**PUBLISHED OPINIONS**
**KENTUCKY SUPREME COURT**
**JUNE 2013**

## I. ABUSE OF PROCESS:

### A. Bobby Garcia, D/B/A Autobahn Automotive v. Larry Whitaker
**2011-SC-000550-DG** **June 20, 2013**

Opinion of the Court by Justice Cunningham. All sitting; all concur. In an action alleging malicious prosecution, the advice of counsel defense was not available to the defendant where he failed to provide a full and fair disclosure of all material facts in his sworn criminal complaint. In addition, the plaintiff established a prima facie case of abuse of process by submitting evidence that the defendant used the criminal complaint process in order to obtain his vehicle which was subject to a valid mechanic's lien.

## II. CRIMINAL:

### A. Kevin Wayne Dunlap v. Commonwealth of Kentucky
**2010-SC-000226-MR** **June 20, 2013**

Opinion of the Court by Justice Scott. Minton, C.J.; Abramson, Keller, Noble, Scott and Venters, JJ., sitting. All concur. Cunningham, J., not sitting. Appellant pled guilty to three counts each of capital murder, capital kidnapping, and tampering with physical evidence, and one count each of attempted murder, first-degree kidnapping, first-degree rape, first-degree arson, and first-degree burglary. He received the death penalty. The Supreme Court affirmed, holding, *inter alia*, that the trial court properly accepted Appellant's Guilty plea and properly denied his Guilty But Mentally Ill plea; the trial court did not err by denying Appellant's motion for a continuance and new competency evaluation; it was not reversible error for trial judge to ask Appellant to admit to aggravating factors; it was not reversible error to play Appellant's videotaped guilty plea colloquy for the jury; although potential juror should have been excused for cause, the trial court acted within its discretion by granting Appellant more peremptory strikes than the Commonwealth received (one of which was used on the potential juror), thereby avoiding a *Shane* violation; the trial court did not err by permitting married couple to serve on jury together; and Appellant's guilty plea did not waive his right to challenge the penalty phase admissibility of his statement to police that was allegedly procured in violation of Miranda.

### B. Glen Rahan Doneghy v. Commonwealth of Kentucky
**2011-SC-000590-MR** **June 20, 2013**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Glenn Rahan Doneghy was convicted of second-degree manslaughter, leaving the scene of an accident, second-degree assault, fourth-degree assaults, first-degree

possession of a controlled substance, possession of marijuana, and possession of drug paraphernalia. The charges arose from Doneghy striking and killing Officer Bryan Durman with his vehicle and subsequently barricading himself in his apartment in an attempt to resist arrest. The Court held there were no errors in Doneghy's trial and affirmed the sentence. Specifically, the Court held that the trial court properly denied Doneghy's motion for directed verdict on the second-degree manslaughter charge, noting that the Commonwealth is not required to prove intoxication in order to support such a charge. The Court also held that the trial court did not err in refusing to sever the charges pertaining to the possession of drugs and paraphernalia from the charges pertaining to the collision with Officer Durman. Doneghy's resistance of arrest, according to the Court, was properly admissible in the trial for second-degree manslaughter and as a result, there was no prejudice in trying the charges together. The Court held that palpable error was not present as a result of the Commonwealth's passing reference to inadmissible testimony during closing argument. The Court also held that the testimony of fellow police officers and other first responders was not cumulative or otherwise in violation of KRE 404. Following precedent, the Court held that the trial court did not err in denying Doneghy's motion for directed verdict on the second-degree assault charge because when dealing with a deadly weapon or dangerous instrument, a knife in this case, any resulting injury is sufficient. The Commonwealth met its burden. Finally, the Court held that the jury instructions for second-degree assault, while unorthodox, were not erroneous. The Court emphasized that the jury instructions did not improperly take a determination away from the jury, but recommended that instructions follow the example set in Thacker v. Commonwealth, 194 S.W.3d 287 (Ky. 2006).

**C. Donna Bartley v. Commonwealth of Kentucky**
**2011-SC-000683-MR** **June 20, 2013**

Opinion of the Court by Justice Abramson. All sitting; all concur. Bartley was convicted of first-degree assault and first-degree criminal abuse for having seriously injured and cruelly confined her severely disabled adult child. Affirming the conviction, the Supreme Court held (1) that an alleged conflict of interest did not affect the performance of Bartley's public defender; (2) that a person can commit assault as outlawed by KRS 508.010 by failing to perform a legal duty; (3) that the assault jury instructions were not improper; (4) and (5) that the trial court did not abuse its discretion by denying Bartley's motions for a continuance and for a mistrial.

