

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
SEPTEMBER 2014**

I. CRIMINAL LAW:

**A. Robert Mason Parker v. Commonwealth of Kentucky
2011-SC-000662-SC September 18, 2014**

Opinion of the Court by Justice Cunningham. All sitting. Minton, C.J.; Cunningham, Keller, Noble, Scott and Venters, JJ., concur. Abramson, J., concurs in result only. Appellant was arrested after police officers discovered contraband in Appellant's vehicle. The search complied with *New York v. Belton*, 453 U.S. 454 (1981), which was the law at the time of the search. Relying on *Arizona v. Gant*, 556 U.S. 332 (2009), the trial court suppressed the evidence. The Commonwealth conceded that the search of Appellant's vehicle did not comply with *Gant*. Relying on *Davis v. United States*, 131 S. Ct. 2419 (2011), a Court of Appeals panel unanimously reversed the circuit court's order suppressing the evidence. The Supreme Court of Kentucky granted discretionary review and held the following: 1) the Commonwealth's motion for additional findings pursuant to RCr. 9.78 is treated as a CR 52.02 motion, thus tolling the appeal period provided by CR 73.02(1)(e); and 2) when law enforcement officers conduct a search in objectively reasonable reliance on clearly established precedent from the Supreme Court of Kentucky or the United States Supreme Court, the exclusionary rule does not apply to exclude the admission of evidence obtained as a result of the search.

**B. James Hedgepath v. Commonwealth of Kentucky
2013-SC-000343-MR September 18, 2014**

Opinion of the Court by Justice Noble. All sitting; all concur. James Hedgepath was sentenced to 50 years imprisonment upon entering a plea of guilty to murder conditioned on being able to appeal the issues raised in this appeal. Hedgepath appealed to the Court as a matter of right, see Ky. Const. § 110(2)(b), claiming that the trial court erred (1) by refusing to suppress evidence against him, (2) by refusing to sever some of this charges, and (3) by excluding recorded statements of the victim's minor children, who could not be found to testify at trial. In affirming Hedgepath's conviction and sentence, the Supreme Court held that (1) the fruit-of-the-poisonous tree doctrine did not require suppression of evidence obtained after detective improperly learned the real-time location of Hedgepath's cell-phone as a result of failing to have the service provider stop "pinging" the phone after exigent circumstances had ceased; (2) seizure of Hedgepath's SUV was legal under the automobile exception; (3) the search of the contents of Hedgepath's cell phone was legal under *Riley v. California*, 134 S. Ct. 2473, 2485 (2014), because police had a sufficiently particular search warrant; (4) joinder of charges for sexual assault on January 15 with charges of sexual assault and murder on January 16 was not erroneous; and (5) exclusion of recorded statements of victim's children was not error as Hedgepath's indirect aaltperp

theory, which he sought to support through introduction of the recordings, was far-fetched and implausible.

**C. Anthony Edward Spicer v. Commonwealth of Kentucky
2013-SC-000735-MR September 18, 2014**

Opinion of the Court by Justice Scott. All sitting; all concur. A Whitley Circuit Court jury found Appellant, Anthony Edward Spicer, guilty of criminal attempt to commit murder and first-degree criminal assault. Appellant was sentenced to twenty years' imprisonment on the attempted murder charge and twelve years' imprisonment on the assault charge, to be served consecutively. He appealed to the Supreme Court of Kentucky as a matter of right, Ky. Const. § 110(2)(b), asserting (1) his convictions for both attempted murder and assault violate our statutory restraints on double jeopardy, (2) a news reporter's interview with Appellant was improperly shown to the jury, and (3) the trial court's order imposing court costs and attorney's fees should be vacated. The Supreme Court affirmed in part and reversed in part, vacating Appellant's conviction and sentence for first-degree assault, vacating the imposition of partial attorney's fees, and affirming his conviction and sentence for attempted murder along with the imposition of courts costs and the arrest fee.

**D. Patrick W. Darcy v. Commonwealth of Kentucky
2012-SC-000427-MR September 18, 2014**

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Patrick Darcy and Randy McCleery were arrested and charged with multiple offenses. Their cases were properly consolidated for trial. Prior to trial, McCleery invoked his statutory speedy-trial right pursuant to KRS 500.110, which, under certain circumstances, grants criminal defendants the right to be tried within 180 days of their speedy-trial demand. Following McCleery's demand, and twelve days before the scheduled trial date, Darcy moved the trial court for a continuance to employ private counsel ahead of trial. In denying the motion, the trial court deferred to McCleery's statutory speedy-trial right and neglected to weigh the factors outlined in Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), on the record. Darcy proceeded to trial represented by the Department of Public Advocacy and was convicted of all charges.

