

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2012**

I. CIVIL:

- A. Jane Colleen Younger v. Evergreen Group, Inc., University Medical Center, Inc., Wehr Constructors, Inc.**
[2009-SC-000814-DG](#) **March 22, 2012**

Opinion of the Court by Justice Cunningham, reversing and remanding. All sitting; all concur. Appellant appealed to the Court of Appeals from a trial court judgment granting summary judgment in favor of the Appellees. The Appellees then moved to dismiss the appeal as untimely, under CR 73.02(1)(a), contending that the trial court wrongly granted Appellant's motion for relief under CR 60.02. The Court of Appeals agreed and granted the Appellees' motion to dismiss. On appeal to Supreme Court, Appellant argued that it was improper for the Court of Appeals to consider the CR 60.02 order in a motion to dismiss. Appellant also claimed that the relief granted by the trial court pursuant to CR 60.02 was proper.

Supreme Court found that challenges to CR 60.02 (a)–(e) orders are, in effect, challenges of jurisdiction. Thus the Court held that, CR 60.02 orders granted under subsections (a)–(e), may be considered within motions to dismiss. Supreme Court further found that appeal was timely because the trial court did not abuse its discretion in granting CR 60.02 relief. Supreme Court reversed and remanded for consideration on the merits of the appeal.

II. CONSTITUTIONAL:

- A. Teco Mechanical Contractor, Inc.v. Commonwealth of Kentucky, Environmental and Public Protection Cabinet, et al.**
[2009-SC-000821-DG](#) **March 22, 2012**

Opinion of the Court by Justice Scott, affirming. All sitting; all concur. Appellant, a subcontractor that performed construction work on various public works projects, was cited by the Labor Cabinet for failing to pay several of its employees in accordance with Kentucky's Prevailing Wage Law. As a result of the alleged violations, the Cabinet demanded payment of back wages and civil penalties from the subcontractor. The subcontractor refused to pay and the Cabinet subsequently sought payment from the prime contractors. The subcontractor then filed suit alleging that the prevailing wage law violates the United States and Kentucky Constitutions by: (1) failing to provide subcontractors with a due process hearing before the Cabinet assesses and seeks to collect back wages and civil penalties; and (2) improperly delegating legislative and/or judicial authority to the Cabinet.

On review, the Supreme Court held that the prevailing wage law does not violate

either the United States or Kentucky Constitutions. With regard to the subcontractor's procedural due process claim, the Court determined that the Cabinet's actions did not deprive the subcontractor of a protected interest; therefore, it was not entitled to a due process hearing. Furthermore, the Court noted that the Prevailing Wage Law requires the Cabinet to file a civil suit in order to collect back wages and civil penalties. As a result, the Cabinet cannot deprive a contractor or subcontractor of property without court intervention. As to the subcontractor's non-delegation claim, the Court concluded that the prevailing wage law provides sufficient safeguards to prevent the Cabinet from abusing any legislative or judicial authority granted to it under the law.

III. CRIMINAL LAW:

A. **James Jackson v. Commonwealth of Kentucky**
[2009-SC-000115-DG](#) **March 22, 2012**

Opinion of the Court by Justice Noble, affirming. All sitting; all concur. Jackson, who was fifteen years old at the time, was charged with felony drug trafficking and several misdemeanors, including possession of a handgun by a minor. The district court certified him as a youthful offender and transferred him to circuit court, where he entered a guilty plea and was sentenced as an adult. In this case, he sought to collaterally attack his conviction on the grounds that the transfer was improper and therefore the circuit court never acquired jurisdiction.

Jackson argued that transfer was not available under the juvenile transfer statute, KRS 635.020. Specifically, Jackson argued that under the facts of this case it was impossible to meet the requirement under the relevant subsection, KRS 635.020(2), that a court find by probable cause that the juvenile committed a capital offense, Class A felony, or Class B felony. The most serious crime that Jackson was charged with, felony drug trafficking, is only a Class C felony. However, the trafficking charge was firearm-enhanced under KRS 218A.992. The firearm enhancement statute increases the penalty of a crime by one class of crimes. So, a Class C felony that was firearm-enhanced would be punished as a Class B felony. Jackson argued that the firearm enhancement statute only affects the sentence and does not control what class the crime should be considered to be for the purposes of juvenile transfer.

After considering the statutes, relevant case law, and the practical effects of classification of crimes, the Court concluded that a firearm-enhanced offense is actually charged at the higher level. Thus, in this case, Jackson was actually charged with a Class B felony because he was charged with felony drug trafficking that was firearm-enhanced. Thus, the district court's transfer order was valid, and the Court of Appeals is affirmed.

