

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001659-MR

CHARLES P. FARMER

APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JUDGE
ACTION NO. 12-CR-00074

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER

** ** *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This case presents an issue of first impression in this Commonwealth, specifically, whether an order denying immunity from prosecution pursuant to Kentucky Revised Statute (KRS) 503.085 is immediately appealable. The Court entered an order directing appellant to show cause why this appeal should not be dismissed as having been improperly appealed from an interlocutory order. Based on the Supreme Court's recognition that immunity

affords protection from litigation in civil cases and an order denying immunity is immediately appealable, we hold that appellant has demonstrated sufficient cause to prevent the dismissal of this appeal.

We begin with the broad nature of Kentucky's version of justifiable self-defense contained in KRS 503.085. The language in KRS 503.085 is unambiguous. It directs that citizens of this Commonwealth may, under certain circumstances, use force without fear of arrest, criminal prosecution and civil liability. Subsection (1) states:

A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

Although no reported case has directly addressed the arguments presented, we find guidance in established precedent.

In the civil context, this Commonwealth has recognized that an order denying absolute immunity is an exception to the definition of an appealable judgment contained in Kentucky Rules of Civil Procedure (CR) 54.01. An interlocutory appeal is permissible because to hold otherwise would defeat the purpose of immunity. Relying on precedent established by the United States

Supreme Court, our Supreme Court explained the logic for the rule in *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009), and emphasized that immunity is an entitlement that frees a defendant from the financial and emotional costs of litigation. Its holding, written with reason and precision, was as follows:

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.” *Id.* at 525, 105 S.Ct. 2806, *citing Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). 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.

Id. at 886-87. The same logic is applicable to immunity from prosecution under KRS 503.085.

In *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009), the Court found the purpose of the statute to be no different than other types of absolute immunity.

By declaring that one who is justified in using force “is immune from criminal prosecution,” and by defining “criminal prosecution” to include “arresting, detaining in custody, and charging or prosecuting the defendant,” the General Assembly has made unmistakably clear its intent to create a true immunity, not simply a defense to criminal charges. This aspect of the new law is meant to provide not merely a defense against liability, but protection against the burdens of prosecution and trial as

well.

Id. at 753. The Court observed that immunity is a bar from prosecution “designed to relieve a defendant from the burdens of litigation” and, therefore, “a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding.”

Id. at 755.

It is obvious that if a defendant cannot immediately appeal the trial court’s decision and must await the outcome of a criminal trial, nothing is gained by invoking KRS 503.085 at the “earliest stage of the proceeding.” After trial and conviction, the burdens have been shouldered and the harm irreparable.

We cannot ignore the futility in an appeal of the denial of KRS 503.085 immunity after a defendant’s conviction. As explained by the author of this opinion in his dissent in *Lemons v. Commonwealth*, 2012 WL 2360131 (Ky. App. 2012)(2010-CA-001942-MR), motion for discretionary review pending, following a trial and conviction, any argument that immunity was improperly denied would be subject to the harmless error rule, and the defendant required to overcome the strong preference in the law for deferring to a jury’s verdict. It is simply nonsensical for the General Assembly to have clearly established immunity from prosecution that is to be determined by the court, but leave a defendant denied immunity without an opportunity for meaningful judicial review.

We end our discussion with a quote by the District of Columbia Court when it considered whether an immediate appeal was available from a denial of

immunity from prosecution under a statutory provision. In *Stein v. U.S.*, 532 A.2d 641, 644 (D.C. 1987), the Court stated:

The question of whether Stein is immune is “effectively unreviewable” on appeal from a judgment of conviction because, if he is immune, he has a statutory right not to be tried at all. His asserted right to [immunity] is forever lost if not resolved in [his] favor before jeopardy has attached. (internal citations and quotations omitted).

In this case, the same reasoning is persuasive. If Farmer is entitled to immunity under KRS 503.085, he cannot be tried. He is entitled to immediate review of the circuit court’s decision.

As pointed out in *Rodgers*, whether a defendant is entitled to immunity should be decided as early in the prosecution as possible. *Rodgers*, 285 S.W.3d at 755. Therefore, we order that the merits of this matter be briefed on an expedited schedule.

ORDER

NOW, THEREFORE, it is ordered that appellant has demonstrated sufficient cause to prevent the dismissal of this appeal.

Appellant has also filed a motion for additional time to file a brief. This motion is DENIED AS UNNECESSARY because the time for filing a brief in this appeal was stayed because of the entry of this Court’s order to show cause.

Because this is a pretrial motion, this appeal shall be expedited. The appellant SHALL FILE his brief in support of his arguments on appeal within fifteen (15) days of the date of this Order. The Commonwealth shall be allowed

ten (10) days to file its brief and there will be no response allowed to the appellant in a reply brief. The case shall stand submitted for decision upon the filing of the Commonwealth's brief.

The Russell Circuit Court Clerk is directed to transmit the record on appeal to this Court upon the expiration of the briefing time established by this Court. The Clerk of this Court shall serve a copy of this order on the Clerk of the Russell Circuit Court.

CAPERTON, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

ENTERED: February 15, 2013

/s/ Kelly Thompson
JUDGE, COURT OF APPEALS

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent.

There is no express grant of appellate jurisdiction permitting our review of the interlocutory order from which this appeal is taken. A search of Kentucky jurisprudence for even a single appeal brought by a criminal defendant from an interlocutory order yields nothing (other than appeals authorized by Kentucky Rules of Civil Procedure 65.07 or petitions for writs).¹ In fact,

¹ However, *Curtis v. Commonwealth*, 2009 WL 4723186, No. 2008-CA-002168-MR (Ky. App. Dec. 11, 2009) refers to an interlocutory appeal to the Kentucky Supreme Court from the denial of a motion to dismiss the appellant's indictment pursuant to the Interstate Agreement on