KENTUCKY SUPREME COURT
MARCH 2021

CRIMINAL LAW:
Jonathan F. Davis v. Commonwealth of Kentucky
2019-SC-0530-MR **March 25, 2021**

Opinion of the Court by Justice Keller. All sitting; all concur. A Fayette Circuit Court jury found Jonathan F. Davis guilty of one count of theft of mail matter and of being a persistent felony offender in the first degree (PFO) for stealing two Amazon packages from Stacey and Mike Davis's front stoop. Consistent with the jury's recommendation, the trial court sentenced Davis to three-and-a-half years' imprisonment on the theft charge, enhanced to the maximum twenty years' imprisonment. On appeal, Davis raised several issues: (1) that the trial court erred in denying his motion for a directed verdict; (2) that the trial court erred in denying his request for a lesser jury instruction on theft by unlawful taking under $500; (3) that the trial court erred in denying his *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge to the Commonwealth's strike of Juror #4070; (4) that the trial court erred in admitting victim impact testimony during the guilt phase of the trial; and (5) that a clerical error in the final judgment required correction.

The Kentucky Supreme Court held that the trial court did not err in denying Davis's motion for a directed verdict because Stacey and Mike's front stoop was an "authorized depository" for mail matter under Kentucky Revised Statute (KRS) 514.140. The Court further held that theft by unlawful taking under $500 is not a lesser offense of theft of mail matter for jury instruction purposes, and therefore the trial court did not err in denying Davis's request for an instruction on theft by unlawful taking. The Court held that the trial court did not err in denying Davis's *Batson* challenge, as Davis did not show purposeful discrimination after the Commonwealth provided a valid race-neutral reason – the lack of life experience and the possibility she would be more forgiving based on her young age – to strike the juror. Finally, the Court held that any error in admitting victim impact testimony was not palpable error and that the clerical error in the judgment regarding restitution did not rise to the level of palpable error. The judgment of the Fayette Circuit Court was affirmed.

Rick Aaron Fisher v. Commonwealth of Kentucky
2019-SC-0738-MR **March 25, 2021**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Appellant Rick Fisher was tried jointly with a co-defendant for complicity to murder and tampering with physical evidence, for which he was convicted and sentenced to thirty-years' imprisonment.

Appellant appealed as a matter of right claiming (1) the admission of a co-defendant's unredacted out-of-court statements to a jail cell-mate against Appellant in a joint trial violated the Confrontation Clause of the United States Constitution under *Bruton v. United States* and *Richardson v. Marsh*; (2) that the trial court improperly admitted hearsay against Appellant through the recording of a phone call he made from jail; and (3) that the Commonwealth's Attorney improperly questioned a witness, amounting to prosecutorial misconduct and warranting reversal and retrial.

First, the Supreme Court clarified the Confrontation Clause only applies to testimonial statements, even those statements made out-of-court, so the trial court did not err in admitting a co-defendant's unredacted out-of-court statement implicating Appellant when the co-defendant's statement was made in what she thought at the time was a private conversation with a cell-mate, as opposed to a more official fact-finding inquiry; and the Court held the statement was hearsay but was excepted as a statement against the declarant's penal interest where the co-defendant's statement implicated her in complicity to murder. Second, admitting the jail phone call was not error, as it contained no hearsay where there was no identifiable assertion of fact. Finally, where the Commonwealth Attorney used questioning methods to coax and suggest answers through an unprepared witness, the Court found the questioning highly improper, but that the misconduct ultimately did not warrant reversal under the circumstances. Accordingly, the Supreme Court affirmed the trial court.

EMPLOYMENT LAW:
Karen C. Britt v. University of Louisville, et al.
2019-SC-0399-DG **March 25, 2021**

Opinion of the Court by Justice Lambert. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. Nickell, J., not sitting. Minton, C.J.; Conley, Hughes, Keller, Lambert and VanMeter, JJ., concur. In this breach of contract action, the University of Louisville claimed that they were immune from suit under the Kentucky Model Procurement Code, codified at KRS 45A. The Court held that Dr. Britt and the University executed a series of valid, written contracts, thus potentially waiving governmental immunity. However, because Dr. Britt failed to bring her action within one year from the termination date of her last written contract pursuant to KRS 45A.260, her action was not timely.