**D. Jeffrey D. McGaha v. Commonwealth of Kentucky**
**2012-SC-000155-MR** **June 20, 2013**

Opinion of the Court by Justice Venters. All sitting; all concur. Opinion by Justice Venters. All sitting. All concur. Criminal Direct Appeal. Questions Presented: (1) whether Juror's failure to disclose during voir dire that she was a "Facebook friend" of the victim's wife was improper; (2) whether the jury improperly considered penalty issues during its guilt phase deliberations; and (3) whether the trial court improperly excluded evidence relating to Appellant's state

of mind regarding his need to use self-defense. Held: (1) because the juror truthfully answered voir dire questions about her acquaintance with victim's family, and was not asked specifically about victim's wife, her failure to disclose "Facebook" relationship was not improper; post-trial discovery that victim's wife was one of the juror's 629 "Facebook friends" did not raise a presumption that juror was disqualified; (2) the jury's inquiry during guilt phase deliberations regarding "who sets the penalty" did not violate the rule that jurors may not consider penalty phase issues during the guilt phase, particularly where defense counsel emphasized during closing arguments that the penalty phase was yet to follow and that the "defendant's life was in the jury's hands"; and (3) the trial court properly excluded prior bad acts of the victim relating to his history of domestic violence and his pointing a gun at someone twenty-five years prior to trial pursuant to Driver v. Commonwealth, 361 S.W.3d 877 (Ky. 2012) and KRE 403; his racist attitude towards Appellant and members of his household pursuant to KRE 403; and testimony from Appellant's family regarding their fear of the victim because Appellant failed to preserve the issue by avowal testimony.

**E. Commonwealth of Kentucky v. Eric Rae Bell**
**2011-SC-000630-DG** **June 20, 2013**

Opinion of the Court by Justice Noble. All sitting; all concur. Bell was convicted of first-degree sodomy, tampering with evidence, and fourth-degree assault. His trial defense was that the victim had consented to sex in exchange for drugs. The trial court admitted some evidence related to that defense, specifically, Bell's own testimony that he and the victim had engaged in a single drugs-for-sex transaction several years before. But the court declined to admit statements the victim made to medical personnel about her 25-year history of drug addiction. The Court of Appeals reversed, holding that the trial court abused its discretion in excluding this proof because it was admissible under KRE 404(b) as tending to show the victim's motive for having sexual contact with Bell.

The Supreme Court, on discretionary review, reversed and reinstated Bell's conviction. The Court agreed with the Court of Appeals that the evidence tended to show the victim's motive, and thus fit within the KRE 404(b) exceptions, but disagreed that the trial court had abused its discretion in excluding the evidence. The Court concluded that merely fitting one of the 404(b) exceptions does not guarantee admissibility. The Court held that the trial court had not abused its discretion because the testimony would have simply been "piling on" after Bell had already offered proof of a sex-for-drugs transaction and would have injected collateral matters into the case. The Court also concluded that Bell's due process right to make a defense had not been violated because the trial court had allowed sufficient evidence of his chosen defense and had only imposed a reasonable limit on the proof.

**F. Barry Kerr v. Commonwealth of Kentucky**
**2011-SC-000247-MR** **June 20, 2013**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Keller, Noble and Venters, JJ., concur. Cunningham, J., dissents by separate opinion in which Scott, J., joins. Opinion of the Court by Chief Justice Minton. Abramson, Keller, Noble, and Venters, J.J., concur. J. Cunningham dissents by separate opinion. J. Scott joins. Berry Kerr appealed as a matter of right his convictions for first-degree trafficking in a controlled substance, second offense; second-degree trafficking in a controlled substance; and being a first-degree Persistent Felony Offender. Kerr argued that the anonymous tip evidence offered at trial was inadmissible hearsay and rendered his trial unfair. The Court agreed and reversed Kerr's conviction, holding that the trial court abused its discretion and the error was not harmless. Specifically, the Court held that it would have been proper for the police to testify that Kerr became a suspect in the case because of a separate, but related, drug investigation. But there was no legitimate need for the police to inform the jury of the anonymous tip that Kerr was dealing drugs out of the hotel where he was arrested. The Court found this testimony to be harmful because it was used, at least in part, to prove that Kerr was arrested because he was trafficking drugs. According to the Court, the anonymous tip reflected directly on Kerr's guilt of the charged offense. The Court also held that evidence that the police had two arrest warrants for Kerr was properly admissible because it was relevant and not prohibited under KRE 404(b)(2), i.e., it was inextricably intertwined with the police surveillance of Kerr's motel room and subsequent arrest. Finally, the Court held that the warrantless search of Kerr's motel guest bedroom was proper under the protective-sweep and plain-view exceptions to the warrant requirement.

