KENTUCKY SUPREME COURT
APRIL 2021

ADMINISTRATIVE LAW:
Perry Puckett v. Cabinet for Health and Family Services, et al.
2019-SC-0282-DG **April 29, 2021**

Opinion of the Court by Justice Keller. All sitting; all concur. Perry Puckett was terminated from his employment with the Commonwealth of Kentucky Cabinet for Health and Family Services (CHFS) in 2009 for excessive and inappropriate personal email usage. Puckett petitioned the Franklin Circuit Court for review of his termination.

While the case was pending in Franklin Circuit Court, Puckett's attorney learned, through discovery in a separate, unrelated case, that Jay Klein, a Division Director in the Division of Employee Management at CHFS, had actually signed the name of J.P. Hamm, CHFS's Human Resources Director, to Puckett's termination letter. Also while Puckett's case was pending, it became clear that Klein did not have the requisite appointing authority to terminate CHFS employees. Based on this new knowledge, Puckett moved to amend his complaint in circuit court to include a claim that Puckett's termination was null and void because the person who signed the termination document lacked appointing authority to terminate him.

The circuit court granted Puckett's motion to amend his complaint and remanded the case to the Personnel Board (Board) for consideration of whether Puckett's termination was void. After protracted litigation through multiple levels of appeals, the Franklin Circuit Court reversed Puckett's termination. CHFS appealed to the Court of Appeals which reversed the circuit court. The Supreme Court granted Puckett's Motion for Discretionary Review.

The Supreme Court held that by failing to file an exception regarding the appointing authority of Klein, Puckett failed to preserve this issue for judicial review and could not raise the issue under Kentucky Revised Statute (KRS) 13B.140. Further, the Court held that the Board's termination of Puckett, despite Klein's lack of authority to terminate him, failed to meet any of the criteria for remand as set out in KRS 13B.150(2), and the circuit court erred in remanding Puckett's case to the Board. The Court also held that in this case the doctrine of primary jurisdiction was not relevant to a determination of whether the circuit court's remand of the matter back to the Board was proper and that the law of the case doctrine was inapplicable. Finally, the Court held that Puckett's termination was void, as opposed to voidable, and needed to be preserved by presentation to the hearing officer or the Board, but it was not. Accordingly, the Supreme Court affirmed the Court of Appeals and reinstated the Board's order terminating Puckett from his employment with CHFS.

CRIMINAL LAW:
Commonwealth of Kentucky v. Jared McCarthy
2019-SC-0380-DG **April 29, 2021**

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Keller, Lambert, and Nickell, JJ., concur. VanMeter, J., concurring in part and dissenting in part by separate opinion in which Conley, J., joins. Criminal Appeal, Discretionary Review Granted. McCarthy was arrested for driving under the influence (DUI) and refused to submit to a warrantless blood alcohol test. He moved pretrial to exclude from evidence his refusal to submit to the test. The trial court ruled McCarthy's refusal to submit to a blood test could not be used to enhance his criminal penalty for DUI and could not be used as evidence that he was guilty of DUI, as otherwise allowed under KRS 189A.105(2)(a)1; however, the refusal could be introduced to explain the Commonwealth's lack of scientific evidence as to McCarthy's blood alcohol content. A jury found McCarthy guilty of DUI, fourth offense. The Court of Appeals concluded the trial court erred by allowing the refusal to be entered into evidence and, finding the error was not harmless, reversed the conviction.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), announced that the Fourth Amendment prohibits warrantless blood tests; without a warrant, either a valid consent or evidence of exigent circumstances is required. Given that warrantless blood tests are invalid under the Fourth Amendment absent a valid exception to the warrant requirement, a defendant cannot be criminally sanctioned for refusing to consent. Because KRS 189A.105 imposes an unauthorized penalty on refusal to submit to a warrantless blood test, the trial court properly determined McCarthy's refusal could not be used to enhance his penalty upon his conviction of DUI. The trial court also properly ruled that McCarthy's refusal could not be introduced as evidence of his guilt during the DUI prosecution. Kentucky precedent, *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005), and *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582 (Ky. 2007), generally prohibits introduction of evidence that a defendant exercised his constitutionally-recognized right to be free from a Fourth Amendment search. McCarthy's right to refuse a blood test was inadmissible as evidence of his guilt of DUI and nothing arose via McCarthy's defense that would have rendered it otherwise admissible as rebuttal or impeachment evidence, a concept recognized in *Coulthard*. Because the erroneously admitted evidence was not harmless beyond a reasonable doubt, the Supreme Court affirmed the Court of Appeals, reversed McCarthy's conviction and remanded the case to the trial court for further proceedings.

