PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2017

I. CRIMINAL LAW:

A. Darryl M. Samuels v. Commonwealth of Kentucky
2015-SC-000180-DG **March 23, 2017**

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Hughes, J., concurs by separate opinion in which Minton, C.J., and VanMeter, J., join. Wright, J., concurs by separate opinion in which Keller, J., joins. Appellant was charged with second-degree assault after a jailhouse brawl. A public defender from the Paducah Trial Office was appointed to represent Appellant. Prior to trial, Appellant's counsel advised him that another public defender from the Paducah Trial Office was representing the victim of the crime in an unrelated matter. Appellant refused to sign a conflict of interest waiver and requested the trial court to appoint new counsel. The trial court could not find the existence a conflict of interest and denied Appellant's request for new counsel. Appellant was ultimately found guilty and sentenced to a ten-year term of imprisonment. On appeal, the Court of Appeals affirmed the trial court's determination, concluding that Appellant was not denied his Sixth Amendment right to conflict-free counsel. The Court affirmed the Court of Appeals and held that in order to show a conflict of interest, Appellant was required to prove more than his attorney's employment within the same public advocacy trial office as the victim's attorney. To hold otherwise, would create a per se Sixth Amendment violation any time a criminal defendant is represented by a public defender who works in the same office as another public defender who happens to represent interests adverse to the defendant's, even on unrelated matters. Thusly, as the Court held, a public defender's conflict of interest is not necessarily imputed to all other public defenders.

B. Don Sterling Wells, Jr. v. Commonwealth of Kentucky
2015-SC-000608-MR **March 23, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. The Appellant pleaded guilty conditionally to various sex-related offenses, reserving his right to appeal the trial court's denial of his motion to suppress his confession. He argued that the confession he gave police should have been suppressed because he was never read his *Miranda* rights. The Supreme Court disagreed and affirmed his conviction. In doing so, the Court held that the Appellant was not in custody at the time he spoke to police about the offenses—although he had been initially placed in a holding cell, he was removed before questioning began; he was never handcuffed or otherwise physically restrained during questioning; and he was told he was free to end the interview and leave at any point, and that police would give

him a ride home. Since the Appellant was not in custody at the time he confessed to police, the *Miranda* warnings were not required, and the failure to give them did not require suppression.

C. Ronald King v. Commonwealth of Kentucky
2015-SC-000386-MR **March 23, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. The Appellant was convicted of second-degree assault, fourth-degree assault, first-degree wanton endangerment, and third-degree arson. He claimed that the trial court erred in refusing to affirmatively instruct the jury on his voluntary-intoxication defense under KRS 501.080(1). The Supreme Court agreed that the evidence sufficed to entitle him to that instruction. But it affirmed his fourth-degree assault, wanton endangerment, and arson convictions because those offenses required wanton mental states, and voluntary intoxication is not a defense to wanton crimes. Because second-degree assault requires an intentional mental state, the Court held that the failure to give a voluntary-intoxication instruction was reversible error as to that conviction.

D. Asa Pieratt Gullet, IV v. Commonwealth of Kentucky
2016-SC-000242-MR **March 23, 2017**

Opinion of the Court by Justice Venters. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, and Wright, JJ., concur. VanMeter, J., concurs in result only. Criminal Direct Appeal. Questions presented: Whether (1) Gullett was entitled to a new trial because a juror withheld material information; (2) a directed verdict should have been granted; 3) the jury instructions resulted in a unanimous verdict violation; and 4) the trial court erroneously permitted the introduction of prior bad act evidence. Held: (1) Gullett is entitled to a new trial based upon juror misconduct. Despite being asked on the juror qualification form and despite several questions during voir dire, the juror failed to inform the court and trial counsel that she had a brother, a sister, and a nephew who had been, or were being, prosecuted on felony charges. As a result of the juror's failure to provide truthful answers to these questions, Gullett was unable to inquire further to determine if grounds existed to exercise a for-cause challenge, or to determine if would exercise a peremptory challenge. The Supreme Court held that the test for obtaining a new trial based upon juror mendacity is not limited to showing that the juror's honest answer would have provide a valid basis of a challenge for cause, as set forth in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) and *Brown v. Commonwealth*, 174 S.W.3d 421, 430 (Ky. 2005). The test may also be satisfied by showing that the juror's dishonesty prevented inquiry into a critical subject that may have exposed a disqualifying bias or prejudice. (2) The victim's testimony provided sufficient evidence to overcome Gullett's motion for a directed verdict. (3) Because the jury instructions did not distinguish the particular acts for which Appellant was charged, court could be assured that the jury verdicts were unanimous. Upon retrial, the jury instructions must be drafted to assure jury unanimity by adequate differentiation of the facts underlying the

charges. (4) The trial court did not err when allowing into evidence the victim's testimony of an uncharged act sodomy. The testimony was relevant to prove the motive and intent of the act charged, falling within the KRE 404(b) exception.