In reversing the trial court's denial of Darcy's motion for a continuance, the Court found that a defendant's motion for a reasonable continuance of a joint trial falls within the "elastic" clause of KRS 500.110, allowing extension of the statutory speedy-trial time period. As a result, the Court held that the trial court erred by denying Darcy's motion to continue the joint trial solely on the basis of McCleery's statutory speedy-trial right. Instead, the Court explained, the trial court should have incorporated McCleery's interest in a speedy trial in its analysis of the Snodgrass factors.

II. EMPLOYMENT LAW:

A. **Kentucky Uninsured Employers' Fund v. Julian Hoskins, et al.** **[2012-SC-000008-WC](#) September 18, 2014**

Opinion of the Court by Justice Venters. All sitting; all concur. Workers' Compensation; Employee Leasing Companies; Loaned Servant Doctrine. The Workers' Compensation Board and the Court of Appeals concluded that an injured truck driver was not an "employee" of the employee leasing company that contracted with his employer for worker's compensation coverage because the truck driver had no knowledge of employee leasing arrangement, applying the loaned servant principle that no "contract of hire" can exist where the employee has no knowledge of his employer ("An employee, for compensation purposes, cannot have an employer thrust upon him against his will or without his knowledge.") Consequently, the leasing company's workers' compensation carrier was not liable for the truck driver's workers' compensation benefits, and that liability shifted to the UEF. Upon appeal, the Supreme Court reversed. Held: 1) The common law loaned servant doctrine does not apply to an employee leasing arrangement as defined in KRS 342.615, and thus the employee's lack of knowledge about his leasing company employer does not negate the existence of a "contract of hire;" 2) In the context of an employee leasing arrangement, KRS 342.615, which contains no requirement that employee have notice of the leasing arrangement, supersedes common law loaned servant doctrine; 3) KRS 342.640 requires that in order for there to be a "contract of hire," the employer must have actual or constructive knowledge of the employment relationship, not that the employee must have such knowledge.

III. FAMILY LAW:

A. **Fonda Morgan v. Daniel Getter and A.G., a Child** **[2013-SC-000196-DGE](#) September 18, 2014**

Opinion of the Court by Justice Abramson. All sitting; all concur. In a KRS Chapter 403 child-custody proceeding the trial court appointed a guardian ad litem to represent the child. The GAL filed a custody report and recommended that custody be transferred to father. The trial court denied mother's request to cross-examine the GAL, and mother appealed, claiming that her right to due process had been violated. Deeming the alleged error harmless, the Court of Appeals affirmed. While discretionary review was pending, the child turned eighteen. The Supreme Court held that given the important public question involved mootness did not preclude review. It further held that the trial court erred by allowing the GAL to blend the roles of court advisor—in which capacity he was subject to cross-examination—and attorney for the child—in which capacity he should not have, in effect, provided testimony. Finally, the Court held that GALs in KRS Chapter 403 proceedings represent the child's best interest, not necessarily the child's wishes.

IV. TEMPORARY INJUNCTION:

- A. Boone Creek Properties, LLC v. Lexington-Fayette Urban County Board of Adjustment, et al.**
2014-SC-000091-1 **September 18, 2014**

Opinion of the Court by Justice Venters. All sitting; all concur. CR 65; Temporary Injunction; Interlocutory relief. Upon motion of the city zoning authority, the Fayette Circuit Court issued a temporary injunction pursuant to CR 65.04 against property owner, temporarily enjoining what the court found to be an ongoing violation of the applicable zoning ordinance. The property owner challenged the circuit court's finding of irreparable harm in a motion for interlocutory relief pursuant to CR 65.07, which the Court of Appeals denied. As a matter of first impression, and upon a showing of extraordinary cause, the Supreme Court granted review pursuant to CR 65.09(1). Held: When a governmental entity shows a probable, ongoing violation of its law, and seeks relief under CR 65, irreparable harm is presumed. The ability of a government to promptly eliminate ongoing violations of law is essential to the ability to govern and maintain order in the community, and the inability to do so is injurious and harmful to the government and the community it serves.

V. ATTORNEY DISCIPLINE:

- A. Charles David Keen v. Kentucky Bar Association**
2012-SC-000648-KB **September 18, 2014**

Opinion of the Court. All sitting; all concur. The KBA moved to suspend Keen due to his violation of a prior disciplinary order he received from the Supreme Court in November 2012. As a condition of his sanction, Keen was to refrain from receiving further disciplinary charges for one year or face a thirty-day suspension.

