PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
NOVEMBER 2008

I. CRIMINAL LAW

A. Joseph Kozak (a minor) v. Commonwealth
2007-SC-000569-MR **11/26/2008**

Opinion by Chief Justice Minton; joined by Justice Abramson). Appellant was 15 when he was indicted on six counts of first-degree sexual abuse (Class D felonies) and two counts of first-degree rape (Class A felonies). Appellant agreed to plead guilty to eight counts of sexual abuse in exchange for the Commonwealth recommending a 20-year sentence. At sentencing, the circuit court denied Appellant's motion to be sentenced under the more lenient provisions of the juvenile code's KRS 635.060. Under KRS 635.020(2), minors charged with Class A or Class B felonies are to be proceeded against as "youthful offenders". However, since Appellant pled guilty to only Class D felonies, he was not eligible for youthful offender status. In remanding for resentencing, the Supreme Court held that juveniles cannot be permitted to unknowingly or impliedly waive the protections of the juvenile code. The Court went on to state that trial judges should engage in a colloquy before accepting plea agreements involving juveniles informing them that such a plea would waive their rights under the juvenile code. In Justice Scott's concurrence (joined by Justice Cunningham), he expressed his belief that the Appellant had made a valid, implied waiver of the provisions of the juvenile code, but concurs in order to establish a bright-line rule that duly informed juvenile offenders who enter into plea agreements waive their right to be sentenced under the juvenile code. In Justice Noble's concurrence (joined by Justice Schroder and Justice Venters), she states that the Commonwealth can only recommend a sentence as part of a plea agreement, and the trial court was still required to sentence Appellant under the juvenile code.

B. Ralph S. Baze v. Commonwealth
2007-SC-000601-MR **11/26/2008**

(Opinion by Justice Cunningham; all concur; Justice Scott not sitting). The Supreme Court affirmed the circuit court's order denying CR 60.02 motion to vacate murder conviction on grounds that trial court lacked jurisdiction. The murders were committed in Powell County, but the case was transferred to Franklin Circuit

Court where the case was assigned to a Special Judge from Rowan County. The Special Judge transferred the case *sua sponte* from Franklin County to Rowan County. After initial objections, the parties agreed to the transfer. Appellant was convicted and sentenced to death. The conviction was affirmed on direct appeal. Appellant brought a CR 60.02 motion to vacate the conviction arguing the Special Judge did not have jurisdiction beyond Franklin County. The Supreme Court affirmed denial of the motion, noting that Rowan County was the Special Judge's home district and, thus, he enjoyed jurisdiction in both counties. Further, the Court characterized the Appellant's challenge to jurisdiction to actually be a question of venue. The Court held venue was not preserved for review since Appellant waived the issue when he agreed to the transfer before the trial. The Court noted even though the events underlying Appellant's CR 60.02 motion occurred in 1994, the venue issue had not been raised previously at trial, upon direct appeal, as part of multiple post-conviction requests for relief or in Appellant's previous CR 60.02 motions.

C. Commonwealth v. Michael Carneal
2006-SC-000653-DG
2007-SC-000203-DG **11/26/2008**

Opinion by Justice Cunningham; all concur; Chief Justice Minton not sitting. Prior to entering a plea of guilty but mentally ill, Carneal, age 15, was evaluated by five mental health professionals who all concluded he was mentally competent to proceed with trial. Six years later, Carneal sought to have his sentence overturned arguing that he was misdiagnosed prior to trial and was mentally incompetent when he agreed to the plea. Claims for relief under CR 11.42 must be brought "within three years after the judgment becomes final." Carneal argued that his judgment did not become final until 2001 when he was transferred into adult custody following his 18-year-old hearing. The Supreme Court, however, held that the judgment was final when Carneal was sentenced in 1998, noting that if judgments against juveniles were not final, they would be unable to collaterally attack their conviction until after they had their 18-year-old hearing. The Supreme Court also rejected Carneal's arguments that he was entitled to equitable tolling of the three-year limitation during his minority and mental incompetence. The Court also held that Carneal's requests for a new trial pursuant to RCr 10.02, RCr 10.06 and Cr 60.02 were not timely, holding that even if revised mental diagnoses constituted "new evidence," it was not evidence that was undiscoverable at the time Carneal pled guilty.