**G. Garrett Thomas Dye v. Commonwealth of Kentucky**
**2012-SC-000003-MR** **June 20, 2013**

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant, a seventeen-year-old, was charged with murdering his nine-year-old sister after confessing to the crime during an interview with police. The trial court subsequently denied Appellant's motion to suppress the statement he gave to police. The Supreme Court reversed. First, it held that under the totality of the circumstances, law enforcement officers coerced Appellant's confession by: (1) repeatedly threatening him with the death penalty even though Appellant was ineligible for the death penalty by virtue of being a minor (and there were no aggravating circumstances which would otherwise make this a death penalty case), and that the only way to avoid the death penalty was to confess; (2) making repeated allusions to prison violence and/or rape and suggesting that the only way to avoid such assault was to confess; and (3) dissuading Appellant from invoking his right to counsel by suggesting that if he did invoke that right, he would lose his opportunity to confess (and, by extension, his opportunity avoid the death penalty and prison violence). Thus, the Court held that Appellant's statement must be suppressed. Second, the Court held that the "fruit of the poisonous tree" doctrine applied to evidence seized pursuant to information obtained from Appellant's coerced confession; however, it remanded to the trial court to determine whether the "inevitable discovery" doctrine applied to that evidence.

**H. Delbert Leger v. Commonwealth of Kentucky**
**2012-SC-000067-MR** **June 20, 2013**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Abramson, Keller, and Noble, JJ., concur. Cunningham and Scott, JJ., dissent without separate opinion. Criminal; *Questions Presented:* 1) Whether a police officer's assurance of confidentiality vitiated the previously given *Miranda* warnings, so as to affect the admissibility of suspect's incriminating statements, and 2) Whether the prosecutor's comment on the lack of witnesses to support Appellant's theory of the case and his comments in his closing argument regarding drug trafficking and the link between drug dealing and bouncing checks constitute prosecutorial misconduct. *Held:* 1) An officer's statement to accused during a custodial interrogation that his statement would remain confidential vitiates the previously given *Miranda* warning. Consequently, statements of suspect made in response to the assurance of confidentiality are made in violation of *Miranda* and must be suppressed; 2) The prosecutor's comment regarding the lack of witnesses to support Appellant's theory of the case did not constitute prosecutorial misconduct and while the prosecutor's statements during closing argument were improper, Appellant's objection was sustained and he requested no further action therefore the issue is unpreserved.

**I. Michelle Smith v. Commonwealth of Kentucky**
**2012-SC-000034-DG** **June 20, 2013**

Opinion of the Court by Justice Scott. All sitting; all concur. Appellant, Michelle Smith, was indicted for Possession of Drug Paraphernalia (PDP), Second Offense. Appellant pled guilty to the charge, and, pursuant to a plea agreement, she received a five-year pretrial diversion. At the time Appellant entered into the diversion, the penalty for Second Offense PDP, a Class D felony, was from one to five years in prison. However, the Kentucky General Assembly amended the statute in April 2010, after which amendment a second or subsequent offense of PDP became a Class A misdemeanor, with a possible penalty of ninety days to twelve months in the county jail. On October 14, 2010, a diversion revocation hearing was held due to the fact that Appellant pled guilty to driving under the influence (DUI), First. At her sentencing hearing, Appellant requested that the trial court continue her diversion given that PDP, Second Offense, the crime for which she was originally charged, was now a misdemeanor under the new statute, and/or apply the new sentence for PDP, Second Offense at her sentencing hearing. However, the trial court voided the diversion agreement and sentenced Appellant to felony time in accordance with the prior law. On appeal, a panel of the Kentucky Court of Appeals affirmed the trial court, although on different grounds. The Supreme Court reversed the Court of Appeals, vacated Appellant's sentence, and remanded to the trial court. This determination was based on the finding that a trial court has the authority to void a plea agreement and the fact that no final judgment was entered against Appellant until after the new law went into effect. Once a judgment was entered against Appellant the sentence called

for in her original plea agreement was contrary to the law as it stood.

