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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

"[w]hereas KRS 22A.020(4) authorizes the Commonwealth to appeal from an interlocutory order, . . . *there is no comparable provision for an appeal by the defendant*." *Evans v. Commonwealth*, 645 S.W.2d 346, 347 (Ky. 1982) (emphasis added). Recently, the Supreme Court reiterated that "KRS 22A.020(4) is uniquely for the benefit of the Commonwealth." *Commonwealth v. Nichols*, 280 S.W.3d 39, 42 (Ky. 2009) (citing *Evans*). Then, in the same case, the Supreme Court vacated that portion of our opinion addressing the criminal defendant/appellee's cross-appeal of a pre-trial order. We unquestionably lacked jurisdiction to address that interlocutory order. *See also James v. Commonwealth*, 360 S.W.3d 189, 194 (Ky. 2012) (James' request for review of dismissal of charges without prejudice "would necessarily be interlocutory in character, at the very least, which is not allowed by our rules.")

When the legislature enacted KRS 503.085 in 2006, it chose not to include a provision allowing for the interlocutory appeal of a denial of the claim to immunity provided by that statute. Nor did the legislature amend KRS 22A.020 to provide for such an interlocutory appeal. Neither the Kentucky Rules of Criminal Procedure (RCr), nor the Kentucky Rules of Civil Procedure (CR), authorize such jurisdiction. *Cf.* CR 65.07.

Detainers. The Supreme Court case is cited as *Curtis v. Lewis*, Ky., No. 96-SC-1053 (rendered September 3, 1998)(reconsideration denied November 19, 1998), which appears not to be a criminal action brought by the Commonwealth. In another case, criminal defendant Charles Dailey appealed an order denying his motion to dismiss for violating his right to a speedy trial; the order was dismissed as interlocutory. *Dailey v. Commonwealth*, 2004 WL 2191796, *1 n.3, (Ky. App. Oct. 1, 2004)(2003-CA-000333-MR).

And, as the majority notes, this is a case of first impression, so there is no Kentucky Supreme Court opinion that authorizes an interlocutory appeal in cases such as this one.

Rather, the majority finds jurisdictional authority in inferences divined primarily from our Supreme Court's opinion in *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009). But there is a flaw in the majority's reasoning.

Less than four years old now, "the case before the Supreme Court in *Prater* presented the first 'opportunity to address whether Kentucky's appellate courts have jurisdiction to consider an appeal from an interlocutory order denying a motion to dismiss or motion for summary judgment premised on the movant's claim of absolute immunity.'" *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 342 (Ky. App. 2011)(quoting *Prater*, 292 S.W.3d at 884). The issue before the Supreme Court in *Prater* presented the same issue that had been adequately addressed in federal cases that were more than twenty years old – explicitly, *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) and *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), and by implication, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Byrd*, 352 S.W.3d at 342. Neither *Mitchell* nor *Nixon* addressed the narrower issue now before this Court – whether every order denying an asserted right to avoid the burdens of trial entitles one to an interlocutory appeal. Fortunately, subsequent federal jurisprudence did – it

answered the question in the negative. Notable among that jurisprudence is *Will v. Hallock*, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006).

Before discussing *Will*, however, we should not forget how closely Kentucky is guided by federal jurisprudence regarding procedural issues. Our civil and criminal rules of procedure are greatly influenced by the federal rules and federal case law interpreting them. *See*, *e.g.*, *Commonwealth v. House*, 295 S.W.3d 825, 828 (Ky. 2009) ("our rule was taken verbatim from Federal Rule of Criminal Procedure 17(c)"). For example, CR 54.02 allowing a trial court to convert certain otherwise interlocutory orders into final and appealable judgments was adapted from Federal Rule of Civil Procedure 54(b).

