

**KENTUCKY SUPREME COURT  
OCTOBER 2020**

**CONTRACTS:**

**Frank Lassiter v. William M. Landrum, III**

**[2018-SC-0657-DG](#)**

**October 29, 2020**

Opinion of the Court by Justice Lambert. All sitting; all concur. The Court addressed the subpoena powers of the Secretary of the Finance and Administration Cabinet. The Court held: (1) under KRS 45.131 and KRS 42.142, the Secretary may issue subpoenas as part of an investigation into a possible violation of Kentucky’s Model Procurement Code; and (2) the Secretary may issue subpoenas to non-government employees as part of an investigation into a possible violation of Kentucky’s Model Procurement Code.

**CRIMINAL LAW:**

**Kenneth Lee v. Kentucky Department of Corrections**

**[2018-SC-0403-DG](#)**

**October 29, 2020**

Opinion of the Court by Justice Hughes. Minton, C.J.; Hughes, Keller, Nickell, VanMeter and Wright, JJ., sitting. All concur. Lambert, J., not sitting. Criminal Appeal, Discretionary Review Granted. Kenneth Lee was convicted of twelve counts of robbery and was classified by the Kentucky Department of Corrections (DOC) under KRS 429.3401(1) as a violent offender, despite the Jefferson Circuit Court not stating in its judgment that any of Lee’s victims suffered serious physical injury or death. Lee petitioned Lyon Circuit Court to declare his violent offender classification unconstitutional, primarily relying on an apparent inconsistency between *Pate v. Department of Corrections*, 466 S.W.3d 480 (Ky. 2015), and *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). *Benet* holds that a defendant automatically becomes a violent offender at the time of his conviction of an offense specifically enumerated in KRS 439.3401(1), regardless of whether the final judgment contains a designation about the victim suffering serious physical injury or death. The Lyon Circuit Court dismissed Lee’s petition for a declaration of rights and the Court of Appeals affirmed. Upon discretionary review, the Kentucky Supreme Court concluded *Benet* accurately interprets KRS 439.3401(1), overruled the portion of *Pate* inconsistent with *Benet*, and affirmed the Court of Appeals and Lyon Circuit Court. Because KRS 439.3401(1)(m) clearly provides that one who commits first-degree robbery is a violent offender, the DOC properly classified Lee as a violent offender. The plain language of KRS 439.3401(1) requires a trial court judgment to state if a victim of any crime listed in KRS 439.3401(1) suffers death or physical injury, if such a finding is supported by the facts of a case. Because none of Lee’s victims suffered serious physical injury or death, the trial court was not required to make any such designation in Lee’s final judgment.

**Chazerae Me’Lon Taylor, Sr. v. Commonwealth of Kentucky**

**[2019-SC-0066-MR](#)**

**[2019-SC-0138-TG](#)**

**October 29, 2020**

Opinion of the Court by Justice VanMeter. All sitting; all concur. Chazerae Taylor appeals as a matter of right from his twenty-year sentence for convictions of wanton murder and four counts

of first-degree wanton endangerment. A jury convicted Taylor of murder under a theory of aggravated wanton conduct under KRS 507.020(1)(b), which requires a person to act “under circumstances manifesting extreme indifference to human life . . . [and] wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.” With respect to first-degree wanton endangerment, the jury found that Taylor engaged in conduct that created “a substantial danger of death or serious physical injury to another person.” KRS 508.060(1). The Supreme Court affirmed Taylor’s convictions and sentence, finding that the trial court did not err by denying his motions for a directed verdict of acquittal on these charges. Under KRS 501.020(3), the Court held that a jury could have reasonably found that Taylor’s conduct was “wanton” – that he knew, or should have known, a shoot-out was rendered substantially more probable by his firing the initial, and multiple, shots into the air amid a late-night crowd gathered in a parking lot to socialize, and that he consciously disregarded a risk that a reasonable person in the same situation would not have disregarded. Regarding causation per KRS 501.060, the Court held that a reasonable jury could have concluded that Taylor’s conduct set into motion the foreseeable response gunfire that resulted in the victim’s death and created a substantial danger of death or serious physical injury to the four people in the victim’s immediate vicinity. With respect to whether others’ responsive gunfire was an intervening event that cut off the chain of causation between Taylor’s conduct and the victim’s death and the endangerment to those near her, the Court held that the inquiry was the same: “Did the defendant know, or have reason to know, that the result (as it actually occurred) was rendered substantially more probable by his conduct?” The Court concluded that the chain of causation remained unbroken in this case and accordingly affirmed.