Following the November 2012 order, the Inquiry Commission issued two separate charges against Keen for misconduct similar to that disposed of in the original disciplinary action. Accordingly, the Office of Bar Counsel petitioned the Court to require Keen to show cause why he should not be suspended from the practice of law for thirty days. Keen filed a response in which he admitted violating the terms of the Court's previous order but asked the Court for forgiveness given the calamitous professional and financial situation he faced from 2010-2013. Keen's response also detailed the measures he was taking to prevent further misconduct from occurring in the future.

The Court sympathized with Keen and applauded his efforts to improve his situation but ultimately concluded that he violated the terms of the Court's order. Accordingly, the Court suspended Keen from the practice of law for thirty days.

**B. Kentucky Bar Association v. Jason Robert Gilbert
2014-SC-000138-KB September 18, 2014**

Opinion of the Court. All sitting; all concur. Gilbert practiced law in Ohio, despite the fact that his Ohio bar license had been in inactive status since 2005. In February 2014, the Supreme Court of Ohio found Gilbert guilty of multiple counts of violating Ohio Rules of Professional Conduct 5.5(a) (unauthorized practice), 1.1 (competency), and 1.3 (lack of diligence) and suspended him from the practice of law in Ohio for one year, with the suspension probation on the condition that Gilbert commit no further misconduct.

Under SCR 3.435(4), Gilbert was subject to identical reciprocal discipline in the Commonwealth unless he could prove by substantial evidence: (a) a lack of jurisdiction or fraud in the Ohio disciplinary action, or (b) that his misconduct warrants substantially different discipline in this Commonwealth. At the request of the KBA, through the Office of Bar Counsel, the Supreme Court of Kentucky issued an order requiring Gilbert to show cause why he should not be disciplined in accordance with the Ohio Supreme Court order. Gilbert did not respond to the show cause order.

Finding no reason to believe that either of the SCR 3.435(4) factors applied, the Court retroactively suspended Gilbert from the practice of law in the Commonwealth of Kentucky for one year, effective February 20, 2014, with the suspension probated on the condition that he receive no additional disciplinary charges during that period.

**C. Cletus Maricle v. Kentucky Bar Association
2014-SC-000411-KB September 18, 2014**

Opinion of the Court. All sitting; all concur. Maricle was convicted by a jury on March 24, 2010 of five felony counts, including violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 2money laundering conspiracy, aiding and abetting the obstruction of justice, voter fraud, and election fraud conspiracy. He was sentenced to 320 months' imprisonment, which he appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit vacated his convictions and remanded for a new trial. Ultimately, on November 6, 2013, Maricle entered a negotiated guilty plea to the RICO charge. He admitted that he and his associates accessed the Clay County Board of Elections in order to corruptly influence the outcome of elections. Furthermore, he confessed to providing cash to bribe voters with the understanding that his associates would ensure that the bribed voters cast their ballots as directed. Additionally, Maricle acknowledged that several of his associates received public works contracts (some of which were funded by federal grant money) by virtue of their participation in the election-fraud enterprise. Pursuant to his negotiated guilty plea, he was sentenced to time served, plus supervised release for two years (to include six months of home incarceration), 200 hours of community service, and no participation in the political process.

Maricle admitted that his actions were violations of SCR 3.130-8.4(b) and requested that the Court grant him leave to resign from the KBA under terms of permanent disbarment pursuant to SCR 3.480(3). The KBA did not object to Maricle's motion. The Court agreed that Maricle's motion to withdraw his membership was appropriate and ordered that he be permanently disbarred in the Commonwealth.

D. Steven O. Thornton v. Kentucky Bar Association
[2014-SC-000457-KB](#) September 18, 2014

Opinion of the Court. Abramson, Cunningham, Keller, Noble, Scott and Venters, JJ., concur. Minton, C.J., not sitting. Thornton was previously suspended from the practice of law for 181 days and ordered to refund two clients based on three separate disciplinary matters. See *Kentucky Bar Ass'n v. Thornton*, 392 S.W.3d 399 (Ky. 2013). Having met all the conditions imposed by the Supreme Court's previous suspension order, Thornton applied for reinstatement. Because of the length of the suspension, SCR 3.510(3) required Thornton to undergo a review and investigation by the Character and Fitness Committee. The Committee concluded Thornton should be readmitted to the practice of law. Bar Counsel did not object to reinstatement, and the Board of Governors unanimously recommended reinstatement. Finding no reason to disagree with the Board, the Supreme Court adopted its recommendation and ordered Thornton reinstated to the practice of law.