

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
DECEMBER 2008**

I. CRIMINAL LAW

**A. Ondra Leon Clay v. Com.
[2007-SC-000377-MR](#) 12/18/2008**

Memorandum opinion of the court; all sitting; all concur. Appellant challenged his conviction for wanton murder and sodomy-- for which he was sentenced to life imprisonment. On appeal, Clay alleged a Batson violation, claiming the prosecution struck a juror solely because of her race. The Court affirmed, citing the recent U.S. Supreme Court decision in Snyder v. Louisiana, which held an appellant could not compare stricken juror's responses to *voir dire* questions side-by-side with those of white jurors after failing to do so at trial. ("A retrospective comparison of juror based on the cold appellate record may be very misleading when alleged similarities were not raised at trial.") The Supreme Court found the trial court had committed error when it took judicial notice of the fact that the Appellant's expert could have had access to the raw data used by the Commonwealth's DNA experts. The Court held that the defendant's access to raw data was not an "adjudicative fact" subject to judicial notice under KRE 201, and noted that there is some question whether defendants actually have a right to such access. However, the Court held that this mistake did not rise to the level of palpable error. The Court also held that the trial court did not commit error by failing to strike a juror who was a former employee of the Fayette County Commonwealth's Attorney's Office for cause. Lastly, the Court held it was not palpable error to admit the testimony of the Sexual Assault Nurse Examiner where Appellant failed to object or otherwise request a Daubert hearing.

**B. Matthew Derry v. Com.
[2006-SC-000181-DG](#) 12/18/2008**

Opinion by Justice Noble; all sitting. Chief Justice Minton and Justice Scott concur in result only. Derry was indicted on charges of rape, sodomy, and sexual abuse in Barren County. After the jury was sworn and testimony had begun, it was determined that the house where the crimes were alleged to have occurred was actually located in Metcalfe County. The trial court granted the defense's motion for a mistrial and told the jury that the mistake

about the location required that the case be dismissed without prejudice. Derry was re-indicted in Metcalfe County and subsequently entered a conditional guilty plea. On appeal, Derry argued that since the prosecution at his first trial could not prove the crime's jurisdictional element of venue, the dismissal was the functional equivalent of a directed verdict, and double jeopardy barred retrial. Derry further argued that there was no manifest necessity for a mistrial since the trial could have continued in Barren County. The Supreme Court affirmed the conviction, holding that under Scott, double jeopardy is not violated when a mistrial is the result of the defendant's motion and does not turn on issues of guilt.

The Court noted that venue is not a necessary element of a criminal offense and included a discussion of the concepts of "vicinage," "venue," and "jurisdiction." Section 11 of the Kentucky constitution provides that criminal defendants shall receive a "speedy trial by an impartial jury of the vicinage." Vicinage refers to the "area surrounding the crime scene" and is geared more towards allowing jurors to have familiarity with the location of a crime and is not intended to dictate the place of trial. Venue, as the law currently exists, is the statutory prescription where a case must be tried. Under KRS 452.650, venue is deemed to be waived by the defendant's failure to make a motion to transfer to the proper county prior to trial. Venue is not jurisdictional, and circuit courts of the Commonwealth are "never without jurisdiction to preside over the prosecution of offenses committed in Kentucky." The Supreme Court concluded that Derry, at most, enjoyed a statutory right to be tried in the county where the crime occurred—a right he waived by failing to raise the issue prior to trial.

C. Stanley Stokes v. Com.

2007-SC-000006-MR

12/18/2008

Opinion by Justice Noble; all sitting; all concur. Justice Abramson concurs by separate opinion. Stokes was convicted of two counts of sodomy and was sentenced to 30 years imprisonment. The victim was a 12-year-old relative. At trial, Stokes testified that he suffered from impotence and entered into evidence medical records to support his testimony. However, these records also indicated that there was no physical cause for Stokes' condition and characterized the problem as "psychogenic." During the prosecution's rebuttal, the trial court took judicial notice that a medical dictionary was a learned treatise and allowed the prosecutor to read the definition of "psychogenic" to the jury. The judge admonished the jury that the definition was reliable and could

be considered during deliberations. On appeal, Stokes argued the trial court abused its discretion by taking judicial notice that the medical dictionary was a learned treatise. The Supreme Court rejected this argument, holding KRE 201 permits courts to take judicial notice of a definition of a word as an adjudicative fact where that definition is “capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned.”

The second issue concerned additional factual and legal information given by the trial court to the jury once penalty phase deliberations were already underway. During deliberations, the jury sent a note to the trial judge asking if Stokes’ previous conviction was also “on a child.” After discussion with counsel, the trial court concluded this information should have been given to the jury during the penalty phase proceedings and advised the jury that Stokes’ prior offense involved subjecting a person less than 14 years of age to sexual contact. The trial judge defined sexual contact as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.” The Supreme Court held that the trial court had gone beyond the “general description” of the prior offense permitted under Robinson by giving the jury more specific information than necessary to ascertain the nature of the offense. However, the Supreme Court held that any error by the trial court was harmless.

