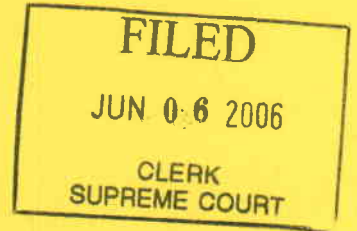


SUPREME COURT OF KENTUCKY
CASE NO. 2005-SC-842-D
(2004-CA-500-MR)



BOYD FISCAL COURT

MOVANT/
CROSS-RESPONDENT

VS:

BOYD CIRCUIT COURT
2001-CI-643

PHILIP STURGILL, individually and as
Sheriff of Boyd County, and
FIDELITY AND DEPOSIT OF MARYLAND

RESPONDENTS/
CROSS-MOVANTS

REPLY BRIEF FOR MOVANT/CROSS-RESPONDENT
BOYD FISCAL COURT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served by mailing a true copy, postage prepaid, to: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 and to Hon. Matthew J. Wixsom, P. O. Box 1790, Ashland, Kentucky 41105-1790 on this the 5th day of June, 2006. I further certify that the court record was not withdrawn from the clerk's office by the party filing this brief.


NELSON T. SPARKS

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PURPOSE

This is the reply brief of the Movant Boyd Fiscal Court.

ARGUMENT ONE

DONATIONS TO A SHERIFF WERE NOT PERMITTED BEFORE THE 2005 AMENDMENT TO KRS 61.310

The first issue to be decided by this court is whether donations to the sheriff's office were allowed during the years that Philip Sturgill was sheriff of Boyd County. The Movants contend that donations to the sheriff were not allowed under any circumstances. The old Court of Appeals answered this question very succinctly in Funk v. Milliken: "A fee officer obligates himself to run the office with the fees that he takes in." 317 S.W.2d 499 (Ky., 1958), at 509.

In their Argument One, the Respondents offer nothing to support their contention that the law permitted donations to a sheriff prior to the 2005 amendment to KRS 61.310, other than their own unsupported statements.

Respondents discuss the requirement of KRS 446.080 that statutes should "be construed according to the common and approved usage of language" but their analysis flies in the face of that requirement.

Subsection (8)(a) of the amended version of KRS 61.310 plainly allows donations to a sheriff by the following language: "A sheriff may accept a donation of money or goods . . ." and then it goes on to set out the conditions that must be followed if such donations are accepted. The language of the statute could not be plainer.

The legislators who enacted the earlier versions of the statute could have used equally plain language if they had intended to allow for donations and the absence of such plain language is conclusive evidence that they lacked such intent.

In determining the intent of the pre-2005 version of KRS 61.310, an obvious question arises: Subsection (3) of the statute provides that peace officers

may only be compensated out of public funds but then it goes on to say that donations made by persons to any governmental unit or officer thereof do not constitute public funds within the meaning of this subsection. Does this indicate that the legislature intended to allow donations to the sheriff's office for other purposes? Respondents argue that this last sentence means that donations to the sheriff are contemplated by the statute and that donations may be used for the purchase of equipment but not for salaries. Movant asserts that the sentence has a totally different meaning.

In OAG 82-433, the Attorney General pointed out that the General Assembly has given fiscal courts (but not sheriffs) the authority to accept gifts for public purposes. If the pre-2005 version of KRS 61.310(3) is read in view of this authority by the fiscal court to accept gifts the meaning is obvious: One desiring to give money to a sheriff, for whatever motives, cannot circumvent the requirement that the sheriff may be paid only out of public funds by giving the money to the fiscal court on condition that it be earmarked to provide salaries for the sheriff and his deputies. In other words, the salaries for the sheriff and his deputies could only be paid out of public funds and donations to the fiscal court are not to be considered as such "within the meaning of this subsection". (Emphasis added). One could not make an illegal donation to the sheriff by laundering the money through the fiscal court. This language shows that the legislature was careful to apply this limitation to the meaning of "public funds" to one subsection of one statute and to no other. By implication, donations to the fiscal court or other entities would be considered public funds for other purposes.

