

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
AUGUST 2011**

I. CRIMINAL LAW

A. Bonner v. Commonwealth

[2009-CA-000502](#) 8/19/11 2011 WL 3628857

Opinion by Judge Thompson; Judge Stumbo concurred; Senior Judge Shake dissented by separate opinion. The Court reversed and remanded an order of the circuit court denying a motion for costs related to a DNA analysis and expert services provided for appellant's criminal defense, despite an earlier finding that appellant was indigent and entitled to have the expenses paid pursuant to KRS 31.110(1)(b). The Court held that the trial court abused its discretion when it denied appellant's motion filed pursuant to CR 60.02(f). The trial court was without authority to rescind its prior orders finding that appellant was indigent and entitled to the expert expenses. If after a hearing pursuant to KRS 31.120, the trial court determined that the defendant was no longer indigent, the order could only operate prospectively.

B. Commonwealth v. Grider

[2009-CA-002080](#) 8/12/11 2011 WL 3516296

Opinion by Chief Judge Taylor; Judge Clayton and Senior Judge Lambert concurred. The Court reversed and remanded with instructions an order of the circuit court granting appellee's motion to dismiss an indictment charging him with fifteen counts of trafficking in a controlled substance and bribing a witness. The Court held that the trial court abused its discretion by dismissing the indictment without first utilizing the least severe sanction to punish the Commonwealth and to insure compliance with the court's discovery order.

C. Cromer v. Commonwealth

[2010-CA-000362](#) 8/19/11 2011 WL 3628870

Opinion by Judge Dixon; Judges Keller and VanMeter concurred. The Court affirmed orders of the circuit court denying appellant's motions for a choice of evils instruction, to suppress evidence found in a warrantless search of his vehicle and to disqualify the county attorney's office. The Court first held that the trial court properly found that the contingencies articulated in *Beasley v. Commonwealth*, 618 S.W.2d 179 (Ky. App. 1981), were not met, when it was unreasonable to believe that operating a motor vehicle under the influence was justified and that there was no evidence in the record that the risk of injury to other unidentified motorists was so compelling or imminent as to leave appellant with no alternative to avoid the injury other than driving under the influence. Therefore, the trial court correctly concluded that appellant was not entitled to a choice of evils instruction under KRS 503.030. The Court next held that the search of his vehicle, wherein an unlicensed weapon was found, did not violate *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Although appellant was not within reaching distance of the passenger compartment, he was arrested for DUI, for which evidence might reasonably be found in his vehicle. The probable cause to search appellant's vehicle for evidence of DUI did not end upon the discovery of a ballistics vest, and it was proper for the police to pick up the vest to see if anything was located beneath it. The Court finally held that the trial court did not err in refusing to disqualify the county attorney's office. Appellant's reliance on the modified rule allowing for disqualification without a showing of actual prejudice, articulated in *Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995), and *Commonwealth v. Maricle*, 10 S.W.3d 117 (Ky. 1999), was misplaced. Appellant could not show that any member of the prosecutorial staff conducted "substantial and personal preparation" involving an "exchange of confidential information" in connection with the case.

D. Foley v. Haney

[2010-CA-001240](#) 8/5/11 2011 WL 3362584

Opinion by Judge Keller; Judge Lambert and Senior Judge Shake concurred. The Court vacated and remanded an order of the circuit court denying appellant's petition for declaratory judgment wherein he argued he was deprived of due process in a prison disciplinary proceeding. The Court held that the circuit court erred in denying the petition. The proceedings were deficient when the hearing officer did not have or did not review the cafeteria and medical records appellant claimed would establish he was somewhere other than where the assault he was accused of committing took place. Further, the hearing officer was required to state on the record that evidence provided by a confidential informant had been reviewed and had been found to be reliable and to set forth reasoning supporting the finding of reliability.

E. Juarez v. Commonwealth

[2011-CA-000017](#) 8/12/11 2011 WL 3524418

Opinion by Judge VanMeter; Chief Judge Taylor and Judge Acree concurred. The Court affirmed an order of the circuit court denying appellant's motion for relief pursuant to CR 60.02. The Court held that the trial court did not abuse its discretion in denying the motion. Appellant's failure to raise the jury instruction error in either his direct appeal or his motion for RCr 11.42 relief, precluded relief under CR 60.02.

