

**PUBLISHED OPINIONS  
KENTUCKY SUPREME COURT  
NOVEMBER 2010**

**I. CRIMINAL**

- A. Semonin T. Moorman v. Commonwealth of Kentucky**  
2009-SC-000420-MR November 18, 2010

Opinion of the Court by Justice Venters. All sitting; all concur. Held - (1) Under the de facto officer doctrine, a criminal conviction obtained by a prosecutor who was not properly sworn in as an attorney is not per se invalid, where the unlicensed prosecutor met all requirements for admission to the Bar and took the Kentucky Constitutional oath, albeit before a judge not authorized to administer said oath; there is no constitutional violation and any error is harmless; (2) trial court properly excluded murder victim's prior drug use as irrelevant; (3) trial court properly excluded victim's prior acts of violence and threats the defendant did not know about, and were thus irrelevant to her claim of self defense.

- B. Robert Hollon v. Commonwealth of Kentucky**  
2008-SC-000618-DG November 18, 2010

Opinion of the Court by Justice Abramson. All sitting. Prisoner serving a life sentence for murder brought an RCr 11.42 action alleging the ineffective assistance of appellate counsel (IAAC). Reversing the policy announced in Hicks v. Commonwealth, 825 S.W.2d 280 (Ky. 1992), of not recognizing IAAC claims in cases that have received a merits review, the Supreme Court held that such claims would henceforth be cognizable and in most instances should be raised along with ineffective assistance of trial counsel claims in a motion pursuant to RCr 11.42. The Court discussed the standards applicable to IAAC claims, the manner of relief the trial court may grant, and how appeals from trial court rulings are to proceed. Justice Noble concurred by separate opinion and Justice Scott dissented by separate opinion.

- C. James F. Robinson v. Commonwealth of Kentucky**  
2008-SC-000556-MR November 18, 2010

Opinion by Justice Cunningham. All sitting; all concur, with Justice Noble concurring in result only. Robinson was convicted of the murder of his 23-month old stepdaughter and sentenced to life imprisonment. The Supreme Court affirmed the conviction, holding that there was no unanimity violation as the Commonwealth produced sufficient evidence to support instructing the jury that Robinson killed his stepdaughter by either "over-medicating" or "beating" her.

**D. Commonwealth of Kentucky v. Jarrod L. Nicely**  
2009-SC-000313-DG November 18, 2010

Opinion of the Court by Justice Noble. All sitting. Nicely, a participant in the probationary program, drug court, had served time in custody as a sanction for violating terms of his probation. After probation was later revoked entirely, Nicely appealed the trial court's refusal to grant time-served credit for that period in custody. The Court of Appeals reversed and, the Supreme Court, on other grounds than the Court of Appeals, agreed that Nicely was entitled to time-served credit. The Court held that the only authority for a drug court to impose temporary sentencing is its probationary power to do so, which, by statute gives rise to credit for such time served. Justice Cunningham dissented because he opined that the period in custody did not arise from an exercise of the court's probationary powers, but was instead simply part of the drug court treatment program and, therefore, did not mandate time-served credit.

**D. Cedric Grady v. Commonwealth of Kentucky**  
2009-SC-000205-MR November 18, 2010

Opinion of the Court by Justice Scott. All sitting. In reversing the appellant's conviction, the Supreme Court held that a finding that the defendant is proceeding with eyes open cannot be made without sufficiently advising him of the dangerous grounds he asks to tread. Only when the defendant has been warned may a court determine that he proceeds without counsel or with hybrid counsel with knowledge, intelligence, and of his own volition.

The Court, however, affirmed the trial court's ruling with regard to the replacement of counsel, and declined to adopt a per se rule which would disqualify appointed counsel where the client has filed a law suit and a bar complaint against the appointed attorney. The Court also rejected appellant's argument that there was a procedural right to testify at a suppression hearing regarding the voluntariness of his confession and instead reiterated the appellate rule that requires an appellant to show "that his version of events, if true, would require the conclusion that his confession was involuntary", i.e., indicating the involuntariness of his confession."

The Court did, however, find error in the trial court's permitting a witness to make an in court identification after that same witness was exposed to a photographic lineup that was subsequently lost by the Commonwealth. The Court held that where a photographic line up is lost and defense counsel has not had the opportunity to examine that lineup, there will a rebuttable presumption that the photo lineup was indeed unduly suggestive.

The Court also refused, in a 5-2 vote, to classify certain statements made by two tenants to their landlord as being in violation of the Confrontation Clause of the United States Constitution.

