Published Opinions
Kentucky Supreme Court
May 2011

I. CRIMINAL LAW

A. David Lee Sanders v. Commonwealth of Kentucky
2008-SC-000825-MR **May 19, 2011**

Opinion by Justice Venters. Justice Minton recused; All Concur. By CR 60.02 motion Sanders claimed he was entitled to post-conviction relief. Upon review, this Court held: (1) that Special Judge Gary D. Payne, a Senior Status Judge, was constitutionally appointed to preside over his case, and that Sanders was given notice of the appointment in time to have sought relief, and so was not now permitted to claim untimely notice; (2) that the trial court did not err in denying his claim of ineffective assistance of direct appeal counsel pursuant to the retroactivity provisions of *Hollon v. Commonwealth*; (3) that the trial court did not err in denying his claim of ineffective assistance of RCr 11.42 counsel; and (4) that reasons of an extraordinary nature did not justify post-conviction relief under his numerous other CR 60.02 claims.

B. Aaron Allen v. Commonwealth of Kentucky
2009-SC-000842-MR **May 19, 2011**

Defendant was convicted of wanton murder for having caused the death of his girlfriend's three-month old son. Upholding the conviction, the Supreme Court held that the trial court did not err when it denied defendant's request for a first-degree manslaughter instruction since the evidence did not support a finding that the defendant killed the child but intended only to injure him. Defendant testified he had no intent of injuring the child and there was no evidence to support a contrary conclusion.

C. Anthony Wayne Garrison v. Commonwealth of Kentucky
2010-SC-000039-MR **May 19, 2011**

Opinion of the Court by Justice Noble. All sitting; all concur. Garrison, convicted of second degree robbery and tampering with physical evidence, appealed the admission during the penalty phase of prior, unrelated felony violations. The Supreme Court

held that such violations were admissible under the truth-in-sentencing statute, which allows for the admission of evidence relevant to sentencing, including seven categories of evidence enumerated in the statute. Although prior felony violations are not among the categories listed, the Supreme Court held this list not to be exhaustive, but instead a collection of examples of the type of evidence that is relevant. Because prior felony violations were analogous to other types of evidence explicitly permitted, they were equally admissible. The Court further found that KRE 404(c) did not require notice that the Commonwealth intended to introduce such evidence because that provision only applies to prior acts introduced during the case-in-chief, not the penalty phase.

D. Michael McQueen v. Commonwealth of Kentucky
2010-SC-000186-MR May 19, 2011

Opinion of the Court by Justice Scott. All sitting; all concur. In this murder case, the Court affirmed Appellant's conviction and sentence. Of note was the Court's resolution of the trial court's alleged erroneous striking of a qualified juror. The Court noted the recent statutory change qualifying a juror whose civil rights have been restored as eligible for service. However, pursuant to RCr 9.34, challenges to the jury selection procedures must occur prior to the examination of the jurors or else are waived, unless counsel "neither knew nor by the exercise of reasonable diligence could have known of the grounds for challenge before the jury was accepted." The Court concluded that this equitable caveat was inapplicable, and therefore, that Appellant waived his selection argument.

E. Jerry Wayne Blades v. Commonwealth of Kentucky
2010-SC-000187-MR May 19, 2011

Opinion of the Court by Justice Scott. All sitting; all concur. In this case, the Court reviewed two issues: (1) whether expiration of an agreed rental period dissolved a guest's privacy interest in a hotel room and (2) whether two previous convictions sufficiently proved first-degree prior felony offender (PFO) status where the two sentences were amended to run concurrently. This case arose from a hotel room search subsequent to an arrest wherein hotel management permitted police officers to commence the search after the checkout time had elapsed. The Court affirmed the constitutionality of the hotel room search because there is no reasonable expectation of privacy after checkout time elapses.

With respect to the PFO issue, the Court affirmed the enhanced conviction, as the "concurrent sentence break" of KRS 532.080(4) does not apply to individuals who commit a felonious act, receive a sentence, and then subsequently commit another felonious act and receive another sentence.

