

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

I. ADMINISTRATIVE LAW

A. Adams v. Meko

[2010-CA-001410](#) 5/27/2011 2011 WL 2078626

Opinion by Senior Judge Lambert; Chief Judge Taylor and Judge Stumbo concurred. The Court affirmed a judgment of the circuit court dismissing appellant's petition for declaration of rights, challenging the imposition of penalties resulting from a prison disciplinary proceeding. The Court first held that appellant was not denied procedural due process when his requested witnesses were rejected by the adjustment hearing officer. CPP 15.6(II)(C)(5)(a)(2) required that witnesses be identified to the committee or officer not less than 24 hours prior to the hearing. Appellant's failure to do so, allowed the hearing officer to decline the request. Even so, any testimony from the witnesses was of dubious value, as one of the witnesses was not involved in any of the events leading to the disciplinary charge and the other had already given a handwritten, signed statement about the incident. The Court then held that the evidence submitted at the hearing was sufficient to satisfy the "some evidence" standard.

B. Givens v. Commonwealth, Cabinet for Health and Family Services

[2010-CA-000280](#) 4/8/2011 2011 WL 1330749 DR Pending

Opinion by Judge Moore; Judge Combs and Senior Judge Isaac concurred. The Court affirmed an order of the circuit court dismissing appellant's petition for review and affirming a decision of the Cabinet for Health and Family services substantiating appellant's neglect of a foster child and placing appellant's name on the central registry of those who had abused or neglected children. The Court first held that appellant's statement that she objected to the Cabinet's order was not an exception capable of preserving an issue for review because it did not specify any concrete or particular error. The Court also held that there was no separation of powers violation by the Supreme Court's defining of the term "exceptions" within the context of KRS 13B administrative proceedings. When the General Assembly chose not to define "exceptions" when it enacted KRS 13B et seq., it could be presumed that the General Assembly intended for the courts to treat the term the same way the court had always treated the term. The Court also held that appellant was provided with adequate notice of her exception rights; that appellant's failure to file exceptions left the trial court with no issues for its consideration; and that whether the hearing officer acted fraudulently was irrelevant to appellant's disagreements with and objections to the rulings. The Court finally held that circuit court was entitled to disregard appellant's argument that placing her name

on the central registry was cruel and unusual punishment. Appellant could not invoke CR 59.05 to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment.

II. CIVIL PROCEDURE

A. **Biggs v. Eaton Sales, Inc.**

[2010-CA-000639](#) 5/20/2011 2011 WL 1901793 DR Pending
Opinion by Judge Clayton; Judges Combs and Wine concurred. The Court affirmed orders of the circuit court related to an individual appellant's complaint for negligence after horses left in appellee's care developed strangles. The Court held that appellant's failure to name the corporate owner of the horses as a party plaintiff within the statute of limitations period did not result from a "mistake in identity" of the real party in interest. Therefore, under a strict interpretation of CR 15.03, the individual appellant and the trustee in bankruptcy for the corporate owner could not amend the original complaint. The Court also held that summary judgment was appropriate because there were no genuine issues of material fact.

III. CRIMINAL LAW

A. **Carter v. Commonwealth**

[2009-CA-000800](#) 5/6/2011 2011 WL 1706517 DR Pending
Opinion by Judge Keller; Judges Nickell and Stumbo concurred. The Court affirmed an order of the circuit court denying appellant's motion to suppress information which was obtained by a police officer from records in the Kentucky All-Schedule Prescription Electronic Reporting System (KASPER). The Court held that the trial court did not err in denying the motion to suppress. In reaching that conclusion, the Court held that, based on the holding in *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006), appellant had no expectation that her KASPER prescription records were private or subject to Fourth Amendment protection from warrantless search and seizure. The Court then held that the officer had sufficient justification under KRS 218A.202 to request the records. Because the records were not subject to Fourth Amendment protection, the officer was not required to articulate a reason sufficient to meet Fourth Amendment requirements. The testimony that he received information from another detective and someone in a physician's office was sufficient to establish he was engaged in a bona fide specific investigation.

B. **Howard v. Commonwealth**

[2009-CA-002399](#) 5/13/2011 2011 WL 1811688 DR Pending
Opinion by Judge Clayton; Judges Combs and Wine concurred. The Court affirmed an order of the trial court denying appellant's motion to suppress evidence obtained pursuant to a search warrant. The Court held that the trial court correctly concluded that, under the totality of the circumstances, there was probable cause for the issuance of the search warrant. Following the holding in

Commonwealth v. Pride, 302 S.W.2d 43 (Ky. 2010), a warrantless search standard of review was not applicable to the search conducted pursuant to a warrant. While the anonymous tips set forth in the affidavit were not alone sufficient probable cause for the issuance of the warrant, the evidence found in a trash pull, when added to the anonymous tips, established probable cause to issue the search warrant. The detective was not required to have the suspected marijuana found in the trash cans tested because, as a trained police officer, he had the necessary expertise to determine the substance was marijuana.