D. Joseph Wayne Allen v. Commonwealth
2007-SC-000642-MR 11/26/2008

Opinion by Justice Abramson; Justice Scott concurs by separate opinion. Allen was convicted of rape, sodomy, burglary, sexual abuse and tampering with physical evidence and was sentenced to seventy years imprisonment. The Supreme Court held that the trial court abused its discretion when it did not dismiss a potential juror for cause after he admitted he had already come to a conclusion about Allen's guilt. The Court also ordered that upon retrial, the jury should be instructed on the seventy-year sentencing limit contained in KRS 532.110(1)(c). In Justice Scott's concurring opinion, he criticized the rule of Thomas (864 S.W.2d 252) and Shane (243 S.W.3d 336), which does not allow for harmless error analysis where a defendant is deprived of peremptory challenges. Justice Scott noted that the potential juror in question did not actually sit on the jury in this trial.

E. Commonwealth v. Deanna Gayle Wooten
2006-SC-000125-DG 11/26/2008

Opinion by Justice Schroder; all sitting. Affirms trial court determination that criminal defendant was incompetent to face trial on charges of first-degree criminal abuse. On appeal, the Commonwealth argued that trial court should not have entered an *ex parte* order granting the defendant's motion for state funds for a private mental examination.
The Commonwealth argued that the defendant did not make required showing necessary before ordering private examination. The Supreme Court held that a review of the trial court's order after the ex parte hearing indicated that use of state facilities would be impractical and that a private expert was reasonably necessary. In his separate concurring opinion Justice Scott (joined by Justice Abramson) notes that under Crawford (834 S.W.3d 847), a defendant must demonstrate that obtaining an independent expert is reasonably necessary. The concurring Justices stated they would expand the rule to state that for a trial judge to order an additional or independent examination a) competency must be legitimately in question; and b) it must appear reasonably likely that only an additional or independent evaluation will lead the court to a firm conclusion as to the defendant's competency.

F. Brian Strange v. Commonwealth
2007-SC-000328-DG 11/26/2008

Opinion by Justice Venters; all concur. Appellant entered a conditional guilty plea to controlled substance charges, preserving his right to challenge the trial court's overruling of his motion to suppress evidence obtained in pat down of his person. The trial court made two factual findings to support Appellant's detention which led to the pat-down and discover: 1) that the neighborhood was known for its late-night criminal activity, and; 2) Appellant's "initial reaction" to the arrival of the police vehicles. In reversing, the Supreme Court held that the latter of the two findings was not supported by substantial evidence, and that Appellant's mere presence in a high-crime area was insufficient to justify an investigatory stop and seizure.

II. PROPERTY

A. TRIPLE CROWN SUBDIVISIONHOMEOWNERS ASSOCIATION, INC. V. CLINTON S. OBERST, ET AL.

2006-SC-000934-DG **11/26/2008**

Opinion by Justice Schroder; all concur; Justice Abramson not sitting. Appellees purchased property whose deed stated the property was subject to the "Declaration of Covenants recorded in Miscellaneous Book 292, Page 1." The developer had previously established a general plan and uniform scheme of development that applied to all property owned and subsequently acquired by the developer. This plan was recorded with the county clerk's office as a "Declaration of Covenants, Conditions and Restrictions." The purchasers claimed that since the plan was never amended to include a legal description of their specific property, the restrictions were inapplicable as to their property. The Supreme Court disagreed holding that "incorporation by reference" was an accepted practice for setting out covenants and the restrictions were applicable as against the Appellees' property.

III. WHISTLEBLOWER ACT

A. Consolidated Infrastructure Management Authority, Inc. v. Thomas Everette Allen

2006-SC-000188-DG
2006-SC-000712-DG **11/26/2008**

Opinion by Justice Cunningham; all concurring; Chief Justice Minton not sitting. Appellant/Cross-Appellee CIMA, Inc. was a municipal corporation formed to administer water and sewer

