

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
JANUARY 2011**

I. CRIMINAL

A. Commonwealth of Kentucky v. James David Adkins
[2009-SC-000782-DR](#) January 20, 2011

Opinion of the Court by Justice Abramson. All sitting. Defendant was convicted of trafficking in methamphetamine. The Court of Appeals reversed the conviction and remanded for a new trial on the ground that the jury should have been expressly instructed on the defendant's claim that he possessed the drug innocently, not with the intention to traffic but with the intention to turn it over to the police. Upholding the Court of Appeals' decision, the Supreme Court held that the statutes outlawing "knowing and unlawful" possession of or trafficking in controlled substances as well as KRS 218A.220 create an "innocent possession" defense which should be reflected in the instructions whenever the defense is raised and the evidence would support a finding that the defendant's possession of the controlled substance was incidental and lasted no longer than reasonably necessary for lawful disposal. Justice Cunningham concurred by separate opinion.

B. Bernard Mason v. Commonwealth of Kentucky
[2009-SC-000070-MR](#) January 20, 2011

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Supreme Court affirmed judgment convicting Mason of first-degree criminal abuse and being a second-degree persistent felony offender (PFO), and sentencing him to twenty years' imprisonment. Issues/holdings include: 1) Mason not entitled to directed verdict on first-degree criminal abuse charge, 2) instructional error occurred due to lack of evidence of one alternative way of committing criminal abuse (cruel confinement) included in trial court's instruction on charge and trial court's not asking jury to indicate which alternative way of committing the crime they found, 3) instructional error was not properly preserved and did not result in palpable error as there was no "real possibility" that jury convicted Mason under cruel confinement theory given lack of any evidence of cruel confinement and ample evidence establishing other ways of committing crime, 4) no palpable error in trial court not sua sponte granting directed verdict on PFO charge despite trial court inadvertently failing to formally admit a collection of documents (referred to as Exhibit 19) evidencing prior convictions because Mason did not object to Commonwealth's motion to admit exhibit into evidence and does not challenge the accuracy of the documents or the fact of his convictions, and 5) evidence of Mason's federal sentence of twelve months and one day was sufficient for jury to find that he received a sentence of one year or more as required by KRS 532.080(2)(a). Also, Supreme Court denied Mason's request for an order requiring the Department of Corrections to classify him as a non-violent offender. Although Mason is included within the definition of *violent offender* in KRS 439.3401(1)(i) due to his first-degree criminal abuse conviction, he is not subject to a requirement that he serve eighty-five percent of his sentence under KRS

439.3401(3) because first-degree criminal abuse is a Class C felony and KRS 439.3401(3) only imposes the eighty-five percent requirement on violent offenders convicted of capital offenses or Class A or Class B felonies. Despite the fact that both parties agree that Mason is not subject to the eighty-five percent requirement, the Supreme Court declined to issue an order to the Department of Corrections to correct Mason's resident card to reflect that he is not required to serve eighty-five percent of his sentence because the Department of Corrections is not a party to this appeal and to properly obtain this relief, Mason would need to file a separate declaratory judgment action against the Department of Corrections.

C. Rachel Jones v. Commonwealth of Kentucky
2009-SC-000375-DG January 20, 2011

Opinion of the Court by Justice Cunningham. All sitting. In prosecution for multiple felony drug trafficking offenses, sufficient evidence existed to support the conviction for trafficking in a controlled substance despite the fact that chemical testing was not performed on alprazolam pills. Circumstantial evidence and lay testimony is sufficient to maintain a conviction involving an alleged controlled substance. Such proof may include testimony regarding the physical appearance of the alleged substance, evidence of its effect on someone ingesting the substance, evidence of its use, testimony regarding the price paid for the substance, testimony that a sale was conducted in secrecy, and testimony that the substance was called by the name of the illegal narcotic by the defendant or others in his presence. Justice Noble wrote a dissenting opinion, in which Justice Schroder joined.

D. James Ricky Owens v. Commonwealth of Kentucky
2009-SC-000511-MR January 20, 2011

Opinion by Justice Venters. All sitting, all concur. Owens appealed his conviction for first-degree assault, tampering with physical evidence, and of being a first-degree persistent felony offender as a matter of right. Owens alleged that the trial court erred by denying his motion for a directed verdict on the first-degree assault charge; by allowing the Commonwealth to amend the indictment; that the jury instruction for tampering with physical evidence failed to identify any specific item of evidence allegedly tampered with; by admitting into evidence during the penalty phase the fact that Appellant was previously convicted as a second-degree PFO; and by failing to give penalty phase jury instructions in accordance with *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987). The Court affirmed Owens's conviction and sentence specifically holding that while the tampering with physical evidence instruction should have specifically stated what items he was accused of tampering with, the error was not palpable. The Court also stated that the failure to follow *Reneer* in the penalty phase instruction is not palpable error, but strongly reiterated that trial courts should follow *Reneer*.

