KENTUCKY SUPREME COURT
OCTOBER 2019

I. ADMINISTRATIVE LAW:

A. Lexington-Fayette Urban County Human Rights Commission v. Hands-On Originals

2017-SC-000278-DG **October 31, 2019**

Opinion of the Court by Justice VanMeter. Minton, C.J.; Buckingham, Hughes, Keller, VanMeter and Wright, JJ., sitting. Minton, C.J.; Hughes, Keller, VanMeter and Wright, JJ., concur. Buckingham, J., concurs by separate opinion. Lambert, J., not sitting. The Supreme Court granted discretionary review of the Court of Appeals' decision affirming the Fayette Circuit Court's dismissal of the lawsuit brought by the Gay and Lesbian Services Organization ("GLSO") against Hands On Originals. The GLSO had alleged that Hands On Originals had violated Lexington Fayette Urban County Government ordinance, Section 2-33, which prohibits a public accommodation from discriminating against individuals based on their sexual orientation or gender identity. The Court of Appeals ruled that dismissal was warranted since it perceived no violation of Section 2-33 by Hands On's engaging in viewpoint or message censorship as a private business. The Supreme Court agreed that dismissal was proper, but for a different reason. The highest court held that the GLSO, the original party to bring this action before the Lexington Fayette Urban County Human Rights Commission, lacked statutory standing to assert a claim against Hands On Originals under Section 2-33 and KRS 344.120 as the plain text of Section 2-33 provides that only an individual—being a single human—can bring a discrimination claim under Section 2-33. The GLSO, an organization and not an individual, therefore lacked the requisite statutory standing to bring its claim. Without a proper complainant, no determination could be made as to whether the ordinance was violated.

II. CONTRACT LAW:

A. Community Financial Services Bank, Etc. v. Ronny L. Stamper AND Ronny L. Stamper v. Community Financial Services Bank, Etc.

2018-SC-000320-DG
2019-SC-000100-DG **October 31, 2019**

Opinion of the Court by Justice Keller. All sitting; all concur. Community Financial Services Bank, f/d/b/a Bank of Benton ("Bank") filed suit in Marshall Circuit Court to enforce a promissory note executed by Ronny Stamper in April 1997. Stamper argued that Kentucky Revised Statute ("KRS") 413.090(2), which

provides a fifteen-year statute of limitations for written contracts, barred the suit. The trial court disagreed and ultimately granted summary judgment in favor of the Bank. On appeal, the Court of Appeals concluded that the promissory note qualified as a negotiable instrument and, as a result, applied the six-year statute of limitations under KRS 355.3-118, Article 3 of Kentucky's Uniform Commercial Code ("UCC"). Neither party had raised the applicability of KRS 355.3-118 to the trial court or the Court of Appeals. The Supreme Court affirmed the Court of Appeals and held that (1) the Court of Appeals had properly considered the application of KRS 355.118; (2) the note was a negotiable instrument despite its references to other agreements because it did not incorporate those agreements nor was it subject to or governed by those agreements; and (3) the action was untimely under KRS 355.118.