Finally, the Court also held, as a case of first impression, that the StunTech React belt system may be used at the trial court's discretion provided there is good reason for doing so. The Court ultimately addressed the final issues of cumulative error and insufficiency of evidence arguments, and found them moot considering the reversal on other issues. Schroder concurred in part and dissented in part by separate opinion, in which Venters, J., joined.

## **II. INSURANCE**

- A. State Farm Mutual Automobile Insurance Company v. Carlene Slusher, Administratrix of the Estate of Donald Slusher**  
2009-SC-000513-DG November 18, 2010

Opinion of the Court by Justice Venters. All sitting; all concur. Held – If, because of the exclusive remedy provisions of Kentucky's Workers' Compensation Act, a worker injured in a work-related motor vehicle accident caused by a co-worker, is not legally entitled to collect any further amounts from either his employer or the co-employee, he may not collect either UM or UIM benefits under an insurance policy which provides that to collect under those provisions the insured must be "legally entitled to collect" from the tortfeasor.

- B. Kentucky Farm Bureau Mutual Insurance Company v. Shelter Mutual Insurance Company**  
2008-SC-000781-DG November 18, 2010

Opinion of the Court by Justice Scott. All sitting; all concur. This case arose from a two-car accident in which Farm Bureau insured the non-owner, but permissive driver, of the vehicle, while Shelter insured the vehicle through the owner's policy. The Court was confronted with two automobile insurance policies, both claiming to provide only excess coverage. The Court found somewhat unsatisfactory the "two-step" framework wherein the trial court examines each policy, determines that the excess clauses are mutually repugnant, and prorates the damages between the insurance companies. Instead, the Court held that, based on legislative intent underlying the Kentucky Motor Vehicle Reparations Act (MVRA) KRS 304.39-010, *et. seq.*, and the spirit and intent of the MVRA, in instances where both the vehicle owner and non-owner driver are separately insured, the vehicle owner's insurance shall be primary.

## **III. PUBLIC SERVICE COMMISSION**

- A. Kentucky Public Service Commission v. L. Glenn Shadoan, Et al.**  
2009-SC-000053-DG November 18, 2010

Opinion of the Court by Justice Schroder. All sitting. The primary issue in this case was whether the Public Service Commission (PSC) or the local planning commission had jurisdiction over the proposed construction of a cellular tower where the local planning body had not adopted regulations specifically relating to the construction of cell phone towers. Reversing the Court of Appeals, the Supreme Court held that under the language of KRS 100.987, the local planning commission had jurisdiction over the placement and construction of the proposed cellular tower. Distinguishing the case from *Louisville Gas and Electric Company v. Hardin and Meade County Property Owners for Co-Location*, 319 S.W.3d 397 (Ky. 2010), the Supreme Court also held that Appellees met the minimum designation of record requirements in KRS 278.420(2) by attaching the PSC order to their complaint, where the sole issue on review was one of law and there was no evidentiary record compiled by the agency in the case. Justice Scott dissented by separate opinion.

#### IV. TRUSTS & ESTATES

##### A. **Janet Hammons, et al. v. Rosa Hammons**

2009-SC-000155-DG

November 18, 2010

Opinion of the Court by Justice Abramson. All sitting; all concur. Dr. Hammons died testate, leaving his wife a life estate in the majority of his property with the remainder to his two daughters from a prior marriage. Under the will, Mrs. Hammons is entitled to the income from the property and has the express power to invade the corpus if necessary to meet her living and medical expenses, provided she has first exhausted her own separate property. On appeal of a suit brought by the daughters, the Court of Appeals held the daughters are contingent remaindermen because their ability to take depends on the wife not depleting the corpus and on the daughters surviving her or leaving issue, and the daughters do not have the right to an accounting of the wife's assets, either personal or those received from the testator's estate. On discretionary review, the daughters argued they received a vested remainder subject to divestment and have the right to an accounting of the use of the corpus which would entail some accounting of the widow's assets. The Supreme Court held the daughters are vested remaindermen whose interests are subject to divestment because their interests vested immediately upon their father's death without regard to any future occurrence. The aforementioned conditions to their taking create the possibility that they may be divested of their interests but they were, nonetheless, vested at Dr. Hammons' death. However, absent litigation, the daughters do not have the right to an accounting of the widow's assets. When a testator explicitly grants a life tenant the power to consume the corpus, the life tenant may invade the corpus in accordance with the provisions of the will, and need not petition the court, provide notice prior to invading the corpus, or provide an accounting of how the property is expended. The remainderman's interest in the estate is protected by his or her ability to bring a waste action and recover appropriate damages if the life tenant acts contrary to the testator's directives.

