

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
August 2011**

I. CRIMINAL LAW

A. James Peters v. Commonwealth of Kentucky
[2010-SC-000384-MR](#) August 25, 2011

Opinion of the Court by Justice Schroder. All sitting; all concur. Appellant was convicted of second-degree manslaughter, first-degree fleeing or evading, two misdemeanor convictions, and being a second-degree persistent felony offender. The charges arose from a single-car crash, which killed the Appellant's passenger, while the Appellant was allegedly under the influence of methamphetamine. A nurse took the Appellant's blood, and it was sent to the Kentucky State Police for testing. A lab report indicated that the Appellant was under the influence of methamphetamine. At trial, the lab technician who prepared the report was unavailable, and a technician who had not prepared the report or tested the sample testified in his place.

The Supreme Court held that, pursuant to *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the lab report was a testimonial statement, and it was error to admit the report and its contents in the absence of the declarant (the lab technician who prepared the report). However, the issue was not preserved at trial, and the Court concluded that the error was not palpable, because considerable other evidence supported the inference that the Appellant was driving under the influence of methamphetamine. The Court also held that an audiotape of the arresting officer's call to dispatch was proper rebuttal evidence when the Appellant denied having heard sirens. The Court reversed the portion of the judgment imposing costs and fines upon the Appellant, who was indigent.

B. Ronnie Lee Anderson v. Commonwealth of Kentucky
[2010-SC-000205-MR](#) August 25, 2011

Opinion of the Court by Justice Abramson. All sitting; all concur. A jury convicted Anderson of assault in the first degree and, finding him to be a persistent felony offender (PFO) in the second degree, sentenced him to twenty years imprisonment. On appeal, Anderson argued the trial court committed reversible error (1) by denying his motion for a directed verdict; (2) by failing to suppress statements made during an interview with the police; and (3) by instructing the jury to determine his PFO status before determining the sentence for his assault conviction.

The Court agreed there was insufficient proof of a "serious physical injury," a necessary element of assault in the first degree, KRS 508.010, where the proof only showed the victim received a cut on his jaw bone, was sutured and released from the hospital the same day, and did not require subsequent medical care. Accordingly, the Court reversed. The Court addressed Anderson's argument

concerning the trial court's failure to suppress his statements to police because it could recur upon retrial on the lesser-included assault charges. On this issue, the Court held the trial court properly admitted Anderson's statements after correctly finding he was not so intoxicated as to make his statements unreliable or involuntary. Further, admission of the statements Anderson made on his cell phone did not violate his *Miranda* rights because they were made prior to police questioning and to a third party. Finally, finding it unlikely to recur at retrial, the Court declined to address at length Anderson's argument regarding the jury instructions but did note the trial court improperly required the jury to determine Anderson's PFO status before determining his sentence for the assault conviction and reminded trial courts to adhere to the procedure prescribed in *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987).

C. James B. Turner, Jr. v. Commonwealth of Kentucky
[2010-SC-000391-MR](#) August 25, 2011

Opinion of the Court by Justice Noble. All sitting; all concur. Turner was convicted of first-degree sexual abuse and incest and was sentenced to 22 years in prison. The Court affirmed Turner's conviction for incest, but reversed the conviction for first-degree sexual abuse and remanded for re-entry of judgment and sentencing.

Turner argued that the Commonwealth had failed to prove that the offenses occurred in Boyle County, where he was tried. The Court held that, although the Commonwealth had the burden of proving venue, Turner waived any right to challenge his conviction on venue grounds by failing to make a timely motion to transfer the prosecution to the proper county. The Court further held that venue is not an element of either first-degree sexual abuse or incest. For these reasons, Turner's challenge to his convictions based on improper venue failed.

The Court reversed Turner's conviction for sexual abuse. The version of the first-degree sexual abuse statute under which Turner was convicted did not go into effect until July 2008, and his conduct did not constitute first-degree sexual abuse under the previous version of the statute. The jury instruction required the jury to find that Turner committed first-degree sexual abuse between December 2005 and July 2008. The instruction therefore allowed the jury to convict Turner of first-degree sexual abuse for conduct committed during a three-and-a-half year period when the conduct was not punishable as first-degree abuse.

