PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
DECEMBER 2015

I. CONTEMPT:

A. Cabinet for Health and Family Services v. J.M.G., et al.

2013-SC-000797-DG **December 17, 2015**

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Keller, Noble and Venters, JJ., sitting. All concur. Wright, J., not sitting. The Fayette Family Court found the Cabinet for Health and Family Services guilty of two instances of criminal contempt for procedural lapses during a child-neglect case, one lapse by a Cabinet social worker and one by a Cabinet attorney. Reversing one of the convictions and vacating the other, the Supreme Court discussed the procedures constitutionally appropriate to actions for indirect criminal contempt and reviewed the elements of criminal contempt. In one case (involving the attorney), the Court held that the evidence was insufficient to support the family court's ruling and in the other case (involving the social worker) the Court remanded to afford the family court an opportunity either to dismiss the action or to clarify its findings.

II. CRIMINAL LAW:

A. Tammy Dillard v. Commonwealth of Kentucky

2013-SC-000425-DG **December 17, 2015**

Opinion of the Court by Justice Abramson. Minton, C.J.; Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. Following a motor vehicle accident, Dillard entered a conditional plea to Failure of Owner to Maintain Required Insurance/Security. Prior to the district court holding a restitution hearing, Dillard appealed to the circuit court in an effort to secure a ruling as to whether restitution was available in the criminal matter to a driver injured in the accident allegedly caused by Dillard. The circuit court concluded that there was no "final action" from the district court, a necessary prerequisite to invoking the circuit court's appellate jurisdiction. The Court of Appeals on discretionary review affirmed the judgment of the lower court but, like the circuit court, decided to address the substantive restitution issue in an advisory manner. On discretionary review, the Supreme Court affirmed the lower courts' holdings with regard to the lack of appellate jurisdiction in the case and explained the compelling reasons for confining appellate review to final judgments. Given the absence of a final judgment , the Court declined to issue an advisory opinion as to whether restitution is statutorily available under these facts.

B. Commonwealth of Kentucky v. Billy Cox
2013-SC-000618-DG **December 17, 2015**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Keller, and Venters, JJ., concur. Noble, J., concurs by separate opinion. Cunningham, J., dissents by separate opinion in which Wright, J., joins. Cox was arrested and convicted of DUI after being stopped at a roadblock. Cox challenged the constitutionality of the roadblock and the Court of Appeals reversed his conviction. In affirming the Court of Appeals' decision, the Supreme Court held that the stop employed in this case was illegal under the Commonwealth v. Buchanon framework for reviewing the constitutionality of a police roadblock. Constitutional restrictions on DUI checkpoints are in place to limit officer discretion and to prevent arbitrary or unreasonable searches, which violate the Fourth Amendment. Specifically in this case, the lack of advance notice and the haste with which the stop was arranged unnecessarily risked unfettered police discretion. So the Court held the roadblock was unconstitutional.

C. Marcus D. Greene v. Commonwealth of Kentucky
2014-SC-000122-MR **December 17, 2015**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., sitting. All concur. Wright, J., not sitting. Greene pled guilty and was sentenced to a host of criminal offenses and sentenced to twenty years' imprisonments, as part of a plea bargain with the Commonwealth. Prior to sentencing, he attempted to withdraw his guilty plea because of a miscommunication with his attorney about jail-time credit he would receive as part of his sentence. The trial judge denied his motion to withdraw, and Greene appealed to the Supreme Court. The Court reviewed his claim for an abuse of discretion because it concluded an ineffective-assistance-of-counsel claim based on incorrect time-served estimations did not render the plea involuntary. Reviewing the plea under that standard, the Supreme Court affirmed his sentence because the misunderstanding did not undermine the Court's confidence in Greene's ultimate decision to accept the Commonwealth's plea bargain.