C. *Jacobi v. Commonwealth*

[2009-CA-001572](#) 5/6/2011 2011 WL 1706528 DR Pending
Opinion by Senior Judge Isaac; Judges Clayton and Nickell concurred. The Court affirmed in part, reversed in part and remanded an order of the circuit court denying appellant's motion for post-conviction relief filed pursuant to RCr 11.42 and CR 60.02. The Court first held that appellant's failure to raise the issues of a defective indictment, an invalid indictment waiver and invalid guilty plea in his previously filed motions for post-conviction relief, precluded review of those claims. The Court then held that the factors relied upon in *Padilla v. Kentucky*, ___U.S.___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), in the deportation context, applied equally, if not more strongly, in the context of parole eligibility. Therefore, trial counsel's gross mis-advice or non-advice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief. The Court remanded with instructions for the circuit court to hold an evidentiary hearing on appellant's claim concerning parole eligibility.

D. *Partin v. Commonwealth*

[2008-CA-002360](#) 8/27/2010 2010 WL 3360319 Released for Publication
Opinion by Judge VanMeter; Judge Dixon and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court denying appellant's motion for post-conviction relief after finding that it was untimely filed and that neither KRS 422.285 nor KRS 31.185 applied to allow for funding of DNA testing of hair evidence presented in appellant's trial. The Court held that the trial court did not abuse its discretion in denying appellant's motion for CR 60.02 relief. In doing so, the Court first held that because appellant was not sentenced to death, he was not entitled to DNA testing and analysis per KRS 422.285(1). The Court then distinguished the holding in *Bedingfield v. Commonwealth*, 260 S.W.3d 805 (Ky. 2008), holding that even if DNA analysis excluded the victim as the source of the hair found in appellant's trash or a third person's DNA showed up among the evidence of the crime scene, no testimonial inconsistencies existed which otherwise would cast doubt on the jury's verdict. Even excluding the hair from evidence would not create the inference that appellant would not have, with reasonable certainty, been found not guilty at trial.

IV. ELECTIONS

A. Grow Trigg, Inc. v. Trigg County/Judge Executive

[2010-CA-000269](#) 5/13/2011 2011 WL 1811914

Opinion by Judge Combs; Judges Thompson and VanMeter concurred. The Court reversed a declaratory judgment of the circuit court permitting a county precinct to hold a local option (wet/dry) election within three years after the county held an election to allow the sale of alcoholic beverages. The Court held that *Campbell v. Brewer*, 884 S.W.2d 638 (Ky. 1994), had been superseded by the 1998 legislative amendment to KRS 241.010. As amended, KRS 241.030, dictated a three-year prohibition for holding a local option election in the same overall territory - precincts notwithstanding. Therefore, the trial court erred in permitting the county precinct to hold the election.

V. EMPLOYMENT

A. Grimes v. Kentucky Unemployment Insurance Commission

[2010-CA-000896](#) 5/6/2011 2011 WL 170677

Opinion by Judge Wine; Chief Judge Taylor and Judge Moore concurred. The Court affirmed an order of the circuit court dismissing appellant's appeal from a decision of the Kentucky Unemployment Insurance Commission to take no action on her motion to reopen a claim for unemployment benefits. The Court held that the circuit court properly dismissed the appeal. In reaching that holding, the Court held that, pursuant to KRS 341.450(1), appellant could not appeal the original denial of her application for unemployment benefits after 20 days from the date of the Commission's decision. In her original attempt to appeal, she failed to follow the jurisdictional prerequisites for bringing an appeal and therefore, the decision became final by operation KRS 341.440(3). The Court then held that there was no statutory or administrative procedure to reopen the final order denying unemployment benefits. Moreover, the decision to take no action, which operated as a denial of the motion to reopen, was not appealable under KRS 341.450(1).

B. Wells v. The City of Bowling Green

[2010-CA-001232](#) 4/15/2011 2011 WL 1441872 DR Pending

Opinion by Judge Nickell; Judge Dixon and Senior Judge Shake concurred. The Court affirmed a summary judgment in favor of the appellee city on appellant's claims of age discrimination and fraud. The Court held that the summary judgment was properly granted to the city because appellant never applied for the permanent position of police chief. Further, appellant admitted that he chose not to apply because he was busy focusing on his doctoral studies, not because he had been convinced that he was too old to apply or that he was ineligible to apply because he accepted the position of interim chief. The Court finally held that appellant could not prevail on his fraud claim when he was told the person chosen as interim chief would not be considered for the permanent position and he was not. Further, KRS 61.848(2) established the procedure and timeline to be followed in filing suit, which were not followed by appellant.