II. DEPENDENCY, NEGLECT & ABUSE

- A. **C.C. V. Cabinet for Health and Family Services, Commonwealth of Kentucky, N.R., a Minor Child, and Z.C., a Minor Child**
[2010-SC-000395-DGE](#) January 20, 2011

Opinion of the Court by Justice Noble: All sitting; all concur. In a dependency, neglect, and abuse (DNA) action taken by the Cabinet for Health and Family Services, the parent was denied pre-hearing discovery of photographs showing her daughter's bruises. The Court of Appeals affirmed this denial, holding that the discovery components of the Civil Rules do not apply in DNA actions. The Supreme Court reversed because the Civil Rules state their applicability to all civil actions, which includes DNA actions. Although the standard timing requirements provided by the Rules may conflict with the statutory requirements of DNA proceedings, this inconsistency does not mitigate the right to regular discovery within the proper timeframe.

III. INSURANCE

- A. **Progressive Max Insurance Company v. National Car Rental Systems, Inc.**
[2009-SC-000577-DG](#) January 20, 2011

Opinion of the Court by Justice Scott. All sitting; all concur. This case involved a subrogation dispute between the insurer of a rental vehicle (National) and the insurer of a rental car driver (Progressive). At issue was: (1) whether National was the primary Basic Reparations Obligor to an injured third party; (2) whether National, having paid basic reparations benefits (BRB) to an injured third party, could employ KRS 304.39.-050 or KRS 304.39-070 to recover the paid BRB from Progressive; and (3) whether, and to what extent, National was required to comply with KRS 304.39-070.

In reversing the Court of Appeals, the Kentucky Supreme Court, applying KRS 304.39-050, held National as the primary obligor for BRB because National was the insurer of "*the vehicle occupied by the injured person at the time of the accident.*" The Court further ruled that National could not employ KRS 304.39-050 as a vehicle for recovery, but rather held that KRS 304.39-070 as National's proper avenue of recover. However, the Court concluded that because National did not comply with KRS 304.39-070, its case should be dismissed.

IV. PRIVATE/PUBLIC PROPERTY DISPUTE:

- A. **Mary Jane Calhoun, ET AL. V. CSX Transportation, Inc., ET AL.**
[2010-SC-000100-DG](#) January 20, 2011

Opinion of the Court by Justice Scott. All sitting. The Court reviewed whether a railroad crossing was public or private and the corresponding duties imposed on the railroad. This case arises out of a non-fatal railroad accident at a crossing in Bullitt County, where a CSX train, operated by Paul L. McClintock, Jr., the engineer, collided with a car driven by Mary Calhoun. The trial court granted summary judgment, finding the crossing private, and consequently that CSX had no duty under well-established precedent. The trial court found that the three

exceptions—assumed duty, ultra-hazardous crossing, and pervasive use—to the limited duty rule were inapplicable. The Supreme Court affirmed the trial court’s holding regarding the private nature of the crossing and thus the minimal duty owed, but found that there was a genuine issue of material fact as to whether the vegetation rendered the crossing ultra-hazardous. Consequently, the Court reversed and remanded for a trial on that issue. Justice Venters dissented in a separate opinion, in which Justice Cunningham joined.

V. SOVEREIGN IMMUNITY

**A. Glen Avery Bryant v. Pulaski County Detention Center and Brian Bishop
2009-SC-000036-DG January 20, 2011**

Opinion of the Court by Justice Noble: All sitting; all concur. In a suit by an inmate against the detention center and its employee over the employee igniting a fire that burned the inmate, the trial court granted sovereign immunity to the detention center and qualified immunity to its employee, and the Court of Appeals affirmed. The Supreme Court affirmed the sovereign immunity awarded to the detention center because it functioned solely as an arm of the government. The Court reversed the qualified immunity bestowed on the employee because igniting the fire for the alleged purpose of scaring the inmate was, in the light most favorable to the inmate’s complaint, not committed in good faith.