Kentucky jurisprudence and federal jurisprudence regarding those interlocutory orders mirror one another. Like the Kentucky Supreme Court, the United States Supreme Court "has repeatedly reiterated that interlocutory or 'piecemeal' appeals are disfavored." *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008)(citation and internal quotation marks omitted); *see Watson v. Best Financial Services, Inc*., 245 S.W.3d 722, 727 (Ky. 2008) (noting "this Court's historic policy against piecemeal appeals"); *see also Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 79 (Ky. 2010)("[A] rule allowing for immediate interlocutory appellate review . . . may seem efficient[, b]ut from a larger perspective, it can be seen that . . . the resources of the appellate courts could easily be consumed with piecemeal appellate review of pre-trial matters."). In both federal jurisprudence and Kentucky jurisprudence, this is generally known as the

"final-judgment rule." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 605, 175 L.Ed.2d 458 (2009); *Prater*, 92 S.W.3d at 886.

Circumstances in certain federal cases made exceptions to the final judgment rule necessary. To assist courts in determining when an exception would be allowed, the U.S. Supreme Court developed the "collateral order doctrine." The collateral order doctrine permits federal appellate courts to hear interlocutory appeals from "a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Indus.*, 558 U.S. 100, 130 S.Ct. at 603 (quoting *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1225-1226). When our own Supreme Court in *Prater* relied on the U.S. Supreme Court cases of *Mitchell* and *Nixon*, it was relying on collateral order doctrine jurisprudence. *Byrd*, 352 S.W.3d at 342 ("[T]he collateral order doctrine, as articulated in *Cohen*, as applied in *Nixon* and *Mitchell*, and as adapted in *Prater*, justifies appellate review of interlocutory orders denying motions . . . by which common law immunity is claimed.").

Federal jurisprudence regarding interlocutory appeals has not remained stagnant. Two decades after *Mitchell* and *Nixon*, "the Supreme Court of the United States unanimously decided *Will v. Hallock*, 546 U.S. 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006), which made clear the limited scope of the collateral order doctrine." *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944, 946 (6th Cir. 2006)(dismissing appeal of pretrial order denying claim of "absolute witness and advocacy immunity"). *Will* discusses the three conditions that must be present to

satisfy the collateral order doctrine in federal courts: "that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citation and internal quotation marks omitted). "The conditions are stringent, and unless they are kept so, the underlying doctrine will overpower the substantial finality interests [the final judgment rule] is meant to further[.]" *Will*, 546 U.S. at 349-50 (citation and internal quotation marks omitted).

Will focused especially on the third of these stringent conditions – that the subject interlocutory order must be "effectively unreviewable on appeal from a final judgment." I also focus on this third condition because that is the touchstone of the majority's reasoning and it was the basis of the holding in *Prater*. *Prater*, 292 S.W.3d at 886 ("entitlement [to immunity] 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." Citing *Mitchell* and *Nixon*).

If Kentucky jurisprudence in this area is to parallel the trajectory of the federal system – as it has thus far, as I contend it should continue to do, and as there is no rationale for deviation – then, *Will* is momentous enough in that federal jurisprudence to be the guide. Therefore, I quote *Will* at length.

> Prior cases mark the line between rulings within the class and those outside. On the immediately appealable side are orders rejecting absolute immunity, [citing *Nixon*], and qualified immunity, [citing *Mitchell*]. A State has the benefit of the doctrine to appeal a decision

denying its claim to Eleventh Amendment immunity, [citation omitted], and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy, [citation omitted].

The examples admittedly raise the lawyer's temptation to generalize. In each case, the collaterally appealing party was vindicating or claiming a right to avoid trial, in satisfaction of the third condition: unless the order to stand trial was immediately appealable, the right would be effectively lost. Those seeking immediate appeal therefore naturally argue that any order denying a claim of right to prevail without trial satisfies the third condition. But this generalization is too easy to be sound and, if accepted, would leave the final order requirement . . . in tatters. . . .