D. Commonwealth of Kentucky v. Michael Young, et al.
2013-SC-000367-DG **December 17, 2015**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Keller, Noble, Venters and Wright, JJ., sitting. Minton, C.J.; Abramson, and Cunningham, JJ, concur. Keller, J., concurs by separate opinion in which Venters and Wright, JJ., join. The appellees pleaded guilty to theft by deception of more than $10,000, a Class C felony, for having accepted living expenses from two different sets of prospective adoptive parents without disclosing that fact to either set of prospective parents. The total sum of the expenses received from both sets of prospective parents was used to exceed the $10,000 threshold, while the expenses taken from each set alone would have fallen below that threshold and

thus only supported Class D felonies. The Court of Appeals reversed the convictions, holding that there was no theft by deception because the prospective parents paid the expenses knowing that there was no guarantee they would be allowed to adopt the unborn child and, therefore, that the indictment should have been dismissed. The Supreme Court reversed in part and affirmed in part, holding that the indictment should not have been dismissed but that the convictions should instead have been vacated. The Supreme Court concluded that the indictment could be dismissed only if it failed to state a theft charge on its face and that the indictment, in fact, alleged a theft charge by alleging the appellees took living expenses from both sets of prospective parents while hiding the fact that they were doing so. But the Supreme Court also determined that it was improper to charge the appellees with Class C felonies by using the sum of the total expenses taken from both sets of prospective parents rather than the expenses taken from the one set listed in the indictment, where it was stipulated that that set of prospective parents gave the appellees less than the amount required for a Class C felony conviction.

E. Adam Anthony Barker v. Commonwealth of Kentucky
2014-SC-000067-MR **December 17, 2015**
2014-SC-000080-MR **December 17, 2015**

Opinion of the Court by Chief Justice Minton. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., sitting. All concur. Wright, J., not sitting. Abramson, J., concurs, and believe this case illustrates the value of the so-called Jefferson County method of voir dire (a method the trial court did not employ in this case) and underscores the wisdom of amending our criminal rules and administrative procedures to approve expressly of this more efficient and effective means of jury selection.

On retrial following this Court's previous reversal of his conviction, Barker was again convicted of second-degree manslaughter. In a misguided attempt to get some degree of revenge, Barker went to the eventual-victim's apartment and slashed the tires of what Barker thought was the eventual-victim's car. This was in the middle of the night, around 1:00 a.m. The eventual-victim's roommate saw Barker and told the eventual victim. The two then chased Barker into an alley, at which point Barker drew his firearm and shot the victim, allegedly in an act of self-defense.

On appeal, Barker alleged the trial court erred in giving a provocation qualification to Barker's self-defense instruction and the second-degree manslaughter instruction was erroneous. The Commonwealth filed a cross-appeal seeking the Court's certification of the law regarding the trial court's jury-selection practices.

The Court agreed with Barker and reversed his conviction because the trial court erroneously included the provocation qualification. In the Court's view, rather than attempting to provoke the victim, Barker was actively trying to avoid

detection, sneaking around in the cover of darkness. Seeking revenge or wanting to anger the victim, alone, are not enough to warrant a provocation instruction. The Court also found erroneous the trial court's deviation from the second-degree-manslaughter model instruction. The trial court's omission of a single clause forced the jury to find Barker acted both intentionally and wantonly. The Court rejected the Commonwealth's attempt to certify the law, holding that such an appeal from a conviction was not supported by the Kentucky Constitution. The Court noted that, in essence, the Commonwealth was seeking an advisory opinion and simply did not want to pay the price of a standard appeal. In the Court's view, the Commonwealth may only have the law certified after an acquittal. Any appeal filed by the Commonwealth following a conviction will simply be treated as a standard appeal.

F. Commonwealth of Kentucky v. Joe Taylor
2014-SC-000211-DG **December 17, 2015**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., sitting. All concur. Wright, J., not sitting. Taylor testified at a suppression hearing and did not object to the Commonwealth's use of that testimony as evidence of guilt at trial. Under Simmons v. United States, 390 U.S. 377 (1968), and Shull v. Commonwealth, 475 S.W.2d 469 (Ky. 1971), the use of such testimony as evidence of guilt at trial over a criminal defendant's objection violates his Fifth Amendment privilege against self-incrimination. Although Taylor did not object to such use at trial, the Court of Appeals nevertheless found palpable error and reversed the conviction. In reversing the Court of Appeals, the Supreme Court held that the requirement of objection is a substantive aspect of the constitutional rule such that failure to object was a waiver of the right, thus barring palpable-error review.