ARGUMENT TWO

A SHERIFF MUST INCLUDE DONATIONS, WHETHER LEGAL OR ILLEGAL, IN HIS ANNUAL SETTLEMENT WITH THE FISCAL COURT

Respondents' argument that donations are not income to the sheriff under KRS 134.310 simply does not hold water. Subsection (4) of that statute requires that the sheriff in his annual settlement must pay to the county treasurer "all money that remains in his hands". In spite of the discussions in his Argument One of how statutes should be construed according to the plain meaning of the words used, the respondent argues that "all money that remains in his hands" does not really mean "all money that remains in this hands."

By the same token, the respondent argues that when KRS 134.310(6) says, "the sheriff shall pay to the fiscal court any fees, commissions, and other income of his office," it should not be interpreted to mean "other income of his office" but should be given some meaning other than the plain meaning of the words used.

If statutes are to be interpreted in the manner urged by the respondents, the cases and statutes requiring that words and phrases be construed according to their plain and approved usage should be stricken from the books because they are meaningless.

The respondent discusses KRS 134.310 as if there were two versions of that statute, one prior to 2005, the other after 2005, with the earlier version somehow excluding donations from being included in the sheriff's settlement. The plain fact is that the statute was last amended in 1998 and nothing that happened in 2005 changed a single word of it. At all times relevant to this litigation, the statute has said "the sheriff shall pay to the fiscal court any fees, commissions, and other income of his office."

One may reasonably ask how it is that the sheriff may not legally receive donations to his office, but if he does accept such donations, they must be paid to

the fiscal court. Should the fiscal court receive the benefit of illegal donations to the sheriff? The answer is in the affirmative. One may take the position of the Court of Appeals that the legislature never contemplated donations when it said the sheriff should pay over “fees, commissions, and other income of his office”. That is probably correct because if donations had been contemplated, the statute would have been written to say “fees, commissions, donations and other income of his office”. The obvious reason to use a general statement such as “other income of his office” is to include items such as donations that are not otherwise contemplated.

The respondents argue that the disputed donations are not income because they were not given for the performance of duties of the office. Movants respectfully contend that while the purposes of the donations do not matter it is obvious that they were given to enhance the performance of the duties of the sheriff’s office. The Court of Appeals quoted the *Ashland Daily Independent* at length to show the public benefits derived from the disputed donations: new communications equipment was purchased, bullet-proof vests were purchased, “stop sticks” were bought for every cruiser, radios were upgraded, and a drug dog was bought and trained. These expenditures were obviously for the purpose of enhancing the performance of the sheriff’s office and it is impossible to argue seriously that the donations that led to these purchases was for any other purpose.

ARGUMENT THREE

A SHERIFF IS NOT ENTITLED TO CREDIT FOR EXPENDITURES FROM FUNDS THAT SHOULD HAVE BEEN PAID TO THE FISCAL COURT IN A PREVIOUS YEAR

KRS 134.310(6) requires the sheriff to pay over his excess fees, commissions, and other income of his office to the fiscal court at the end of each year. The respondents argue that the sheriff can avoid this requirement if he keeps

the money and spends it on equipment in some subsequent year. The problem is that KRS 134.310(1) requires the sheriff to “annually settle his accounts.” Funk v. Milliken describes the same requirement: “A county officer who is compensated wholly or in part from fees is required to pay over to the county, each year, the excess of receipts over and above the amounts allowable for his personal compensation, the compensation of his legally authorized deputies and assistants, and authorized official expenses” 317 S.W.2d at 506 (Emphasis added.)

At the end of the year, these excess funds become the property of the fiscal court and this fact is not changed by whether the sheriff uses the money in a later year for purchases that are beneficial to his office. One cannot spend money that rightfully belongs to another and justify his actions by claiming he spent the money for a good purpose.