## V. WORKERS' COMPENSATION

A. **Chester Hogston v. Bell South Telecommunications, et al.**  
2010-SC-000299-WC November 18, 2010

Opinion of the Court. All sitting; all concur. The claimant injured his right knee while performing work for Bell South. His medical history included a previous non-work-related left knee injury as well as work-related injuries to both knees. An Administrative Law Judge relied on *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009), as authority to deny double benefits under KRS 342.730(1)(c)2. The ALJ noted that the restrictions resulting in his termination concerned his left knee and found there to be no connection between the cessation of employment and the right knee injury for which he sought compensation. Appealing, the claimant asserted that the ALJ misapplied *Chrysalis House* and that the decision should be limited to its facts because it ignored the plain language of KRS 342.730(1)(c)2, which is more specific than KRS 342.730(1). The Workers' Compensation Board and the Court of Appeals affirmed. The Supreme Court reversed, convinced that the claimant was entitled to double benefits. The court refused to limit *Chrysalis House* to instances in which an employee would otherwise profit from the consequences of illegal conduct, noting that the decision was based on statutory interpretation rather than public policy. The court reasoned that the claimant was entitled to double benefits, however, because KRS 342.730(1) permits disability from previous work-related injuries to be considered for certain limited purposes, such as when finding a worker to be totally disabled, and noted that KRS 342.730(1)(e) makes no reference to enhanced benefits.

## VI. ATTORNEY DISCIPLINE

A. **Kentucky Bar Association v. Robinson**  
2010-SC-000569-KB November 18, 2010

Opinion of the Court. All sitting; all concur. Attorney was suspended for 30 days for failure to act with reasonable diligence and promptness in representing client, failure to keep client reasonably informed or promptly respond to reasonable requests for information, knowing failure to respond to lawful demand for information from disciplinary authority, and failure to maintain with Director current address at which attorney can be communicated with by mail. Despite fact that client who initially filed complaint later indicated he did not wish to proceed further, SCR 3.160(1) required submission to Inquiry Commission once complaint was filed and investigated. Attorney had been previously suspended for failure to pay bar dues and entry of guilty plea to felony and had not been reinstated. He was also ordered to attend Ethics and Professional Enhancement Program and to pay costs of proceeding.

**B. Kentucky Bar Association v. Jennifer Sue Whitlock**  
2010-SC-000538-KB November 18, 2010

Opinion of the Court. All sitting; all concur. Attorney was found to have committed several ethical violations and was suspended from the practice of law for one year. The Supreme Court further ordered attorney to refund fees to a former client and to consult with and agree to monitoring by the Kentucky Lawyers Assistance Program.

**C. Kentucky Bar Association v. Louis Zimmerman**  
2010-SC-000563-KB November 18, 2010

Opinion of the Court. All sitting; all concur. Supreme Court adopted recommendation that attorney be publicly reprimanded as a result of engaging in misconduct during his representation of a client. Attorney was ordered to attend and successfully complete the Ethics and Professional Enhancement Program presented by the KBA Office of Bar Counsel and to pay all costs associated with the disciplinary proceedings.

**D. Kentucky Bar Association v. Joshua Michael Robinson**  
2010-SC-000569-KB November 18, 2010

Opinion of the Court. All sitting; all concur. Attorney was suspended for 30 days for failure to act with reasonable diligence and promptness in representing client, failure to keep client reasonably informed or promptly respond to reasonable requests for information, knowing failure to respond to lawful demand for information from disciplinary authority, and failure to maintain with Director current address at which attorney can be communicated with by mail. Despite fact that client who initially filed complaint later indicated he did not wish to proceed further, SCR 3.160(1) required submission to Inquiry Commission once complaint was filed and investigated. Attorney had been previously suspended for failure to pay bar dues and entry of guilty plea to felony and had not been reinstated. He was also ordered to attend Ethics and Professional Enhancement Program and to pay costs of proceeding.

**E. Inquiry Commission v. Donald Lynn Richardson**  
2010-SC-000570-KB November 18, 2010

Opinion of the Court. All sitting; all concur. Supreme Court temporarily suspend attorney from the practice of law based on probable cause that attorney misappropriated or otherwise improperly dealt with funds held for others.