**Commonwealth of Kentucky v. Leecole Mitchell**  
**[2019-SC-0087-DG](#)**

**October 29, 2020**

Opinion of the Court by Justice Keller. All sitting; all concur. LeeCole Mitchell entered a conditional guilty plea to the charge of felon in possession of a handgun, reserving the right to appeal the trial court’s denial of his motion to suppress evidence obtained from the search of a vehicle in which he was a passenger. Mitchell argued that the stop was impermissibly extended under *Rodriguez v. United States*, 575 U.S. 348 (2015), to facilitate the dog sniff.

At the suppression hearing, the Commonwealth argued the stop was not impermissibly extended to facilitate the dog sniff and that officers possessed reasonable suspicion transforming the stop into a *Terry* stop justifying Mitchell’s detention until the dog’s arrival. The trial court found the stop was not unreasonably delayed but did not address the Commonwealth’s reasonable suspicion argument. The Court of Appeals reversed, finding that the stop was impermissibly extended and that the Commonwealth was precluded from arguing reasonable suspicion to justify the extension.

The Kentucky Supreme Court granted discretionary review to decide whether the officers impermissibly extended Mitchell’s stop and whether *Smith v. Commonwealth*, 542 S.W.3d 276 (Ky. 2018), precluded the Commonwealth’s reasonable suspicion argument. The Supreme Court affirmed the Court of Appeals’ holding that Mitchell’s stop was impermissibly extended but reversed its holding that the Commonwealth’s reasonable suspicion argument was precluded.

In affirming the impermissible extension, the Court stated the permissible duration of a stop is a fluid and fact dependent analysis. Courts must review the actual actions taken by the officers during the stop. Here, it was unrefuted that officers ceased conducting the original purpose of the stop to discuss the need for a canine unit and that the completion of the citation corresponded with the arrival of the canine unit. There is no *de minimis* or “reasonableness” exception for delays attributed to actions unrelated to the stop’s original purpose.

As to officers’ reasonable suspicion, the Court held the Court of Appeals erred in finding the issue precluded. The Court of Appeals incorrectly applied *Smith* to the Commonwealth’s argument. *Smith* concerned a case where the Commonwealth was seeking to reverse a trial court’s suppression of evidence by introducing a new argument at the appellate level. Under CR 52.04, a party seeking to reverse a trial court is precluded from arguing issues not brought to the attention of the trial court, but the restriction does not apply to arguments seeking to affirm a trial court. Furthermore, the Commonwealth argued reasonable suspicion to the trial court, but the trial court failed to make any findings relevant to that argument. Due to a lack of factual findings or conclusions of law on the record regarding officers’ reasonable suspicion, the issue was remanded to the trial court.

**Benny Lee Hodge v. Commonwealth of Kentucky**  
[2019-SC-0137-TG](#)

**October 29, 2020**

Opinion of the Court by Justice VanMeter. Minton, C.J.; Hughes, Keller, Lambert, Nickell, and VanMeter, JJ., sitting. All concur. Wright, J., not sitting. On transfer from the Court of Appeals, the Supreme Court held that the Laurel Circuit Court did not err in denying Hodge’s motion for DNA testing with respect to hair found at the residence of Bessie and Edwin Morris, for whose June 1985 murders, burglary and robbery, Hodge was convicted and sentenced to death. The Court noted that Hodge’s DNA arguments had been raised and rejected both by this Court and the federal courts, but nonetheless proceeded to address the merits of his claims due to the severity of his sentence. With respect to Hodge’s claim that testing seven hairs may prove that co-defendant Bartley had entered the Morris’ house with him, the Supreme Court noted the proof that Bartley was also at the crime scene that night and that DNA results of hair testing showing that Bartley was inside the home with Hodge would not have influenced the jury to find Hodge not guilty as any evidence that Bartley’s hairs were inside the home would not demonstrate that Hodge was not also inside and helped to kill and rob the two victims and burglarize the residence. Based on the extensive evidence of Hodge’s direct involvement inside the residence, the Court concluded that no reasonable probability exists that Hodge’s “verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence[.]” KRS 422.285(6)(a).

