KENTUCKY SUPREME COURT
PUBLISHED OPINIONS
APRIL 2010

I. ADULT ENTERTAINMENT

A. Blue Movies, Inc., d/b/a/ Love Boutique; et al. v. Louisville / Jefferson County Metro Govt.

2007-SC-000812-DG **April 22, 2010**

Opinion by Justice Schroder; all sitting. Appellants challenged amendments to Louisville Metro ordinances regulating their adult entertainment businesses. The Supreme Court affirmed most elements of the ordinances including 1) ban on alcoholic beverage sales; 2) ban on direct tipping of performers; 3) licensing requirements; 4) criminal disability provisions; and 5) disclosure of principals owning a 20 percent or greater interest. The Court reversed the "no touching" provision, holding it was unconstitutionally overbroad since it was not limited to performances or working hours. Justice Venters, joined by Justice Abramson and Justice Cunningham, concurred by separate opinion, asserting that since Appellants made no federal constitutional arguments, the matter should be decided solely on the basis of Section 1(4) of the state constitution. The minority contended that the state constitution does not afford the same protection to adult entertainment benefits as to those given to "higher orders of expression of thought and opinion."

II. BUDGET

A. University of the Cumberlands v. Albert M. Pennybacker, et al. & Vernie McGagha (Senator) v. University of the Cumberlands, et al.

2008-SC-000253-TG **April 22, 2010**
2008-SC-0000285-TG **April 22, 2010**

Opinion by Justice Abramson; all sitting. The Supreme Court upheld the circuit court's ruling that a $10 million appropriation to build a pharmacy school at the University of the Cumberlands and a related scholarship program were unconstitutional. The Court determined that the appropriation to a private Baptist college violated § 189 of the state constitution, which prohibits public funding of "any church, sectarian or denominational school." Further, the Court held that a Memorandum of Understanding in which the school committed to not use the funds for any religious purpose and return the property to the county should it no longer be used as a pharmacy school could not save the appropriation. The Court also held that the pharmacy scholarship violated § 59 of the state constitution, which prohibits special legislation. The majority noted the plain language of KRS 164.7901(1) states the scholarships are intended

only for the University of the Cumberlands students. Justice Cunningham, joined by Justice Scott, concurred by separate opinion stressing the decision was not a "legalistic swipe" at religion and that well-defined boundaries between church and state promote the free exercise of religion. Justice Scott, joined by Justice Venters, dissented in part, contending that the language of the actual scholarship provisions did not limit them to just University of the Cumberlands students and thus did not constitute special legislation.

B. Mary Lassiter (in her official capacity as State Budget Director) v. American Express Travel Related Services Co., Inc.; et al.
2008-SC-000904-DG April 22, 2010

Opinion by Justice Venters; all sitting. The Court of Appeals dismissed State Budget Director's appeal of a ruling of the Franklin Circuit Court, ruling she failed to name an indispensible party—the State Treasurer. The State Treasury had been named in the caption, but not the Treasurer personally. The Supreme Court reversed the Court of Appeals, finding substantial compliance and holding that in the absence of a specific rule to the contrary, naming an agency to an appeal is the functional equivalent of naming the agency's head in his or her official capacity. Justice Scott concurred in result only.

III. BUSINESS ORGANIZATIONS

A. Ben Spurlock v. Tate Begley
2009-SC-000050-DG April 22, 2010

Opinion by Justice Cunningham. All sitting; all concur. Begley loaned Caribou Coal Mining Processing LLC $75,000, in exchange he received a promissory note. Begley then purported to sell a 25% interest in Caribou to Spurlock based on the note. After Caribou ceased operations, Begley sued Spurlock to enforce the terms of the sale. The jury returned a verdict in Begley's favor and the Court of Appeals affirmed. The Supreme Court reversed, holding that as a matter of law, Begley failed to prove he possessed an interest in Caribou. The Court noted that KRS 275.275 addresses how one can become a member of an LLC. Since Begley had presented no proof of either an operating agreement or written consent of the other members of the LLC, the Court determined that Spurlock should have received a JNOV at trial. The Court also held that it was an error not to instruct the jury on the legal requirements for membership in an LLC.

IV. CRIMINAL LAW

A. William Buck v. Commonwealth of Kentucky
2008-SC-000896-DG **April 22, 2010**

Opinion by Justice Schroder. All sitting; all concur. Buck, a 2005 parolee, entered a conditional guilty plea to failing to register under the Kentucky Sexual Offender Registration Act (SORA), reserving his right to challenge the constitutionality of the 2006 amendments to the Act. On appeal, Buck argued application of the amended statue against him violated the *ex post facto* clauses of the federal and state constitutions. The Court affirmed the conviction, reiterating its position from Hyatt that the SORA is a remedial measure with a rational connection to the non-punitive goal of protection of public safety.