F. Perry Bennington v. Commonwealth of Kentucky
2009-SC-000521-MR May 19, 2011

Opinion of the Court by Justice Noble. All sitting. Bennington, convicted of multiple sex crimes against his daughter, appealed on multiple grounds. One ground, insufficiency of the evidence, led the Supreme Court to reverse one rape conviction because it was described in the instructions to have occurred prior to a point when any testimony had recalled the inception of sexual intercourse. Bennington lodged an unsuccessful unanimous verdict challenge, arising from the identical wordings of the various instructions, save their differentiation based on the year they allegedly occurred. The similarity of various instructions was unproblematic; the temporal specification clearly directed the jury to a particular instance of the crime. Bennington contested one of his sodomy convictions because it related to conduct prior to enactment of the sodomy statute. Although it was anachronistic and erroneous to indict and convict Bennington under the modern statute, any harm was cured by the court sentencing him under the Indecent and Immoral Practices statute, the timely analog to sodomy. The same conduct Bennington was indicted and convicted for as sodomy was equally punishable at the time as Indecent and Immoral Practices, so he suffered no prejudice. Justice Cunningham filed a dissenting opinion on this last matter, in which Justice Scott joined, to say that regardless of any overlap between indecent and immoral practices and sodomy, indicting under the latter statute deprived the court of jurisdiction to convict and sentence under the former.

G. William Alford v. Commonwealth of Kentucky
2009-SC-000141-MR May 19, 2011

Opinion of the Court. All sitting. Defendant was convicted of first-degree sodomy and first-degree sexual abuse. The admission of an egregious amount of inadmissible hearsay by a police detective and a physician, which repeated the alleged victim's accusations,

unfairly bolstered the credibility of the alleged victim to the extent as to rise to the level of palpable error. RCr 10.26. The convictions were reversed and the case remanded for a new trial. Justice Cunningham concurred by separate opinion, in which Justice Abramson and Justice Scott joined. Justice Venters concurred in result by separate opinion in which Justice Schroder joined.

H. Commonwealth of Kentucky v. Anthony Nash
2010-SC-000065-DG **May 19, 2011**

Opinion of the Court by Justice Schroder. All sitting. Defendant was convicted of two counts of third-degree sodomy in December, 1993, and was released on October 1, 1997, having served out his sentence. In January, 2007, defendant was charged with violating the registration requirements of Kentucky's Sex Offender Registration Act (SORA) and PFO II. Defendant entered conditional guilty plea to registration violation (Class D felony) for which he was sentenced to five years' imprisonment enhanced to ten years by the PFO II. The Supreme Court determined that defendant was never required to register under any version of SORA and therefore he could not be guilty of the crime of failing to register. Case remanded to Fayette Circuit Court with instructions to set aside the judgment and sentence and to dismiss the indictment and order release of defendant from the charges. Justice Venters dissented by separate opinion in which Chief Justice Minton joined.

II. FAMILY LAW/MAINTENANCE

A. Kerry Drew Woodson v. Kimberla Woodson
2010-SC-000053-DG **May 19, 2011**

Appellant's motion to modify court-ordered maintenance of $338.00 per month for a period of five years could be considered by the trial court because, under KRS 403.250(1), all decrees "respecting maintenance" are modifiable under certain circumstances. The Court overruled the holding in *Dame v. Dame* 628 S.W.2d 625 (Ky. 1982), and held that a maintenance award in a fixed amount to be paid out over a definite period of time is subject to modification where there are changed circumstances so substantial and continuing as to make the terms unconscionable.

III. MEDIA

A. Jason Riley; And The Courier-Journal, Inc. V. Honorable Susan Schultz Gibson, Judge, Jefferson Circuit Court; And Commonwealth Of Kentucky; And Don Sinclair Fielder

2010-SC-000619 **May 19, 2011**

Opinion of the Court by Justice Noble. All sitting. In the Courier-Journal and its reporter's petition for a writ of prohibition against their exclusion from a juror contempt hearing, the Court of Appeals had denied the writ because the finality of the contempt proceeding had rendered it moot. The Supreme Court reversed because, while moot, the issue of media access to contempt hearings was capable of repetition yet evading review. The Court further found that Freedom of the Press applied to criminal contempt hearings, as it does to standard criminal trials. Justice Schroder issued a concurring opinion, in which Justice Scott joined, to emphasize that the right of the media to access a criminal contempt hearing is a simple matter.