**Brady Lee Ray v. Commonwealth of Kentucky**  
[2019-SC-0164-MR](#)

**October 29, 2020**

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Hughes, Lambert, VanMeter, and Wright, JJ., concur. Keller and Nickell, JJ., concur in result only. Ray was convicted of one count each of attempted murder, first-degree robbery, first-degree burglary, first-degree wanton endangerment, and violating an emergency protective order/domestic violence order. Ray broke

into the home of his father-in-law and attacked his estranged wife. On appeal, Ray argued that the trial court erred by failing to grant his directed verdict motions on the charges of first-degree robbery and first-degree wanton endangerment. The Commonwealth responded that Ray failed to properly preserve the issue for appeal due to his failure to move for directed verdict on all of the charges against him, as well as all of their lesser included offenses, and thereafter failed to object to the jury being instructed on first-degree robbery and first-degree wanton endangerment. The Court held that the rule cited by the Commonwealth had historically been inconsistently applied and was cumbersome and inconsistent with modern trial practice. The Court overruled *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (Ky. 1977), and its progeny insofar as it requires a defendant to move for directed verdict on all of the charges against him and all of their lesser included offenses and thereafter object to a jury instruction on a particular charge in order to preserve a failure to grant a directed verdict issue for appeal. The Court held that in order to preserve a directed verdict issue for appeal, a criminal defendant need only move for a directed verdict at the close of the Commonwealth's evidence; renew the same directed verdict motion at the close of all the evidence, unless the defendant does not present any evidence; and in those motions identify the particular charge the Commonwealth allegedly failed to prove and which elements of the charge the Commonwealth allegedly failed to prove. The Court further held that the trial court did not err by denying Ray's motions for directed verdict, and that no reversible errors occurred during the sentencing phase of Ray's trial.

**Commonwealth of Kentucky v. Michael Wayne Crowe**  
**[2019-SC-0231-DG](#)**

**October 29, 2020**

Opinion of the Court by Justice Keller. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Nickell, J., not sitting. Michael Wayne Crowe pled guilty to manslaughter in the first degree for the death of his wife, Felicia Walker. After pleading guilty but before he was sentenced by the trial court, Crowe moved the trial court to classify him as a domestic violence victim pursuant to Kentucky Revised Statute ("KRS") 439.3401(5). This classification would reduce his parole eligibility from 85% of his sentence to 20% of his sentence. The trial court denied Crowe's motion finding that the smothering of Walker by Crowe did not occur **as the result of** domestic violence and abuse. The Court of Appeals reversed the trial court, and the Supreme Court granted the Commonwealth's motion for discretionary review.

The Court first clarified the appellate standard of review of a trial court's determination regarding the domestic violence exemption to violent offender parole eligibility. Whether a defendant is a victim of domestic violence or abuse is a factual finding that is reviewed for clear error. Whether the domestic violence or abuse endured by a defendant occurred with regard to the offenses committed by that defendant is a mixed question of law and fact and is reviewed de novo.

In applying that standard of review to the trial court's determination in this case, the Court held that the trial court did not err in finding Crowe was a victim of domestic violence, as its finding was supported by substantial evidence. However, the Court held that the trial court did err when it found that Crowe was not a victim of domestic violence with regard to the manslaughter. The Court reaffirmed its prior holdings that an act of domestic violence need not **cause** the commission of the crime in order for the defendant to be eligible for the domestic violence exemption under KRS 439.3401(5). That is to say, the defendant need not have committed the

crime **because of** the domestic violence nor must the crime be **the result of** the domestic violence for the defendant to be eligible for the domestic violence exemption under KRS 439.3401(5). The domestic violence need only be involved in the commission of the crime or there must be a relationship or a connection between the two.