B. **Billy Mash v. Commonwealth of Kentucky**
[2010-SC-000584-MR](#) **March 22, 2012**

Opinion of the Court by Justice Noble, affirming. All sitting; all concur. Mash was convicted of first-degree sodomy and sentenced to twenty years' imprisonment. On appeal, he argued that the jury panel did not represent a fair cross-section of the community because there was only one African American out of 42 potential jurors. The Court affirmed the trial court's ruling on the fair cross-section issue because Mash had not provided evidence to show that African Americans were underrepresented in the venire or that any underrepresentation was due to systematic exclusion of the group in the jury selection process.

Mash next challenged the Commonwealth's use of a peremptory strike to remove the one African American juror on the panel. The Court affirmed on this issue because the trial court's ruling that the prosecutor had provided a race-neutral explanation that was not a pretext for discrimination was supported by the evidence.

Mash also argued that he was entitled to a directed verdict because, he alleged, the Commonwealth failed to prove the elements of sodomy as laid out in the jury instructions. The jury instructions required the jury to find anal penetration, even though *contact*, and not penetration, is all that is required under the sodomy statute. If this was error, it was error that helped the defendant because the Commonwealth had to prove a more specific act than what was required under the statute. The Court found that there was sufficient evidence of penetration from the victim's testimony and the physical evidence, and so the trial court was correct to deny Mash's motion for a directed verdict.

Finally, Mash argued that it was error for the trial court to deny his request for an instruction on the lesser included offense of first-degree sexual abuse. The Court affirmed the trial court because there was no evidence presented at trial that would support such an instruction.

Finding no reversible errors, the Court affirmed Mash's conviction.

**C. Desean Maynes v. Commonwealth of Kentucky
2010-SC-000681-DG March 22, 2012**

Opinion of the Court by Justice Abramson, affirming. All sitting; all concur. Maynes, a "needy person" for purposes of the public defender statute, KRS 31.110, pled guilty to third-degree burglary, and as a condition of his diversion agreement was ordered to pay the court costs mandated by KRS 23A.205. Affirming the Court of Appeals in upholding the imposition of costs, the Supreme Court held that a person's qualifying as "needy" under KRS Chapter 31 does not necessarily excuse the payment of court costs. To be excused from court costs under KRS 23A.205, the person must first be deemed a "poor person" as defined in KRS 453.190, the in forma pauperis statute. A "poor person" is someone who is unable to pay the costs without depriving himself and his dependents of the

necessities of life, including food, shelter and clothing. Furthermore, under KRS 23A.205, the controlling statute on court costs, the trial court must determine whether the defendant is a "poor person" who is unable to pay the costs both currently and in "the foreseeable future." The trial court did not err by finding that Maynes, who was being released and was capable of employment, failed to meet the KRS 23A.205 standard for relief from court costs.

**D. Ronald Copley v. Commonwealth of Kentucky
2011-SC-000063-MR March 22, 2012**

Opinion of the Court by Justice Abramson, affirming. All sitting; all concur. Cunningham, J., concurs by separate opinion in which Noble and Schroder, JJ., join. Copley, who was sentenced to twenty years in prison after pleading guilty to murdering his wife, argued the evidence seized during a search of his home should have been suppressed because the affidavit supporting the underlying warrant was not properly sworn pursuant to Rules of Criminal Procedure 2.02 and 13.10. The notary public who administered the oath to the affiant had not been specifically authorized by a judge of the county under RCr 2.02. Affirming the conviction, the Supreme Court held that although the rules were violated, suppression was not warranted because the error was not of constitutional magnitude, the error did not prejudice Copley and there was no deliberate disregard of the rules. The Court first noted that the exclusionary rule applies only to searches that are carried out in violation of an individual's constitutional rights. In this case, because all of the interests sought to be protected by the Fourth Amendment of the U.S. Constitution and Section 10 of the Kentucky Constitution were safeguarded, the exclusionary rule did not apply. The Supreme Court then articulated a standard to be employed in cases where a rule is breached but the transgression does not arise to a constitutional violation warranting suppression under the exclusionary rule. In such cases, suppression may still be warranted if there is (1) prejudice to the defendant, in the sense that the search might not have occurred or been so abusive if the rule had been followed or (2) if there is evidence of deliberate disregard of the rule. Copley was not entitled to relief because he was neither prejudiced by the violation nor was there evidence the rule was deliberately disregarded.

**E. William Dustin Goldsmith v. Commonwealth of Kentucky
2009-SC-000768-DG March 22, 2012**

Opinion of the Court by Justice Noble, affirming in part, reversing in part, and remanding. All sitting; all concur. Goldsmith pleaded guilty to three counts of second-degree criminal possession of a forged instrument in Hickman Circuit Court. His sentence was probated, but he violated the terms of his probation. At the revocation hearing, the trial judge decided to run his sentences for the Hickman County crimes consecutive to his sentences for related charges in a neighboring county.