Robert Carson, Jr. v. Commonwealth of Kentucky
2019-SC-0585-MR **April 29, 2021**

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Conley, Hughes, Nickell, and VanMeter, JJ., concur. Nickell, J., concurs in result only. Keller, J., dissents without opinion. A criminal case wherein the Court considered the propriety of a detective's testimony concerning his use of a specialized technique to spot a criminal suspect's deception during an interrogation.

The Court held that the detective's testimony went beyond the permissible scope of a lay opinion. Under Kentucky precedent, law enforcement officers are permitted to testify as to his or her observations of a defendant during an interrogation and opine

as to the defendant's demeanor. However, when the detective testified that the defendant's deceptive behavior was revealed by the technique, he infringed on the jury's role to determine the veracity of a witness or the defendant.

FAMILY LAW:

A.G. v. Cabinet for Health and Family Services, Commonwealth of Kentucky, et al.
2020-SC-0273-DGE **April 29, 2021**

Opinion of the Court by Justice Lambert. All sitting; all concur. A termination of parental rights action in which the Court reversed the Court of Appeals and vacated the judgment of the Jefferson Family Court. The Court held that the record did not contain substantial evidence of dependency, neglect, or abuse sufficient to support termination pursuant to KRS 425.090. Further, the Court held that a noncustodial parent who is not subject to allegations of neglect or abuse is not required to complete a home study under KRS 615.030, the Interstate Compact for the Placement of Children.

Cabinet for Health and Family Services, Commonwealth of Kentucky, et al. v. H.L.O. 2020-SC-0276-DGE **April 29, 2021**

Opinion of the Court by Justice Keller. All sitting; all concur. E.R.-L.O. was born in February 2016, and at birth, both she and her mother, H.L.O., tested positive for Methamphetamine and Buprenorphine. E.R.-L.O. was placed in the Cabinet's custody, where she has remained her entire life. Following an evidentiary hearing in February 2019, the Letcher Circuit Court terminated H.L.O.'s parental rights. The circuit court specifically found three grounds justifying H.L.O.'s termination. First, H.L.O. had continuously or repeatedly failed or refused to provide or had been substantially incapable of providing essential parental care and protection with no reasonable expectation for improvement considering the age of the child. KRS 625.090(2)(e). Second, for reasons other than poverty alone, H.L.O. had continuously or repeatedly failed to provide, or was incapable of providing, essential food, clothing, shelter, medical care, or education with no reasonable expectation of improvement in the immediately foreseeable future. KRS 625.090(2)(g). Third, E.R.-L.O. had been in the custody of the Cabinet for fifteen of the past forty-eight months. KRS 625.090(2)(j).

A divided Court of Appeals reversed the trial court's termination. The Court of Appeals held that the circuit court's findings pursuant to KRS 624.090(2)(e) and (g) were not supported by clear and convincing evidence. It went on to say that while E.R.-L.O. had been in the Cabinet's custody for the requisite length of time under KRS 625.090(2)(j), the facts of the case were such that the circumstances should not be held against H.L.O.