G. Patrick Deon Ragland v. Commonwealth of Kentucky
2014-SC-000267-MR **December 17, 2015**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., sitting. All concur. Wright, J., not sitting. Ragland was convicted of second-degree manslaughter, tampering with physical evidence, and of being a first-degree persistent felony offender, and was sentenced to twenty years in prison. The Supreme Court reversed his convictions and sentence and remanded the case for retrial, holding that the trial court committed reversible error by including a "no duty to retreat" jury instruction—using the language of KRS 503.055(3)—with a general self-protection instruction and by inadequately instructing the jury on the justifiable use of force to protect against unwanted sexual intercourse compelled by threat or force under KRS 503.050(2). The evidence did not support giving the "no duty to retreat" instruction, which unnecessarily convoluted the jury's consideration of Ragland's self-defense claim, adding additional facts and conditions the jury reasonably, but incorrectly, would have perceived as necessary to find before accepting his self-protection defense.

III. FAMILY LAW:

A. Commonwealth of Kentucky, Cabinet for Health and Family Services v. S.H.; V.N.M.J.R.N, a Child, et al.

2015-SC-000185-DG **December 17, 2015**

Opinion of the Court by Justice Keller. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. After two findings of neglect or abuse, failed reunification efforts, and years of foster care, the Cabinet for Health and Family Services (the Cabinet) petitioned the family court to involuntarily terminate S.H.'s parental rights with respect to her four children. At the final termination hearing, the Cabinet sought to call the social services caseworker assigned to S.H. and her children and to admit corresponding reports and other documents into evidence. S.H.'s counsel objected prior to the testimony and argued that the Cabinet had failed to comply with Family Court Rule of Practice and Procedure (FCRPP) 7(1)'s 14-day notice requirement. The family court ruled that FRCPP 7(1) did not apply to the termination hearing because the permanent custody of the children was not in issue and allowed the testimony and exhibits to be entered. The caseworker's testimony and exhibits were the only proof offered at the hearing. Following a subsequent custody hearing, the family court terminated S.H.'s parental rights and continued custody with the Cabinet. On appeal, the Court of Appeals reversed and vacated the termination orders, finding that FCRPP 7(1) applied to the hearing because termination of S.H.'s parental rights permanently deprived her of custody.

The Supreme Court affirmed the opinion of the Court of Appeals and remanded the case back to the family court. In so doing, the Court found that FCRPP 7(1), by its unambiguous terms, requires 14 days' notice of witnesses and exhibits in "any action in which the permanent custody or time-sharing of the child(ren) is in issue." Applying that language to S.H.'s termination hearing, the Court held that the permanent custody of S.H.'s children was in issue and that, therefore, FCRPP 7(1) applied. The Court reasoned that custody was in issue because when parental rights are terminated, permanent custody vests in the Cabinet or someone other than the parent. Furthermore, the Court considered the FCRPP as a whole as well as the magnitude of terminating parental rights and concluded that application of FCRPP 7(1) to termination proceedings appropriately affords parents all of the substantive and procedural protection the law allows. Finally, the Court concluded that, although FCRPP 7(1) permits reasonable discretion to the family court to reduce the notice requirement, the family court abused its discretion in this case because no notice was given; thus, S.H. and her counsel were not able to prepare a full defense.