III. CRIMINAL LAW:

A. Asiel Iraola-Lovaco v. Commonwealth of Kentucky

2018-SC-000257-MR **October 31, 2019**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Asiel Iraola-Lovaco appealed as a matter of right his conviction for three counts of Assault in the Second Degree and one count of DUI First Offense, stemming from an incident in which he struck three pedestrians with his vehicle while driving intoxicated. Iraola-Lovaco raised two claims of error on appeal. Regarding his first, and unpreserved, claim of error, Iraola-Lovaco argued that the arresting officer should not have been permitted to identify the field sobriety tests ("FSTs") he conducted as "tests" and to testify that Iraola-Lovaco "failed the tests" as this nomenclature improperly lent the investigative procedures the gravitas of scientific weight for which no scientific opinion foundation was laid, and therefore should not have been admitted under KRE 702. The Court held that no palpable error resulted from the trial court's admission of the police officer's testimony to this effect, noting that Kentucky law is clear that evidence of FSTs is admissible and that officers observing a defendant's driving and physical condition may offer opinion testimony that the defendant was intoxicated. Specifically, in this case, the officer did not equate a level of certainty or probability to his opinion that Iraola-Lovaco was intoxicated, or correlate Iraola-Lovaco's performance on the FSTs with a specific blood alcohol content ("BAC") level. Rather, the officer properly testified that based on his training, experience, and personal observations, Iraola-Lovaco's performance on the FSTs led the officer to opine that Iraola-Lovaco was intoxicated. Secondly, the Court held that the evidence presented at trial did not support an instruction on Fourth-Degree Assault as the evidence showed that all three victims suffered serious physical injury and that Iraola-Lovaco was legally intoxicated when he struck the three victims (his BAC was between 0.105-0.116), he was speeding and drove up on the sidewalk when he struck them, and he left the scene of the accident after striking them.

B. Hubert McGuire v. Commonwealth of Kentucky
2017-SC-000404-MR **October 31, 2019**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Buckingham, Hughes, and Keller, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion, in which Lambert and VanMeter, JJ., join. McGuire was convicted in Henderson Circuit Court of first-degree trafficking in a controlled substance, second-degree fleeing and evading police, tampering with physical evidence, resisting arrest, and of being a first-degree persistent felony offender. McGuire appealed to the Kentucky Supreme Court as a matter of right alleging several issues for review.

The Court first held that it was not error for the trial court to allow a police officer to testify that, based on his experience, the small plastic bags found on McGuire were commonly used to carry drugs, the quantity of drugs recovered was inconsistent with personal use, and the persons in possession of drugs for personal use were usually found with some means of administering the drugs. The Court determined this testimony did not amount to an opinion on the ultimate issue of whether McGuire was guilty of trafficking and further determined that the officer was qualified to render these opinions. The Court next held that sufficient evidence existed for a jury to conclude that McGuire possessed the drugs in question in order to support the conviction for trafficking in a controlled substance. Specifically, the Court found that testimony by an officer that he saw McGuire move his hand away from his body in a manner consistent with throwing an object during a foot pursuit and that the officer later returned to the same area and recovered the drugs was sufficient for a jury reasonably to infer that McGuire was in actual possession of the drugs. Finally, the Court held there was insufficient evidence to support a conviction for tampering with physical evidence because McGuire had merely tossed evidence of a possessory crime in the presence of an officer and the officer was able to quickly and readily retrieve it upon returning to the scene. To reach this conclusion, the Court looked to the rule announced in *Commonwealth v. James*, No. 2017-SC-000576-DG, 2018-SC-000066-DG (Ky. Oct. 31. 2019). Accordingly, the Court reversed McGuire's conviction for tampering with physical evidence, but affirmed the remaining convictions.

C. Commonwealth of Kentucky v. Michael Joseph James
AND
Michael Joseph James v. Commonwealth of Kentucky
2017-SC-000576-DG
2018-SC-000066-DG **October 31, 2019**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Buckingham, Hughes, and Keller, JJ., concur. Wright, J., concurs in part and dissents in part by separate opinion, in which Lambert and VanMeter, JJ., join. James was convicted in the Henderson Circuit Court of tampering with physical evidence, first-degree possession of a controlled substance, and possession of

drug paraphernalia. The Court of Appeals reversed the trial court, finding there was insufficient evidence for a jury to conclude James was in possession of the drugs and drug paraphernalia and, therefore, also insufficient evidence to find James tampered with the evidence.