The Kentucky Supreme Court granted discretionary review. The Supreme Court reversed the Court of Appeals, holding that the circuit court's findings under KRS 625.090(e) and (g) were supported by substantial evidence. The Court held that the circuit court's consideration of H.L.O.'s relationship with her significant other was relevant to the circuit court's assessment of H.L.O.'s protective capacity, her ability to support E.R.-L.O., and her reasonable expectation for improvement in these measures. The Court then turned to E.R.-L.O.'s time in the Cabinet's custody, holding

that for purposes of KRS 625.090(2)(j), it is a measure of the time from the first custody order, not from a permanent commitment order.

WORKERS COMPENSATION:
Alice Jolly v. Lion Apparel, Inc., et al.
2019-SC-0631-WC **April 29, 2021**

Opinion of the Court by Justice Lambert. Minton, C.J.; Conley, Hughes, Keller, Lambert, and VanMeter, JJ., sitting. All concur. Nickell, J., not sitting. Workers' Compensation. Petition for Reconsideration. Time for Appeal. An improper petition for reconsideration does not toll the running of time to file an appeal. Where a party improperly filed a second petition for reconsideration of a decision outside the 14-day window of KRS 342.281, and the same party thereafter appealed to the Board, the appeal was untimely.

Brownwood Property, LLC v. Sheena Thornton, et al.
2020-SC-0167-WC **April 29, 2021**

Opinion of the Court by Justice Lambert. All sitting; all concur. The employee was injured while working on a horse farm owned by the employer. At the time of the employee's injury, the farm was in the process of being restored to a fully functioning horse farm. It was undisputed that the employer was an employer "solely engaged in agriculture" under KRS 342.630(1). Therefore, the dispositive issue was whether the employee was a "person employed in agriculture" in accordance with the definition of agriculture under KRS 342.0011(18), i.e., whether her job duties were "any work performed as an incident to or in conjunction with the farm operations." The Court held that her job duties, which primarily consisted of mowing grass around the numerous residences on the farm in addition to cleaning one of the guest houses, met the definition of agriculture. Accordingly, the agricultural exception to workers' compensation coverage applied, and the employee was not entitled to workers' compensation benefits.

ATTORNEY DISCIPLINE:
Alecia Lococo v. Kentucky Bar Association
2020-SC-0543-KB **April 29, 2021**

Opinion and Order of the Court. All sitting; all concur. Lococo was suspended from the practice of law after two disciplinary actions were brought against her. The first resulted in her temporary suspension. A probable-cause determination was later made that Lococo was negligent in maintaining an adequate accounting system for handling client funds and that she misappropriated for her own benefit funds held for others, resulting in an additional three-year suspension. In 2006, Lococo was suspended again for six months for conduct that occurred before the first disciplinary action began. Lococo moved for that suspension to run concurrently to the previously imposed three-year suspension. The KBA agreed and the Supreme Court granted the motion.

In 2017, Lococo moved for reinstatement. At the hearing, Lococo submitted affidavits establishing that at the time of her professional misconduct she was suffering from undiagnosed Adult Attention-Deficit Hyperactivity Disorder (ADHD). The affidavits also

established that after she was suspended she sought medical treatment and has been compliant with all treatment recommendations for 17 years. The Character and Fitness Committee ultimately found Lococo had satisfied all requirements for reinstatement, including compliance with all terms of her suspension; that while under suspension she showed she was worthy of the trust and confidence of the public; that she had sufficient professional capabilities to serve the public as a lawyer; she exhibited good moral character; she appreciated the wrongfulness of her misconduct; she had manifested remorse for her professional misconduct; and she had rehabilitated herself from her past mistakes.

After reviewing the Character and Fitness Committee's findings, as well as the record of Lococo's disciplinary actions, the Board of Governors recommended her reinstatement application be approved. It additionally recommended KYLAP monitoring and mentoring, all the requirements under SCR 3.510(4), and completion of the bar exam. After reviewing the record, the Supreme Court adopted the Board of Governors' recommendations and ordered Lococo to be reinstated, subject to conditions.