More problematic for the Court was the introduction of new evidence after the jury had begun its deliberations. While recognizing that the practice is authorized under RCr 9.74, the Court urged that such instances should be rare and carefully thought out since juries may place undue emphasis on that portion of the proof. In affirming, the Court, held that the presentation of the additional evidence in this case did not create a fundamentally unfair trial by placing undue emphasis on the evidence admitted after jury deliberations had begun. In her concurrence, Justice Abramson underscored that the trial court is not “a safety net for counsel, standing ready to supply what they have inadvertently omitted.”

D. Kareem Ali Henry v. Com.
[2006-SC-000767-DG](#)

12/18/2008

Opinion by Justice Abramson; Justice Schroder not sitting; Justice Noble concurs in part and dissents in part by separate opinion. When arresting Henry outside a gas station, police officers had reason to believe Henry had discarded a handgun nearby moments

earlier. Before advising Henry of his Miranda rights, the officers asked him three times regarding the whereabouts of the handgun. In response, Henry made some incriminating statements. On appeal, Henry argued that his statement should have been suppressed by the trial court. The Supreme Court affirmed the trial court, holding that the police's questioning fell within the "public safety exception" of Quarles and was therefore lawful under federal and state constitutions. The Supreme Court noted that, as in Quarles, the officers had reason to believe the suspect had abandoned a gun in an area accessible to the public and had limited their pre-Miranda questioning to locating and removing the hazard. In her dissent, Justice Noble stated that the immediacy and exigency of the public hazard in Quarles was not present in this case, noting that the police knew before they apprehended the suspect that he did not have the weapon and where he had abandoned it.

Henry was also convicted of two counts of firearm possession by a felon. Both counts concerned the handgun recovered at the crime scene. After his arrest and indictment on the charges outlined above, Henry was indicted by a separate division of Jefferson Circuit Court after the serial number on the handgun matched that of a weapon previously reported stolen from an acquaintance of Henry. In reversing the second conviction, the Supreme Court cited Fulcher, which states "uninterrupted possession of the same contraband over a period of time is but one offense constituting a continuing course of conduct, precluding convictions of multiple offenses for possession of the same contraband on different dates." Accordingly, the Supreme Court reversed the second conviction for firearm possession by a felon on double jeopardy grounds.

E. Timothy Taylor v. Com. 2006-SC-00863-MR 12/18/2008

Opinion by Justice Abramson. All sitting; all concur. The Supreme Court affirms a 25-year sentence for defendant convicted of murder. Taylor, who was 17 year old when the crime was committed, appealed the trial court's refusal to suppress his confession. Taylor argued the confession was the product of coercion, that police had failed to follow statutes regarding minors in custody, and that police lacked probable cause for the arrest that led to the confession. The Supreme Court held that the trial court did not err in refusing to exclude Taylor's statement. The Court noted that witness' identification of Taylor, his brother and their vehicle provided adequate probable cause for the arrest and that Taylor's confession had not been the result of coercion. The Court

held that although police were alleged to have violated KRS 610.200-- which requires that parents of a minor taken into custody must be notified and given a specific account of the charges-- the violation did not render the confession inadmissible where it had been otherwise shown to have been given voluntarily.

Taylor testified in his own defense at trial, and upon cross-examination, the prosecutor asked Taylor why he had waited until trial to recant his confession and had not taken advantage of previous opportunities to do so. On appeal, Taylor argued that this questioning violated his right to remain silent. The Supreme Court held that Taylor waived his right to remain silent and noted under Anderson, the prohibition against prosecutorial references to the defendant remaining silent found in Doyle did not apply to cross-examination that merely inquires into prior inconsistent statements.

Taylor's defense at trial was that police deceived him into confessing by making false promises about the consequences of his confession. At trial, Taylor sought to introduce a portion of his brother's statement to show that the police used deceptive interview practices. The Supreme Court upheld the trial court's decision that whatever occurred during his brother's interrogation was irrelevant to Taylor's claim that he was deceived.

Lastly, Taylor wanted to introduce the victim's outstanding arrest warrants at trial—not as evidence of the victim's character—rather to bolster his claims that he believed the police when they told him the victim was a wanted criminal and, as such, Taylor's punishment would be light. The Supreme Court said while it was a “close call,” the trial judge's decision to exclude the victim's warrants from evidence was not unreasonable or arbitrary and noted that, in any event, the error would have been harmless.