In this case, the evidence put forth was sufficient to satisfy Crowe's burden of proving by a preponderance of the evidence that he was a victim of domestic violence in regard to the manslaughter of Walker.

**Rickey Allen Rhoton v. Commonwealth of Kentucky**  
**[2019-SC-0298-DG](#)**

**October 29, 2020**

Opinion of the Court by Justice Keller. All sitting; all concur. Rickey Allen Rhoton entered a conditional guilty plea to charges of first-degree possession of a controlled substance, possession of a controlled substance not in original container, and possession of drug paraphernalia. Rhoton moved to suppress the evidence based on the trooper impermissibly extending his stop of Rhoton for a seatbelt violation to facilitate a canine search.

At the suppression hearing, the trial court found that while the stop exceeded the trooper's ordinary seatbelt stop, it was not excessive given the trooper's discovery of an outstanding warrant for the arrest of Rhoton's passenger and the need to take the passenger into custody. Furthermore, even absent the need to take the passenger into custody, the trooper's observation of a container he associated with drug activity, coupled with the stop's location, provided an independent reasonable suspicion of criminal activity to justify prolonging the stop. The Court of Appeals affirmed the trial court.

The Kentucky Supreme Court granted Rhoton's motion for discretionary review to address two questions. First, was Rhoton's stop impermissibly extended? Second, was the trooper's observation of a small container, readily available from local merchants, sufficient independent reasonable suspicion for a search?

The Supreme Court held that actions taken to facilitate the arrest of Rhoton's passenger did not impermissibly extend his traffic stop. While the stop exceeded the time for an ordinary seatbelt violation, this was not an ordinary stop. Officers are permitted to run routine warrant checks, and the resulting notification of an outstanding warrant provided the trooper independent probable cause to extend a stop for the time reasonably necessary to address the warrant. Citing the recent opinion from *Carlisle v. Commonwealth*, 601 S.W.3d 168 (Ky. 2020), the Court held that in the interest of officer safety, those at the scene can be detained until a stop is complete. While *Carlisle* dealt with the detention of a passenger as officers investigated the driver, the Court concluded there was no reason for the rule to apply differently to the detention of a driver while processing the passenger. Having found that Rhoton's traffic stop was not impermissibly extended, the Supreme Court declined to address whether the trooper's observation of the container combined with the stop being in a high-crime area provided independent reasonable suspicion to extend the stop.

**FAMILY LAW:**

**Commonwealth of Kentucky, Cabinet for Health and Family Services v. K.S., et al.**

**2019-SC-0692-DGE**

**October 29, 2020**

Opinion of the Court by Justice Lambert. All sitting; all concur. The Court considered whether KRS 620.100 or the Kentucky Constitution require that indigent parents receive reasonably necessary expert assistance in dependency, neglect, and abuse proceedings. The Court held that the statute did not mandate funding for experts. However, it held that the due process provisions of the Kentucky Constitution require that parents receive expert funding in certain circumstances. Looking to *Ake v. Oklahoma*, 470 U.S. 68 (1985) for guidance, the Court set out a new test to guide family courts in their consideration of requests for expert assistance.