B. Larry Thomas Jones & Gerald Henley v. Commonwealth of Kentucky
2007-SC-000922-DG **April 22, 2010**

Opinion by Justice Schroder; all sitting. The Supreme Court held that KRS 532.043(5) which gives judges the power to revoke a conditional discharge imposed after a period of incarceration, violates the separation of powers doctrine found in § 27 and § 28 of the state constitution. The Court held once a sentence becomes final, the power over incarceration passes to the executive branch. The majority drew a distinction between conditional discharge and shock probation-- categorizing the latter as a "short, limited extension of the trial court's jurisdiction." Justice Venters, joined by Justice Scott, dissented, arguing that nothing in the separation of powers doctrine either expressly or inherently bars the General Assembly from granting such authority to the courts.

C. Michael Dale St. Clair v. Commonwealth of Kentucky
2005-SC-000828-MR **April 22, 2010**

Opinion by Chief Justice Minton; all sitting. The Supreme Court reversed Appellant's death sentence and remanded for a third capital sentencing trial. The Court held that the trial court failed to conform its jury instruction on the aggravator to the requirements of KRS 532.032(2)(a)(1). The instruction used by the trial court required only that the jury determine whether St. Clair had a prior conviction for murder—rather than whether he had a prior record for a capital offense at the time the offense he was on trial for was committed. Since there was evidence showing that St. Clair committed capital offenses before and after the offense he was on trial for, it could not be determined whether the jury based the death penalty on a qualifying or non-qualifying aggravator—thus denying St. Clair his right to a unanimous verdict. The Court suggested that a better practice would be to identify the specific qualifying aggravator in the text of the jury

instruction. Justice Scott, joined by Justice Cunningham, dissented in part, arguing there was ample unconverted evidence of record for the jury to have found a qualifying aggravator. Justice Cunningham, joined by Justice Scott, dissented in part writing "[St. Clair] is not entitled to a perfect trial. No American is. He is only entitled to a fair one, and he has had several."

D. John Tim Jenkins v. Commonwealth of Kentucky
2007-SC-000248-DG April 22, 2010

Opinion by Justice Schroder; all concur. Justice Abramson not sitting. The Supreme Court reversed Jenkins' conviction for sexual abuse and remanded for a new trial, holding the trial court erred by refusing to allow testimony from defense's expert witness regarding suggestive interview techniques used on child witnesses. In stating its reasons for disallowing the expert, the trial court expressed its belief that Kentucky law deems such testimony to be an improper comment on a child's credibility. To the contrary, the Supreme Court noted that it has long held that "it is well established that the credibility of witnesses, including children, is a matter for the jury."

E. Raymond McClanahan v. Commonwealth of Kentucky
2008-SC-000033-MR April 22, 2010

Opinion by Justice Venters. All sitting; all concur. Defendant, charged with robbery and burglary, entered into a plea agreement containing a "hammer clause." A "hammer clause" is an agreement whereby a defendant is allowed to remain free on his own recognizance until sentencing, under penalty of a significantly enhanced sentence if he fails to appear. The defendant failed to appear and a bench warrant was issued. The trial court subsequently invoked the "hammer clause" and sentenced the defendant to 35 years, noting that the defendant "created" his own sentence and had "made his choice." The Supreme Court reversed the conviction for two reasons. First, the Court held that the sentence imposed exceeded the maximum legal punishment for the offense in violation of KRS 532.110(1)(c). The Court noted that defendants cannot consent to illegal punishment—overruling Myers and Johnson. The Court further held that the trial court violated its obligations under KRS 532.050(1), KRS 533.010(1) and RCr 11.02 when it imposed the "hammer clause" without giving due consideration to the pre-sentence report and all relevant factors. The Court emphasized that these requirements "are not mere procedural formalities, but are substantive and may not be ignored."

F. Russell Winstead v. Commonwealth of Kentucky & Commonwealth of Kentucky v. Russell Winstead

2007-SC-000829-MR **April 22, 2010**
2008-SC-000446-TG **April 22, 2010**

Opinion by Chief Justice Minton; all sitting. Winstead was convicted of murder and robbery and sentenced to life without the possibility of parole for 25 years and 20 years. The sentences were order to be served consecutively. The Supreme Court affirmed the conviction but vacated the sentence. The Supreme Court held: 1) any error in permitting Winstead's ex-wife to testify in violation of KRE 504 was harmless; 2) sentence of life without the possibility of parole for 25 years did not violate terms of extradition from Costa Rica; 3) use of inmate to obtain potentially incriminating statements did not rise to the level of palpable error since there was no evidence the informant deliberately elicited the statements; 4) mistrial not warranted for jurors' unsupervised use of cell phones since there nothing to suggest jurors discussed the case with outsiders. However, the Court held that Winstead was entitled to a new sentencing hearing since the consecutive terms violated KRS 532.110(1)(c), which provides that a term for a sentence of years cannot run consecutive to a life sentence. Justice Scott concurred in the result only.