E. Joseph Pace v. Commonwealth of Kentucky
AND
Brandon Collins v. Commonwealth of Kentucky
2015-SC-000399-DG **March 23, 2017**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Officers surveilled an apartment complex in response to possible violence in the area. While sweeping the back area of the apartment complex, Officers walked within the enclosed back patio of Appellants' apartment. From their vantage point, officers observed marijuana baggies on the inside table. Without obtaining a warrant, officers subsequently entered Appellants' apartment to conduct a search. Officers discovered a small marijuana grow operation and paraphernalia. Officers halted the search and obtained Appellants' consents, after which law enforcement seized the evidence. Appellants filed motions challenging the legality of the search and to suppress the evidence obtained. On appeal, the Court held that the initial search was illegal for the following reasons: (1) the protective sweep exception to the warrant requirement was inapplicable since no arrests were made in or near the apartment; (2) Officers could not invoke the emergency aid exception to the warrant requirement because there was no indication that someone was injured within the apartment; (3) the plain view doctrine cannot justify the officers' warrantless entry and search, as the exception only applies to warrantless seizures. In regards to the seizure which occurred after officers obtained Appellants' consents, the Court held that the consents were invalid since officers obtained the consents by exploiting the fact that they viewed the marijuana baggies. As the Court explained, officers where within the curtilage of the home when they viewed the marijuana baggies and were therefore at an unlawful vantage point. Moreover, officers were not permitted to invade this curtilage to conduct a knock and talk.

F. Durand Edward Murrell v. Don Bottom, Warden, Northpoint Training Center
2016-SC-000076 **March 23, 2017**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Murrell, a prisoner at the North Point Training Center, filed a petition for writ of habeas corpus after his parole was revoked. Murrell originally served ten years of a Kentucky sentence before being paroled to the Federal Bureau of Prisons to serve a federal sentence. When Murrell's federal sentence had been fulfilled, he returned to Kentucky and was placed on active state parole supervision pursuant to his original state sentence. Now that his parole has been revoked, Murrell argues that the Kentucky Department of Corrections permanently surrendered jurisdiction over his sentence when it transferred custody to federal authorities. The lower courts ruled that Murrell's petition be dismissed since he was not

attacking the validity of his underlying sentence. The Court disagreed and held that habeas corpus relief is not limited to only those prisoner who can establish that the underlying judgment is void ab initio. Nonetheless, the Court concluded that Murrell was required to satisfy the remainder of his sentence upon his return to the Commonwealth since the forfeiture rule was abandoned in *Commonwealth v. Hale*, 96 S.W.3d 24, 34 (Ky. 2003).

II. DOMESTIC RELATIONS:

A. Jude Weber v. Thomas Francis Lambe

2015-SC-000173-DG **March 23, 2017**

Opinion of the Court by Justice Keller. All sitting; all concur. The family court: included expenses that were fully or partially attributable to the parties' children in the unemployed spouse's reasonable expenses when calculating her maintenance; granted Weber maintenance for nine-years; determined the amount of maintenance, which did not include Lambe's 2012 projected earnings; and denied Weber's request that Lambe pay the entirety of her attorney's fees. The Court of Appeals reversed the family court as to the inclusion of children's living expenses in determination of Weber's expenses, and remanded the duration of maintenance issue to the family court to determine if nine years was appropriate. The Court of Appeals affirmed the family court's determination of the maintenance amount and its decision not to require Lambe to pay the entirety of Weber's attorney's fees.

The Supreme Court affirmed in part and reversed in part. As to the inclusion of the children's living expenses in determination of Weber's expenses, the Court noted that KRS 403.200(2)(a) allows the family court to consider all relevant factors when determining the amount and duration of a maintenance award. These factors include "[t]he financial resources of the party seeking maintenance" and her ability to meet her needs independently, "including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian"; thus, the Court held that the family court did not err by considering the children's expenses when determining Weber's maintenance amount.

As to the maintenance award's nine-year duration, the Court reversed the Court of Appeals and affirmed the family court, holding that the family court made sufficient findings of fact to justify the duration. The Supreme Court affirmed the Court of Appeals as to the family court's amount of maintenance and its decision not to require that Lambe pay the entirety of Weber's attorney's fees, holding that both rulings were within the family court's discretion.