FAMILY LAW:
R.M., et al. v. Cabinet for Health and Family Services, Commonwealth of Kentucky, et al.
2020-SC-0205-DGE **March 25, 2021**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Appellant-parents, R.M. and S.M., appealed the Court of Appeals' opinion affirming a family court's order permanently terminating parental rights (TPR) to the Appellants' two boys, D.M. and V.C.M., per KRS 625.090.

Appellant-parents moved the Court for discretionary review, which was granted, claiming (1) there was a lack of substantial evidence to support a finding that TPR was in the children's best interests; (2) that the Cabinet for Health and Family Services failed to make reasonable efforts at reunification as required by law; and (3) the family court admitted prejudicial evidence of another family member's abuse which unfairly skewed the best interest analysis against the Appellants.

First, the Supreme Court held there was substantial evidence supporting TPR was in the children's best interests where they were left in a van for two hours on a hot summer morning; the children were not enrolled in school but were made to panhandle; when the children were eventually taken into foster care they had extensive dental neglect, struggled with sexual misbehavior indicative of sexual abuse

or indirect exposure to sexual abuse in close family units; and where, most importantly, the Appellant-parents failed to demonstrate an understanding or willingness to change the conditions constituting neglect after several years of rehabilitative social work. All the findings were amply supported by the record and uncontradicted, demonstrating adoption with foster parents was in the children's best interests. Second, the Cabinet made reasonable efforts when it spent years attempting to reunify the Appellant-parents with the children, while the parents continued the lifestyle practices that led to the children's removal and resulted in inexcusably slow progress towards reunifying with their children. Finally, the Court held the evidence of another family member's abuse was relevant and admissible where the facts involved Appellants and their children traveling unusually closely with this family member in a caravan of family units traveling the country panhandling and engaging in suspected criminal activity, and that in any case it was harmless error since the family court presumably did not assign unfair blame to the Appellants for the family member's act. Accordingly, the Supreme Court affirmed the decision of the Court of Appeals.

OPEN RECORDS:
University of Kentucky v. The Kernel Press, Inc. d/b/a The Kentucky Kernel
2019-SC-0468-DG **March 25, 2021.**

Opinion of the Court by Justice Hughes. All sitting; all concur. The Kernel, the University of Kentucky's student-run newspaper, filed two Open Records Act (ORA) requests pursuant to Kentucky Revised Statutes (KRS) 61.870-.884 seeking disclosure of various documents, including all documents pertaining to the University's investigation of sexual assault allegations made by two graduate students against a professor, James Harwood. Although the University provided some personnel records and a copy of Harwood's resignation letter and separation agreement, a second request for the investigative file was denied. On review pursuant to KRS 61.882, the Attorney General ordered the University to disclose the records with appropriate redactions. The University declined and sought judicial review. The Fayette Circuit Court conducted an *in camera* examination of the investigative file maintained by the University and concluded that the entire file was protected as "education records" under the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The Court of Appeals reversed the trial court's order, finding that the University failed in the first instance to comply with its statutory obligations under the ORA and, when challenged, failed to meet its burden of showing that the requested records are exempt from disclosure.

On discretionary review, the Supreme Court determined that the University failed to comply with its obligations under the ORA and that the trial court clearly erred in finding the entire investigative file exempt from disclosure. The University's one-paragraph, four-sentence response to The Kernel's request for an investigative file that was ultimately determined to contain 470 pages of documents of varying types was insufficient. Further, grouping the investigative file together and treating it as one giant record to avoid production is patently unacceptable. The ORA generally favors disclosure and a public agency has the obligation to prove that requested documents fit within an exception to the ORA. Additionally, it was incumbent upon the University to specifically claim the FERPA exclusion where legally applicable and to articulate how a given document qualifies as an "education record." FERPA was clearly not intended as an "invisibility cloak" that can be used to shield any document that

involves or is associated in some way with a student, which was the approach taken by the University in this case. The Court of Appeals' decision was affirmed and the case was remanded to the trial court for further proceedings in accord with the ORA and the Court's opinion.