B. Ruth Ann Sadler v. Barbara Lois Van Buskirk

2012-SC-000809-DG **December 17, 2015**

Opinion of the Court by Justice Venters. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. Prior to her 1997divorce, wife was named as the designated beneficiary to receive balance of her husband's IRA at his death. In the divorce settlement agreement, wife agreed to "make no claim upon any interest owned by [husband], now or in the future, in [husband's IRA]." The beneficiary designation on the IRA was never changed. When husband died several years after the divorce, the Administratrix of his estate sought a declaration of rights voiding wife's purported interest in the proceeds of IRA based upon the separation agreement disclaimer. Question presented: Whether the separation agreement disclaiming any interest in husband's IRA extinguished wife's interest as the designated beneficiary to receive the balance of the IRA at husband's death. HELD: The dissolution of the marriage did not automatically terminate the beneficiary designation on the IRA, reaffirming Ping v. Denton, 562 S.W.2d 314 (Ky.1978) and Hughes v. Scholl, 900 S.W.2d 606 (Ky.1995); however, the designation can be implicitly overridden by a separation agreement in which the designated beneficiary agrees to forfeit that interest, or by a divorce decree ordering such a divestiture. The Court noted that specific language of the separation agreement disclaimed any interest in property "owned" by husband, "now or in the future." Unlike life insurance proceeds which cannot be "owned" by the insured policy holder, the fund held in the IRA was property that husband during his lifetime and, therefore, was disclaimed by wife.

IV. TAX:

A. Estate of Mildred L. McVey v. Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky

2014-SC-000013-DG **December 17, 2015**

Opinion of the Court by Justice Noble. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. In this dispute over inheritance taxes, the testator's will included a tax-exoneration provision directing that all taxes on transfers of estate property passing under or outside the will be paid by the estate on behalf of the beneficiaries as "costs of administration." In affirming the result of the Court of Appeals, which affirmed the Department's assessment of tax, the Supreme Court held (1) that questions of law were to be review de novo and that no deference was owed the Board of Tax Appeals because it does not administer the statutes at issue and because those statutes are not ambiguous; (2) that inheritance taxes paid by the estate on behalf of beneficiaries are not "costs of administration," which would otherwise be deducted from the value of distributive shares and reduce overall tax liability under KRS 140.090, because such costs are defined by law, not the will of the testator; and (3) that inheritance taxes paid by the estate on behalf of a beneficiary is a separate "bequest of tax" that is itself subject to inheritance taxes because it is a transfer of value from the estate to the beneficiary. Because the Department ignored that the will required payment of inheritance taxes for all taxable parts of

the estate before calculation of any residue to be distributed to residuary beneficiaries, which affected the calculation of tax, its attempted correction of the inheritance-tax return resulted in an under-calculation of the tax owed, meaning that at least the full amount of the tax so assessed was properly owed. However, the Department never claimed the Estate owed more tax than assessed or otherwise appealed the decision of the Court of Appeals affirming its assessment of tax.

V. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. David Lynn Hill
2015-SC-000253-KB **December 17, 2015**

Opinion and Order of the Court. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. Hill was charged with fifteen counts of alleged misconduct, primarily arising from Hill systematically misleading his clients about the status and progress of their respective cases. Following an evidentiary hearing, the trial commissioner issued a report finding Hill guilty of twelve of the fifteen counts and not guilty of the remaining three. The trial commissioner recommended that Hill be suspended from the practice of law for a period of five years.

Under SCR 3.370(5)(a)(ii), the Board of Governors voted to reject the report of the trial commissioner and to consider the matter by *de novo* review. Upon its independent review, the Board voted in agreement with the trial commissioner to find Hill guilty of the same twelve counts and not guilty of the remaining three. The Board recommended a 181-day suspension from the practice of law, along with a requirement that Hill continue to obtain substance abuse counseling through the KBA's Kentucky Lawyer Assistance Program (KYLAP).

Hill did not contest the Board's findings of guilt and admitted to the underlying conduct and to his guilty concerning the twelve ethical violations. But Hill argued that in light of the mitigation evidence he had presented—which included evidence of his depression, anxiety, alcoholism and other psychological factors affecting his life—even the Board's recommended sanction was excessive. Hill suggested instead that he be sanctioned to 180 days or less, subject to his continued compliance with his recovery under the guidance of KYLAP.