VI. WORKERS’ COMPENSATION:

**A. Matthew Hudson v. Cave Hill Cemetery
2010-SC-000223-WC January 20, 2011**

Opinion of the Court. All sitting; all concur. After the ALJ rendered an opinion and order in this medical reopening relieving the employer of liability for some of the disputed expenses, Hudson asserted that the parties settled their dispute before the submission date listed on the hearing order. The employer argued, however, that the parties failed to come to terms concerning a particular bill and a Medicare Set-Aside Account and also because they failed reduce the agreement to the memorandum required by KRS 342.265(1). Hudson submitted his handwritten notes indicating that the carrier agreed to settle for a lump sum of \$50,000.00 “to include set aside” as well as his attorney’s note to the carrier indicating that he agreed to accept the offer. He also submitted a letter from the carrier, which indicated that the lump sum represented a “full and final resolution” of his workers’ compensation claim and that the carrier was seeking information about how to proceed with the Medicare Set-Aside. Although the ALJ found there to be a valid agreement, the Workers’ Compensation Board reversed and the Court of Appeals affirmed. The Supreme Court also affirmed, holding that the agreement was incomplete because the lump sum included income as well as medical benefits but the parties clearly had not come to terms concerning the amount of lump sum proceeds to be allocated to the Medicare Set-Aside Account. The court reasoned that the allocation may have legal consequences and is an essential element of a settlement that includes such an account.

VII. ATTORNEY DISCIPLINE:

- A. **Kentucky Bar Association v. Charles C. Leadingham**
[2010-SC-000673-KB](#) January 20, 2011

Opinion of the Court. All sitting; all concur. In two consolidated KBA cases, Leadingham was found to have accepted money from clients for work not performed. In the first case, after Leadingham was suspended from the practice of law, he stopped communicating with his client and failed to refund any of the fee paid by the client. In the second case, Leadingham accepted a fee to represent a client, but after he was suspended from the practice of law, he failed to refund any part of the fee and failed to communicate with the client. Given the attorney's extensive record of prior discipline for similar conduct, the KBA recommended, and the Supreme Court imposed, permanent disbarment.

- B. **Inquiry Commission v. Scott Truesdell**
[2010-SC-000738-KB](#) January 20, 2011

Opinion of the Court. All sitting; all concur. The Supreme Court found probable cause to believe that Truesdell, as the closing attorney for a mortgage refinancing, failed to pay \$185,443.97 to Bank of America after First Federal Bank wired that amount to him for the purpose of satisfying Bank of America's existing mortgage. The Supreme Court imposed a temporary suspension pending further investigation.

- C. **Kentucky Bar Association v. James E. Isenberg**
[2010-SC-000691](#) January 20, 2011

Opinion of the Court. All sitting; all concur. Attorney suspended for five years due to ethical violations including failing to keep client properly informed, failing to deposit client's settlement proceeds into escrow or trust account, failing to promptly deliver funds due to client, and engaging in dishonest and/or fraudulent conduct. Mental illness and lack of prior disciplinary history were considered as mitigating factors.

- D. **James Gregory Troutman v. Kentucky Bar Association**
[2010-SC-000698-KB](#) January 20, 2011

Opinion of the Court. All sitting; all concur. Attorney suspended for thirty days for practicing law while under a two-year suspension.

VIII. JUDICIAL DISCIPLINE

- A. **Honorable Tamra Gormley v. Judicial Conduct Commission**
[2009-SC-000736-RR](#)
[2010-SC-000010-RR](#)
(Original Opinion: August 26, 2010; Modified: January 20, 2011)

Memorandum Opinion of the Court by Chief Justice Minton. Justices Abramson, Cunningham, Schroder, Scott, and Venters sitting. Judicial Conduct Commission found that Family Court Judge engaged in three counts of misconduct for violations of the Kentucky Code of Judicial Conduct, imposing as a penalty public reprimands and a 45-day suspension. The Supreme Court affirmed the findings and penalties imposed in all respects. As modified on denial of rehearing, issues/holdings include: 1) judge may be sanctioned for even one egregious incident of judicial misconduct as a pattern of misconduct is not necessarily required, overruling *Hinton v. Judicial Retirement and Removal Commission*, 854 S.W.2d 756 (Ky. 1993) to the extent that it conflicts with this holding, and furthermore 2) evidence was sufficient to establish pattern of misconduct and Judicial Conduct Commission implicitly found such a pattern of misconduct, 3) evidence was sufficient to show bad faith and Judicial Conduct Commission implicitly found bad faith, and 4) judges may be sanctioned for egregious error contrary to settled law about which there is no confusion or question as to its interpretation. Justice Schroder concurred in result only, joined by Justice Scott. Justice Noble recused.