

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001425-MR

MICHAEL REDMON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIMOTHY KALTENBACH, JUDGE  
ACTION NO. 15-CI-00835

CITY OF PADUCAH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Michael Redmon appeals from an Order granting Summary Judgment in favor of the City of Paducah. Redmon argues that the law firm representing Paducah Police Chief Brandon Barnhill in a proceeding to terminate Redmon's employment should have been disqualified; that Redmon's right to Due Process was violated when he was not given the opportunity to cross-examine a

witness; and, that the hearing was arbitrary and capricious. For the reasons stated below, we find no error and AFFIRM the Summary Judgment on appeal.

On July 29, 2015, Joseph Cerullo was arrested by the Paducah Police Department (“PPD”) for assaulting his girlfriend, violating a protective order and fleeing from police. After his arrest, Cerullo told officers that he had ingested a large quantity of cough medicine and was suicidal. Officers transported Cerullo to Lourdes Hospital for treatment. PPD officer Michael Redmon was assigned to watch Cerullo at the hospital.

During Redmon’s shift, Cerullo was discharged from the hospital. While preparing to leave the hospital, Cerullo asked to use the restroom. Redmon escorted Cerullo to the restroom and stood by the open door. After Cerullo told Redmon that he could not urinate while Redmon was watching, Redmon directed Cerullo to put his hands behind his back, after which Cerullo was handcuffed.

After Cerullo was finished in the restroom, Redmon escorted him into the hallway. Witness accounts vary, but there is agreement that Cerullo began cursing at Redmon. Redmon then grabbed Cerullo by the throat and lifted him into the air against a wall. One witness would later state - and Redmon so acknowledges - that Redmon’s hands were around Cerullo’s throat or neck and that Cerullo’s face turned red. Two witnesses stated that Cerullo, though cursing, was not physically uncooperative or otherwise resisting prior to Redmon grabbing him.

Hospital personnel complained to the PPD about Redmon’s conduct, and a PPD investigation followed. The PPD Chain of Command Board

unanimously found that Redmon violated PPD policies by using excessive force against Cerullo. PPD Chief Brandon Barnhill filed formal charges against Redmon pursuant to Kentucky Revised Statute (KRS) 15.520 and KRS 95.450.

A hearing on the charges was conducted before the Board of Commissioners, which found that Redmon violated three PPD policies. In support of its finding, the Board determined that Redmon used a chokehold on Cerullo's neck in violation of PPD policies governing the use of force and that Redmon engaged in conduct unbecoming a police officer. Cerullo was called to testify at the hearing, but exercised his right to remain silent under the Fifth and Fourteenth Amendments due to the pending criminal charges. Chief Barnhill then offered into evidence an audio interview of Cerullo recorded at the jail. The Board voted to hear the interview. Redmon argued that the playing of the audio violated his Due Process rights to cross-examine the witness. At the conclusion of the hearing, the Board terminated Redmon's employment with the PPD.

Redmon prosecuted an appeal from the Board's decision to the McCracken Circuit Court. Pursuant to KRS 15.520(8), he argued that the decision was arbitrary and capricious and that he was denied Due Process when he was not allowed the opportunity to cross-examine Cerullo. Redmon also argued that his Due Process rights were violated because the law firm of Keuler, Kelly, Hutchins & Blankenship ("KKHB"), which represented Chief Barnhill before the Board of Commissioners, contemporaneously represented the City in a separate civil action against the PPD. Redmon maintained before the circuit court that this relationship

was highly prejudicial and that it implicated the appearance of impropriety.

Redmon analogized the situation to that of a judge who hires a lawyer to represent the judge and then fails to recuse in subsequent proceedings when the lawyer is a litigant.

During the pendency of the appeal before the circuit court, the City filed a Motion for Summary Judgment. On July 7, 2016, the court rendered a Memorandum and Order Granting Summary Judgment to the City of Paducah which disposed of all matters before it. In granting Summary Judgment in favor of the City, the circuit court found that substantial evidence of record supported the Board's conclusion and that the law was properly applied. It noted that while Cerullo's taped statement, taken alone, would not have been sufficient to support the Commissioners' findings, the charges were supported by the testimony of three hospital employees, Chief Barnhill and Redmon's own admissions. Further, the court opined that the Kentucky Code of Judicial Conduct did not apply to the Board, that the Commissioners were represented by independent counsel Dan Key, and that Redmon conceded that "[t]here is no suggestion or evidence that collusion occurred." Redmon's subsequent Motion to Alter, Amend or Vacate was denied and this appeal followed.

Redmon argues that the circuit court abused its discretion when it granted the City's Motion for Summary Judgment by erroneously applying the law to the facts. Specifically, Redmon first maintains that KKHB should have been disqualified from concurrently representing Chief Barnhill in the instant

proceeding while also representing the City in a separate proceeding.<sup>1</sup> While acknowledging that there was no suggestion or evidence of improper conduct or collusion, Redmon argues that the point is not whether impropriety exists, but rather whether there is the mere appearance of impropriety.