## III. REAL PROPERTY:

### A. Deborah Manning, et al. v. Robert Knox Lewis
2012-SC-000296-DG June 20, 2013

Opinion of the Court by Justice Scott. All sitting; all concur. Appellee, Robert Lewis, sought to void or reform a deed resulting from a sale of property through Appellant Deborah Manning's real estate company. Appellee filed suit claiming that the deed grossly misrepresented the amount of land he contracted to buy. The trial court ruled in favor of Appellants, finding that no fraud existed that would warrant reforming the deed, as Appellee was aware at the time of closing that the tract did not contain 300 acres of land. The Court of Appeals reversed and remanded for the trial court to decide whether to reform the deed and give Appellee a partial refund, or to void the deed altogether. The Supreme Court reversed and remanded based upon the fact that the Court of Appeals erroneously applied the 10% Rule established in Wallace v. Cummins, 334 S.W.2d 904 (Ky. 1960). It was apparent that Appellee was aware that he was not purchasing 300 acres of land, and the law does not provide a remedy for unwise decisions.

## IV. TAXATION:

### A. Department of Revenue, Finance and Administration Cabinet, Commonwealth of Kentucky v. Cox Interior, Inc.
2010-SC-000794-DG June 20, 2013

Opinion of the Court by Justice Abramson. All sitting; all concur. The Department of Revenue denied Cox Interior's request for an ad valorem tax refund on the ground that Cox Interior had not protested the tax within the forty-five-day protest period provided for in KRS 131.110. The Board of Tax Appeals, the Circuit Court, and the Court of Appeals all held that the tax protest limitations period did not apply to Cox Interior's claim and that the claim was timely under the two-year limitations period for tax refunds under KRS 134.590. Affirming the Court of Appeals' decision, the Supreme Court held that unlike questions of property valuation, which are subject to the forty-five day protest period, the claim by Cox Interior that a portion of its tax was improperly assessed because the Cabinet had applied the wrong tax rate (and so the tax was not due) came within the refund statute, had been timely and properly pursued, and should be addressed on the merits.

## V. UNEMPLOYMENT BENEFITS:

### A. Western Kentucky Coca-Cola Bottling Company, Inc. v. Trevor Runyon and Kentucky Unemployment Insurance Commission
2011-SC-000784-DG June 20, 2013

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J., Abramson, Keller, Noble and Venters, JJ., concur. Scott, J., dissents. In action contesting unemployment benefits, the employee was not entitled to benefits because he had failed to establish that his absenteeism was for good cause. In so finding, the Court noted that whether or not an employee's attendance is unsatisfactory must be considered in light of the circumstances of the employment; there is no bright line rule regarding a number of absences that qualifies as "unsatisfactory." Further, the employer was not entitled to default judgment in the circuit court, where the claimant failed to respond to the employer's complaint. An appeal from the Unemployment Insurance Commission is a special statutory proceeding, and the statute requires only the Commission to respond to the complaint. Civil rules that would otherwise require the employee to respond do not apply.

## VI. ATTORNEY DISCIPLINE:

### A. Kentucky Bar Association v. Ronald Hines

**2012-SC-000842-KB** **June 20, 2013**

Opinion of the Court. All sitting; all concur. Hines was charged in four separate disciplinary files with 22 counts of violating the Rules of Professional Conduct. The first and second charges stemmed from Hines' representation of a corporation that was formed to manage the property from an estate and had a combined total of 15 counts. The trial commissioner entered a lengthy recommendation to resolve all the charges by merging some of the counts and dismissing others, ultimately concluding that Hines had violated SCR 3.130-1.4(a); SCR 3.130-1.13(a); SCR 3.130-1.13(d); SCR 3.130-1.16(d); and SCR 3.130-1.6(a). Based on these findings of misconduct, the trial commissioner recommended a 120-day suspension from the practice of law, noting as mitigating factors Hines' substantial experience in the practice of law; his previous misconduct (a violation of SCR 3.130-1.15(a); a pattern of misconduct; multiple offenses; and a refusal to acknowledge the wrongful nature of his actions.

The third charge against Hines arose from his representation of a child in a dog-bite case and contained four counts. The trial commissioner found Hines guilty of two counts, violations of SCR 3.130-3.3(d) and SCR 3.130-3.4(c), and recommended a public reprimand. Finally, the fourth charge included three counts and arose from a Civil Rule 11 sanction against Hines relating to a series of banking lawsuits. The trial commissioner found that Hines had not knowingly or intentional disobeyed Rule 11; accordingly, the commissioner found Hines not guilty of the three counts.