F. Turner v. Commonwealth

[2009-CA-002141](#) 8/12/11 2011 WL 3516298

Opinion by Senior Judge Lambert; Judge Caperton concurred; Judge Dixon dissented. The Court reversed and remanded a judgment of the circuit court entered pursuant to a jury verdict finding appellant guilty of trafficking in methamphetamine and finding that appellant was a persistent felony offender in the first degree. The Court held that the trial court erred in denying appellant's motion to suppress evidence found in his vehicle. The Court held that because appellant was securely in police custody in the back seat of a cruiser with no

opportunity to disturb the interior of the truck, pursuant to *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed. 2d 485 (2009), the warrantless search of his vehicle violated his Fourth Amendment rights.

II. EMPLOYMENT

A. **Mendez v. University of Kentucky Board of Trustees**

[2010-CA-001244](#) 8/12/11 2011 WL 3516861

Opinion by Judge Clayton; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a judgment of trial court entered pursuant to a jury verdict in favor of appellees on appellant's religious discrimination claim and summary judgment entered in favor of appellees on appellant's wrongful discharge claims. The Court first held that the trial court did not err in instructing the jury on the religious discrimination claim. The jury instructions provided sufficient guidance for the jury to decide the threshold issue of whether religious discrimination was involved in the decision to terminate appellant. The Court rejected appellant's reliance on federal cases decided under the Federal Civil Rights Act rather than the Kentucky Civil Rights Act. The Court also held that the trial court did not err when it granted appellees' motion for summary judgment on the wrongful discharge claims. Whether the public policy asserted by appellant met the exceptions to the terminable-at-will doctrine was a question of law for the court, not a question of fact for the jury. Further, appellant failed to provide any support that a conversation he claimed led to his termination was constitutionally protected or that it caused the adverse employment action.

B. **Skees v. Kentucky Unemployment Insurance Commission**

[2010-CA-000389](#) 8/12/11 2011 WL 3516301

Opinion by Judge Thompson; Judge Stumbo and Senior Judge Shake concurred. The Court reversed an opinion and order of the circuit court affirming a decision of the Kentucky Unemployment Insurance Commission (KUIC) denying appellant's claim for unemployment benefits. The Court held that the circuit court erred in affirming the decision because it was based on an improper application of the law. Appellant's refusal to abruptly relocate her employment for an indeterminate time and with no information regarding compensation for expenses was not a refusal to obey reasonable instructions so that she could be considered as having been discharged for misconduct as set out in KRS Chapter 341. Therefore, appellant was not precluded from receiving unemployment benefits.

III. FAMILY LAW

A. **Druen v. Miller**

[2011-CA-000278](#) 8/12/11 2011 WL 3524422

Opinion by Judge VanMeter; Chief Judge Taylor and Judge Acree concurred. The Court dismissed appellant's appeal from an order of the circuit court, denying her motion to dismiss appellee's petition for custody of appellant's biological minor child. The Court held that the appeal was interlocutory. The order did not determine the issue of custody of the minor child and therefore,

was not final since it did adjudicate all the rights of the parties. Although the order granted appellee temporary joint custody and temporary child support, those matters were likewise interlocutory and non-appealable.

B. M.C. v. Commonwealth, Cabinet for Health and Family Services

[2010-CA-002088](#) 8/12/2011 2011 WL 3516928

Opinion by Judge Dixon; Judges Keller and VanMeter concurred. The Court affirmed an order of the circuit court finding educational neglect of appellant's child. The Court held that the circuit court did not abuse its discretion in finding educational neglect as defined in KRS 600.020(1). The facts and evidence permitted an inference that by incurring 30 absences and 16 tardies, the child was unable to benefit from the instruction, structure and socialization provided in a classroom setting. Providing an adequate education for the child's well-being necessarily required appellant to ensure the child attended school each day to participate in educational instruction. Her repeated inability to do so presented a threat of harm to the child's welfare by denying the child the right to educational instruction.

C. Rupp v. Rupp

[2011-CA-000143](#) 8/26/11 2011 WL 3760043

Opinion by Judge VanMeter; Chief Judge Taylor and Judge Acree concurred. The Court affirmed an order of the circuit court reissuing a domestic violence order against appellant. The Court held that the trial court did not err in reissuing the order after it found that domestic violence had occurred and may occur in the future and that appellee was in fear of imminent physical harm from appellant, that appellee had a reasonable basis for her fear, that the DVO had been effective in preventing domestic violence, and that a continued need for the DVO existed.