services for Russellville and Auburn. In August 2001, Allen, CIMA's safety director and Appellee/Cross-Appellant, sent a letter to CIMA's board threatening to have Ky. OSHA conduct a survey if safety violations were not repaired. In February 2002, CIMA informed Allen that he was being laid off for budgetary reasons. The following week, Allen sent a letter to the Kentucky Labor Cabinet documenting the safety violations at CIMA and requesting an unannounced inspection of the facility. Allen later sued CIMA for violating Kentucky's Whistleblower Act, and was awarded $40,000 in compensatory damages, plus attorney's fees. The Court of Appeals affirmed the judgment. On appeal, CIMA argued that Allen's claims were time barred by KRS 61.103(2) which reads in part "employees alleging a violation…may bring a civil action for appropriate injunctive relief or punitive damages, or both, within ninety (90) days…" In affirming, the Supreme Court held that, under the plain language of the Whistleblower Act, the 90-limitation only applied to claims for punitive damages and injunctive relief, not to compensatory damages. Secondly, the Supreme Court rejected CIMA's argument that Allen was not entitled to Whistleblower Act Protection since he did not report the plant condition until after he was a laid off. The Court held that the threat of reporting—which Allen did in his letter to CIMA's board-- triggers the protections of the Whistleblower Act. Finally, on the cross-appeal, the Court affirmed the trial court's ruling that CIMA was not required to post a supersedeas bond upon its dissolution. Since the CIMA was absorbed into the cities of Russellville and Auburn, the statutory exemption for governmental entities from the requirement for supersedeas bonds applied.

B. Workforce Development Cabinet, Dept. for Employment Services, Div. of Unemployment Insurance v. Mary C. Gaines
2005-SC-000965-DG 11/26/2008

Opinion by Justice Schroder; Justice Cunningham, Justice Scott and Justice Venters concur; Justice Abramson and Justice Noble not sitting. Gaines witnessed document destruction at the Jefferson County Unemployment Office where she worked. She suspected this activity was related to a suit she had pending against her employer. She advised her attorney of this situation who, in turn, informed in-house counsel for the Cabinet for Workforce Development. Gaines later amended her suit to include a violation of the Whistleblower Act, claiming she was transferred to another office because she had reported the document destruction. The trial court awarded summary judgment in favor of the Cabinet on the whistleblower claim, ruling that Gaines had only reported the perceived misconduct to the agency internally and not to any

outside individual or agency enumerated in KRS 61.102(1) of the Whistleblower Act. The Supreme Court affirmed the Court of Appeals reversal of summary judgment holding that the "any other appropriate body" provision of the statute includes "any public body or authority with the power to remedy or report the perceived misconduct." In Special Justice Royse's dissent (joined by Chief Justice Minton and Special Justice Conner), he states that in holding that the "any other appropriate body" provision in KRS 61.102(1) included Gaines' lawyer and the Cabinet's in-house counsel, the majority abandoned the long-standing doctrine of statutory interpretation known as *ejusdem generis*. This doctrine stands for the principle that where a general word or phase follows a list of specific person or things, the general word or phrase should be interpreted to include only person or things of the same type as those listed.

IV. WORKERS' COMPENSATION

A. Allene Hall v. Hospitality Resources, Inc. et al

2007-SC-000153-WC **11/26/2008**

Opinion by Justice Scott; Justice Cunningham, Justice Noble and Justice Schroder concur. Hall was injured on the job in 1995. Her workers compensation claim was resolved in 1997 with benefits based upon a 60% permanent partial disability. After Hall's impairment worsened over a period of years, her temporary total disability benefits were reinstated in 2001. In 2003, Hall filed a motion to reopen, seeking an increase in her permanent disability award. The Workers' Compensation board decided the claim was time barred by KRS 342.125(3), since it was filed more than four years after Hall's original award. In reversing, the Supreme Court held that where an order granting or denying benefits is entered subsequent to the original award, the four-year limitation period should be calculated from the latter date. The Court focused its analysis on the fact that "maximum medical improvement" (MMI) is required before impairment can be deemed permanent. Permanency, in turn, is part of the claimant's burden of proof upon reopening. Under the Board's interpretation of the statute, the Court held, it would be impossible for her to meet her burden of proof within the limitations period. In his dissent, Chief Justice Minton (joined by Justice Abramson and Justice Venters) argued that the majority was ignoring the statute's plain language and intent of the legislature to establish definitive time limits on reopening workers compensation awards. The minority noted that KRS 342.125 was emergency legislation, enacted by the General Assembly during a special session, for the express purpose of

limiting the time in which claims could be reopened in order to avoid a "looming financial catastrophe."

