

**KENTUCKY COURT OF APPEALS
PUBLISHED OPINIONS
MARCH 2012**

I. CRIMINAL LAW

A. Ayers v. Commonwealth

[2010-CA-000590](#) 03/30/2012 2012 WL 1057661

Opinion by Judge Acree; Judges Moore and Nickell concurred. The Court reversed and remanded appellant's conviction of five counts of failure to file a tax return. The Court held that the circuit court's failure to conduct a hearing mandated by *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 562 (1975), rendered the conviction invalid. The fact that appellant was an attorney who represented criminal defendants was not dispositive of the issue. Further, *Faretta* violations were not subject to harmless error analysis.

B. Commonwealth v. Cline

[2011-CA-000219](#) 03/23/2012 2012 WL 967564

Opinion by Judge Lambert; Judges Acree and Combs concurred. On discretionary review, the Court reversed and remanded an opinion and order of the circuit court reversing a district court order denying appellee's motion to suppress evidence obtained after appellee was stopped by police while driving his motorcycle and arrested for operating a motor vehicle under the influence of alcohol in violation of KRS 189A.010. The court held that the district court properly denied appellee's motion and the circuit court erred in reversing that ruling. While the matter was initiated by an anonymous tip, which in and of itself would not be reliable or provide any reason for stopping appellee, coupled with the officer's observation of erratic driving, there was a sufficient reason to initiate a stop.

C. Cornelius v. Commonwealth

[2009-CA-001624](#) 03/09/2012 2012 WL 751956

Opinion by Judge Thompson; Chief Judge Taylor and Judge Lambert concurred. The Court reversed appellant's conviction for tampering with physical evidence and for first-degree persistent felony offender. The case was on remand from the Kentucky

Supreme Court for reconsideration in light of *Mullins v. Commonwealth*, 350 S.W.3d 434 (Ky. 2011). The Court held that appellant's placing marijuana in his pocket was directly incident to the possession of marijuana charge and was not to prevent the evidence from being used in an official proceeding. "Piling on" the additional charge of tampering was precisely the situation forbidden by *Mullins*. Therefore, the trial court erred when it denied appellant's motion for a directed verdict on the tampering with physical evidence charge.

D. Napier v. Commonwealth

[2011-CA-002028](#) 03/16/2012 2012 WL 876888

Opinion by Judge Acree; Judges Moore and VanMeter concurred. The Court dismissed as moot appellant's appeal, filed pursuant to RCr 4.43, challenging a circuit court order establishing pretrial bond. The Court held that because appellant was allowed to enter a deferred prosecution program under KRS 218A.1415, the appeal was unquestionably moot. The Court rejected appellant's argument that the issue was capable of repetition, yet evading review. Should the trial court find that appellant violated the conditions of the program, it could continue appellant's participation in the program, change the terms or conditions for participation in the program or order appellant removed from the program and proceed with the ordinary prosecution for the offenses charged in the indictment. That would necessarily include entry of another order determining the conditions of appellant's release, which appellant would be entitled to challenge by means of RCr 4.43.

E. Park v. Commonwealth

[2010-CA-000712](#) 03/16/2012 2012 WL 892196

Opinion by Judge Keller; Judges Stumbo and VanMeter concurred. The Court affirmed an order of the circuit court denying, without a hearing, appellant's combined RCr 11.42 and CR 60.02 motions. The Court held that the trial court did not err in denying the motions without a hearing. In reaching that holding, the Court first held that while there was evidence in the record sufficient to support an extreme emotional disturbance defense, there was no likelihood the defense would have been successful at trial given the overwhelming evidence of appellant's guilt. Further, there was little reason to believe a jury would have sympathized with appellant, given that he shot his wife in his daughter's presence, he calmly reported the crime, he calmly gave his statement to police, and he gave differing versions of events to the police and the expert witnesses. The Court also held that, given the sentences appellant faced, counsel's advice to accept a plea agreement was reasonable.

F. Robbins v. Commonwealth

[2009-CA-002178](#) 01/27/2012 2012 WL 246243

Opinion by Judge Wine; Judge Nickell concurred; Judge Caperton dissented. The Court affirmed in part, reversed in part and remanded orders of the circuit court denying appellant's motions to set aside his plea, conviction and sentence on charges of wanton abuse or neglect of an adult, wanton exploitation of an adult over \$300; theft by unlawful taking over \$300; and persistent felony offender, second degree. The Court first held that the guilty plea proceedings fully complied with the requirements of *Boykin v. Alabama*, 395 U.S. 328, 89 S.Ct. 1709, 23 L.Ed. 274 (1969), thus raising a strong presumption that counsel's assistance was constitutionally sufficient. The Court then held that the circuit court erred in finding that no evidentiary hearing was necessary when appellant pleaded guilty on the advice of counsel without an opportunity to review the evidence against him. Further, given the questionable factual and

legal support for the charges, there was a question of the reasonableness of counsel's advice to plead guilty and a reasonable implication that appellant would not have pleaded guilty but for counsel's deficient advice. Therefore, appellant was entitled to a hearing on the issues. The Court finally held that appellant's second motion filed pursuant to RCr 11.42 was barred as successive.