"Allowing immediate appeals to vindicate every such right would move [the final-judgment rule] aside for claims that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim. Such motions can be made in virtually every case." [*Digital Equipment Corp. v. Desktop Direct, Inc*., 511 U.S. 863,] 873, 114 S.Ct. 1992 [(1994)] (citations omitted).

Since only some orders denying an asserted right to avoid the burdens of trial qualify, then, as orders that cannot be reviewed "effectively" after a conventional final judgment, the cases have to be combed for some further characteristic that merits appealability[. T]hat something further boils down to "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." 511 U.S., at 878–879, 114 S.Ct. 1992 (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988)). [citation omitted]

Thus, in *Nixon*, *supra*, we stressed the "compelling public ends," [*Nixon*, 457 U.S.] at 758, 102 S.Ct. 2690, "rooted in . . . the separation of powers," *id.*, at 749, 102 S.Ct. 2690, that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity, *id.*, at 743, 752, n.32, 102 S.Ct. 2690. In explaining collateral order treatment when a qualified immunity claim was at issue in *Mitchell*, *supra*, we spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not "clearly established." *Id.*, at 526, 105 S.Ct. 2806. *Puerto Rico Aqueduct* [*and Sewer Auth. v. Metcalfe & Eddy, Inc.*], 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 [(1993)], explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests. *Id.*, at 146, 113 S.Ct. 684. And although the double jeopardy claim . . . in *Abney* [*v. United States*, 431 U.S. 651, 660, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)], did not implicate a right to be free of all proceedings whatsoever (since prior jeopardy is essential to the defense), we described the enormous prosecutorial power of the Government to subject an individual "to embarrassment, expense and ordeal . . . compelling him to live in a continuing state of anxiety," *id.*, at 661–662, 97 S.Ct. 2034 (internal quotation marks omitted); the only way to alleviate these consequences of the Government's superior position was by collateral order appeal.

In each case, some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial *that would imperil a substantial public interest*, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later. *Coopers &*

> *Lybrand* [*v. Livesay*], 437 U.S. [463,] 468, 98 S.Ct. 2454 [(1978)] (internal quotation marks omitted).

Will v. Hallock, 546 U.S. 345, 350-53, 126 S.Ct. 952, 958-59 (2006) (emphasis added).

No substantial public interest comparable to those listed in *Will* is at stake in this case that would distinguish it from the multitude of criminal cases for which post-judgment review of procedural and jurisdictional decisions has been found effective. Compare the case before us with *Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944 (6th Cir. 2006).

In *Kelly*, the appellants asked the court "to review the district court's nonfinal order denying them, among other things, the defense of absolute witness and advocacy immunity . . . ." *Id.* at 946. When the appellants argued, as the appellant before us has argued, "that [interlocutory] appeal could be had from denials of all forms of absolute immunity[,]" the court rejected the argument. *Id.* at 948.

> The Supreme Court [in *Will*] stated only that it had permitted "immediate appeal of a denial of absolute Presidential immunity," and it referred to *Nixon* . . . to demonstrate that collateral appeal from a denial of absolute Presidential immunity protected "compelling public ends rooted in the separation of powers." [citation omitted]. *The Supreme Court did not say that denials of all forms of absolute immunity, regardless of the function that the invoking litigant served, were immediately appealable.*

Id. (emphasis added). The Supreme Court in *Will* "identified four instances in which it had recognized that interlocutory appeals were proper, and the Court

identified *the substantial public interest in each of those four cases that the immediate appeal protects*[.]" *Id.* at 948 (emphasis added). So, what substantial public interest would be protected by interlocutory appeal of the denial of the *Kelly* appellants' claims to absolute witness immunity?

The Sixth Circuit acknowledged that

> [a]bsolute witness immunity strengthens the substantial public interest of having witnesses come forward and testify truthfully, [citation omitted], but lack of interlocutory appeal from denials of witness immunity does not "imperil [this] substantial public interest," *Will*, 126 S.Ct. at 959. Witness immunity, as in this and most cases, protects private individuals from being subject to suit and from liability . . . .