The Court agreed with the Board that Hill was guilty of twelve disciplinary counts and not guilty of three. But the Court departed from both the trial commissioner's recommendation and the Board's recommendation with respect to Hill's sanction and instead suspended Hill from the practice of law for a period of eighteen months, subject to review by the Character and Fitness Committee and other requirements under the Supreme Court Rules. The Court also conditioned Hill's reinstatement upon his continued treatment for substance abuse through KYLAP.

B. Kentucky Bar Association v. Cabell D. Francis, II
2015-SC-000446-KB December 17, 2015

Opinion and Order of the Court. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. In August 2014, Francis was suspended from the practice of law for 181 days. In the Supreme Court's Opinion and Order, Francis was instructed to notify "all of his clients of his inability to represent them and of the necessity and urgency of promptly retaining new counsel." Approximately ten days later, one of Francis's clients learned of his suspension through a third party. The client contacted Francis and requested that he return the funds she had recently provided for Francis's representation of her son in a criminal matter. Francis responded but did not return the money.

A bar complaint was served upon Francis, who failed to respond. The Inquiry Commission then filed a three-count Charge against Francis alleging violations of SCR 3.130-1.5(a) (charging an unreasonable fee); SCR 3.130-1.16(d) (failure to protect client's interest upon termination of representation, including refunding any advanced payment or fee); and SCR 3.130-8.1(d) (failure to respond to a lawful demand for information from an admissions or disciplinary authority). Francis again failed to respond.

The case proceeded to the Board and Francis was ultimately found guilty of committing all three disciplinary infractions. Neither Francis nor the Office of Bar Counsel requested that the Court take review of the Board's decision under SCR 3.370(7) and the Court declined to independently review the Board's decision. The Court concluded that the Board's findings were adequately supported by the record and that its recommended period of suspension was suitable punishment. Accordingly, the Court suspended Francis from the practice of law for 60 days, to run consecutively to the 181-day suspension previously imposed.

C. Marty Richard Mefford v. Kentucky Bar Association
2015-SC-000571-KB December 17, 2015

Opinion and Order of the Court. All sitting; all concur. In September 2014, Mefford was suspended from the practice of law for his plea of guilty to two felony offenses. Mefford subsequently moved to withdraw his membership from the KBA under terms of permanent disbarment. The KBA did not object to Mefford's motion to withdraw. The Court agreed and ordered Mefford permanently disbarred from the practice of law in Kentucky.

D. Elizabeth Robertson Murray v. Kentucky Bar Association
2015-SC-000573-KB December 17, 2015

Opinion and Order of the Court. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. Murray moved to withdraw her membership from the KBA. At the time, she did not have any disciplinary investigations, complaints or charges pending against her. In September 2005, the Court granted her motion to withdraw.

In April 2014, Murray applied for restoration to the practice of law in Kentucky under SCR 3.500(3). The Court reviewed Murray's application and concluded that she had satisfied all of the necessary requirements under the rules. Accordingly, Murray was restored to KBA membership and the practice of law in Kentucky.

E. Kentucky Bar Association v. An Unnamed Attorney
2015-SC-000574-KB December 17, 2015

Opinion and Order of the Court. Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., sitting. All concur. Wright, J., not sitting. While representing her son in a child custody dispute, Respondent sent a letter, containing legal arguments and other documents, to a New York Court Clerk without sending a copy to the adverse party and without being admitted to practice law in New York. The Kentucky Bar Association investigated and, following a full evidentiary hearing, the Trial Commissioner found that Respondent violated Supreme Court Rule (SCR) 3.130-3.5(b) (ex-parte communication) and SCR 3.130-5.5(a) (unauthorized practice of law) and recommended a private reprimand and additional Continuing Legal Education ethics classes. Finding the Trial Commissioner's findings and recommendation to be supported by the record and the law, the Supreme Court declined to review the decision and adopted the Trial Commissioner's recommendation pursuant to SCR 3.360(4).