

**KENTUCKY SUPREME COURT
APRIL 2020**

I. CRIMINAL LAW:

A. Dawan Q. Mulazim v. Commonwealth of Kentucky and Quincino Deonte Canada v. Commonwealth of Kentucky

[2018-SC-000466-MR](#)

April 30, 2020

[2018-SC-000471-MR](#)

April 30, 2020

Opinion of the Court by Justice Hughes. All sitting; all concur. A Fayette County jury found Dawan Q. Mulazim and Quincinio Deonte Canada guilty of several counts of first-degree robbery, tampering with physical evidence and of being first-degree Persistent Felony Offenders. Mulazim and Canada robbed three people at gunpoint and robbed two others five days later, killing a man in the process. The trial court sentenced Mulazim to sixty years in prison and Canada to fifty years in prison in accordance with the jury's recommendation. On appeal, they raise identical issues. The Supreme Court held that the trial court properly admitted a pre-trial photo identification in which police digitally removed a small tattoo from Canada's face. Recognizing the novelty of the issue, the Court determined that the manipulation did not render the identification procedure impermissibly suggestive. Additionally, Mulazim and Canada argued that the trial court erred in failing to strike jurors for cause. The trial court granted more strikes than required by RCr 9.40 to both the defendants and the Commonwealth. Given the number of jurors the Appellants alleged should have been removed for cause, the trial court could have erroneously failed to remove four jurors and the Appellants still would have received everything they were entitled to under RCr 9.40. The Court determined that two of the five jurors were properly allowed to continue in the jury pool, thus concluding that the Appellants retained the advantage built into RCr 9.40. Other issues included the sufficiency of evidence to overcome a motion for directed verdict, impermissible burden shifting, evidence of prior convictions, and improper but harmless shackling in the penalty phase. Finding no error, the Court affirmed the judgment of the Fayette Circuit Court.

B. Steven Dale Eversole v. Commonwealth of Kentucky

[2018-SC-000656-MR](#)

April 30, 2020

Opinion of the Court by Justice Wright. All sitting; all concur. A Laurel Circuit Court jury found Appellant, Steven Dale Eversole, guilty of first-degree fleeing or evading, first-degree wanton endangerment, reckless driving, and being a first-degree PFO. He was sentenced to twenty years' imprisonment in accordance with the jury's recommendation. Eversole appealed to the Supreme Court of Kentucky as a matter of right, Ky. Const. §110(2)(b). On appeal, Eversole raised five issues, alleging the trial court erred by: (1) depriving him of counsel at a critical stage of trial, (2) failing to grant his motions for directed verdict, (3) denying him

a unanimous verdict, (4) admitting evidence of uncharged prior bad acts, and (5) providing the jury with improper penalty-phase jury instructions. Agreeing with Eversole that the trial court erred in depriving him of the right to be represented during a critical stage of the trial when it had an ex parte discussion with a juror in which the juror revealed an attempted bribe, the Court reversed Eversole's conviction, vacated the corresponding sentence, and remanded for further proceedings. Because it was reversing on other grounds, the Court only took up Eversole's remaining arguments concerning his motions for directed verdict, holding the trial court had not abused its discretion in denying said motions.

C. Steven Zapata v. Commonwealth of Kentucky

[2018-SC-000666-MR](#)

April 30, 2020

Opinion of the Court by Justice Wright. All sitting; all concur. A Jefferson County Grand Jury indicted Steven Zapata for one count of murder for killing his wife, Tondelia. Zapata entered a guilty plea pursuant to *North Carolina v. Alford*, 91 S. Ct. 160 (1970), in which he maintained his innocence while acknowledging the Commonwealth had sufficient evidence to convict him. A week after entering the plea, Zapata's court-appointed counsel filed a motion to withdraw the guilty plea. Four days after his counsel's motion to withdraw the plea, Zapata mailed his own motion to withdraw the guilty plea, alleging deficiencies in representation. The trial court denied both motions and Zapata appealed to the Supreme Court of Kentucky. In *Zapata v. Commonwealth*, 516 S.W.3d 799 (Ky. 2017), the Supreme Court vacated the judgment and order denying Zapata's motion to withdraw the guilty plea and remanded the case for further proceedings. On remand, Zapata's newly-appointed counsel filed a new motion to withdraw Zapata's guilty plea. After an evidentiary hearing, the trial court denied Zapata's motion to withdraw his guilty plea and sentenced Zapata to twenty-four years' imprisonment in accordance with the agreement. He again appealed to the Supreme Court of Kentucky as a matter of right, Ky. Const. § 110(2)(b). In his second appeal to the Supreme Court, Zapata argued: 1) the trial court erred by not permitting him to withdraw his guilty plea (due to (a) ineffective assistance of counsel, (b) Elleman's disqualifying conflict of interest, and (c) "Zapata's incorrect belief of his absolute right to withdraw his guilty plea at any time prior to sentencing") and 2) even assuming the plea was voluntarily entered, the trial court abused its discretion when it denied his motion to withdraw his guilty plea. The Supreme Court affirmed, holding the trial court did not err in denying Zapata's motion to withdraw his guilty plea due to ineffective assistance of counsel, counsel's alleged conflict of interest, or Zapata's incorrect belief that he could withdraw his guilty plea at any point prior to sentencing. The Supreme Court also held the trial court did not abuse its discretion in denying Zapata's motion to withdraw his plea.