V. ATTORNEY DISCIPLINE

A. KBA v. Ruth Ann Sebastian

2008-SC-000433-KB 11/26/2008

Imposes identical reciprocal discipline upon attorney indefinitely suspended from practice of law by U.S. District Court for Eastern District of Kentucky for failure to respond to show cause order. Show cause order originated from federal civil rights case where attorney failed to respond to defense's motion to dismiss.

B. Stanley Brown v. KBA

2007-SC-000455-KB 11/26/2008

Attorney was permanently disbarred in Ohio in 1997. In 2007, attorney filed for reinstatement in Kentucky. The KBA moved to dismiss the motion for reinstatement, or, alternatively, for the Supreme Court to impose reciprocal discipline. The Court granted dismissal of reinstatement proceedings.

C. KBA, CLE Commission v. Jared Squires

2008-SC-000035-KB 11/26/2008

Orders suspension of attorney for failure to complete 2006-07 CLE requirements within time allowed under previous 90-day extension. The Court noted attorney's failure to obtain any CLE credits for 2007-08 as well.

D. KBA v. Zack N. Womack

2008-SC-000456-KB 11/26/2008

Clients retained attorney in a foreclosure proceeding. Later, client testified that they did not discuss the attorney's fee, but that he had assumed it would be at the hourly rate he had charged on previous occasions. The attorney claimed that the client asked him to do the work on a contingency basis, but admitted that there was no written fee agreement. After the Master Commissioner's sale, the attorney deposited the $33,946.77 proceeds check—which did not name the attorney as a payee—into his client escrow account. The attorney then mailed a check to the clients representing the proceeds less a

20% contingency fee ($6,789.35). After the clients' request for an accounting and a bill for a fee at the customary hourly rate was refused, they filed a bar complaint. The attorney was found guilty of charging a contingency fee without a prior written agreement, failing to refund an unearned portion of fees to a client, and making a false statement of fact to the Office of Bar Counsel regarding the amount of work performed on the clients' behalf. The Court suspended the attorney from the practice of law for 30 days and ordered him to pay $4,089 in restitution to the client.

E. KBA v. Pat Harris
2008-SC-000474-KB 11/26/2008

The Supreme Court affirmed a public reprimand for an attorney found by Board of Governors to have engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by presenting false time records to the Department of Financial Institutions, her former employer. The Court rejected attorney's arguments that the structure of the KBA's disciplinary process compromises the impartiality of the proceedings. Further, the Court found it was not an error for the Office of Bar Counsel to present the Personnel Board's findings of fact in lieu of retrying or re-presenting the case. The Court noted that public reprimand was appropriate only because the attorney's license was otherwise suspended since 1997 for failure to pay dues.

F. KBA v. Charles C. Leadingham
2008-SC-000522-KB 11/26/2008

Orders 30-day suspension and public reprimand of attorney found guilty of failing to obey an obligation under the rules of a tribunal and failing to respond to a request for information from a disciplinary authority. Attorney failed to file required briefs with the Court of Appeals; then after disciplinary proceedings were instituted, attorney did not respond to Inquiry Commission's request for additional information.

G. Constance L. Buehner (f/k/a Connie Lee Runner) v. KBA
2008-SC-000727-KB 11/26/2008
The Supreme Court granted attorney's motion for public reprimand and 30-day suspension of license, probated for one-year. Movant was convicted of felony charges of tampering with physical evidence. On appeal, a new trial was ordered and movant entered an Alford plea to misdemeanor charges of unsworn falsification to authorities. Movant acknowledged her plea amounted to an admission of a violation of SCR 3.130-8.3(b)—commission of a

criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness. The Court approved the proposed discipline, noting Movant had already served six-month automatic temporary suspension for the felony conviction that was later vacated.

I. An Unnamed Attorney v. KBA
2008-SC-000728-KB 11/26/2008

Attorney admitted to advising divorce client to execute mortgage in attorney's favor, instructing her not to tell her client's husband (co-owner of encumbered property) and without otherwise giving the client the opportunity to seek independent legal counsel. After client signed all interest in the property to her husband in property settlement, attorney recorded the mortgage. The now-former husband filed a bar complaint against the attorney when he learned of the mortgage. The Supreme Court granted the attorney's motion for a private reprimand against the attorney.