VI. FAMILY LAW

A. **Commonwealth, Cabinet for Health and Family Services v. Garber**

[2010-CA-001226](#) 5/6/2011 2011 WL 1706792

Opinion by Judge VanMeter; Judges Combs and Keller concurred. In an opinion and order, the Court granted petitions for writs of prohibition and mandamus and prohibited the family courts from enforcing orders in domestic violence proceedings directing the Cabinet for Health and Family Services to investigate certain individuals for the risk of dependency, neglect and abuse. The Court held that the family courts exceeded their jurisdiction in ordering an investigation. Section 28 of the Kentucky Constitution precluded the family courts from exercising the executive powers given to the Cabinet in KRS 620.040 to determine the necessity of and to initiate an investigation.

VII. PROPERTY

A. **Commonwealth, Transportation Cabinet, Department of Highways v. Blackburn**

[2008-CA-001455](#) 7/9/2010 2010 WL 2696272 Released for publication

Opinion by Judge Thompson; Judges Acree and Caperton concurred. The Court affirmed in part, reversed in part and remanded a judgment of the circuit court reversing a decision of the Transportation Cabinet regarding replacement housing payments to appellants after appellants were notified of the Cabinet's intent to take appellants' property pursuant to the Kentucky Eminent Domain Act, KRS 416.540. The Court first held that the trial court did not err by not dismissing appellants' petition for review as untimely. Applying the literal meaning of Section 31 of 600 KAR 3:010, the appeal period began to run on the date of the written notice of the actual award, not the date when appellants were notified of their initial replacement housing payment eligibility. The Court then held that the trial court erred by determining the method by which the replacement housing payment should be calculated. Section 19(5) of 600 KAR 3:010 gave the Cabinet the authority to determine the appropriate replacement housing payment using either of two methods. Therefore, the trial court could not choose which calculation to apply. However, the Court also held that the trial court correctly determined that a three-year-old valuation could not be offered by the Cabinet without proof that the valuation reflected current market values.

B. **Stewart v. Slusher**

[2009-CA-001297](#) 5/20/2011 2011 WL 1900162

Opinion by Judge Acree; Judges Dixon and Stumbo concurred. The Court affirmed an order of the circuit court granting summary judgment in favor of appellees for damages and interest resulting from appellants' lease to a third party of mineral interests in land they previously agreed to convey to appellees in an option contract. The Court also affirmed the circuit court's denial of appellants' motion for summary judgment to collect the option price. The Court

first held that the circuit court properly concluded that appellants breached the special warranty deed when they leased the mineral rights to the property, which was an encumbrance upon the property. However, the Court also concluded that appellants were liable for committing waste on the property equitably owned by appellees and that appellants breached the option contract by failing to convey the property as described in the option contract. The Court rejected appellants' argument that the eventual conveyance by special warranty deed of the remainder of the property, or the merger doctrine, prohibited appellees from claiming a right to recover based on the mineral lease. The Court also rejected appellants' arguments that the doctrines of *res judicata* and issue preclusion required reversal. The Court then held that awarding appellees the amount of the advance royalty payment, which would not have exceeded the value of the coal removed, was a proper measure of damages. The Court also held that the award of prejudgment interest from a date after the date marking appellees acquisition of their equitable interest in the coal was the correct one on which prejudgment interest began to accrue. The Court finally held that the circuit court properly denied appellants' claim for the amount they returned to appellees, which was given in consideration for the option contract, after appellants attempted to repudiate the option contract. Appellants could not benefit from their breach of the option contract, thwarting any effort by appellees to exercise the option, and then claim that the option was not timely exercised.

VIII. WORKERS' COMPENSATION

A. **Schmidt v. South Central Bell**

[2010-CA-000986](#) 5/13/2011 2011 WL 1843056

Opinion by Judge Lambert; Judges Moore and Nickell concurred. The Court reversed and remanded a decision of the Workers' Compensation Board affirming a decision of the ALJ finding that an employer was no longer responsible for the payment of future medical payments. The finding was based upon the \$3,500.00 cap on the amount of medical expenses found in the version of KRS 342.020 in effect at the time of the worker's injury. The Court held that the amendments in 1964 and 1972 to KRS 342.020, removing the cap on future medical expenses, represented a remedial, procedural change as described in *Kentucky Insurance Guaranty Association v. Conco, Inc.*, 882 S.W.2d 129 (Ky. App. 1994). Therefore, the amendments applied to the worker and the Board misconstrued the controlling statutes and law in upholding the decision that the employer was no longer responsible for payment of the future medical expenses.