**PRODUCTS LIABILITY:**

**Clifford Russell, Sr., et al. v. Johnson & Johnson, Inc., et al.**

**2019-SC-0118-DG**

**October 29, 2020**

Opinion of the Court by Justice Wright. Minton, C.J.; Hughes, Keller, Lambert, VanMeter, and Wright, JJ., sitting. All concur. Nickell, J., not sitting. Appellants, Clifford Russell and his wife Jeanene (“Russells”), alleged state tort claims against the collective Biosense Appellees (“Biosense”) for injuries caused by an investigational, Class III medical device. The Russells attempted written discovery to gather information on the investigational device, but Biosense objected and then moved for judgment on the pleadings. Biosense argued federal preemption of all claims due to the limited preemption clause in the Medical Device Amendments of 1976. Although the Russells argued they asserted non-preempted state tort claims, the trial court granted Biosense’s motion, dismissing the Russells’ claims; the Court of Appeals affirmed. The Russells petitioned the Supreme Court of Kentucky for discretionary review, which was granted. Following the Kentucky Rules of Civil Procedure, the Supreme Court reversed the Court of Appeals; “[Kentucky’s] high standard necessary for granting a judgment on the pleadings requires there be no possible way the opposing party can prevail.” Further, the Supreme Court “refuse[d] to mandate a heightened pleading standard and, therefore, reiterate[d] Kentucky’s requirement of bare-bones, notice pleading.” The Supreme Court also clarified the interaction of Kentucky’s state claims and causes of action with the limited federal preemption clause in the Medical Device Amendments of 1976, explaining it “is not a blanket federal preemption of state causes of action.”

**ATTORNEY DISCIPLINE:**

**Christy Hanley Shircliff v. Kentucky Bar Association**

**2020-SC-0123-KB**

**October 29, 2020**

Opinion and Order of the Court. All sitting; all concur. Shircliff moved the Supreme court of Kentucky to enter a one-year suspension stemming from a negotiated sanction pursuant to SCR 3.480(2) in order to resolve pending disciplinary proceedings against her in three separate files. In the first file, Shircliff was hired to represent a client in a child custody case and took a retainer of \$1,800. In that case, Shircliff failed to file a petition to register a foreign judgment, failed to reply to communication from the client, and did not respond to attempts to account for or recover the \$1,800 retainer.

A bar complaint was filed and Shircliff failed to respond. The Inquiry Commission filed a change against Shircliff who filed an untimely response. In the interim, Shircliff failed to response to KBA's motion for indefinite suspension pursuant to SCR 3.380(2) and Shircliff was indefinitely suspended on February 14, 2019. Despite the indefinite suspension, Shircliff continued to practice law and represent clients.

Per the negotiated sanction agreement, Shircliff admitted to violating numerous Supreme Court Rules including, but not limited to, SCR 3.130(8.1)(b) (failing to respond to a lawful demand for information from and admissions or disciplinary authority); SCR 3.130(1.3) (diligence and promptness in representing a client); SCR 3.130(1.4)(a)(4) (promptly complying with a reasonable request); SCR 3.130(1.16)(d) (failing to return the unearned retainer); SCR 3.130(5.5)(a) (practicing law in a jurisdiction in violation of the legal profession); SCR 3.130 (5.5)(b) for failing to disclose her indefinite suspension to a court, opposing counsel, and her client); SCR 3.130 (5.7)(a) (continuing to represent clients while suspended); SCR 3.130(3.4)(c) (knowingly disobeying the Court's order of suspension and continuing to practice law); and SCR 3.130(7.50)(5) (misrepresenting her suspension to clients when notifying of her suspension).

Initially, Shircliff's suspension was to be retroactive. However, the Court found that too lenient of a punishment especially in light of Shircliff's continued practice of law throughout her suspension. Instead, the Court suspended Shircliff for one year from the date of this Order.

**Kentucky Bar Association v. Robert Andrew Rowland**  
**[2020-SC-0228-KB](#)**

**October 29, 2020**

Opinion and Order of the Court. All sitting. Minton, C.J.; Hughes, Keller, Lambert, Nickell and Wright, JJ., concur. VanMeter, J., concurs in part and dissents in part by separate opinion. The Inquiry Commission of the Kentucky Bar Association (KBA) levied a four-count charge against Rowland for violating SCR 3.130(8.1)(b) (knowing failure to respond to a lawful demand for information from a disciplinary authority); SCR 3.130(1.3)(reasonable diligence); SCR 3.130(1.4)(a)(4) (prompt compliance with requires for information); and SCR 3.130(1.16)(d) (steps to be taken upon termination of representation). Rowland took a \$2,000 retainer and did not execute any kind of payment agreement. Rowland filed some documents on his client's behalf but then did not have any other contact with his client after repeated attempts by the client for communication. Further, Rowland failed to communicate with opposing counsel and failed to set up mediation in the case. Finally, Rowland failed to provide the client's full case file and failed to account or refund the \$2,000 retainer.