This Court held that, because the judge had not specified at the time of sentencing that the two sentences would run consecutive to each other, the judge did not have the discretion at the revocation hearing to run them consecutively. Thus, the sentences in the two cases had to run concurrently. The Court of Appeals was affirmed in part and reversed in part.

**F. Johnny Smith v. Commonwealth of Kentucky
2011-SC-000144-MR March 22, 2012**

Opinion of the Court by Justice Scott, affirming in part and reversing and remanding in part. All sitting; all concur. Appellant was convicted of first-degree robbery, unauthorized use of a motor vehicle, and being a second-degree persistent felony offender. On appeal, Appellant argued that (1) he was denied the right to a speedy trial, (2) the trial court erred by denying his motion for a directed verdict, (3) the trial court erred by assessing court costs and fines, and (4) the trial court erred by ordering him to pay restitution.

The Supreme Court upheld Appellant's convictions. First, it found that Appellant's right to a speedy trial was not violated because the factors set out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), on balance, did not weigh in his favor. Second, the Court found no error in the trial court's decision to deny a directed verdict because there was sufficient evidence for a juror to conclude that Appellant committed the crimes with which he was charged. Third, in light of the Court's same-day decision in *Maynes v. Commonwealth*, 2010-SC-000681-DG, the issue of imposition of court costs was remanded to the trial court for a determination of (1) whether Appellant is a poor person as defined by KRS 453.190(2), and (2) whether he is unable to pay courts costs now and for the foreseeable future. Finally, the Court held that the restitution order was sufficiently specific to identify to whom the restitution was to be paid.

**G. Robert Dwayne Smith v. Commonwealth of Kentucky
2011-SC-000285-MR March 22, 2012**

Opinion of the Court by Justice Venters, affirming in part and vacating and remanding in part. All sitting; all Concur. Criminal. Held: (1) first-degree robbery instruction did not violate defendant's right to a unanimous verdict upon application of harmless error rule as stated in *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010); (2) RCr 10.26's palpable error standard for insufficiently preserved trial error is essential to the efficient functioning of the appellate process, and therefore defendant's proposal to abolish the distinction between preserved and unpreserved error is rejected; (3) ambiguous provision in judgment which could be construed as opposing fines and costs, though the defendant was an indigent and a needy person, vacated and judgment remanded for entry of a new judgment without the ambiguous provision.

H. Stephen Driver v. Commonwealth of Kentucky
[2009-SC-000639-DG](#) March 22, 2012

Opinion of the Court by Justice Venters, reversing and remanding. All sitting. Minton, C.J.; Abramson, Cunningham and Noble, JJ., concur. Schroder, J., concurs in part and dissents in part; Scott, J. concurs in result only by separate opinion. Criminal. Held: (1) the trial court properly permitted the Commonwealth to introduce KRE 404(b) prior bad act evidence of previous violent conduct by Driver against his present wife, who is also the victim in the instant case, but erred by permitting the introduction of prior violence against his former wife; (2) the trial court properly denied the defendant's request for an instruction on assault under extreme emotional disturbance; (3) the trial court properly declined to instruct the jury on extreme emotional disturbance instruction based upon wife's infidelity where the evidence did not disclose that defendant learned of the infidelity within reasonably close temporal proximity of the alleged crime; (4) the Commonwealth improperly referred to the consequences of the verdict during its closing arguments.

I. Michael Knox v. Commonwealth of Kentucky
[2010-SC-000816-MR](#) March 22, 2012

Opinion of the Court by Justice Venters. Minton, C.J., Abramson, Noble, Schroder and Scott, JJ., concur. Cunningham, J., dissents by separate opinion. Criminal. The Court held that the trial court abused its judicial discretion when by imposing a sentence without first complying with the requirements of KRS 533.010(2), KRS 532.050(1), and RCr 11.02 to consider the nature and circumstances of the crime and the history, character and condition of the defendant before fixing sentence. The final judgment in a criminal case should clearly reflect the trial court's compliance with the foregoing requirements. Per *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010) and *Misher v. Commonwealth*, 576 S.W.2d 238 (Ky. App. 1978), no sentencing shall occur until KRS 532.050 has been followed. While the Commonwealth may enter into any plea bargain agreement, the trial judge must exercise his independent discretion before deciding to adopt the agreed upon sentence. *Chapman v. Commonwealth*, 265 S.W.3d 156 (Ky. 2007) (“[a] trial court abuses its discretion by imposing a sentence based upon a plea agreement without first making the particularized and case-specific determinations that the plea is legally permissible and, considering all the underlying facts and circumstances, appropriate for the offense in question.”)