III. PREMISES LIABILITY:

A. Teresa Grubb, et al. v. Roxanne Smith, et al.

2014-SC-000641-DG **March 23, 2017**

Opinion of the Court by Justice Hughes. Part I: Minton, C.J.; Keller, Venters, and Wright, JJ., concur. Cunningham, J., dissents for the reasons stated in his concurring in part, dissenting in part opinion. Part II: Minton, C.J.; and Cunningham, J., join Part II of the opinion. Keller, Venters, and Wright, JJ., do not join for the reasons stated in Venters, J., separate opinion. Part III: Minton, C.J.; Cunningham, Keller, Venters, and Wright, JJ., concur. Part IV: Minton, C.J.; Cunningham, Keller, and Venters, J., concur. Wright, J., dissents for the reasons stated in his concurring in part, dissenting in part opinion. VanMeter, J., not sitting. Following a bench trial, the trial court awarded damages to the plaintiff, a customer at a convenience store/filling station, for injuries she sustained when she tripped in a pot hole in the store's parking area and fell. The trial court ruled that the store's owner and its manager were jointly and severally liable, but it did not address the plaintiff's comparative fault. Reversing, the Court of Appeals held that the open-and-obvious doctrine provided the premise owner with a complete defense and that the store manager had no liability. Reversing the Court of Appeals' decision and remanding to the trial court, the Supreme Court applied recent precedent under which the open-and-obvious doctrine has been deemed a partial, no longer a complete, defense. In light of that precedent, the Court held that the trial court did not err in finding the premise owner liable, but it did err, so as to necessitate a remand, by failing to consider the plaintiff's comparative fault. The six-member Court divided evenly over whether, in the circumstances presented, the store manager could be deemed liable. The Court also rejected a claim that the trial judge ought to have recused.

IV. WORKERS COMPENSATION:

A. Ray Ballou v. Enterprise Mining Co., LLC, et al.

2016-SC-000039-WC **March 23, 2017**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, VanMeter, and Venters, JJ., concur. Wright, J., dissents without opinion. An ALJ found that Ballou suffered from category 1/1 coal workers' pneumoconiosis (CWP) and awarded Ballou retraining incentive benefits (RIB) under KRS 342.732(1). In order to receive RIB, an employee must stop working in the coal mining industry and enroll in a bona fide training program. Pursuant to KRS 342.732(1)(a)7 an employee who is 57 or older may leave the coal mining industry and opt to receive compensation based on a 25% disability rating without enrolling in a training program. Those benefits will be paid for a period of 425 weeks or until the employee reaches the age of 65, whichever first occurs. Ballou, who was 69 when last exposed to the hazards of CWP, could not avail himself of that option. However, he was not foreclosed from receiving RIB if he enrolled in a bona fide training program because the only statutory age limitation is on the 25% option. Ballou challenged the constitutionality of that age limitation.

The Court held that the age limitation is constitutional. In doing so, the Court noted that, contrary to Ballou's argument, the statute did not completely foreclose receipt of compensation based on age. In fact, there is no statutory age limitation on RIB. The only age-related foreclosure is the option to receive compensation without participating in a retraining program. Thus, the statute treats Ballou the same as every other medically eligible coalminer younger than 57 and older than 65.

The Court then determined that this disparate treatment did not violate the equal protection provisions of the U.S. and Kentucky Constitutions. The purpose of RIB is to encourage coalminers with early stage CWP to leave the coal mining industry before the disease results in significant impairment. Those coalminers who are approaching retirement age will be less inclined to change careers late in life and may forego RIB for that reason. However, offering compensation without requiring participation in retraining may encourage coalminers in that age group to leave the coal mining industry. Thus, the age restriction is rationally related to the purpose of RIB.

Finally, the Court noted that the provisions of KRS 342.732(1)(a)7 are so intertwined that the statutory section had to stand or fall in its entirety. The Court could not simply change the age restrictions, and if the Court struck KRS 342.732(1)(a)7, Ballou would be in the same position. He would have to enroll in a bona fide retraining program in order to receive compensation.

B. Margie Mullins v. Leggett & Platt, et al.
2016-SC-000383-WC **March 23, 2017**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. After reaching a settlement agreement with her employer, Mullins elected to pay her attorney fees in the form of a lump-sum payment collected from her weekly benefits. She soon discovered that her benefits were additionally discounted to reflect the present-value of future payments. She argued that statute did not allow the use of this multiplier, that her employer could not make this calculation on its own, and that this process was beyond the scope of her settlement agreement.

The Court unanimously ruled in favor of the employer. Specifically, the word "commute" in the context of attorney fees directly contemplates discounting her weekly disability benefits to account for the present value of future payments. The statute recognizes the financial principle that a dollar paid today is worth more than a dollar paid tomorrow and that, in actuality, refusing to apply this multiplier would allow Mullins to recover more than she actually negotiated to receive.

V. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Michael Thornsbury
2016-SC-000607-KB **March 23, 2017**

Opinion and Order of the Court. All sitting; all concur. Thornsbury was charged in the Southern District of West Virginia with a felony offense for conspiracy to violate the constitutional rights of another. The indictments stated that Thornsbury had engaged in criminal conspiracies in his role as West Virginia Circuit Judge to frame his secretary's husband for crimes he did not commit following Thornsbury's affair with his secretary. Thornsbury pled guilty and received a sentence of 50 months' incarceration in federal prison. He also tendered his "Affidavit for Consent to Disbarment" in conjunction with his plea agreement.

The West Virginia Disciplinary Counsel concluded that Thornsbury violated numerous West Virginia judicial canons and the West Virginia Supreme Court of Appeals ordered that his license to practice law be annulled by voluntary consent. The Kentucky Bar Association filed a petition for reciprocal discipline under SCR 3.435. The Supreme Court of Kentucky ordered Thornsbury to show cause why he should not be permanently disbarred but he failed to comply. Accordingly, the Supreme Court permanently disbarred Thornsbury consistent with the order of identical discipline from West Virginia.

B. Kentucky Bar Association v. James E. Isenberg
2016-SC-000663-KB March 23, 2017

Opinion and Order of the Court. All sitting; all concur. In 2011, Isenberg was suspended from the practice of law for five years. Despite his suspension, Isenberg continued to actively practice law. The Inquiry Commission eventually filed a charge against Isenberg but he failed to answer. The charge was submitted as a default case and the Board of Governors unanimously recommended that Isenberg be permanently disbarred from the practice of law. Upon reviewing the record, the Supreme Court agreed and permanently disbarred Isenberg from the practice of law in the Commonwealth.

C. Kentucky Bar Association v. Thomas Steven Poteat
2016-SC-000664-KB March 23, 2017

Opinion and Order of the Court. All sitting. Minton, C.J.; Cunningham, Hughes, Keller, Venters, and Wright, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion. Poteat, who had been suspended for failure to comply with CLE requirements, did not advise clients involved in a real estate dispute of his suspension, and he continued to represent them. As part of that representation, Poteat negotiated a settlement, part of which he paid out of his own funds. In exchange for that payment, Poteat attempted to convince the clients to sign a waiver of any potential legal malpractice claims they might have against him. Poteat did not advise the clients to seek legal representation regarding the proposed waive. The KBA charged Poteat with six violations and the Board voted to find him guilty of five of those violations, including failure to advise the clients of his suspension, practicing law while suspended, engaging in conduct involving dishonesty, and failing to respond to requests for information

from the KBA. The majority of the Board members voted to recommend a one-year suspension to run consecutively with Poteat's existing CLE suspension. The Court adopted the Board's recommendation.

D. Kentucky Bar Association v. Brian Nathan Hopper
2016-SC-000669-KB March 23, 2017

Opinion and Order of the Court. All sitting. Minton, C.J.; Hughes, Keller, VanMeter, Venters, and Wright, JJ, concur. Cunningham, J., concurs in result only. The Board of Governors found Hopper guilty of violating SCR 3.130-1.3, -1.4(a)(4), -1.15(b), -1.16(d), and -8.1(b) and recommended that he be suspended from the practice of law for 181 days. Hopper did not respond to the initial complaint or the charge that was filed by the Inquiry Commission.

Neither Hopper nor Bar Counsel filed a notice of appeal. Accordingly, under SCR 3.370(9), the Supreme Court adopted the recommendation of the Board of Governors, finding Hopper guilty of all six charged counts and suspending him from the practice of law for 181 days.

E. Kentucky Bar Association v. Franklin S. Yudkin
2017-SC-000022-KB March 23, 2017

Opinion and Order of the Court. All sitting; all concur. The Indiana Supreme Court suspended Yudkin from the practice of law for a period not less than 90 days, without automatic reinstatement. As a consequence, the KBA moved for the Supreme Court of Kentucky to order Yudkin to show cause why he should not be subject to reciprocal discipline. Yudkin responded by requesting that reciprocal discipline not be imposed. But the Court concluded that Yudkin failed to provide a legally sufficient reason why the Court should not impose reciprocal discipline, finding that his conduct, which consisted of affirmatively misrepresenting facts to the trial court and the appellate court, did not "warrant substantially different discipline" in Kentucky under SCR 3.434(4)(b). Accordingly, the Court ordered Yudkin suspended from the practice of law in the Commonwealth for a period not less than 90 days, beginning December 8, 2016.

F. Timothy Michael Longmeyer v. Kentucky Bar Association
2017-SC-000025-KB March 23, 2017

Opinion and Order of the Court. All sitting; all concur. Longmeyer pled guilty to engaging in an unlawful "kickback" scheme involving the Kentucky Employees' Health Plan and was sentenced to 70 months' imprisonment. He moved the Court for leave to resign under terms of permanent disbarment, a motion the Court granted.