The Kentucky Supreme Court granted discretionary to determine whether sufficient evidence exists to support a charge of tampering with physical evidence under KRS 524.100 where a defendant drops or tosses physical evidence of a possessory crime in the presence of an officer. The Court first concluded that sufficient circumstantial evidence existed to allow a reasonable jury to infer that James was in actual possession of the drugs and paraphernalia because an officer testified that he observed James dropping something from his waistline and later recovered the evidence in that same area. The Court then concluded there was insufficient evidence to support the tampering with physical evidence charge because James's dropping the glass pipe on the ground in the presence of an officer did not constitute "concealment" or "removal" under the statute. The Court looked to the interpretations of similar statutes by other state courts and concluded that, where a defendant merely drops, throws down, or abandons potential evidence of a possessory crime in the vicinity of the defendant and in the presence and view of the police, and in a manner that renders the evidence quickly and readily retrievable by the police, the act of "concealment" or "removal" has not occurred under KRS 524.100. Accordingly, the Court upheld James's convictions for possession of a controlled substance and drug paraphernalia but reversed the conviction for tampering with physical evidence.

D. Keantay Hunter v. Commonwealth of Kentucky
2018-SC-000166-MR **October 31, 2019**

Opinion of the Court by Justice Keller. All sitting; all concur. On July 17, 2012, patrol officers noticed Keantay Hunter jogging and attempting to waive down a car with a heavy object in the pocket of his shorts, which the officers believed to be a gun. They approached Hunter and announced that they were police. In response, Hunter immediately ran from the officers. Hunter was apprehended and arrested, but his pocket was empty. Officers set up a perimeter to locate the gun. In this other pocket, the officers located a live .380 round. They then received a "shots fired" call over the radio, in reference to the shooting of two individuals in a nearby home. One of those individuals had been fatally wounded. Hunter, then seventeen years old, was ultimately transferred to circuit court under KRS 635.020(4) for trial as an adult. A Jefferson County jury found him guilty of murder, assault in the first degree, tampering with physical evidence, fleeing or evading police in the second degree, and possession of a handgun by a minor. He was sentenced to twenty-five (25) years in prison. The Supreme Court affirmed in part and reversed in part. The Court first held that the juvenile transfer statute, KRS 635.020(4), was constitutional. Furthermore, the trial court did not err in denying Hunter's motion to suppress the gun and live round as fruits of an illegal search and seizure. Under *California v. Hodari D.*, 499 U.S. 621 (1991) and *Taylor v. Commonwealth*, 125 S.W.3d 216 (Ky. 2003), Hunter was not seized

until he was physically subdued by the officers. At that point, they had probable cause to arrest Hunter for fleeing and evading in the first degree. The live round was then discovered in a search incident to that lawful arrest. The Court also held that the jury verdict of not guilty on attempted murder and the verdict of guilty on assault first degree were not inconsistent. Lastly, the Court held that the trial court did not err in denying Hunter's motions for directed verdict on assault in the first degree and tampering with physical evidence because the Commonwealth had presented sufficient evidence of both for a reasonable jury to find guilt. Both parties agreed, however, that the trial court had erred in denying Hunter's motion for directed verdict on the charge of fleeing or evading police in the second degree. The Supreme Court therefore vacated Hunter's conviction for fleeing or evading police in the second degree but affirmed the remaining convictions. The case was remanded to the trial court for entry of a judgment consistent with the Court's opinion.

E. Benjamin Dwayne Ward v. Commonwealth of Kentucky
2018-SC-000056-MR **October 31, 2019**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Ward was convicted in Boone Circuit Court of first-degree sexual abuse, third-degree rape, third-degree sodomy, use of a minor in a sexual performance, and possession of matter portraying a sexual performance by a minor. Ward appealed to the Kentucky Supreme Court as a matter of right alleging several issues for review.

The Court first held that the Commonwealth's possession of privileged attorney-client information, in the form of jail phone calls including conversations between Ward and his attorney, did not violate Ward's Sixth Amendment right to counsel. As such, the Commonwealth's possession of that information did not require the disqualification of the Commonwealth's Attorney's Office and the Sheriff's Department. The Court noted that there was no evidence suggesting that the jail routinely recorded attorney-client telephone calls or visits, or that the jail had no protocol for privileged calls or visits. The Commonwealth had also not sought to obtain recordings of privileged conversations and, instead, the obtaining of such calls was a mistake. The Court next held that the trial Court erred in denying Ward's motion to strike for cause a prospective juror who indicated that she had previously been raped while she was a minor. The Court found that the nature of the juror's experience and her answers to defense counsel and the trial court's questions created a reasonable ground to believe the juror could not render a fair and impartial verdict on the evidence. The Court also found this error to be preserved and, relatedly, announced a new rule that litigants must show clearly on their strike sheet that a peremptory strike was used on the juror for which they later complain on appeal should have been struck for cause. As such, the Court reversed Ward's conviction and remanded the case for a new trial.