After being served with the bar complaint, Rowland failed to respond to the complaint or the request for additional information. After issuing its four-count charge, Rowland answered with a one-page answer and otherwise did not participate in the disciplinary process. A trial commissioner was appointed to the disciplinary case and made several unsuccessful attempts to contact Rowland. The Supreme Court of Kentucky temporarily suspended Rowland on February 20, 2020, for failing to participate in the disciplinary process. On March 2, 2020, Rowland provided the KBA copies of letters sent to clients, pursuant to SCR 3.390, to inform them of his suspension. Additionally, Rowland requested a final determination of his disciplinary action. On March 31, 2020, the trial commissioner issued his Memorandum finding Rowland violated all four rules as alleged by the KBA and adopted the recommendation of the KBA for a 181-day

suspension with conditions. The Court reviewed the trial commissioner's order on its own initiative and adopted the findings of fact but disagreed with the penalty. Instead, the Court found the penalty to be too harsh and inconsistent with prior disciplinary cases. The Court suspended Rowland for 180 days with the only disagreement on the Court being to adopt the original trial commissioner's recommendation of a 181-day suspension.

**Kentucky Bar Association v. Leila Louise Hale**

[2020-SC-0317-KB](#)

**October 29, 2020**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association (KBA) moved the Supreme Court of Kentucky to enter an order directing Hale to show cause why she should not be subject to reciprocal discipline after being publicly reprimanded by the Nevada disciplinary authority. The Nevada disciplinary authority publicly reprimanded Hale for Hale's non-attorney employee engaging in the unauthorized practice of law and for an unreasonable retainer agreement (Kentucky Supreme Court Rules 3.130-5.3 and 3.120-1.5 respectively). Hale failed to show cause as to why reciprocal discipline should not be imposed. Per SCR 3.425(4), the Court granted KBA's motion to publicly reprimand Hale.

**Kentucky Bar Association v. Harold McClure Schwarz, III**

[2020-SC-0318-KB](#)

**October 29, 2020**

Opinion and Order of the Court. All sitting; all concur. The Kentucky Bar Association (KBA) moved the Supreme Court of Kentucky to enter an order directing Schwarz to show cause why he should not be subject to reciprocal discipline after being indefinitely suspended from the practice of law by the Supreme Court of Ohio. Schwarz's indefinite suspension in Ohio stems from a guilty plea for importuning for soliciting an undercover law-enforcement officer who posed as a 15-year-old boy. Schwarz failed to reply to KBA's show cause request. Per SCR 3.425(4), the Court granted KBA's motion to indefinitely suspend Schwarz.

**Kentucky Bar Association v. Ryan Richard Stith**

[2020-SC-0320-KB](#)

**October 29, 2020**

Opinion and Order of the Court. All sitting; all concur. Stith was an associate attorney for Wael Ahmad. Ahmad filed a bar complaint against Stith for Stith's failure to adequately represent clients, which included missing appeals deadlines, misplacing documents, and failing to seek guidance on cases he was not qualified to practice. Before leaving the firm, Stith disclosed to Ahmad that he was struggling with alcohol impairment.

Service of the bar complaint was unsuccessful at Stith's roster address and person service was eventually perfected by the Fayette County Sheriff's Department. Stith failed to respond to the complaint. The Inquiry Commission charged Stith with violating SCR 3.130(1.1) (competency), SCR 3.130(1.3) (reasonable diligence), SCR 3.130(1.4)(a)(3) (communication), and SCR 3.130(8.1)(b) (failure to respond to a lawful demand from a disciplinary authority). The Kentucky Bar Association (KBA) provided to Stith an authorization form for Kentucky Lawyer's Assistance (KYLAP) along with the charge. Despite numerous attempts by the KBA, Stith failed to participate in the disciplinary process including failing to answer either the initial bar complaint or the charge against him. Due to his failure to respond, the KBA requested that the Supreme Court of Kentucky

indefinitely suspend Stith. Accordingly, the Court granted the KBA's request and indefinitely suspended Stith.