D. Commonwealth of Kentucky v. Randy Leinenbach
[2010-SC-000091-DG](#) August 25, 2011

Opinion of the Court by Justice Cunningham. Chief Justice Minton not sitting. The instructions on a single charge of rape allowed the jury to find Appellant guilty for either of two distinct instances of rape by forcible compulsion. Though expressing doubt that the instructions were erroneous, the Court assumed error nonetheless for purposes of Appellant's ineffective assistance of counsel claim. Even assuming error, Appellant was unable to establish that he was prejudiced by

any such error and, therefore, failed to satisfy the requirements of *Strickland v. Washington*. Because the evidence supported a conclusion that Appellant in fact committed both instances of rape by forcible compulsion, he was not prejudiced where he was ultimately convicted of only one count, notwithstanding that the jury was permitted to "choose" which instance supported the conviction.

II. FAMILY LAW/SUPPORT

- A. **Commonwealth of Kentucky v. Randy Marshall; Randy Marshall v. Commonwealth of Kentucky; Commonwealth of Kentucky v. Mark Johnson**
[2009-SC-000229-DG](#) August 25, 2011
[2010-SC-000348-DG](#) August 25, 2011
[2009-SC-000589-DG](#) August 25, 2011

Opinion of the Court by Chief Justice Minton. All sitting. Supreme Court affirmed Court of Appeals decisions vacating Johnson's and Marshall's probation revocations for failure to make child support payments required as conditions of probation under plea agreements. Issues/holdings include: 1) analysis required under *Bearden v. Georgia*, 461 U.S. 660 (1983) for considering probation revocation for failure to pay fines or restitution applies to considering probation revocation for failure to pay child support; 2) thus, trial court considering probation revocation for failure to pay child support must consider a) whether defendant made sufficient bona fide attempts to make payments and if so, b) whether alternatives to imprisonment would fulfill Commonwealth's interests in punishment and deterrence; 3) such *Bearden* analysis requirements apply even when defendant has pled guilty to flagrant non-support and has agreed to pay child support as probation condition under terms of plea agreement, 4) trial court must make specific findings on the record of *Bearden* factors, although such findings do not necessarily have to be in writing, and 5) trial court may properly focus consideration on post-plea changes where defendant pled guilty to flagrant non-support and specifically agreed to pay child support as probation condition under plea agreement. Justice Cunningham dissented by separate opinion, in which Justice Scott and Justice Venters joined.

III. MUNICIPALITIES

- A. **Madison County Fiscal Court, Et. Al. V. Kentucky Labor Cabinet, Et. Al.**
[2010-SC-000322-TG](#) August 25, 2011

Opinion of the Court by Justice Venters. All sitting. All concur. On appeal from a judgment of the Franklin Circuit Court, the Supreme Court of Kentucky held: 1) that municipalities and local government entities were not immune from suit by, or on behalf of, local firefighters to recover underpayment of wages due to improper calculation of firefighters's overtime compensation; 2) that the Kentucky Labor Cabinet had jurisdictional authority under KRS Chapter 337 to pursue administrative action to compel municipalities and local governments to pay the unpaid portions of overtime pay owed to their firefighter-employees.

IV. WORKERS' COMPENSATION

A. Abel Verdon v. Miguel A. Rivera

[2010-SC-000744-WC](#)

August 25, 2011

Opinion of the Court. All sitting; all concur. Rivera sought workers' compensation benefits from Verdon for injuries sustained when he fell through a hole in the second floor of a home that Verdon was constructing. Verdon denied liability on the grounds that Rivera was not working an employee and was an "unauthorized alien" for whom the Immigration Reform and Control Act of 1986 (IRCA) preempted the application of Chapter 342. The ALJ found Rivera to be Verdon's employee; determined his average weekly wage; and awarded TTD benefits followed by triple benefits for partial disability. The ALJ refused to certify Rivera's expert to testify concerning Verdon's alleged safety violation and concluded that no violation was applicable. The Court of Appeals determined subsequently that the Board erred by reversing the refusal to certify the safety expert but determined that KRS 342.165(1) did not require expert testimony; found that the Board did not err by remanding for additional consideration of a safety violation under the statute; and affirmed otherwise. The court also determined that the IRCA did not preempt the application of Chapter 342. The Supreme Court affirmed. The court held that substantial evidence supported the finding that Rivera was Verdon's employee and also held that the IRCA did not preempt KRS 342.640(1), which provides workers' compensation coverage without regard to the legality of the employment relationship. The court also held that substantial evidence supported the findings with respect to Rivera's average weekly wage for less than 13 weeks' employment as well as the date for terminating TTD. Finally, the court noted evidence in the record that residential construction regulations imposed certain requirements concerning fall protection at the time of the injury and that KRS 342.165(1) does not require expert testimony. Noting also that nothing covered or barricaded the hole through which Rivera fell, the court concluded that the ALJ must analyze the evidence to determine what regulation governed the facts; whether it required the employer to have some form of fall protection in place at the time of Rivera's accident; and, if so, whether the failure to have such protection helped to cause the accident. Justice Scott concurred separately with respect to KRS 342.610(1).