WORKERS COMPENSATION:

Viwin Tech Windows & Doors, Inc. v. Mark E. Ivey, et al.
2019-SC-0370-WC **March 25, 2021**

Opinion of the Court by Justice VanMeter. All sitting. Minton, C.J.; Conley, Hughes, and Lambert, JJ., concur. Keller and Nickell, JJ., concur in result only. The issue before the Court was whether Appellee Mark Ivey's pre-employment lower back disc herniation and two surgeries required an impairment rating to be carved out of his permanent partial disability rating for which his employer, ViWin Tech, would be responsible. The Court held that such carve-out is required, and therefore remanded the case to the Board for remand to the ALJ to make a factual determination of that carve out percentage in accordance with the AMA Guides.

Nathaniel Edward Maysey v. Express Services, Inc., et al.
2020-SC-0132-WC **March 25, 2021**

Opinion of the Court by Justice Hughes. All sitting; all concur. Nathaniel Edward Maysey sustained a serious work-related injury while employed by Express Services, Inc., a temporary staffing company. Express Services placed Maysey at Magna-Tech Manufacturing, LLC where he worked for five days operating machinery before being involved in an accident that resulted in the amputation of his left arm above the elbow. Maysey settled with Express Services prior to the final adjudication of his workers' compensation claim, and the sole remaining issue was whether Maysey was entitled to a 30% enhancement of benefits from Express Services as a result of workplace safety violations pursuant to Kentucky Revised Statute (KRS) 342.165(1). The ALJ denied the enhancement and the Workers' Compensation Board and Court of Appeals affirmed.

The Supreme Court reluctantly affirmed the Court of Appeals based on KRS 342.165(1). Finding Maysey's case virtually identical to *Jones v. Aerotek Staffing*, 303 S.W.3d 488 (Ky. App. 2010), the Court held that Maysey was required to prove that Express Services, not Magna-Tech, intentionally failed to comply with a safety statute or regulation. While several obvious safety violations existed at the Magna-Tech facility, Express Services had no knowledge of the unsafe practices and therefore could not have intentionally failed to comply with safety statutes or regulations. Despite *Jones* being rendered in 2010, the legislature has not amended KRS 342.165 and the Court cannot rewrite the statute to extend its application to temporary staffing employers, who have little to no control over the workplace where the injury occurred.

Diane Anderson v. Mountain Comprehensive Health Corporation, et al.
2020-SC-0133-WC **March 25, 2021**

Opinion of the Court by Justice Keller. All sitting; all concur. Diane Anderson appealed the Court of Appeals' affirmation of the Administrative Law Judge's dismissal of her

cumulative trauma injury claim as untimely under KRS 342.185(1). Anderson filed her claim in October 2018. Anderson left her job as a nurse for Mountain Comprehensive Health Care in November 2017 due to debilitating pain, and Anderson testified at her deposition she was first informed of the injury's connection to her work the following January, which would have been January 2018. At Anderson's hearing before the ALJ, however, the doctor's report entered into evidence was dated January 2017. The ALJ accepted the date on the doctor's report and found Anderson's 618-day delay in providing notice to her employer was insufficient and not "as soon as practicable" under KRS 342.185(1). The Board and Court of Appeals affirmed the ALJ, holding the typographic error was not the type of mistake that a petition for rehearing is meant to correct and did not constitute newly discovered evidence.

Anderson appealed to the Kentucky Supreme Court as a matter of right. The Kentucky Supreme Court reversed, holding that the ALJ, Board, and Court of Appeals applied the wrong provision of KRS 342.185. Effective July 2018, the Kentucky General Assembly added KRS 342.185(3) to govern notice of cumulative trauma injuries. The new notice provision instituted a two-year statute of limitations from when the worker is first informed of her injury's work-related nature. Unlike the notice provision in subsection one, the notice provision associated with cumulative trauma does not include the limitation that such notice be given "as soon as practicable after the happening thereof." Furthermore, the Kentucky General Assembly made the operation of the statute retroactive, and thus it applied to Anderson's claim.

Based on the new notice provisions of KRS 342.185(3), Diane Anderson's claim was timely whether the doctor first informed her of the work-related nature of her injury in January 2017 or January 2018. For this reason, Anderson's case was reversed and remanded to the ALJ for further proceedings consistent with the opinion.

