

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000256-MR

WILL L. MCGINNIS, III

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 04-CI-05156

COMMONWEALTH OF KENTUCKY;  
KEVIN M. HORNE, JUDGE;  
AND ROBERT J. STOKES

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, HENRY, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, Will T. McGinnis III, appeals, pro se, the Fayette Circuit Court dismissal of his action against the Commonwealth of Kentucky, Judge Kevin Horne and Robert Stokes, the prosecutor handling a prior criminal action against McGinnis. We affirm the dismissal.

McGinnis was pulled over for reckless driving, in violation of KRS 189.120. He was charged with backing his car down an exit ramp to I-75 in Fayette County and arrested at that

time. McGinnis requested a jury trial. The District Judge, Kevin Horne, instructed the jury on reckless driving, and also, sua sponte, on a charge of operating a motor vehicle contrary to law. The jury found McGinnis not guilty of reckless driving, but convicted him of operating a motor vehicle contrary to law pursuant to KRS 189.244. He was fined \$100, and applicable court costs.

McGinnis appeared before Judge Horne on the date the fine was due to be paid. He informed Judge Horne that he had filed an appeal of his conviction, and stated that he believed that he did not have to pay the fine while the case was on appeal. Judge Horne ordered McGinnis jailed for five days in lieu of paying the fine. McGinnis argues that he offered to pay the fine rather than go to jail, but Judge Horne denied him the right to pay the fine. The court's discussion with McGinnis grew heated, including Judge Horne's comments that McGinnis perjured himself, and that McGinnis had "wasted the jury's time" trying the case against him.

McGinnis' conviction was reversed on appeal to the Fayette Circuit Court, which held that the district court was in error in instructing on "operating a motor vehicle contrary to law." McGinnis sued the trial court and the prosecutor for conspiring to convict him of a crime he did not commit. The

Fayette Circuit Court dismissed the complaint on February 3, 2005. McGinnis appeals the dismissal of his action.

The Commonwealth argues that the Appellant's brief should be dismissed for failure to comply with the civil rules governing the format of appellate briefs. This Court grants pro se litigants more leniency than an attorney might receive. The brief in this action was served on all relevant parties. The brief contained a discussion of the facts and an argument; the brief was timely filed; the brief is of the proper color and is well bound, and the discussion of the record shows that the issue raised was preserved for appeal. This constitutes substantial compliance with the civil rules such that dismissal is not warranted. See Norwest Bank Minnesota, N.A. v. Hurley, 103 S.W.3d 21, 22 (Ky. 2003).

McGinnis alleges that Judge Kevin Horne is not entitled to judicial immunity for the acts complained of. McGinnis asserts that Judge Horne acted in an extra-judicial manner, and that his actions should not be considered privileged. A review of the record shows that McGinnis complains only of actions taken by Judge Horne in his official capacity. McGinnis complains that the judge, sua sponte, researched his driving record and provided the jury with information showing that he had prior traffic offenses. This was noted as grounds for reversal in the circuit court opinion

vacating and remanding the conviction. McGinnis also complains of the judge's rude comments, and the fact that the judge ordered him jailed rather than permitting him to pay his fine. McGinnis complains that these actions were "extra-judicial."

The record shows that the actions complained of all occurred while Judge Horne was presiding over the case against McGinnis. The actions properly fall within the broad rubric of permissible judicial action, and Judge Horne is protected by judicial immunity for the actions. A judge is immune for personal liability for acts taken while he has jurisdiction over a case. Vaughn v. Webb, 911 S.W.2d 273, 275 (Ky.App. 1995). Even where such action may be contrary to law, judicial immunity still applies. City of Louisville v. Bergel, 610 S.W.2d 292, 293 (Ky. 1980). We affirm the dismissal of the claims against Judge Horne on the grounds of judicial immunity.

McGinnis also claims that Assistant County Attorney, Robert Stokes, was not entitled to immunity for his actions. McGinnis filed a claim against Stokes for subpoenaing McGinnis' records of employment and dismissal from his former job at the police department. McGinnis complains that Stokes did not give McGinnis notice of the subpoena. McGinnis also avers that Stokes acted outside the scope of his employment duties by charging McGinnis with the offense he was convicted of. McGinnis asserts that these actions were improper.

RCr 7.02 permits issuance of a subpoena. This law does not require the prosecutor to give a defendant notice of the subpoena. McGinnis provides no legal authority requiring notice be given. All other actions of Mr. Stokes complained of by McGinnis were taken in the course of prosecuting McGinnis for reckless driving. This prosecution was in accordance with the job duties required of Mr. Stokes. Mr. Stokes is clearly entitled to immunity for these actions, pursuant to McCollum v. Garrett, 880 S.W.2d 530 (Ky. 1994). A prosecutor is granted quasi-immunity while investigating and preparing his case, and absolute immunity while trying it. Jefferson County Commonwealth Attorney's Office v. Kaplan, 65 S.W.3d 916, 920 (Ky. 2001). We affirm the dismissal of the claims against Mr. Stokes.

Lastly, McGinnis argues that the Commonwealth of Kentucky is not judicially immune from suit under sovereign immunity. The law provides for sovereign immunity for the Commonwealth of Kentucky. See Yanero v. Davis, 65 S.W.3d 510, 517 (Ky. 2001). As McGinnis notes, KRS 44.072 grants the Board of Claims exclusive jurisdiction over negligence claims against the Commonwealth. McGinnis also notes on appeal that he has filed an action with the Board of Claims against the Commonwealth. McGinnis' claim against the Commonwealth in Fayette Circuit Court was barred by the doctrine of sovereign

immunity. Dismissal of the claims against the Commonwealth was proper.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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