II. FAMILY LAW

A. **Gossett v. Kelley**

[2011-CA-001536](#) 03/09/2012 2012 WL 752081

Opinion by Judge Acree; Judges Combs and Lambert concurred. The Court vacated an order of the family court naming appellees de facto custodians of appellant's minor child and awarding appellees custody. The Court held that the family court lacked subject matter jurisdiction to enter the order. Because a final custody decree awarded custody to appellant, appellees were seeking modification of the final custody decree. Because no affidavits were submitted, as required by KRS 403.270, and the family court order made it clear that the circumstances were identical to those when appellant was originally awarded custody, subject matter jurisdiction did not and could not exist.

B. **Hohman v. Dery**

[2010-CA-001827](#) 01/20/2012 2012 WL 162922

Opinion by Judge Dixon; Judges Clayton and Lambert concurred. The Court affirmed a domestic violence order entered against appellant by the family court pursuant to a petition filed by appellee. The Court first held that the evidence was sufficient for the court to reasonably infer that appellant's conduct caused appellee to fear imminent physical injury and therefore, the court's finding of domestic violence was not clearly erroneous. The Court next held that appellant was not denied procedural due process when the family court denied his motion for a continuance until appellee could be deposed. The timely holding of a domestic violence hearing was essential to the purpose of the statutes, the family court conducted the hearing in a full and fair manner, and appellant failed to show how it prejudiced his defense.

C. **Willis v. Willis**

[2010-CA-002328](#) 03/09/2012 2012 WL 752035

Opinion by Judge Lambert; Chief Judge Taylor and Judge Dixon concurred. The Court reversed an order of the family court modifying a Qualified Domestic Relations Order (QDRO). The Court held that the family court abused its discretion in modifying the QDRO and reassigning a portion of appellant's nonmarital property to appellee. The family court violated KRS 403.190 in reassigning appellant's nonmarital property to appellee when the parties entered into a valid separation agreement assigning the specific amounts to each party. Furthermore, the family court did not have jurisdiction to modify the QDRO 15 months after its entry.

III. JUVENILES

A. **Commonwealth v. Bell**

[2011-CA-000562](#) 03/30/2012 2012 WL 1057966

Opinion by Judge Acree; Judges Moore and VanMeter concurred. The Court affirmed an order of the circuit court denying the Commonwealth's petition for a writ of prohibition, seeking to prohibit the district court from suppressing a thirteen-year-old juvenile's confession on the basis that it was given involuntarily. The Court first held that a writ was proper to challenge the suppression of the statement because the Commonwealth did not have an adequate remedy by appeal and would suffer great and irreparable injury if the district court erred in suppressing the juvenile's statements. The Court then held that there was no clear error in the district court's fact-finding. The Court finally held that even though the detectives who questioned the juvenile at school did not deprive him of food or sleep, used calm and conversational tones throughout the interview, read the juvenile his *Miranda* rights, and told him he was not under arrest, viewing the interrogation through the lens of this thirteen-year-old student, under the circumstances the district court did not err in finding that the juvenile's statements were not the product of his free choice when given. Therefore, the district court did not act erroneously by granting the motion to suppress the statements.

IV. LICENSES

A. **Reynolds Enterprises, Inc. v. Kentucky Board of Embalmers and Funeral Directors**

[2010-CA-000729](#) 03/30/2012 2012 WL 409616

Opinion by Judge VanMeter; Judges Acree and Caperton concurred. The Court affirmed an order of the circuit court denying the appellant crematorium's request for declaratory and injunctive relief wherein it sought to have KRS Chapter 316 declared unconstitutional and to enjoin the Kentucky Board of Embalmers and Funeral Directors from instituting proceedings to enforce the regulations against it for transporting dead human bodies. The Court held that the circuit court did not err by declining to declare KRS Chapter 316 unconstitutional or abuse its discretion by declining to enjoining the Board from regulating appellant's activity under KRS Chapter 316. In reaching that conclusion, the Court first held that the circuit court did not err in determining that the regulations contained in KRS 316.030(1) were rationally related to a legitimate state interest. The distinction between funeral directors and crematory operators reflected the state's legitimate interest in protecting the public health and welfare and that there was a rational basis for the licensing requirement. The Court next held that the circuit court did not err in finding that the Board did not exceed the scope of its authority to enforce the provisions of KRS Chapter 316, which expressly required an individual acting for profit to obtain a funeral director's license before transporting a dead human body and the Board properly asserted its authority to enforce the provision upon discovering that appellant had transported a dead human body without first obtaining a license to do so. The Court finally held that the circuit court did not err in finding that an

immediate family member could not delegate the personal authority to transport a dead human body to a business subject to the legal regulations governing the transportation of dead human bodies.