IV. WORKERS' COMPENSATION:

A. Randy Lewis v. Ford Motor Company
[2011-SC-000294-WC](#) March 22, 2012

Opinion of the Court, affirming. All sitting; all concur. Lewis's claims for work-related lumbar spine injuries sustained in 2001 and 2002 (Claim #01-88767) and for a work-related cervical spine injury sustained in 2005 (Claim #06-00277)

were litigated together. The ALJ awarded triple benefits for the injuries, which resulted in 425-week awards of \$315.46 per week beginning on August 17, 2004 in Claim #01-88767 and \$498.00 per week beginning on November 22, 2007 in Claim #06-00277. Petitioning for reconsideration, the employer noted that the combined partial disability awards exceeded the statutory maximum of \$607.23 for total disability during the period that they overlapped. The ALJ granted the petition and amended the award in Claim 06-00277 to give the employer credit for the entire \$315.46 per week

B. John A. Richey; Harned Bachert & Denton, LLP; And Norman E. Harned v. Perry Arnold, Inc.

[2011-SC-000326-WC](#)

March 22, 2012

Opinion of the Court, affirming in part and reversing in part. All sitting; all concur. Richey sustained a work-related shoulder injury; received a diagnosis of subacromial bursitis; and underwent surgery. His surgeon could not explain his continued pain complaints. Dr. Goldman assigned a 9% impairment rating but recommended an MR arthrogram to be certain that Richey did not have an undetected problem. Two other physicians found nothing significant. The parties' settlement listed the injury as a rotator cuff tear; listed the disability as 9%; and listed the average weekly wage and the amounts paid previously in temporary total disability (TTD) and medical expenses. It provided a \$15,500.00 lump sum "for complete resolution of indemnity benefits" but did not include a waiver of future medical benefits. The insurance carrier refused a subsequent request to pre-authorize a referral to an orthopedic surgeon, so Richey proceeded at his own expense. Dr. Anderson opined that the MR arthrogram revealed torn shoulder ligaments and recommended surgery. After the carrier failed to respond to Richey's request for pre-authorization, which he accompanied with Dr. Anderson's treatment notes, he underwent surgery to repair his anterior and posterior glenoid labrum and a subacromial decompression. His condition improved and Dr. Anderson assigned a 4% impairment rating. Richey then reopened his claim to recover his surgical expenses, associated TTD benefits, and, under KRS 342.310(1), his expenses related to the reopening. The ALJ found the surgery to be compensable but denied TTD based on the settlement and denied the sanctions request, convinced that 803 KAR 25:096, § 8(1) did not require the employer to pay for the surgery or file a reopening or medical dispute within 30 days of Richey's pre-authorization request. The Board reversed only with respect to TTD benefits, but the Court of Appeals reversed and reinstated the ALJ's decision. The Supreme Court affirmed with respect to TTD benefits, finding nothing in the agreement to indicate that the lump-sum amount in excess of that provided for permanent income benefits related to something other than a waiver of future income benefits. The court reversed with respect to the denial of sanctions, remanding to the ALJ to reconsider the matter based on a correct understanding of the employer's obligations under 803 KAR 25:096, § 8(1) and on any other considerations relevant to the reasonableness of its action under KRS 342.310(1) and 803 KAR 25:012, § 2(1)(a).

V. ATTORNEY DISCIPLINE:

- A. Kentucky Bar Association v. Rebecca C. Gee**
[2011-SC-000771-KB](#) March 22, 2012

Opinion and Order. All sitting; all concur. The Court found Gee guilty of SCR 3.130-3.4(c); SCR 3.130-5.5(a); SCR 3.130-5.5(b)(2); and SCR 3.130-8.1(b) and suspended her from the practice of law for sixty-one days.

- B. Russel W. Burgin v. Kentucky Bar Association**
[2011-SC-000778-KB](#) March 22, 2012

Opinion and Order. All sitting; all concur. Burgin was found guilty of failing to diligently proceed with a client's divorce case and failing to communicate with the client. The Court entered an order imposing a 30-day suspension to be probated on the condition that he comply with certain requirements.

- C. Marc Ashley Bryant v. Kentucky Bar Association**
[2012-SC-000023-KB](#) March 22, 2012

Opinion and Order. All sitting; all concur. Bryant was found guilty of failing to keep a client reasonably informed, failing to provide a client's file at the termination of the representation, failing to notify the federal court of his suspension, failing to respond to a bar complaint, and failing to maintain a current bar roster address. The Court entered an order imposing a 45-day suspension.