V. DOMESTIC RELATIONS

A. Levodis Artrip v. James Stephen Noe

2009-SC-000260-DGE **April 22, 2010**

Opinion by Justice Cunningham; all sitting. Artrip filed for a reduction to her child support obligation, seeking a credit for social security benefits the children received as a result of Noe's disability. The trial court granted the reduction, holding it was authorized under KRS 403.211(15). The Court of Appeals reversed, holding that only the disabled parent was allowed to claim a credit for the children's social security benefits. The Supreme Court affirmed the Court of Appeals, holding that it defied common sense and the plain wording of the statute to allow the non-disabled parent to take the credit. The Court also held that those payments provide no basis for deviation from the statutory child support guidelines. Justice Noble, joined by Justice Scott and Justice Venters, concurred in the result only, asserting that under appropriate circumstances, the trial court should be permitted to consider such benefits when deviating from the guidelines.

VI. EMPLOYMENT LAW

A. Kimberly G. Hill, et al. v. Kentucky Lottery Corporation

2006-SC-000748-DG **April 22, 2010**
2008-SC-000380-DG **April 22, 2010**

Opinion by Justice Venters. Special Justices Whitlow and Martin sitting for Justice Abramson and the Chief Justice. The Hills sued the Kentucky Lottery Corporation (KLC), alleging 1) unlawful retaliation in violation of Kentucky's Civil Rights Act; 2) common law wrongful discharge in violation of public policy; and 3) defamation. After a jury verdict for the Hills, the trial court mistakenly entered an erroneous judgment. Months later, the judge entered an amended judgment, but also granted KLC's motion for a new trial. At the second trial, the Hills were awarded less damages and KLC received a defense verdict on the defamation claim. The Supreme Court reversed and reinstated the jury verdict from the first trial, holding the trial court should not have ordered a second trial. The Court held that the trial court erred when it concluded that the Hills' claim for common law discharge was preempted by their civil rights claim. The Court held that a separate claim will lie where the wrongful discharge is based on a termination that violates public policy (in this case, termination for refusing to commit perjury). The Supreme Court also held that the trial court erred in ordering a new trial because it failed to instruct the jury on qualified privilege. The Court held that KLC never requested such an instruction, a prerequisite for assignment of error under CR 51(3). Justice Noble, concurred in result only, contending that the trial court's original judgment was final and it lacked jurisdiction to order a new trial.

VII. GOVERNMENTAL IMMUNITY

A. Erin Haney v. Biljana Monskey (as next friend of Max Zager, a minor child)

2008-SC-000337-DG **April 22, 2010**

Opinion by Justice Scott; all sitting. Next friend of a minor child injured at a Louisville Zoo summer camp sued a camp counselor alleging negligence in leading campers of a "night hike." The counselor moved for summary judgment, arguing she was entitled to qualified immunity. The trial court denied summary judgment, ruling the counselor was not entitled to qualified immunity since her actions were ministerial in nature. The Court of Appeals affirmed the trial court. The Supreme Court reversed the Court of Appeals, holding the counselor's supervision of the children on the hike was discretionary—not ministerial—thus she was entitled to qualified immunity. The Court noted that the hike was an activity selected by the counselor herself—distinguishing this case from Yanero, where the

governmental employee was afforded no discretion in how safety rules were enforced. The Court emphasized that the distinction between discretionary and ministerial actions is inherently fact sensitive. Chief Justice Minton, joined by Schroder, concurred in the result consistent with his separate concurrence in Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage.

VIII. POLITICAL APPOINTMENTS

A. Virginia G. Fox v. Trey Greyson (in his official capacity as Sec'y of State); Steven L. Beshear (in his official capacity as Governor); and Pam Miller

2009-SC-000066-TG **April 22, 2010**

Opinion by Chief Justice Minton; all sitting. Gov. Fletcher appointed Fox to the Council for Postsecondary Education (CPE) in July 2007. During the following legislative session, bicameral confirmation proceedings began pursuant to KRS 164.011(1). The Senate voted to confirm the appointment, but the House took no action. The new administration informed Fox her appointment was vacant and appointed Miller. Fox sued, claiming Miller's appointment was ineffective because Fox had been duly confirmed. The trial court granted the Governor's motion to dismiss for failure to state a claim for which relief may be granted. The Supreme Court reversed the trial court, holding that KRS 164.011(1) which requires bicameral confirmation of CPE members violates Section 93 of the state constitution which vests the Senate with the sole power to confirm appointees such as Fox. Justice Abramson concurred in result only, asserting that while the General Assembly intended to allow for bicameral confirmation, the Court could not look beyond the "clear language" of Section 93. Justice Cunningham, joined by Justice Schroder, dissented arguing that Section 93 authorizes the General Assembly to "prescribe by law" the method for appointment to the CPE. Justice Schroder, joined Justice Cunningham, dissented, contending that Section 93 does not preclude bicameral confirmation.