B. Jeffrey Graham v. TSL, Ltd.

[2010-SC-000676-WC](#)

August 25, 2011

Opinion of the Court. All sitting; all concur. Graham was a Kentucky resident who spent a majority of his time in no one state when working as a trucker. TSL had corporate offices in Missouri and Ohio but no Kentucky office. Graham sought workers' compensation benefits in Kentucky for an injury that occurred in New Jersey. He stated that he telephoned TSL's Missouri offices seeking employment and faxed the information requested by TSL's representative, who reviewed it during their phone conversation and told him that he could "start tomorrow." He traveled to TSL's Missouri offices, where he completed various requirements before receiving his truck and beginning to work. The ALJ

dismissed the claim for lack of jurisdiction under KRS 342.670(1) and (5) based on TSL's evidence that it issues a letter for hire only after the applicant satisfies all pre-employment requirements, which Graham did in Missouri. The ALJ reasoned that Graham "may have been assured employment over the telephone line while he was in Kentucky" but that the contract of hire was made in Missouri. The Workers' Compensation Board and Court of Appeals affirmed. The Supreme Court also affirmed, noting that a contract is made at the time the last act necessary for its formation is complete and at the place where that act is performed. The court acknowledged that a contract made by telephone is made in the place where the acceptor speaks his acceptance. It concluded, however, that the record supported the ALJ's finding that no contract was formed until the claimant completed TSL's pre-employment requirements in Missouri.

V. ATTORNEY DISCIPLINE

A. **Robert W. Riley v. Kentucky Bar Association**

[2011-SC-000309-KB](#)

August 25, 2011

Order of Public Reprimand. All sitting; all concur. The Supreme Court publicly reprimanded Riley for violating a prior version of SCR 3.130-1.7(b). Riley engaged a client in sexually explicit telephone conversations and made a sexual advance towards the client while representing the client in a class action.

B. **David A. Baker v. Kentucky Bar Association**

[2011-SC-000328-KB](#)

August 25, 2011

Order Restoring Movant to the Practice of Law with Conditions. All sitting; all concur. The Supreme Court restored Baker, who had been suspended from the practice of law for nonpayment of dues, on the conditions that he pay all back dues, pay costs, and be re-certified as compliant with his continuing legal education requirements.

C. **An Unnamed Attorney v. Kentucky Bar Association**

[2011-SC-000333-KB](#)

August 25, 2011

Order of Private Reprimand with Conditions. All sitting; all concur. The Supreme Court privately reprimanded the Movant for violation of SCR 3.130-1.15(b). The Movant received an "Assignment of Proceeds, Lien, and Authorization" from a chiropractor who had treated the Movant's personal injury client. Upon subsequent settlement of the case, the Movant deducted his fee and distributed the remaining money to his client without notifying the chiropractor of the settlement or distribution. The Movant was also required to attend the next Ethics and Professionalism Enhancement Program.

D. **Kentucky Bar Association v. Luann Glidewell**

[2011-SC-000206-KB](#)

August 25, 2011

Opinion and Order. All sitting; all concur. The Court adopted the KBA's recommendation to suspend Glidewell from the practice of law for three years. Glidewell violated SCR 3.130-4.4, which bars a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, by filing an improper lien on property her client no longer had an interest in and refusing to remove it. She also violated SCR 3.130-8.1(b) by failing to respond to a demand for information from the KBA.

**E. Kentucky Bar Association v. William A. Mitchell
2011-SC-000-300-KB August 25, 2011**

Opinion and Order. All sitting; all concur. The Court adopted the Board of Governors' recommendation to suspend Mitchell from the practice of law for one year as a result of two disciplinary charges. Mitchell failed to respond to the charges, resulting in default cases under SCR 3.210.

**F. John F. Rampulla III v. Kentucky Bar Association
2011-SC-000310-KB August 25, 2011**

Opinion and Order. All sitting; all concur. The Court suspended Rampulla from the practice of law for 181 days, with 91 days probated for three years, subject to the following conditions: continued participation in the KYLAP program for three years; no further misdemeanor or felony charges for three years; and no additional disciplinary charges for three years.