KENTUCKY SUPREME COURT
DECEMBER 2019

CRIMINAL LAW:

A. William McLemore v. Commonwealth of Kentucky

2017-SC-000293-MR **December 19, 2019**

Opinion of the Court by Justice Wright. Minton, C.J., Hughes, Keller, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. A Jefferson Circuit Court jury found Appellant, William McLemore, guilty of murder, first-degree assault, and first-degree wanton endangerment. McLemore and four others were involved in a shooting that left sixteen-month-old Ne'Riah Miller dead as she played on the porch with her parents and uncles. Ne'Riah's mother was also injured by a gunshot. McLemore was sentenced to thirty-five years' imprisonment for his involvement in these crimes. McLemore appealed his convictions to the Supreme Court of Kentucky as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred in: (1) allowing the Commonwealth to present evidence that one of his co-defendants had been shot in the months leading up to the murder; (2) ruling that McLemore could not call a particular impeachment witness, as it found the witness had a Fifth Amendment right not to testify; and (3) denying McLemore's right to a speedy trial. The Supreme Court disagreed with McLemore and affirmed his convictions and corresponding sentences. As to McLemore's first allegation of error, the Court held that evidence that a co-defendant had been previously shot did not prejudice McLemore, unduly or otherwise. Rather, the Court held that evidence helped establish a motive for the shooting. As to McLemore's second claim of error, the Court stated that "[b]oth McLemore's and the Commonwealth's proffered questions (which concerned where he was on the day of the two shootings, who he was with, and, more directly, whether he was involved in [an earlier] shooting) could have implicated [the witness] in a crime." Therefore, the Court held that the trial court had not abused in ruling that McLemore could not call the witness, as that witness had a Fifth Amendment right not to testify. Finally, as to McLemore's speedy trial claim, the Court went through a thorough analysis of the factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972). The Court held that while the length of the delay was presumptively prejudicial in order to trigger a full inquiry, "his compliance in agreeing to an order that resulted in his trial date being rescheduled for an unassigned future date casts serious doubt on his desire for a speedy trial." Holding that McLemore did not show any serious prejudice, the Court held he was not deprived of his right to a speedy trial.

B. Christopher Culver v. Commonwealth of Kentucky

2017-SC-000568-DG **December 19, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J., Hughes, Keller, Nickell, VanMeter, and Wright, JJ., concur. Lambert, J., not sitting. Criminal Appeal. A jury found Culver guilty of first-degree fleeing or evading police (motor vehicle), first-degree wanton endangerment (two counts, one count for each pursuing police

officer), second-degree wanton endangerment, theft by unlawful taking over $500; and being a persistent felony offender in the first degree (PFO I). The Court of Appeals vacated the second-degree wanton endangerment conviction, but affirmed all the other convictions. On discretionary review to this Court, Culver continues only his challenge of the first-degree fleeing or evading and first-degree wanton endangerment convictions, arguing the Court of Appeals erred when affirming the trial court's denial of his directed verdict motions.

Culver's primary argument is that the Court of Appeals ignored factually similar *Willis v. Commonwealth*, 2016 WL 4487202 (Ky. Aug. 25, 2016) (unpublished), and like *Willis*, the evidence introduced at his trial was not sufficient to prove he created a substantial risk of serious physical injury or death, the element common to both charges, when the police pursued him in a motor vehicle chase. Although Culver contends otherwise, the risks created were not due to speeding alone. In the instant case, it is undisputed that the pursuit happened in the dark, while traveling down the highway and curvy side roads, and the officers' speed reached 10-25 m.p.h. over the limit while pursuing a faster traveling Culver. Both officers testified they felt in danger as they pursued Culver. When speeding occurs with other factors (for example, disobeying stop signs and red lights; inclement weather; and circumstances in which other vehicles and pedestrians are at risk of serious physical injury indicated by the need to get out of the defendant's way, or likely to be put at such risk, such as in congested areas with schools and shopping centers) it may be enough to establish a substantial risk of serious physical injury. *See e.g.*, *Brown v. Commonwealth*, 297 S.W.3d 557 (Ky. 2009); *Lawson v. Commonwealth*, 85 S.W.3d 571 (Ky. 2002); *McCleery v. Commonwealth*, 410 S.W. 3d 597 (Ky. 2013). The officers' testimony, which may be viewed in harmony with the other circumstances of the pursuit, was sufficient to allow the jury to decide whether Culver caused or created a substantial risk of serious injury or death to the pursuing officers.