IX. ATTORNEY DISCIPLINE

A. Gregory A. Gabbard v. Kentucky Bar Association

2007-SC-000459-KB **April 22, 2010**

The Supreme Court revoked attorney's reinstatement to the bar for failing to comply with established conditions. The attorney did not participate in KYLAP to the extent required and failed to appear for random drug tests. Further, the attorney did not check in with his monitor as frequently as

required, and had not paid the costs of his conditional reinstatement as ordered.

B. Jeffrey M. Walson (Judge, 25th Judicial Circuit of Kentucky v. The Ethic Committee of the Kentucky Judiciary
2009-SC-000623-OA April 22, 2010

The Supreme Court reviewed Judicial Ethics Opinion (JE-118) at the request of a family court judge. The Court held that no judge may serve as an advisor or member of the board of directors for a financial institution. This decision was broader than JE-118 which included an exception for judges who held an ownership interest in the financial institution. The Court also rejected the judge's argument that family court judges should be exempted from the rule since financial institutions are not likely to be frequent litigators in family court. The Court held there was no constitutional basis for treating family court judges differently than their colleagues on the circuit bench since they all belong to Kentucky's single unified circuit court. Justice Schroder dissented, asserting that the permissive language of Canon 4(D) of the Code of Judicial Conduct authorized consideration of the individual judge and individual financial institution—not imposition of a blanket rule.

C. Kentucky Bar Association v. Jane K. Kissling
2009-SC-000628-KB April 22, 2010

The Supreme Court ordered permanent disbarment of attorney previously disbarred in New Jersey. In 1994, the attorney was indicted on charges she misappropriated client funds. After being a fugitive for four years, the attorney entered into pretrial intervention program. In 2008, she was permanently disbarred by the Supreme Court of New Jersey.

D. Kentucky Bar Association v. Jamal A. Khoury
2010-SC-000023-KB April 22, 2010

The Supreme Court suspended attorney from the practice of law for 181 days. Attorney was found to have repeatedly engaged in the unauthorized practice of law during a previous suspension for nonpayment of bar dues. The Court made any future reinstatement subject to approval by the KBA's Character and Fitness Committee and authorized the imposition of additional KYLAP requirements.

E. Kentucky Bar Association v. James Kevin Mathews
2010-SC-000024-KB April 22, 2010

The Supreme Court permanently disbarred attorney from the practice of law. The attorney was supposed to purchase an annuity for a client.

Instead he converted the funds for his own use and subsequently misled the client about his actions. The Court noted the attorney's prior disciplinary history, including prior suspensions.

F. Bruce Dwain Atherton v. Kentucky Bar Association
2010-SC-000057-KB April 22, 2010

The Supreme Court granted attorney's motion for permanent disbarment. In 2009, the attorney pled guilty to felony conspiracy charges in federal court. Additionally, a bankruptcy court determined that the attorney made material misrepresentations to the court and parties and ordered full disgorgement of the attorney's fee. Attorney also admitted to failing to file a reply brief on behalf of a client, resulting in an adverse summary judgment. Lastly, the attorney admitted to violating the Rule of Professional Conduct in his handling of a client's medical malpractice and lender liability actions.

G. Carl Turner v. Kentucky Bar Association
2010-SC-000060-KB April 22, 2010

The Supreme Court granted attorney's motion for a two-year suspension from the practice of law. Attorney admitted that he caused a client's case to be dismissed with prejudice by failing to comply with a discovery order. After the case was dismissed, the attorney represented to the client that the case was still pending and even continued to conduct witness interviews.

H. Kentucky Bar Association v. Leo Marcum
2010-SC-000105-KB April 22, 2010

The Supreme Court suspended attorney from the practice of law for one year. The attorney was found to have mishandled client funds. Also, attorney caused a case to be dismissed for lack of prosecution for failing to properly serve the defendant and then let the case languish for over three years. The suspension was ordered to run consecutively to previous disciplinary actions against the attorney.

I. John Grant Cook v. Kentucky Bar Association
2010-SC-000170-KB April 22, 2010

The Supreme Court granted attorney's motion for a 61-day suspension from the practice of law. Attorney admitted that he accepted a fee in an uncontested divorce case and then performed no work and did not return the unearned fee. The Court noted that the attorney has yet to be reinstated from his April 2009 suspension.