IV. PATERNITY

A. J.A.S., Appellant v. Hon. Lisa O. Bushelman, Judge, Kenton Circuit Court, Appellee and C.H.E., Real Party In Interest,

2010-SC-000045-MR **May 19, 2011**

Opinion by Justice Venters, . All sitting. Abramson, Noble, Schroder, Venters, J.J. concur. Minton J., dissents by separate opinion. Cunningham J., dissents by separate opinion in which Scott J. joins. Paternity, Family law. K.R.S. Chapter 406 permits a man who had a sexual relationship with a married woman to file an action to determine the paternity of a child born to her, despite the fact that her sexual relationship with her husband continued throughout the relevant time period. As used in K.R.S. Chapter 406, "child born out of wedlock" and "birth out of wedlock" refer to birth of child to woman who was not lawfully married to the biological father at the time of the child's conception or at the time of the child's birth. *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008) is overruled.

V. WORKER'S COMPENSATION

A. Ron Burroughs v. Martco
2010-SC-000431-WC **May 19, 2011**

Opinion of the Court. All sitting; all concur. The ALJ found Burroughs to be totally disabled at the reopening of his claim but, having noted that the weekly benefit for total or partial disability would be the same, awarded benefits only for "the remaining period of his earlier award." Burroughs failed to petition for reconsideration or appeal. Martco ceased paying benefits when the 425-week period of the initial award ended, which occurred before Burroughs became eligible for old-age social security retirement benefits but more than four years after the latest order granting or denying benefits. Burroughs sought to have the duration of the award corrected by filing a motion to reopen under KRS 342.125, in which he alleged a mistake of law, as well as by filing a motion to reopen under CR 60.01 and CR 60.02. The ALJ denied both motions reasoning that KRS 342.125(3) barred reopening at that time and that an ALJ lacks the authority to rule on a motion filed under CR 60.01 or CR 60.02. The Board and the Court of Appeals affirmed. Also affirming, the Supreme Court noted that the award clearly contained a patent error but that KRS 342.125(3) requires a motion to reopen to correct such a mistake to be filed within four years after the original award or four years after the latest order granting or denying benefits. The court noted also that the Kentucky Rules of Civil Procedure apply to proceedings before an administrative agency only to the extent provided by statute or regulation and that the workers' compensation regulations have not adopted CR 60.01 or CR 60.02.

B. Kroger v. Japheth Ligon
2010-SC-000385-WC **May 19, 2011**

Opinion of the Court. All sitting. All concur. Ligon underwent arthroscopic shoulder surgery involving the surgical implantation of two metallic anchors in order to repair a work-related SLAP tear (superior labrum tear from anterior to posterior). The ALJ awarded temporary total disability benefits but dismissed the claims for permanent income and medical benefits based on the 0% impairment rating assigned by Kroger's medical expert as well as other physicians' statements that Ligon required no further medical treatment and had received "all the treatment he needs at this point." The Board held that the ALJ erred by denying future

medical benefits but that the evidence did not compel an award of permanent income benefits. The Court of Appeals affirmed. Also affirming, the Supreme Court noted that Ligon did not sustain a temporary exacerbation of a pre-existing condition but an injury that required surgery and the permanent implantation of hardware in his shoulder. Thus, evidence that he required no treatment as of MMI or the date his claim was heard did not show that he would not require treatment "during disability" regardless of the finding that the injury warranted no permanent impairment rating. The court noted also that a different ALJ might have relied on a different physician with respect to the permanent impairment rating the injury caused but was not convinced that the evidence compelled the ALJ to do so.

