PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
APRIL 2017

I. ADMINISTRATIVE LAW:

A. Sycilla Collins, Etc., et al. v. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways

2015-SC-000675-DG April 27, 2017

Opinion of the Court by Justice Cunningham. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., sitting. All concur. Wright, J., not sitting. Deceased's wife filed a claim in the Board of Claims alleging that the Department of Highways negligently enforced the vehicle length and width restrictions of a Kentucky highway after an oversized tractor trailer hit her deceased husband's vehicle. The Board of Claims dismissed the claim. After subsequent appeals, the Court held that there was no statutory or regulatory evidence that the Department of Highways is charged with the duty to enforce the length and width restrictions. The Court further held that the Department of Highways' common law duty to keep highways in a reasonably safe condition did not extend to ensuring compliance with the size restrictions.

II. CIVIL PROCEDURE:

A. Ted H. Jefferson, D.O., et al. v. Ronald D. Eggemeyer

2015-SC-000625-DG April 27, 2017

Opinion of the Court by Justice Keller. All sitting; all concur. Ronald Eggemeyer alleged that Dr. Jefferson failed to recognize a post-surgical infection had developed. The parties began trying the case in mid-August 2012. After three days of trial, the trial court declared a mistrial because Dr. Jefferson had mentioned insurance after being specifically warned against doing so. Eggemeyer asked the court to immediately schedule a new trial, for sanctions against Dr. Jefferson, and for an order limiting the parties to the evidence presented in the first trial. The court scheduled a second trial for November 2012 and agreed that the parties would be limited to the evidence presented in the first trial. However, the court stated that it would take the motion for sanctions under advisement until the second trial. Because of a medical condition, the defense attorney from the first trial could not participate in the second trial; therefore, Dr. Jefferson had new counsel during that trial. During the course of the trial, Eggemeyer argued that Dr. Jefferson's counsel was introducing new evidence. Dr. Jefferson and his counsel disagreed that they were offering new evidence; however, the trial court admonished the jury several times to disregard the new theories. During Dr. Jefferson's direct testimony and during closing argument, his counsel introduced one piece of evidence that the trial court had specifically excluded. When the jury returned a verdict in Dr. Jefferson's favor, Eggemeyer moved for JNOV and for a new trial. The trial court denied those motions; however, it levied sanctions

against Dr. Jefferson. In its order, the trial court stated that the sanctions were because of the mistrial; however, the order also recited a number of incidents of "misbehavior" during the second trial. Dr. Jefferson appealed and the Court of Appeals affirmed the trial court's award of sanctions but reversed its denial of Eggemeyer's motion for a new trial.

The Supreme Court reversed the Court of Appeals, As to the motion for a new trial, the Supreme Court held that the trial court, not the Court of Appeals, was present at trial and in a better position to determine if Eggemeyer received a fair trial. Furthermore, the Court noted that the trial court specifically stated in its order that, despite any misbehavior by the defense, Eggemeyer received a fair trial. As to the sanctions, the Court noted that the trial court said in its sanction order that it had initially determined that Dr. Jefferson was in civil contempt. However, the Court could not find any indication in the record of such a finding until after the second trial. Furthermore, the Court noted that, for contempt to be civil, there must be a mechanism for the contemnor to purge his contempt. The trial court had not specified how Dr. Jefferson could purge himself of the alleged civil contempt. Because of these deficiencies, the Court reversed the Court of Appeals on this issue and vacated the trial court's sanction order.

III. CLEAN WATER ACT:

A. Louisville Gas and Electric Company v. Kentucky Waterways Alliance, et al. AND Commonwealth of Kentucky, Energy & Environment Cabinet v. Kentucky Waterways Alliance, et al.

2015-SC-000461-DG
2015-SC-000462-DG **April 27, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Pursuant to the federal Clean Water Act, Kentucky's Division of Water issued a permit to Louisville Gas & Electric Co. to discharge certain pollutants into the Ohio River in conjunction with the operation of its electricity generating facility in Trimble County. Environmental groups brought suit, and the Franklin Circuit Court invalidated the permit on the ground that it failed to impose limits on certain toxic chemicals which, the court concluded, existing regulations did not address but which the Division of Water should have imposed using its judgment. The Court of Appeals affirmed. Reversing, the Supreme Court held that the Division of Water had correctly construed the pertinent existing federal regulations and had appropriately exercised its discretion by deferring additional permit requirements pending the imminent promulgation of a revised regulation.

IV. CRIMINAL LAW:

A. William Robert Rigdon v. Commonwealth of Kentucky
2015-SC-000689-MR **April 27, 2017**

Opinion of the Court by Justice Keller. All sitting; all concur. A Warren County jury convicted Rigdon of murder, and the trial court sentenced him to thirty-eight years' imprisonment. Rigdon challenged the trial court's rulings: ordering increased security during the trial; admitting testimony regarding the culture of the Iron Horsemen; permitting alleged-*ex parte* communication between the Commonwealth and the trial court; and overruling Rigdon's motions for a mistrial.