Id. at 949. But is it not enough that the claim is for *immunity*? Not after *Will*.

> It is also not enough after *Will* that the nonliability . . . invoke[d] is described as an "immunity." For example, . . . although the privilege of a spouse not to testify or not to have his spouse testify is referred to as "spousal immunity privilege," [citation omitted], we have uncovered no instances where an appellate court entertained an interlocutory appeal from the denial of spousal immunity. The *nature of the protection is what is important*, not the loose ability of an attorney to use the term "immunity."

Id. at 950 (emphasis added). Arguably, it is not "the loose ability of an attorney" but KRS 503.085 itself that uses the term "immunity" in our case. And if the Kentucky Supreme Court sees fits to deviate from the path it has followed thus far based on that distinction, the bench and bar must and will follow that new course.

Other than this distinction, the nature of the protection at issue before us is like that in *Kelly*; it "protects private individuals from being subject to suit." But

the appellant before us cannot claim even the measure of public interest the Sixth Circuit acknowledged was protected by absolute witness immunity. The interest in the immunity identified in KRS 503.085 is not a public interest at all; it is purely a personal interest.

The federal jurisprudence discussed above explains that when a substantial public interest is not at stake, it is appropriate to wait until a final judgment to appeal denials of claims of immunity. The immunity identified in KRS 503.085 is a good example.

While the immunity of KRS 503.085 is personally important enough to a criminal defendant to merit being raised "at the earliest stage of the proceeding[,]" *Rodgers v. Commonwealth*, 285 S.W.3d 740, 755 (Ky. 2009), it does not even merit "an evidentiary hearing at which the defendant may counter probable cause with proof 'by a preponderance of the evidence' that the force was justified[.]" *Id.* In *Rodgers*, the Supreme Court said this:

> The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is . . . probable cause. We decline to create a hearing right that the statute does not recognize and note that there are several compelling reasons for our conclusion.

Id. Significantly, each of the Supreme Court's reasons for disallowing an evidentiary hearing also supports the conclusion that no interlocutory appeal is available, because each is a practical reason appellate courts so jealously guard the final-judgment rule.

First, as with the evidentiary hearing, the legislature did not delineate a right to interlocutory appeal.

Next, we must consider "the large volume of Kentucky cases for which immunity may be an issue," *id.* at 756, and the equal number of appeals that would compound "a process fraught with potential for abuse." *Id.* at 755. Because our order is also an interlocutory order, the Commonwealth may raise this issue again by motion to dismiss or may present the argument to the panel of the Court of Appeals assigned to consider the merits.

There is also "Kentucky's strong preference for jury determinations in criminal matters[.]" *Id.* at 756. The absence of this immunity is "one of the elements of the alleged crime (no privilege to act in self-protection)[.]" *Id.* at 755. Appellate resolution of the trial judge's determination of this element would entirely sidestep the jury.

Then, there is the fact that, in *Rodgers*, the trial court's treatment of the immunity claim analysis under the directed verdict standard "was certainly sufficient[.]" *Id.* ("trial court's approach to the immunity issue was not the one outlined by this Court, [but] it was certainly sufficient"). Kentucky appellate courts have never allowed an interlocutory appeal from either a finding of probable cause or from the denial of a directed verdict.

Finally, I also disagree with the majority's order to the extent it expedites and limits briefing as set forth in CR 76.12(1) and (2). "[I]t hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that

justifies delay." *U.S. v. Loud Hawk*, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). How can this not also be so when an interlocutory appeal is brought by the defendant himself? This appeal should take the normal course provided for by the rules governing appellate procedure and not by new rules we create by this order.

For all these reasons, I cannot agree that an interlocutory appeal is authorized in this case. I would hold that the appellant failed to demonstrate sufficient cause to prevent dismissal. I would dismiss this appeal *sua sponte* for lack of jurisdiction. Therefore, I dissent.

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