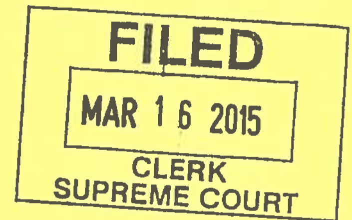

SUPREME COURT OF KENTUCKY
CASE NO. 2014-CA-000456-DE
(2013-CA-001347)

JEFFREY PETTINGILL APPELLANT

JEFFERSON CIRCUIT COURT
2013-D-501731

VS.

SARA YOUNT PETTINGILL APPELLEE

REPLY
BRIEF FOR APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 9th day of March, 2015, the original and nine copies of the Reply Brief For Appellant was sent via FEDEX to the Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601, by U.S. First Class Mail to Sam P. Givens, Jr., Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, and by Hand-Delivery to: Hon. Judge Jerry J. Bowles, Family Court Division Six, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky, 40202 and Brian D. Gatewood, Johnson and Gatewood, P.S.C., 231 South Fifth Street, Suite 200, Louisville, Kentucky 40202, Counsel for Appellee.

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STATEMENT OF POINTS AND AUTHORITIES

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ARGUMENT

I

A KRS 403.750 HEARING IS A TRIAL FOR THE PURPOSES OF THE KENTUCKY RULES OF CIVIL PROCEDURE AND KENTUCKY RULES OF EVIDENCE

In her brief Appellee asserts "[t]he recording in dispute in the instant case is a hearing not a trial. As such it is not governed by CR 98(2), but by CR 98(3)…".[1] Respectfully, Appellee's assertion is incorrect. Neither the style of the pleading which brings a matter before a trial court, the name given to the court proceeding, hearing or trial, nor the name given to the pronouncement made by the trial court thereafter, order or judgment , controls whether the Kentucky Rules of Civil Procedure or the Kentucky Rules of Evidence must be followed. The question is whether the preceding was an adjudication of the merits of the claim. If it was the proceedings are governed by the Kentucky Rules of Civil Procedure and the Kentucky Rules of Evidence. Anderson v. Johnson, 350 S.W.3d 453 (Ky.2011) (Hearing conducted upon motion to relocate with child nonetheless required trial court to comply with CR 52.04). Therefore, the Jefferson County Circuit Court Clerk was required to comply with CR 98(2) and certify the video record on appeal along with his certification of the paper record.

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[1] Appellee's Brief, page 6, 1st paragraph, 2nd line.

II

UNDER KRE 201 ADJUDICATIVE FACTS INCLUDE FACTS GENERALLY KNOWN IN THE VENUE AND FACTS FROM ALTERNATE SOURCES WHOSE ACCURACY CANNOT BE REASONABLY QUESTIONED

In her brief the Appellee asserts that "[a]ppellant's claim that that [sic] the [trial] Court took notice of adjudicative or historical facts is absurd."[2] Respectfully, Appellant disagrees. Specifically, KRE 201(a) [Judicial Notice of Adjudicative Facts] states: "Scope of Rule. This ***rule*** (Emphasis added) governs only judicial notice of adjudicative facts". Section (b)(1) of the rule, captioned "Kinds of facts", then states:

> (b)A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
> (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed: or
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Thus, KRE 201 includes within its definition of an adjudicative fact what Professor Lawson describes as facts which can be obtained from alternate sources. This is usually referred to as the "Alternate Source Rule". Clay v. Commonwealth, 291 S.W.3d 210, 219 (Ky.2009). This analysis is consistent with the Court's definition of an adjudicative fact as set out in Clay:

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and ***with what motive or intent***—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts...." Lawson, *Kentucky Evidence* § 1.00[2][b], at 6 (quoting Fed.R.Evid. 201, Advisory Committee's Note to Subdivision (a)). Id., 218. (Emphasis added.)

Indeed, it was the "alternate source" aspect of KRE 201 which was at the heart of this Court's decision Commonwealth v. Howlett, 328 S.W.3d 191(Ky. 2009). Therein the trial judge, relying on his knowledge as a former prosecutor, took judicial notice that a

[2] Appellee's Brief, page 13, last sentence.

burp during the administration of a breathalyzer test required that the test be started again. In other words the trial judge took judicial notice of a test protocol which, when followed correctly, presumably yields a conclusion about blood alcohol content in humans. This Court analyzed that case within the frame work of KRE 201 holding "[t]hus, we reaffirm our longstanding position that, under KRE 201, a trial judge is prohibited from relying on his personal experience to support the taking of judicial notice". Id., 193.

To satisfy the statutory requirement that he find that an act of domestic violence occurred and may occur again, KRS 403.750, the trial judge in the case at bar applied the Lethality Factors in Intimate Partner Violence factors/test to the facts. He applied the test, which came from his personal knowledge of domestic violence, after the close of the evidence. The test was not offered into evidence by either party and the trial judge did not put the parties on notice of his intention to use the test prior to the close of the evidence as required by KRE 201(e). When the allegation on appeal is that a trial court improperly used its own knowledge of a testing protocol to render a judgment, rather than having the testing protocol put into evidence by one of the parties, the issue is properly analyzed by reference to KRE 201. Howlett. This is because KRE 201 defines adjudicative facts to include facts which can be taken from alternative source whose reliability cannot be reasonably questioned. KRE 201, Clay, Howlett. Appellant's argument was therefore not "absurd" but legally sound and correct as a matter of law.

III

THE APPELLEE HAS CONCEDED THAT IN REACHING ITS JUDGMENT THE TRIAL COURT USED ITS OWN KNOWLEDGE IN THE AREA OF DOMESTIC VIOLENCE TO MAKE AN "ASSESSMENT"

In her brief the Appellee states: "[t]he trial court, using its knowledge in the area of domestic violence, made an ***assessment*** that Appellant's action [sic] put Appellee at 'extreme risk of physical harm'." [3] (Emphasis added.) In this context, and in the context of the trial courts judgment, extreme risk of physical harm falls under the evidentiary requirement of KRS 403.750. Said statute requires, as a predicate to issuing a domestic violence order, that a trial court find both an act of domestic violence occurred and that it may occur again. As more fully argued in his Appellants brief, the trial courts error was that it made positive findings on both issues only after preforming this "assessment", i.e. applying the Lethality Factors in Intimate Partner Violence test, which test was not properly admitted into evidence either through the parties or via KRE 201. With this admission the Court can now move past the question of whether the Lethality Factors in Intimate Partner Violence test was employed by the trial court and on to the question of whether it was employed correctly.

CONCLUSION

The opinion of the Kentucky Court of Appeals must be reversed in this case as must the judgment of the trial court. The domestic violence order entered by the trial court must also be vacated. The decision of the Court of Appeals was erroneous on two counts. When that court saw that the Circuit Court Clerk had only partially complied with CR 98 it should have issued an order directing the Circuit Court Clerk to come into full compliance with CR 98. It abused its discretion when it denied the Appellant a full

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[3] Appellee's Brief, page 13, 1st paragraph, 2nd to last sentence.

appellate review of his case because of an administrative error. The judgment of the trial court must be reversed and the domestic violence order issued vacated because the trial judge used his personal knowledge of the so called Lethality Factors in Intimate Partner Violence test to satisfy the evidentiary requirements under KRS 403.750. Rather than wait until after the close of the proof to take judicial notice said test protocol he should have complied with KRE 201(e), which would have given the parties the opportunity to vet the test through the application of the Kentucky Rules of Evidence.

Respectfully,

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