The Supreme Court affirmed the trial court. The Court noted that courtroom security was a matter within the trial court's discretion and, given that Ridgon was unable to show that the security measures unduly prejudiced him, the trial court did not abuse its discretion. As to Rigdon's challenge to admitting testimony regarding the Iron Horsemen, the Court held that the testimony was relevant and did not unduly prejudice him. As to the alleged *ex parte* communication, the Court held that the communication was not *ex parte* and, although it was improper, the trial court stated that it had not read the communication; thus, there was no error. The Court did admonish the bar that electronic communication with trial courts is not advised, but if such communication is conducted between the parties and the trial court, the trial court must enter an order expressly allowing such communication, and there must be a way to verify that the communication was sent and received. Lastly, the Court held that the trial court did not abuse its discretion by denying Rigdon's motions for a mistrial.

B. Commonwealth of Kentucky v. William Fugate
2015-SC-000597-DG **April 27, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. Police arrested the Appellant for operating a motor vehicle on a DUI-suspended license. Because it was his third such offense committed within 10 years, he was charged under the enhancement provision in KRS 189A.090(2)(c). He had pleaded guilty in both prior cases without the assistance of counsel. In this case, he sought their suppression and challenged their use in enhancing his third offense, arguing that the two earlier guilty pleas were invalid under *Boykin v. Alabama*, 395 U.S. 238 (1969). The trial court addressed and rejected his *Boykin* challenge on the merits. The Court of Appeals reversed. The Supreme Court reversed the Court of Appeals and reinstated the enhanced conviction, holding: (1) precedent barred the Appellant's collateral *Boykin* challenge of his prior convictions being used for enhancement purposes in this later proceeding; and (2) the Appellant validly waived, and so was not completely denied, counsel when he pleaded guilty to the earlier offenses.

C. Commonwealth of Kentucky v. Rita Mitchell
2015-SC-000021-DG **April 27, 2017**

Opinion of the Court by Justice Hughes. All sitting; all concur. Defendant was convicted of second-degree abuse and first-degree assault-by-omission of a mentally handicapped young man, the son of her friend, with whom she had lived and whose care she had helped provide for more than twenty years. She was sentenced, respectively, to five and twelve years in prison. The Court of Appeals reversed and dismissed the assault conviction on the ground that the defendant's duty to care for the young man was subsumed by the parent's more fundamental duty. Reversing the Court of Appeals and remanding to the trial court, the Supreme Court held that while the Commonwealth had presented sufficient evidence of a potential crime of omission to avoid dismissal of the assault charge, its failure to specify the duty the defendant allegedly breached had rendered the trial of the matter fundamentally unfair so as to necessitate reversal of the assault conviction and remand for additional proceedings.

D. Steven Zapata v. Commonwealth of Kentucky
2016-SC-000020-MR **April 27, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. The Appellant entered an *Alford* plea to one count of murder, but moved to withdraw the plea before sentencing and entry of the final judgment. His motion alleged, among other things, that ineffective assistance of counsel rendered his plea involuntary. The trial court denied the withdrawal motion without appointing other counsel or taking evidence. The Appellant appealed, arguing that he was denied his right to conflict-free counsel during his prejudgment motion to withdraw his guilty plea. The Supreme Court agreed, holding that under its recent decision in *Tigue v. Commonwealth*, 459 S.W.3d 372 (Ky. 2015), the trial court was required to appoint the Appellant conflict-free counsel to assist him in moving to withdraw his allegedly involuntary plea.

V. WORKERS COMPENSATION:

A. Marshall Parker v. Webster County Coal, LLC (Dotiki Mine), et al.
AND
Webster County Coal, LLC (Dotiki Mine) v. Marshall Parker, et al.
2014-SC-000526-WC
2014-SC-000536-WC **April 27, 2017**

Opinion of the Court by Justice Keller. All sitting. Cunningham, Keller, Venters, and Wright, JJ., concur. Minton, C.J., concurs in part and dissents in part by separate opinion, in which Hughes and VanMeter, JJ., join. Parker had worked in the coal mining industry for more than 30 years. At the age of 68, Parker injured his knee and low back. The ALJ awarded Parker permanent partial disability benefits based on a 26% permanent impairment rating. However, because Parker was older than his normal social security retirement age, the ALJ limited Parkers'

combined permanent partial disability and temporary total disability benefits to two years pursuant to KRS 342.730(4). On appeal, Parker challenged the constitutionality of KRS 342.730(4).