C. Ronald Bullitt, Jr. v. Commonwealth of Kentucky
2018-SC-000190-MR **December 19, 2019**

Opinion of the Court by Justice Hughes. Minton, C.J., Hughes, Keller, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. Criminal Appeal. A jury found Bullitt guilty of first-degree rape and of being a persistent felony offender in the first degree (PFO I). As recommended by the jury, the trial court sentenced Bullitt to twenty years in prison. Bullitt contends the trial court erred by 1) denying his motion for a directed verdict on the PFO I charge**,** and 2) denying his motion to suppress his statements to police.

KRS 532.080**(**3) pertinently provides that a person is guilty of being a PFO I when he stands convicted of committing one or more felony sex crimes against a minor as defined in KRS 17.500 and that the previous felony conviction includes convictions in any other jurisdiction as long as certain conditions are met. As to other jurisdictions, KRS 17.500(8)(c) defines "sex crime" as a "felony offense from another state or a territory where the felony offense is similar to a felony offense specified in

[KRS Chapter 510, Sexual Offenses]." Bullitt argues on appeal that because the Commonwealth failed to prove the age of the child in the Georgia statutory rape conviction, it did not establish that the Georgia offense is similar to an applicable Kentucky felony statutory rape offense, and his PFO I conviction must be dismissed. Bullitt's argument on appeal goes beyond the motion for a directed verdict. Our review is limited to whether it would be clearly unreasonable for a jury to find Bullitt was previously convicted of a sex crime with a minor. The Commonwealth presented proof **during the penalty phase** that **Bullitt was previously convicted in Georgia of committing the felony offense of statutory rape.** Upon review, although it is better practice to introduce a minor victim's age into evidence as part of the PFO proof, we conclude that "statutory rape" is commonly understood to be the offense of unlawful sexual intercourse with a minor. Consequently, the jury could reasonably infer from the evidence that Bullitt was convicted in Georgia of committing a sex crime against a minor.

Police officers interviewed Bullitt about the sexual assault accusation the same day he was arrested. Bullitt did not confess to any crimes during his interrogation. Bullitt moved to suppress his statements to police. Bullitt identifies two statements which he alleges should have been understood by the interviewing officer as the invocation of his right to remain silent. Bullitt alleges that he first invoked his right to remain silent by stating "if I'm going to jail, I'm saying, let's go, you know, that's all I'm saying, sir. I'm innocent, I'm innocent." We agree with the trial court that Bullitt's request to be taken to jail, made in the context of expressing frustration with being charged with rape, did not clearly communicate to the officer that he wanted to remain silent or that he did not want to talk with the police, and was not an invocation of the right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010). The other statement at issue, "I'm done talking . . . whatever y'all got to do, man, y'all do it," on its own, could be viewed as an invocation of the right to remain silent. However, Bullitt on his own volition continued to talk about the case by stating "if I was the rapist . . ." Under these circumstances, Bullitt again waived his right to remain silent and was subject to further interrogation. *Oregon v. Bradshaw*, 462 U.S. 1039,1043 (1983). Because Bullitt's Fifth Amendment rights were not violated, the trial court did not err when denying his motion to suppress.

D. Preston Wright v. Commonwealth of Kentucky
2018-SC-000237 **December 19, 2019**

Opinion of the Court by Justice Lambert. Minton, C.J., Hughes, Keller, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. Defendant was convicted of one count of first-degree sodomy, victim under twelve years old. At trial, after jury deliberations began, the trial court read the jury two separate *Allen* charges. *Allen v. United States*, 164 U.S. 492 (1896); RCr 9.57. The trial court also spoke to the foreperson three separate times out of the presence of the rest of the jury regarding their deliberations. On appeal, the defendant implored the Court to adopt a rule that giving a jury multiple *Allen* charges is *per se* coercive. The Court declined to do so, and instead held that appellate courts should consider the totality of the circumstances to determine whether or not the giving of multiple *Allen* charges

coerced a jury into reaching a verdict. Further, though it found the error to be waived, the Court reiterated that trial courts must follow RCr 9.74's prohibition against speaking to an individual juror outside the presence of the rest of the jury after deliberations begin.

E. Genaro Herrera Hernandez v. Commonwealth of Kentucky
2018-SC-000492-DG **December 19, 2019**

Opinion of the Court by Justice VanMeter. Minton, C.J., Hughes, Keller, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. The Supreme Court granted discretionary review of the Court of Appeals' dismissal of Genaro Herrera Hernandez's appeal of the trial court's order reducing the invoiced fee of a Spanish interpreter for services rendered on Hernandez's behalf. The Court of Appeals granted the Commonwealth's motion to dismiss on grounds that the appeal was not timely filed and an indispensable party (the interpreter) was not named in the Notice of Appeal. The Supreme Court affirmed the dismissal of the case, but on different grounds. The Supreme Court held that irrespective of the initial judicial authorization of the interpreting services, and subsequent orders approving and/or reducing the interpreter's fee, by statute, the payment obligation for the interpreter's fee remained with the requesting agency, the Louisville Public Defender's Office. KRS 30A.415(2). Because resolution of the fee issue is between the interpreter and the Louisville Public Defender's Office, the Court concluded that the attempt to try and recoup the interpreter's fee in Hernandez's name and in this circuit court case was improper and dismissed the appeal.