C. NESCO v. Jacklyn Haddix
2010-SC-000216-WC **May 19, 2011**

Opinion of the Court. All sitting. All concur. An ALJ found that Haddix's work for NESCO's temporary employment agency was sporadic but failed to specify whether KRS 342.140(1)(d) or (1)(e) was used to calculate her average weekly wage. Stating that the parties were uncertain which subsection to apply, the Board reversed and remanded for the taking of further proof followed by an analysis of the evidence under subsection (1)(e). The Court of Appeals affirmed. The Supreme Court affirmed to the extent that the ALJ must make a realistic estimate of Haddix's probable earnings in a normal 13-week period of employment under subsection (1)(e), taking into account the parties' sporadic employment relationship of nearly two years' duration as well as the fact that she sometimes declined offered work. The court reversed with respect to reopening the proof, noting that Haddix had argued from the outset that KRS 342.140(1)(e) governed the calculation and had the burden to submit the necessary evidence within the time for taking proof.

VI. WRITS

A. State Farm Insurance Company v. Brian C. Edwards, Judge of the Jefferson Circuit Court, and Mark Roden
2010-SC-000521-MR **May 19, 2011**

State Farm sought an order prohibiting the Jefferson Circuit Court from referring its default judgment motion to a court commissioner for preliminary factual findings. State Farm maintained that

referrals of default judgment motions are a routine practice in the Jefferson Circuit Court, that they are unnecessary, and that they violate the civil rules providing for commissioner referrals. The Court of Appeals denied the motion for extraordinary relief, and the Supreme Court upheld that denial. The Court noted that there was no evidence of record regarding this alleged routine practice, simply representations of counsel. While a practice of automatically referring all default judgment matters to the commissioner would likely violate the civil rules, the Court held that State Farm could raise its concerns regarding this particular referral by way of appeal and that extraordinary relief was therefore inappropriate.

VII. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. Ronald Dean Harris

2011-SC-000123-KB **May 19, 2011**

The KBA Inquiry Commission charged Respondent with failure to act with reasonable diligence and promptness in his representation of a client, failure to maintain reasonable communication with said client, and with failure to respond to a bar complaint.

The Court adopted the recommendation of the Board of Governors and ordered that the Respondent be suspended for a period of no less than 181 days.

B. MICHAEL D. LUTES V. KENTUCKY BAR ASSOCIATION

2011-SC-000148-KB **May 19, 2011**

Opinion and Order. All sitting; all concur. Supreme Court adopted KBA's recommendation to publicly reprimand Lutes for ethical violations including lack of diligence in client representation and mishandling of client funds.

C. Leonard K. Nave v. Kentucky Bar Association

2011-SC-000204-KB **May 19, 2011**

Leonard K. Nave petitioned the Court to impose a five-year suspension from the practice of law for his violation of SCR 3.130 –

8.3(c). The Court found the five year term of suspension to be appropriate, and imposed it. At the end of the five year period, Petitioner may re-apply for admission to the Bar.

D. Benjamin Clay Johnson v. Kentucky Bar Association
2001-SC-00211-KB **May 19, 2011**

Benjamin Clay Johnson petitioned to be reinstated to the bar following his suspension for non-payment of bar dues. Petitioner completed an Application of Restoration, completed sufficient CLE hours, and paid past bar dues. Three bar members in good standing supplied affidavits supporting Petitioner's restoration. The Board of Governors voted unanimously to restore Petitioner to bar membership, and the Court adopted their recommendation.

E. Leslie Gail Bridges v. Kentucky Bar Association
2011-SC-000214-KB **May 19, 2011**

Leslie Gail Bridges made a motion before the Court to impose a two-year suspension upon herself to resolve the charges in KBA File 13168. These charges stem from her violations of SCR-3.130-8.4(c), SCR 3.130-3.3(a)(1), and SCR 3.130-5.5(a) during her tenure as Assistant U.S. Attorney in Arkansas. The KBA did not oppose the Motion, and the two-year suspension was granted by the Court.