D. Nathaniel L. Breazeale v. Commonwealth of Kentucky
[2019-SC-000113-MR](#) April 30, 2020

Opinion of the Court by Justice Lambert. All sitting; all concur. Defendant was convicted of one count of first-degree assault and one count of first-degree criminal abuse in relation to severe injuries suffered by a one-year old child in his care. The Court held: (1) the defendant’s convictions for first-degree assault and first-degree criminal abuse did not violate his rights against being subjected to double jeopardy; (2) the jury instruction for first-degree criminal abuse did not violate his right to a unanimous verdict; (3) the trial court did not err by failing to instruct the jury on use of force by a person with the responsibility for care, discipline, or safety of others; (4) the trial court did not err by allowing prior bad acts evidence; and (5) the trial court did err by allowing two photographs into evidence.

II. JURISDICTION:

A. John Hauber and Cheri Hauber v. Harry W. Hauber, III and Rebecca L. Alter
[2018-SC-000394-DG](#) April 30, 2020
[2019-SC-000154-DG](#) April 30, 2020

Opinion of the Court by Justice VanMeter. All sitting; all concur. John Hauber and Cheri Hauber (“the trustees”) petitioned for discretionary review of the Court of Appeals’ decision reversing the Jefferson Circuit Court’s dismissal of this case. The Jefferson Circuit Court had dismissed Henry Hauber, III’s and Rebecca Alter’s second action against the trustees of their parents’ trust on grounds that a prior action had been filed in and decided by the Jefferson District Court. The Kentucky Supreme Court affirmed the Court of Appeals, finding that while KRS Chapter 386B provides for concurrent jurisdiction for district and circuit courts over many trust-related matters and disputes, under subsection 2 of KRS 386B.2-030, the legislature focused on matters arising from any given trust in determining exclusive jurisdiction. Based on the statutory language, the Court held that the term “matter” as used in KRS 386B.2-030(2) refers to a discrete event arising from the trust, rather than the trust itself. Thus, although this case involves the same siblings, and same trust and trust instrument, the underlying matter and claims brought in circuit court differ from the dispute in district court. Accordingly, the Court remanded the case to the Jefferson Circuit Court to exercise jurisdiction over all further appropriate proceedings.

III. MEDICAL MALPRACTICE:

A. Jassica Sneed v. University of Louisville Hospital
[2018-SC-000048-DG](#) April 30, 2020

Opinion of the Court by Justice Keller. All sitting; all concur. Jassica Sneed was admitted to the University of Louisville Hospital (“Hospital”) on August 1, 2013

in active labor. She delivered her baby the next day under the care of Doctors Tanya Franklin and Jennifer Ford Allen. During her delivery, Sneed suffered a fourth-degree laceration. Two weeks later she was diagnosed with a rectovaginal fistula. She eventually filed claims against the Hospital and various doctors and nurses, including Drs. Franklin and Allen. The trial court granted summary judgment in favor of the defendants. On appeal Sneed argued that the statute of limitations was tolled by the continuous treatment doctrine and the fraudulent concealment of her medical records which delayed her discovery of the doctors who delivered her baby. She also argued that the physicians were ostensible agents of the Hospital.

The Supreme Court (1) declined to expand the continuous treatment doctrine under the facts of this case to include situations when a patient continues to receive care at the same hospital but not by the same physician; (2) declined to apply equitable tolling principles due to fraudulent concealment because Sneed was well aware of her cause of action prior to the running of the statute of limitations; and (3) held that there was no genuine issue of material fact as to whether Drs. Franklin and Allen were ostensible agents of the Hospital because the Hospital took reasonable steps to notify patients that they would be treated by independent contractor physicians, and there was no evidence of any intent of the Hospital to deceive its patients into believing that the physicians were employees of the Hospital, nor was there evidence of the Hospital holding the physicians out to be employees.

IV. WRIT OF PROHIBITION:

A. Commonwealth of Kentucky v. Honorable Mary Shaw, Judge, Jefferson Circuit Court, and Charles Rutledge **[2019-SC-000218-MR](#) April 30, 2020**

Opinion of the Court by Justice VanMeter. All sitting; all concur. The Commonwealth appealed the Court of Appeals' decision denying a writ of prohibition against the trial court for granting Rutledge's motion for in camera review of the victim's therapy records during a particular one-month period of treatment. On appeal, the Court held that the trial court properly followed the directive set forth in *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003), but overstepped its authority by ordering the Commonwealth to retrieve the names of the victim's medical providers. The Court set out a new process by which medical providers' identities and records can be retrieved and reviewed in camera when the defendant knows of the relevant information and specific time frame but lacks the names of the medical providers. The Court ultimately granted the Commonwealth's writ and ordered the trial court to follow this new framework to retrieve the relevant documents for in camera review.

V. **ATTORNEY DISCIPLINE:**

A. **Johnathan L. Smith v. Kentucky Bar Association**

2020-SC-000046-KB

April 30, 2020

Opinion and Order of the Court. All sitting; all concur. In January 2020, the Kentucky Bar Association suspended Smith for non-payment of his 2019-20 dues. Smith appealed and tendered his affidavit of good cause that the suspension should be revoked. In his affidavit, Smith averred that he had moved out of state and that his failure to pay his dues had been an “oversight” on his part. However, Smith acknowledged that he failed to comply with SCR 3.035(1)(a) by providing the KBA Director with his current address. Moreover, the KBA notified delinquent members by mail, by notice in the Bench & Bar, and by email. Smith received at least two of these emails, along with at least one voicemail from an employee of the KBA Membership Department. KBA membership records indicated that Smith had been delinquent in payment of annual bar dues for the past five (5) fiscal years.

Based on this information, the Supreme Court determined that Smith had not shown good cause for revocation of his suspension. The KBA followed the protocol established by SCR 3.050 but Smith failed to pay his bar dues prior to being suspended; failed to keep the KBA informed of his current address; and had been delinquent in his bar dues payments for the last five years. Accordingly, the Court suspended Smith from the practice of law.