V. OPEN RECORDS

A. **Lawson v. Office of the Attorney General**

[2011-CA-000210](#) 03/02/2012 2012 WL 669966 DR Pending

Opinion by Judge VanMeter; Judge Acree concurred; Judge Caperton concurred in part and dissented in part by separate opinion. The Court affirmed a summary judgment of the circuit court refusing to grant a permanent injunction to preclude the release of appellant's proffer held by the Office of the Attorney General (OAG) in an investigation of bids for state road contracts. The Court held that the trial court properly held that the proffer was not exempt from disclosure under KRS 61.878(1)(a). Taking into consideration that the proffer did not contain information of a private nature, as well as appellant's diminished expectation of privacy in the information, the public interest, specifically the methods of procuring state road contracts, required disclosure of the proffer under the Open Records Act. The Court also held that the proffer was not exempt from disclosure under KRS 61.878(1)(h) as that provision was only applicable if the evidence revealed that disclosure would harm the agency. The Court finally held that the trial court did not apply the wrong legal standard when it dissolved a temporary injunction and denied appellant's motion for a permanent injunction. Since the proffer was not exempt from the Open Records Act, appellant was not entitled to a permanent injunction and the conditions which justified the temporary injunction were no longer present.

VI. TORTS

A. **Energy & Environment Cabinet v. Robinson**

[2011-CA-000139](#) 03/16/2012 2012 WL 876776

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court reversed and remanded a circuit court opinion and judgment remanding to the Board of Claims appellees' petition for review before the Board seeking compensation from the Division of Forestry for property lost after the Division set "line fires" to create a buffer to control a fire. The Court held that, while the Division had the ministerial duty to fight the fire, the methods used to fight that fire, including the determination that the fire had been contained and that it was appropriate to leave the area, were discretionary. Therefore, the circuit court's finding that the Division may be subject to liability for negligence was in error.

B. **Oghia v. Hollan**

[2011-CA-000779](#) 03/16/2012 2012 WL 876792

Opinion by Judge Keller; Judges Combs and Stumbo concurred. The Court affirmed a jury verdict and judgment in favor of appellee on his medical malpractice suit against the appellant doctor wherein appellee claimed the doctor did not adequately inform appellee of alternative treatment modalities for a

kidney stone and that the doctor should have removed the kidney stone using a less invasive and less risky procedure. The Court first held that the trial court did not err in issuing a separate jury instruction regarding the doctor's duty to inform appellee of the risks of the procedure performed. Because the evidence indicated that the doctor had two duties of care - to treat appellee with the care and skill of a reasonably competent surgeon and to disclose to appellee the risks associated with surgery as a reasonably competent surgeon would - the evidence supported the issuance of two separate duty-of-care instructions. The separate jury instructions did not result in inconsistent verdicts. The Court next held that the trial court did not err in failing to issue a comparative negligence instruction. While a comparative negligence instruction may be appropriate in a medical malpractice case based on lack of informed consent, the case must be extraordinary, which this case was not. The Court next held that because appellant did not offer any narrative statement regarding appellant's claim that the trial judge's conduct during the first day of trial resulted in undue prejudice to him, the Court presumed the record supported the judge's actions. The Court finally held that the trial court did not abuse its discretion in failing to declare a mistrial when counsel for appellee quoted a passage from a treatise during closing arguments, nor did the trial court err by not reprimanding counsel and admonishing the jury. The statements by counsel did not rise to the level of egregiousness in *Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991). Further, a number of passages from the treatise had been read or cited to the jury, the concepts put forth in the disputed passage had been discussed by witnesses and appellant did not ask the court to reprimand opposing counsel or to admonish the jury.

C. R.O. v. A.C.

[2010-CA-001677](#) 03/23/2012 2012 WL 967579

Opinion by Judge Acree; Judges Combs and Keller concurred. The Court affirmed a judgment of the circuit court awarding \$6 million in punitive damages against appellant on appellee's claim for compensatory and punitive damages for physical and emotional injuries she sustained as a result of appellant's sexual abuse of her multiple times per week for a substantial span of time when she was 11 years old. The Court held that the punitive damage award was not constitutionally excessive. The degree of reprehensibility of appellant's actions was significant; the award bore a reasonable relationship to the compensatory damages of over \$2 million; and given the severe penalty the circuit court could have imposed on both the original charges of first-degree sodomy and the amended charges of four counts of sexual misconduct, there was no reason to modify the punitive damages award.

VII. WORKERS' COMPENSATION

A. Kentucky Employers' Mutual Insurance v. Novation Capital, LLC

[2008-CA-000449](#) 02/25/2011 2011 WL 832316 Released for publication

Opinion by Judge Thompson; Judge Caperton and Senior Judge Lambert concurred. The Court affirmed an order of the circuit court requiring appellant

to transfer workers' compensation benefits payable to a worker to appellee under a structured settlement agreement. The Court first held that the circuit court had subject matter jurisdiction to approve the petition for approval of transfer of the structured settlement rights. The petition was unrelated to the worker's compensation and the Structured Settlement Act established jurisdiction in the circuit court. The Court then held that the transfer of the structured settlement payment did not violate the anti-assignment provision of KRS 342.180. The agreement was not an assignment of a claim but was a transfer of the compensation received under the compensation agreement. Further, pursuant to the terms of the Act, the transfer of the structured settlement agreement was subject to judicial approval and a finding that it was in the worker's best interest to satisfy his delinquent housing and automobile debts.