The Board of Governors accepted the trial commissioner's report as to all four files. Hines sought review with the Supreme Court under SCR 3.370(7). On review, the Court agreed with the recommendation of the Board of Governors for the most part, holding that Hines was guilty of violating SCR 3.130-1.4(a); SCR 3.130-1.13(a); SCR 3.130-1.16(d); SCR 3.130-1.6(a); SCR 3.130-3.3(d); and SCR

3.130-3.4(c) but not guilty of violating SCR 3.130-1.13(d). The Court suspended Hines from the practice of law in the Commonwealth for 120 days.

**B. Kentucky Bar Association v. Ronald E. Thornsberry**
**2013-SC-000153-KB** **June 20, 2013**

Opinion of the Court. All sitting; all concur. Thornsberry was suspended from the practice of law on March 7, 2011, for failing to pay his KBA dues. On June 21, 2011, while he remained under suspension, Thornsberry was paid $675 to represent a client in a divorce proceeding. Several months later, Thornsberry informed his client via text message that he had filed her divorce petition, even though he had not. After the client became pregnant, Thornsberry advised her that she could not get a divorce while she was pregnant, even if the child did not belong to her husband. In November of 2011, the client asked Thornsberry for a refund of the $675 retainer. Thornsberry complied and the client filed a bar complaint against him. Thornsberry was informed of the charges by letter dated January 11, 2012, but did not file a response to the complaint. The Inquiry Commission issued the charges by notice, which was returned. The sheriff also attempted service on Thornsberry to no avail, and a second certified notice was also returned. Therefore, the case went to the Board as a default case. The Board found Thornsberry guilty of violating SCR 3.130-5.5(a); SCR 3.130-5.5(b); and SCR 3.130-8.4(c). Neither Thornsberry nor the KBA filed a notice of review with the Supreme Court, so the Court adopted the Board's recommendation. Considering Thornsberry's substantial prior disciplinary history and the seriousness of the present violations, the Court agreed to and adopted the Board's recommendation to suspend Thornsberry for two years, to run consecutively to all suspensions currently imposed.

**C. Kentucky Bar Association v. Daniel Keith Robertson**
**2013-SC-000221-KB** **June 20, 2013**

Opinion of the Court. All sitting; all concur. Robertson was provided with a $2,500 retainer to represent a client in a legal matter. Robertson failed to communicate with his client and failed to return the client's retainer. The client filed a bar complaint but Robertson failed to file an answer. The Inquiry Commission issued a charge against Robertson alleging violations of four disciplinary rules: SCR 3.130-1.3 (failure to act with reasonable diligence); SCR 3.130-1.4(a)(3) and (4) (failure to keep client reasonably informed); SCR 3.130-1.16(d) (failure to refund advance payment of fee); and SCR 3.130-8.1(b) (failure to respond to lawful demand for information from an admissions or disciplinary authority). The Board of Governors found Robertson guilty of all charges and, taking into consideration his prior disciplinary actions, recommended that he be suspended from the practice of law for 181 days, refund all fees to the client, attend the Ethics and Professionalism Enhancement Program, and be referred to Kentucky Lawyers Assistance Program. Pursuant to SCR 3.370(9), the Court adopted the recommendation of the Board based on the severity of Robertson's

violations, his prior disciplinary record, and his failure to respond to the complaint.

**D. Brian P. Gilfedder v. Kentucky Bar Association**
**2013-SC-000261-KB June 20, 2013**

Opinion of the Court. All sitting; all concur. Gilfedder was suspended from the practice of law under SCR 3.166 for a federal criminal conviction. Thereafter, he moved to resign from the KBA under terms of permanent disbarment. The Court granted the motion, permanently disbarring Gilfedder from the practice of law in the Commonwealth and prohibiting him from applying for reinstatement of his license to practice law.

**E. Rodney S. Justice v. Kentucky Bar Association**
**2013-SC-000281-KB June 20, 2013**

Opinion of the Court. All sitting; all concur. Justice sought reinstatement to the practice of law following a disciplinary suspension. The Kentucky Office of Bar Admissions, Character and Fitness Committee, denied Justice's application for reinstatement; and the Board of Governors voted unanimously to adopt that recommendation. The Court agreed, holding that Justice should not be granted reinstatement to the practice of law in Kentucky.