The Court also addressed two issues likely to occur on remand. First, the Court held that the trial court's denial of Ward's motion to suppress evidence recovered by officers at his residence was, at most, harmless error, because the only

evidence recovered was one or two cell phones, and Ward had not explained how the admission into evidence of the cell phones or their contents harmed him during his trial. Second, the Court determined that the trial court did not err in excluding from evidence, pursuant to the rape shield rule, testimony regarding the victim's prior allegations of sexual misconduct made against her brother because there was not a substantial probability that the prior allegations were false.

F. Commonwealth of Kentucky v. Sherry Gilmore
2018-SC-000588-DG **October 31, 2019**

Opinion of the Court by Justice VanMeter. All sitting; all concur. The Court granted discretionary review of a Court of Appeals' decision holding that the trial court's probation revocation findings were not adequate to satisfy the requirements of KRS 439.3106. After review, the Court opined that an appellate court reviews probation revocation findings of a trial court by looking at "both the written and oral findings in conjunction with one another and not separately in a vacuum." After conducting this analysis, the Court held that the trial court complied with KRS 439.3106 and the rule set forth in *Commonwealth v. Andrews*, 448 S.W.3d 773 (Ky. 2014), regarding the requirements of probation revocation hearings. Accordingly, the Court of Appeals' opinion was reversed.

IV. DEBT COLLECTION:

A. University of Kentucky, Etc., et al. v. Sarah R. Moore, et al.
AND
Commonwealth of Kentucky, Department of Revenue, et al v. Sarah R. Moore
2018-SC-000193-TG
2018-SC-000194-TG **October 31, 2019**

Opinion of the Court by Justice Hughes. All sitting; all concur. Using KRS Chapter 45's statutory framework for debt collection, University of Kentucky referred Sarah Moore's delinquent UK Healthcare accounts to the Kentucky Department of Revenue for collection rather than filing civil suit against Moore. The Department's collection efforts included imposition of a 25% collection fee and interest as well as garnishment of Moore's paychecks, bank accounts, and tax refunds. Moore filed suit against UK and the Department and petitioned the circuit court for a declaration that the University is not an agency within the executive branch as required by KRS 45.237(l)(a) and therefore not authorized to refer its accounts to the Department. The circuit court rejected the University's claim that sovereign immunity barred Moore's action and declared the University is not in the executive branch of state government for purposes of KRS 45.237 *et seq*. Both decisions were appealed by the University and the Department, and the appeals were transferred from the Court of Appeals to the Supreme Court. *Held*: UK is within the executive branch for purposes of KRS 45.237 *et seq.* The University is principally a creature of the legislature, and must fall within one of the three recognized branches. Neither removal of UK from the Department of

Education through the 1952 amendment of KRS 156.010(3), nor KRS164.225's or KRS164.160's grant of a level of autonomy to the state universities which may not be enjoyed by other executive branch entities excludes UK from the executive branch. Furthermore, while *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*,498 S.W.3d 355 (Ky. 2016), recognized that state universities maintain statutorily recognized independence in many respects, it also recognized that they are attached to the executive branch. Finally, as explained in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), the state is not sovereignly immune from a declaratory judgment action.