II. WORKER COMPENSATION

A. **Sandra Toy v. Coca Cola Enterprises; Hon. Sheila Lowther, ALJ; Workers' Compensation Board** **2008-SC-000149-WC 12/18/2008**

Memorandum opinion of the court; all sitting; all concur. To furnish an incentive for partially disabled workers to work as much as they are able, KRS 342.730 provides that they receive a basic income benefit regardless of their post-injury income. In the event that the worker's employment subsequently ceases, that benefit is doubled. Appellant returned to work after she and her employer agreed to a weekly benefit of \$59.65 for 425 weeks. Shortly thereafter,

Appellant's employment was terminated and her weekly benefit doubled. Her former employer later learned that Appellant had taken a new job earning as much or more than she did previously and reduced her benefit to the original amount. Appellant filed a motion with the ALJ contesting the reduction, claiming that KRS 342.730 referred only to the cessation of employment to which she originally returned and that her former employer should not benefit simply because she was able to find other work. The ALJ, Workers' Compensation Board and Court of Appeals all ruled in favor of the employer. The Supreme Court affirmed, holding KRS 342.730 applies "without regard to whether the worker returns to the employment in which the injury occurred or to other employment."

B. T.J. Maxx v. Christine L. Blagg; Hon. John B. Coleman, ALJ; Worker's Compensation Board
2007-SC-000939-WC 12/18/2008

Memorandum opinion of the court; all sitting, all concur. After the ALJ had already taken a worker's compensation claim under submission, he ordered claimant to undergo a university evaluation stating that the evidence was "in great conflict." The employer objected, arguing that the ALJ's order established that the claimant had failed to meet her burden of proof. In reversing, the Supreme Court held that while KRS 342.315 permits referral for a university evaluation whenever a medical issue is at question, the statute "evinces no intent to depart from regulations governing the taking of proof." The Supreme Court remanded the case with instructions for the ALJ to make a decision based on the evidence of record at the time it took the claim under submission.

C. Trico County Development & Pipeline v. Scotty Smith; Hon. Grant S. Roark, ALJ; Worker's Compensation Board
2007-SC-000556-WC 12/18/2008

Memorandum opinion of the Court; all sitting; Chief Justice Minton, Justice Noble and Justice Venters dissent by separate opinion. ALJ dismissed worker's compensation claim because claimant failed to prove he had given his employer notice of his injury "as soon as practicable" as required by KRS 342.185. The Supreme Court reversed, holding that the delay was excused under KRS 342.200 since the employer had actual knowledge of the accident via claimant's contact with employer's insurance carrier. The dissenting Justices stated that they considered the ALJ's decision to be reasonable and noted that permitting a worker to bypass the employer by giving notice to the insurance carrier delays the

employer's opportunity to address the problem and prejudices the employer if another worker is injured as a consequence.

III. ATTORNEY DISCIPLINE

A. KBA v. Eric Lamar Emerson
2008-SC-000732-KB 12/18/2008

All sitting; all concur. The Court adopted the KBA Board of Governors' recommendation to suspend attorney from the practice of law for 61 days. Attorney failed to file a motion for shock probation despite accepting a fee to do so. The client was forced to file *pro se* motions, which were dismissed for not being timely filed. The attorney did not respond to the KBA's charges or otherwise defend himself in the disciplinary proceedings.

B. KBA v. Dana Lea B. Quesinberry
2008-SC-000769-KB 12/18/2008

All sitting; all concur. The Court granted the KBA's motion to suspend attorney's license for one year. The charge arose from the attorney's failure to file the required brief with the Court of Appeals and failing to respond to subsequent notices from the COA. The attorney did not respond to or otherwise defend herself in the disciplinary proceeding. The Court made the suspension consecutive to the one the attorney is currently serving, noting she had six previous disciplinary matters.

C. KBA v. Jennifer Sue Whitlock
2008-SC-000743-KB 12/18/2008

All sitting; all concur. A client retained the attorney to file a bankruptcy petition. The petition was never filed and the client subsequently learned the attorney no longer worked at the law firm. The attorney initially defended herself in the disciplinary proceeding, but failed to respond to subsequent requests for additional information from bar counsel. The Supreme Court adopted the Board's recommendation of a 30-day suspension, ordered the attorney to refund the client's fee and to submit to mental health-related supervision to be approved by the KBA's Lawyer Assistance Program.

D. James Gregory Troutman v. KBA
2008-SC-000833-KB 12/18/2008

All sitting; all concur. Attorney entered Alford plea to charges of wanton endangerment, criminal mischief and criminal littering as part of a pretrial diversion agreement. Per the plea agreement, the charges were subsequently dismissed. The attorney conceded that his plea is proof he committed a criminal act reflecting adversely on his honesty, trustworthiness or fitness as a lawyer. The Supreme Court granted the attorney's motion for a two-year suspension of his license to practice law.