The majority of the Court determined that KRS 342.730(4) violates the Equal Protection Clause because it treats one group of older workers, those who qualify for social security retirement benefits, differently from another group of older workers, teachers. As the Court noted, the statute "invidiously discriminates against those who qualify for one type of retirement benefit (social security) from those who do not qualify for that type of retirement benefit but qualify for another type of retirement benefit (teacher retirement)." As noted by the Court, teachers, who never qualify for social security retirement benefits can collect their teacher retirement and their full workers' compensation benefits while other workers can only collect a portion of their workers' compensation benefits. The Court could find no rational basis for treating all other workers in the Commonwealth differently from teachers.

The dissent saw no reason to alter past decisions that had found no equal protection violation.

VI. ATTORNEY DISCIPLINE:

A. Inquiry Commission v. Danny Perkins Butler

2016-SC-000668-KB **April 27, 2017**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission moved the Court to temporarily suspend Butler's license to practice law based on information the Commission had received from the Hardin County Commonwealth's Attorney. That information revealed that Butler had been indicted for theft by unlawful taking of more than $10,000 related to Butler's misappropriation of client funds. The Commission also noted that the Federal Bureau of Investigation was investigating 115 complaints related to Butler that it had received. The Supreme Court granted the Commission's motion.

B. Kentucky Bar Association v. Christopher David Wiest

2017-SC-000039-KB **April 27, 2017**

Opinion and Order of the Court. All sitting; all concur. The Supreme Court of Ohio suspended Wiest for two years, with the second year stayed on the condition he engage in no further misconduct. Thereafter, the Kentucky Bar Association filed a petition with the Supreme Court of Kentucky asking that reciprocal discipline be imposed. The Court issued a show cause order and Wiest responded but failed to prove by substantial evidence that the grounds set forth in SCR 2.435(4)(a) and (b) were met in his case. Accordingly, the Court suspended him from the practice of law consistent with the order of the Supreme Court of Ohio.

C. Kentucky Bar Association v. Dennis Michael Stutsman
2017-SC-000098-KB April 27, 2017

Opinion and Order of the Court. All sitting; all concur. Stutsman was banned from filing any new cases in federal court for a period of one year for failing to timely filing appeals in two separate Social Security cases. The matter was referred to the KBA Office of Bar Counsel for disciplinary proceedings. Stutsman was served with a copy of the Inquiry Commission complaint but failed to respond. He also received a copy of the Commission's charge via certified mail but again failed to respond. Accordingly, the matter proceeded to the Board of Governors by default and Stutsman was found guilty. The Board recommended that Stutsman be suspended from the practice of law for thirty days, be required to attended the Ethics and Professionalism Enhancement Program and be referred to KYLAP.

Neither Stutsman nor the Office of Bar Counsel requested that the Supreme Court take review of the Board's decision under SCR 3.370(7) and the Court declined to independently review the Board's decision under SCR 3.370(8). After reviewing the record, analogous case law and Stutsman's disciplinary history, the Court adopted the Board's Findings of Fact, Conclusions of Law and Recommendations under SCR 3.370(9) and suspended Stutsman from the practice of law in the Commonwealth for thirty days.

D. Kentucky Bar Association v. David Cary Ford
2017-SC-000099-KB April 27, 2017

Opinion and Order of the Court. All sitting; all concur. Ford pleaded guilty in federal court to criminal charges of fraud and money laundering. He acted as the executor of seven estates between 2008 and 2015, from which he took approximately $1.7 million for his own personal benefit. The money Ford stole was intended for various charities and the decedents' families.

The Inquiry Commission issued a two-count charge against Ford. All attempts to serve Ford were unsuccessful and service was finally completed via the KBA's Executive Director under SCR 3.175(2). Ford never filed a response and the Board of Governors found Ford guilty of violating both SCR 3.130-8.4(b) and (c). The Supreme Court agreed with the Board's findings and, given the nature of Ford's violations and their gravity, agreed that permanent disbarment was the appropriate sanction. Accordingly, the Court ordered Ford permanently disbarred from the practice of law in the Commonwealth.

E. Christopher Lee Stansbury v. Kentucky Bar Association
2017-SC-000100-KB April 27, 2017

Opinion and Order of the Court. All sitting; all concur. Stansbury conducted a number of real estate closings and held himself out as being authorized to collect title insurance premiums on behalf of an insurance carrier when he had no such

authorization. In another matter, Stansbury advised a client that he had filed a QDRO, when he had not done so, and he failed to advise that client that his license had been suspended for unrelated violations of the Rules of the Supreme Court. The Supreme Court accepted the agreed to sanction of a two-year suspension with readmission contingent upon completion of a KYLAP assessment.

F. James David Johnson v. Kentucky Bar Association
2017-SC-000114-KB April 27, 2017

Opinion and Order of the Court. All sitting; all concur. Johnson admitted to six counts of violating the Kentucky Rules of Professional Conduct and moved the Court to impose the sanction of permanent disbarment. The KBA did not object to Johnson's motion. Upon review, the Court agreed that the proposed sanction was appropriate and permanently disbarred Johnson from the practice of law in the Commonwealth.