IV. INSURANCE

A. Yates v. Shelter Mutual Insurance Company

[2010-CA-000022](#) 8/19/11 2011 WL 3628866

Opinion by Senior Judge Shake; Judge Stumbo concurred; Chief Judge Taylor dissented by separate opinion. The Court reversed and remanded a summary judgment of the circuit court in favor of the appellee insurance company finding that a permissive driver step-down provision was valid and effectively limited appellee's liability to \$25,000 for bodily injuries sustained by appellant. The Court held that the trial court erred in granting summary judgment to appellee. Appellee's failure to provide adequate notification of its reduction in coverage to appellant promoted a reasonable expectation that appellant's coverage continued to encompass higher bodily liability limits.

V. PROPERTY

A. Maynard v. Williamson

[2010-CA-001019](#) 8/5/11 2011 WL 3361732

Opinion by Judge VanMeter; Judges Dixon and Stumbo concurred. The Court affirmed a judgment of the circuit court requiring appellees to pay the remaining amount due on a land contract and requiring appellant to execute a deed transferring certain real property to appellees. The Court held that the trial court possessed the equitable power to require appellees to resubmit payment as being owed for checks appellant had held until they were stale and refused by the bank. Once appellees fulfilled the terms of the land contract, appellant was obligated to perform under the land contract and execute the appropriate deed.

B. Newton v. Newton

[2010-CA-001877](#) 8/19/11 2011 WL 3628898

Opinion by Judge Caperton; Judges Combs and Thompson concurred. The Court affirmed orders of the circuit court in a title dispute between the appellant estate and the appellee who was convicted on his guilty plea for reckless homicide in the death of the decedent. The Court held that the result reached by the trial court, that appellee was entitled to half of the property and the estate to the other half, was correct. Because appellee and the deceased owned the property in joint tenancy with right of survivorship, the holdings in both *Bates v. Wilson*, 313 Ky. 572, 232 S.W.2d 837 (1950), and *First Kentucky Trust Co. v. U.S.*, 737 F.2d 557 (6th Cir. 1984), were distinguishable. Because both appellee and the deceased each had their own separate ownership share and could have conveyed their respective interest in the property whenever and to whomever they chose, while appellee forfeited his right of survivorship pursuant to KRS 381.280, he was not stripped of the ownership of the property that was already vested in him and the property he would have forfeited passed to the heirs of the deceased.

VI. TORTS

A. Jerauld ex rel. Robinson v. Kroger

[2010-CA-001429](#) 8/5/11 2011 WL 3363074

Opinion by Judge Clayton; Chief Judge Taylor and Judge Caperton concurred. The Court affirmed a summary judgment in favor of the appellees on a guardian's claims of negligence and intentional infliction of emotional distress after an inmate at the county detention center attempted to commit suicide, resulting in permanent brain injury. The Court first held that the trial court properly granted summary judgment to the appellees. The acts taken by the appellees, as employees of the detention center, were discretionary and therefore, entitled to qualified official immunity. The Court also held that the appellee psychologist was entitled to qualified official immunity and that official immunity related to the functions performed rather than the title or credentials of the one performing the functions.

B. Jones v. Overstreet

[2010-CA-000920](#) 8/12/11 2011 WL 3516837

Opinion by Judge Moore; Judges Acree and Nickell concurred. The Court affirmed a jury verdict in favor of a physician in appellants' medical negligence

action. The Court held that the trial court did not abuse its discretion in admitting into evidence a wire used in an esophageal dilation procedure on the basis that the wire qualified as a true replica of the instrument that allegedly caused the injuries at issue. The wire was properly identified and authenticated as evidence of the wire it represented and the wire used was relevant. The differences between the condition of the sample guide wire and what the appellants speculated was the condition of the actual guide wire were a matter of weight, not admissibility, and appellants could not demonstrate that the sample wire posed a substantial danger of misleading the jury. Appellants' argument that the trial court failed to admonish the jury per the requirements of KRE 105(a) was meritless. Finally, admitting the sample wire into evidence posed little danger of prejudicing appellants' case and even if it was needlessly cumulative, any error that resulted from admitting it was harmless.