in 1998 after Mayor Spalding removed him from duty as a police officer following an incident that occurred on May 24, 1998.

On that day, Royalty was dispatched to some debris that was covering the roadway. As Royalty was directing traffic around the debris, an approaching vehicle hit the debris. Royalty then approached the vehicle once it stopped and noticed two people inside. Royalty observed that Jarrett Downs was driving a vehicle owned by Timmy Bartley. Royalty knew both of these individuals through his work on the police force. While questioning Downs about his license, Royalty learned that Downs had no license. Knowing that Downs also had an outstanding warrant for his arrest, Royalty asked Downs to step out of the car.

Downs then opened the car door, placing Royalty in the "V" between the door and the vehicle. Downs placed the vehicle in reverse, dragging Royalty some fifty feet. Royalty was able to draw his weapon and fire a shot at Downs, striking him. Royalty fired the first shot from approximately three or four feet. After being dragged the aforesaid distance, Royalty was thrown free from the vehicle and came to rest on his knees, facing the headlights of the vehicle which was fifteen to twenty feet away. Royalty testified that he then fired two more shots at the Downs vehicle because he was not sure whether the vehicle was coming

toward him or backing away from him. Royalty testified that he never saw the vehicle slow down or indicate that it was breaking, and he admitted that at the time he fired the shots, he could not say the vehicle was moving toward him.

On June 16, 1998, Mayor Spalding sent Royalty written notice that Royalty faced certain charges in relation to this incident and that he was to be placed on suspension without pay until the matter was resolved after an administrative hearing was conducted pursuant to Kentucky Revised Statutes (KRS) 15.520. That hearing was conducted on August 3, 1998. On August 12, 1998, Mayor Spalding removed Royalty from his position as a police officer and stated that he could return to work as a Community Relations Specialist.

On August 13, 1998, Mayor Spalding issued findings of fact and conclusions to clarify the basis for Royalty's removal. The Mayor concluded that the firing of shots two and three violated Sections III (E) and (F) of the City's Deadly Force Policy. The relevant portions of that policy are as follows:

> A. An officer may use deadly force to protect himself or others from what he reasonably believes to be an immediate threat of death or (near-death) critical bodily harm.
>
> ***
>
> E. Officers are prohibited from discharging firearms when it appears that an innocent person may be injured.
>
> F. Officers should not discharge a firearm at or from a moving vehicle except as the ultimate measure of self-defense or defense of another

> when the suspect is using deadly force by means other than the vehicle.

In the absence of evidence to the contrary, Mayor Spalding noted Royalty's estimate that he fired the second and third shots from fifteen to twenty feet away from the vehicle, and that he was not in immediate danger of personal injury or death at this time. The second and third shots were not, under the circumstances, an "ultimate measure of self-defense." According to Mayor Spalding, Royalty also fired these shots without regard to any injury that might come to the passenger in the car, who was an innocent bystander. There was no evidence that the car "had traveled in any direction other than reverse—away from Officer Royalty." Finally, Mayor Spalding concluded that Royalty had no reason to believe that the vehicle had changed direction and was moving towards him.

As stated above, Royalty appealed Mayor Spalding's decision to the Nelson Circuit Court. The Court affirmed the Mayor's actions and conclusions by its order entering summary judgment. Royalty now appeals to this Court.

Our standard of review is set forth in *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996):

> The standard of review on appeal of a summary judgment 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, Ky., 833 S.W.2d 378, 381 (1992).

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

On appeal, Royalty argues that Mayor Spalding's finding that his actions in firing shots two and three violated the city's deadly force policy was based on conjecture and speculation and not on probative evidence. The Appellees argue that Royalty did not present this argument to the trial court, and thus is barred from presenting it for the first time on appeal. Royalty counters that he consistently argued that there was a failure of substantive evidence to support the Mayor's decision and the decision of the Circuit Court. A careful review of Royalty's response to the Appellees' motion for summary judgment indicates that Royalty never raised the argument before the Circuit Court. Instead, Royalty argued about the nature of the proceedings he was entitled to, whether it be an original action or a quasi trial *de novo*.

It is well settled that a trial court must be given the opportunity to rule in order for an issue to be preserved for appellate review. *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000). Because Royalty did not preserve this argument for appellate review, we shall not address it on appeal. We note, however, that even if the argument were properly preserved, it is without merit.

Based on the clearly stated findings of the Mayor and the order entered by the circuit court, we find the Mayor's conclusion that shots two and

three violated the City of Bardstown's Deadly Force Policy to be supported by the evidence. Royalty's own testimony indicated that he knew an innocent passenger was in the car at the time he fired the shots. Further, the shots were fired from fifteen to twenty feet away and there was no evidence to indicate that the car had ceased traveling away from him and, instead, was traveling toward him. Finally, in direct contravention of the Deadly Force Policy, Royalty did not fire the shots as an "ultimate measure of self-defense" and Downs was not using deadly force by means other than the vehicle.

Royalty also argues that in his ruling, Mayor Spalding applied the wrong definition of self-defense. In addition, Royalty argues that the City's Deadly Force Policy is in contravention with KRS 503.050(2), which states that the use of deadly physical force by a defendant upon another person is justifiable only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, etc. Again, the Appellees counter that Royalty raises this argument for the first time on appeal, and as such we should not address it.

Again, we agree with the Appellees. Royalty did not raise his argument that Mayor Spalding failed to consider KRS 503.050(2) in his response to the Appellees' motion for summary judgment or otherwise present the argument to the Circuit Court. Further, Royalty does not provide a citation in his brief as to the location in the record indicating this argument was preserved for appellate

review. Thus, this argument is not properly before this Court and we decline to address it on appeal.

Even if Royalty had not waived this argument, we find it to be without merit. The criminal statute on self-defense does not apply to the facts of this case. The City of Bardstown never charged Royalty with a crime, but instead reviewed his job status based on its own policies and procedures, as the law entitles it to do. Based on the evidence of record and the City's Deadly Force Policy, Mayor Spalding concluded that Royalty violated the policy on self-defense.

Based on the foregoing, we affirm the Nelson Circuit Court's order entering summary judgment in favor of the Appellees.

COMBS, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Larry D. Raikes
Bardstown, Kentucky

BRIEF FOR APPELLEES:

Robert D. Hudson
Amy M. Miller-Mitchell
Florence, Kentucky