V. ATTORNEY DISCIPLINE:

A. Kentucky Bar Association v. Cassidy Ann Teater
2019-SC-000412-KB **October 31, 2019**

Opinion and Order of the Court. All sitting; all concur. Teater was retained to represent a client in a deportation matter in the US Immigration Court in Memphis. Teater failed to prepare her client or witnesses for the hearing and later failed to communicate with her client or inform him of the results of the hearing. The client filed a bar complaint but Teater failed to respond or participate in any of the disciplinary hearings.

The Inquiry Commission ultimately issued five charges against Teater including violations of SCR 3.130(1.1); SCR 3.130(1.3): SCR 3.130(1.4)(a)(3); SCR 3.130(1.4)(1)(4); and SCR 3.130(8.1)(b). Teater again failed to respond to the charges and the matter was submitted to the Board of Governors as a default case under SCR 3.210. The Board unanimously recommended that Teater be found guilty of all charges and that she be suspended from the practice of law for 30 days, to run consecutively with her current suspension for CLE deficiency; that she be referred to the Kentucky Lawyer Assistance Program; and that she be required to attend and successfully complete Bar Counsel's Ethics and Professionalism Enhancement Program.

After considering the current charges and Teater's disciplinary history – including two private admonitions and her current suspension for CLE deficiency – the Supreme Court adopted the Board's recommended discipline in full and sanctioned Teater accordingly.

B. Mark Kindred Wickersham v. Kentucky Bar Association
2019-SC-000540-KB **October 31, 2019**

Opinion and Order of the Court. All sitting; all concur. Attorney Mark Kindred Wickersham and the Kentucky Bar Association (KBA) agreed to a negotiated sanction under Supreme Court Rule (SCR) 3.480(2) to impose a suspension of Wickersham for violations of SCR 3.130(8.4)(b) ("It is profession misconduct for

a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]"). In 2017, Wickersham was indicted by a Madison County Grand Jury for three counts of First-Degree Wanton Endangerment, alcohol intoxication in a public place, and DUI. The criminal case was resolved by a guilty-plea agreement in Madison Circuit Court, providing for pretrial diversion for a period of three years.

Thereafter, an Inquiry Commission Complaint was filed and Wickersham and the KBA reached a negotiated sanction providing for suspension of Wickersham's license to practice law in Kentucky for a period of three years, or until he has satisfied in full the terms and conditions of his pretrial diversion in the criminal proceedings, whichever event occurs first. The KBA stated no objection to the proposed discipline. The Court approved the negotiated sanction in light of Fink v. Ky. Bar Ass'n, 568 S.W.3d 354 (Ky. 2019), Kentucky Bar Association v. Embry, 152 S.W.3d 869 (Ky. 2005), and Wade v. Ky. Bar Ass'n, 126 S.W.3d 358 (Ky. 2004). The Court also found that significant mitigating circumstances offered by Wickersham and the KBA, including Wickersham's health and financial hardships suffered during the years leading up to the criminal action, and Wickersham's demonstrated commitment to treatment and sobriety, supported the proposed discipline.

C. William Joshua Brown v. Kentucky Bar Association
2019-SC-000593-KB October 31, 2019

Opinion and Order of the Court. All sitting; all concur. Brown sought restoration of his license to practice law after a non-disciplinary suspension for non-payment of dues. In mid-2015, Brown left the practice of law in Kentucky and moved to Florida. He did not, however, withdraw from the KBA and was subsequently suspended in 2017 for non-payment of dues.

In 2018, Brown timely filed an application for restoration under SCR 3.500(1), including the required payment for the filing fee, back dues, late fee and costs and the necessary CLE certification. Due to concerns with Brown's application, the Board of Governors referred the matter to the Character and Fitness Committee pursuant to SCR 3.500(2)(d). After considering Brown's application and his previous discipline, which included two private admonitions, the Committee ultimately determined that Brown met the standards required for restoration and recommended approval.

Upon receiving the Committee's recommendation, the Board again considered Brown's application and unanimously concluded that he met the standards required for restoration. The Supreme Court reviewed the recommendations of the Committee and the Board and agreed that Brown should be restored to the practice of law, with the condition that he pay current membership dues and the costs related to this proceeding.