JURY SELECTION:

A. Richard D. Floyd, IV, MD, et al. v. Charlotte A. Neal, Etc.
2018-SC-000277-DG **December 19, 2019**

Opinion of the Court by Justice Lambert. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, J., sitting. Minton, C.J., Hughes, Keller, Lambert and VanMeter, JJ., concur. Wright, J., dissents by separate opinion. Nickell, J., not sitting. A medical malpractice case wherein the sole issue on appeal was whether the trial court's alleged error of failing to strike a juror for cause was properly preserved. The Court acknowledged the need for clarity on the steps required to preserve such an issue, and held that the proper procedure was as follows: (1) move to strike a juror for cause and be denied the for cause strike; (2) exercise a peremptory strike on said juror by clearly indicating the peremptory strike on the litigant's strike sheet; (3) exhaust all other peremptory strikes; (4) clearly indicate, by writing on the litigant's strike sheet, the juror he or she would have used a peremptory strike on, had the litigant not been forced to use a peremptory on the juror complained of for cause; (5) designate the same number of would-be peremptory strikes as the number of jurors complained of for cause; (6) the would-be peremptory strikes must be made known to the court prior to the jury being empaneled; and (7) the juror identified on the litigant's strike sheet must ultimately sit on the jury.

To establish this procedure, the Court prospectively overruled *Sluss v. Commonwealth*, 450 S.W.3d 279 (Ky. 2014) insofar as it held that verbally stating on the record the juror a litigant would have exercised a peremptory strike on had the litigant not been required to use a peremptory strike on a juror that should have been struck for cause was sufficient to preserve the issue.

SOVEREIGN IMMUNITY:

A. State of Ohio and Joseph Testa, Tax Commissioner of Ohio v. Great Lakes Minerals, LLC
2018-SC-000161 **December 19, 2019**

Opinion of the Court by Justice Keller. Minton, C.J., Hughes, Keller, Lambert, VanMeter, and Wright, JJ., concur. Nickell, J., not sitting. Ohio's Department of Taxation issued a tax assessment against Great Lakes Minerals, LLC ("Great Lakes"), a mineral processing company with a plant in Kentucky. In response, Great Lakes sued Ohio and Ohio's Tax Commissioner in his official and individual capacities in circuit court in Kentucky, seeking both declaratory and monetary relief. Ohio moved to dismiss Great Lakes' complaint on various grounds, including immunity and comity. The trial court denied the motion, Ohio appealed, and the Supreme Court accepted transfer of that interlocutory appeal. The Kentucky Supreme Court relied on the United States Supreme Court's unequivocal statement in *Franchise Tax Board of California v. Hyatt* that under the United States Constitution, "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S.Ct. 1485, 1492 (2019). The Kentucky Supreme Court saw no distinction between claims seeking monetary damages and claims seeking other types of relief and held that Ohio was protected by sovereign immunity. The Court further held that the Tax Commissioner, in his official capacity, was entitled to the same sovereign immunity that protects Ohio. Finally, the Court relied on the principle of comity to dismiss the claim against the Tax Commissioner in his individual capacity. The Court therefore reversed the judgment of the trial court and remanded for dismissal of the claims.

WRIT OF PROHIBITION:

A. PNC Bank, National Association v. Honorable Brian C. Edwards, J., Jefferson Circuit Court, and Hope Boyd, Etc., et al.
2019-SC-000183 **December 19, 2019**

Opinion of the Court by Justice VanMeter. All sitting; all concur. PNC Bank ("PNC") appealed the decision of the Court of Appeals granting in part and denying in part PNC's petition for a writ of the first class. The Court of Appeals held that the Jefferson Circuit Court maintained concurrent jurisdiction with the Jefferson District Court over Hope Boyd's breach of fiduciary duty, breach of trust, and breach of confidential relationship claims. The Kentucky Supreme Court reversed the Court of Appeals' decision, finding that under KRS 386B.8-

180 the Jefferson District Court had exclusive jurisdiction over these claims, as they were the same claims raised in her objections to PNC's accounting. Based on the statutory language, the Court held that "the district court possesses exclusive jurisdiction over **any breach of trust claims raised in a KRS 386B.8-180 objection which is subsequently filed by the trustee in district court** for resolution in accordance with the statute." Thus, the Court ultimately remanded the case to the Court of Appeals to enter a writ of prohibition consistent with the Supreme Court's opinion.