WRIT OF MANDAMUS/PROHIBITION:
Eunice Barnes v. Honorable Julie Goodman, Fayette Circuit Court, Division 4, Formerly Honorable John Reynolds, et al.
2020-SC-0088-MR **March 25, 2021**

Opinion of the Court by Justice Nickell. All sitting; all concur. Keller, J., concurs by separate opinion in which Lambert, J., joins. Affirms denial of petition for writ of prohibition and/or mandamus to stay all civil discovery until conclusion of criminal trial in context of parallel civil and criminal cases due to Barnes—only criminal defendant involved in civil proceeding and only party seeking stay—not establishing "great and irreparable harm," as required by *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

Barnes argued *Lehmann v. Gibson*, 482 S.W.3d 375 (Ky. 2016), supports granting a writ to prevent *any* party—defendant or Commonwealth—from skirting limited criminal rules, by using broader civil discovery rules to access otherwise off-limits proof. She sought a total ban on civil discovery until conclusion of her criminal case to prevent Commonwealth from abusing civil discovery—although it was not a party to the civil case—and using that proof to convict her. The Court read *Lehmann* as simply "protecting" the integrity of the criminal prosecution." *Id.* at 384. Nothing in *Lehmann* directly addresses prohibiting Commonwealth from misusing civil discovery or protecting criminal

defendant, neither of which was at issue. Any perceived misuse of more liberal civil discovery by Commonwealth can be addressed by requesting protective ruling from trial court in criminal case. Here, same judge is presiding over both civil and criminal cases.

Opinion adds more factors to seven identified in *Lehmann*, including length of requested stay and its impact on party opposing stay. That item was particularly relevant in this wrongful death/negligence case in which family of now-deceased psychiatric hospital patient claims Barnes, a now-former hospital employee, attacked patient resulting in patient's death a few days later. Opinion states any stay must be of specified duration and discovery cannot linger for years.

Since March 2019, Barnes has been under indictment for abusing patient. When Barnes first asked for stay, her criminal trial was to occur in April 2020, with any delay being portrayed as "short" and "brief." Criminal trial did not occur as planned, and now, two-years post-indictment, still has not occurred and is not on trial calendar. Case will not receive scheduling priority because Barnes is not in custody and has not requested speedy trial. Patient's family alleges corporate defendants have already destroyed evidence and though the corporate defendants have no Fifth Amendment right to assert, have allegedly stymied taking of other depositions in solidarity with Barnes.

Trial court consistently found Barnes could achieve personal goal of protecting her Fifth Amendment right against self-incrimination by requesting protective order for herself before the criminal court without staying all civil discovery since no other civil defendant needs protection. Opinion identifies other, less onerous options to total stay, echoing *Lehmann* directive that trial courts remain flexible and not grant stay as "default position." Opinion discusses "contention interrogatories" and follows *Maze v. Kentucky Judicial Conduct Commission*, 575 S.W.3d 204, 210 (Ky. 2019). Like Judge Maze, Barnes may still invoke her Fifth Amendment right in both her civil and criminal trials.

ATTORNEY DISCIPLINE:
Robert Lee McKinney, II v. Kentucky Bar Association
2021-SC-0049-KB **March 25, 2021**

Opinion and Order of the Court. All sitting; all concur. McKinney was admitted to practice law in the Commonwealth of Kentucky in March 2004. He subsequently moved to withdraw his membership and the Supreme Court granted his motion in August 2013. At the time, McKinney had no disciplinary investigations, complaints or charges pending against him.

In February 2020, McKinney applied for restoration to the practice of law pursuant to Supreme Court Rule ("SCR") 3.500(3). The Board of Governors of the Kentucky Bar Association unanimously recommended McKinney's application. The recommendation was supported by the Character and fitness Committee's recommendation as to McKinney's good character and fitness to practice law, along with a certification from the Office of Bar Counsel that McKinney had no pending disciplinary matters and was not subject to any claims against the Clients' Security Fund. The Director of

Continuing Legal Education further certified that McKinney had completed the required number of CLE credits for restoration under SCR 3.685.

Upon review of the record, the Court agreed that McKinney had satisfied the requirements of SCR 3.500(3). Accordingly, he was restored to KBA membership and the practice of law in the Commonwealth.