ARGUMENT FOUR

SUMMARY JUDGMENT WAS PROPER BECAUSE THERE WERE NO ISSUES OF MATERIAL FACT

Summary judgment was absolutely proper in this case. The funds that Philip Sturgill and all other sheriffs receive, namely, fees and commissions, were properly reported and audited and the fiscal court has no reason to contest the accuracy of the accounting for those funds. However the donated funds were never reported and there was no accounting for them until the fiscal court requested an audit that showed that over \$24,000 of expenditures were undocumented. One may choose to accept the sheriff's contention that the money was properly spent but the fact is that money is gone and there is nothing to show what happened to it.

To determine how the disputed funds were spent, the movant served on the respondent a request for production of documents that asked for the sheriff's documentation of the donations that were made during the period in question and

the documents showing how the money was spent. The sheriff provided these documents and the movant accepted this without questioning their accuracy or validity. This information was divided into yearly categories and the documented expenditures for each year were subtracted from the donation for the same year. The difference was the amount owed for that year. This was a simple matter of simple arithmetic, receipts minus expenditures. The movant did not question a single expenditure; the sheriff was given credit for every expenditure for which he had documentation.

Pursuant to the requirement that a sheriff must settle his accounts annually, each year was examined separately and the total for all the years was added together to determine the total amount owed.

The amounts shown in the circuit court's judgment are based exactly on the documents provided by the sheriff.

The allegation that the state auditor found no evidence of wrongdoing is correct but misleading; as to the undocumented \$24,000, the auditor found no evidence of "right doing" either; the money was simply gone and there was nothing to show where it went. To allow credit for undocumented expenditures of public money is to invite corruption and this should not be allowed as a matter of public policy.

The respondents state that the "analysis" by the fiscal court's attorney is not evidence; once again, this is correct but misleading. Movants do not deny that their attorney took the documents provided by the respondents, sorted them out and did the arithmetic required by KRS 134.310 and Funk v. Milliken. There was no analysis involved. Not a single expenditure by the sheriff was questioned and he was given credit for every one within the year that it was made.

The allegation that the sheriff did not receive credit for money transferred from a block grant account is simply wrong.

In 1997, the sheriff opened an account, which he called a "Local Block Grant", while maintaining the "Special Account" he opened in 1994 for donated

funds. The sheriff's documents for this Special Account shows receipts of \$8,575.27 and disbursements of \$3,936.09, leaving \$4,639.18 that should have been paid to the fiscal court but was not.

The sheriff transferred \$24,000 from the Special Account to the new Block Grant Account in 1997 but this was money that had carried over from previous years and was therefore not shown as a disbursement from the Special Account or a receipt by the Local Block Grant Account.

Grant money was excluded from the calculations. The Local Block Grant Account shows total receipts of \$25,771.06. This does not include Federal Grant Money that was placed in the account and it does not include the \$24,000 that was transferred from the Special Account.

Disbursements of \$963.35 were documented from the Special Account. An additional \$478.95 was claimed but was undocumented and therefore was not included.

For 1997, \$24,807.71 should have been paid from the Local Block Grant Account but it was not.

For the two accounts, a total of \$29,446.89 should have been paid to the fiscal court.

The argument that the fiscal court did not set a budget for the sheriff for the year 1999 is untrue. While the language of the fiscal court's minutes might have been better, the parties agree that the sheriff submitted a budget to the fiscal court and the fiscal court voted to accept it. The fiscal court rightfully believed that it had set the sheriff's budget at the amount of his submission. To say that this was not an affirmative setting of the budget is, at best, a game of semantics.

As to the contention that there were issues of fact that should have precluded summary judgment, Movant respectfully contends that after the sheriff provided by discovery all his documents showing income and receipts for the disputed funds, there was nothing left to do except to apply the law to determine

the amount owed to the fiscal court. There are no issues of fact in this case but only issues of law.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nelson T. Sparks", is written over a horizontal line.

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