Redmon directs our attention to the Kentucky Rules of Professional Conduct 1.7, as codified at Kentucky Rule of the Supreme Court (SCR) 3.130(1.7).

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an

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<sup>1</sup>According to the City, Redmon is referencing *McKinney v. City of Paducah*, 2013-CA-00262-MR, 2014 WL 631700 (Ky. App. Feb. 14, 2014).

explanation of the implications of the common representation and the advantages and risks involved.

Redmon asserts on p. 5 of his appellate brief that “KKHB’s concurrent representation of the *Appellant* and [Chief] Barnhill violated [SCR] 3.130(1.7)(1) because terminating the employment of the Appellant for violation of PPD policy and procedures regarding excessive force was an admission that Cerullo’s civil rights were violated” in a separate civil action apparently filed by Cerullo against the City. (Emphasis added). This is an apparent typographical error, as KKHB has never represented Redmon. This point aside, the City directs our attention to *Marcum v. Scorsone*, 457 S.W.3d 710, 717 (Ky. 2015), which rejected the mere appearance of impropriety standard previously set out in *Lovell v. Winchester*, 941 S.W.2d 466, 469 (Ky. 1997). The *Marcum* Court characterized the *Lovell* standard as little more than a question of subjective judgment by a former client. In its place, *Marcum* held that before a lawyer is disqualified based on a relationship with a former or existing client, the complaining party must show actual conflict and not merely a vague appearance of impropriety. *Marcum*, 457 S.W.3d at 718. In the matter before us, Redmon acknowledges that he has not tendered – nor even alleged – the existence of any evidence of actual impropriety.

We characterize Redmon’s argument as a mixed question of law and fact. Issues of law are reviewed *de novo* by a reviewing court, and issues of fact are considered using a clear error standard. *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011); *Miller v. Eldridge*, 146 S.W.3d

909, 915 (Ky. 2004). In applying these standards to the matter before us, we find no basis for concluding that the McCracken Circuit Court erred in denying Redmon's motion to disqualify KKHB. Redmon has cited no authority for the proposition that the SCR provisions governing attorney conduct impose upon a trial court the duty to disqualify counsel, and *Marcum* requires a showing of actual conflict rather than a vague appearance of impropriety. Having closely examined the record and the law on this issue, we find no error.

Redmon also argues that the McCracken Circuit Court abused its discretion in failing to conclude that his right to Due Process was violated when he was not allowed to cross-examine Cerullo before the Board. After Cerullo asserted his Fifth Amendment right against self-incrimination, the Board played a recording of Cerullo made at the McCracken County jail. Redmon argued before the circuit court that the playing of the recording violated Redmon's right to cross-examine the witnesses against him. Redmon cites case law standing for the proposition that in a trial-type adjudicatory hearing before an administrative body, the right of cross-examination is required by due process of law. He also points to KRS 15.520(7)(g), which provides that a police officer has a right to cross-examine witnesses "called by the charging party" at an administrative hearing. Redmon now argues that the administrative hearing was arbitrary and capricious because the City called Cerullo as a witness, excused him after he asserted the right against self-incrimination, and then played an audio recording which denied Redmon his fundamental right to cross-examine a witness.

It is uncontroverted that Cerullo did not testify at the administrative hearing. As such, he was not a witness subject to cross-examination. Redmon, who has the burden of demonstrating error, has not cited any case law standing for the proposition that the playing of a recorded jailhouse interview properly characterizes the interviewee as a witness subject to cross-examination. Further, even if Cerullo had appeared for cross-examination, he had already asserted his Fifth Amendment right against self-incrimination and had chosen not to testify.

In *Giberson v. City of Ludlow*, 2012-CA-002191-MR, 2015 WL 1880755 (Ky. App. April 24, 2015), to which the City cites, a panel of this Court found that the introduction of written statements by third-parties at a police misconduct hearing did not run afoul of the rules against the introduction of hearsay nor otherwise violate KRS Chapter 15. Similarly, we conclude that the McCracken Circuit Court did not err in failing to conclude that the introduction of Cerullo's recorded interview did not constitute hearsay or otherwise deprive Redmon of the right to cross-examine the witnesses against him. We find no error on this issue.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment



and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Redmon and resolving all doubts in his favor, we conclude that the circuit court correctly determined that there were no genuine issues as to any material fact and that the City was entitled to a Judgment as a matter of law. The circuit court did not err in finding no actual conflict stemming from KKHB’s representation of Chief Barnhill, and the playing of Cerullo’s recorded interview at the administrative hearing did not run afoul of Redmon’s KRS 15.520(7)(g) right to cross-examine the witnesses against him. We find no error.

For the foregoing reasons, we AFFIRM the Memorandum and Order Granting Summary Judgment to the City of Paducah rendered by the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy Ian Smith  
Paducah, Kentucky

BRIEF FOR APPELLEE:

Stacy A. Blankenship  
Kristen N. Worak  
Paducah, Kentucky