

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
FEBRUARY 2017**

I. CONSTITUTIONAL LAW:

**A. Dennis Champion v. Commonwealth of Kentucky
2015-SC-000570-DG February 16, 2017**

Opinion of the Court by Chief Justice Minton. All sitting. Minton, C.J.; Hughes, Keller, Venters, and Wright, JJ., concur. Cunningham and VanMeter, JJ., concur in result only. Champion was arrested for violation of a Lexington city ordinance prohibiting begging or soliciting on public streets or intersections. He challenged the ordinance on two grounds: (1) questioning whether the city had the power to impose criminal laws and (2) that the ordinance violated his free speech rights under the First Amendment to the United States Constitution.

In an opinion by Chief Justice Minton, the Court reversed the lower court ruling and held the ordinance unconstitutional. Under the United States Supreme Court's ruling in *Reed v. Town of Gilbert, Arizona*, the Court declared that speech codes imposing different standards based on the content of a speaker's message are presumptively unconstitutional and subject to strict-scrutiny review. Here, the Court determined that Lexington's ordinance discriminated based on content. The ordinance failed to meet the standards of strict scrutiny because Lexington failed to prove the existence of a compelling state interest and its methods of achieving its stated goals were both under and over inclusive.

II. CREDITORS' RIGHTS:

**A. Unifund CCR Partners v. Carol Harrell
2015-SC-000117-DG February 16, 2017**

Opinion of the Court by Justice Keller. Minton, C.J.; Cunningham, Hughes, Keller, and Wright, JJ., concur. Venters, J., dissents by separate opinion. VanMeter, J., not sitting. Harrell obtained a credit card from Citibank and had an outstanding balance of \$1,472.58 when she defaulted. On January 18, 2011, Citibank "charged off" Harrell's debt, and, in compliance with federal law, stopped sending Harrell statements and stopped adding interest to her account. In November 2011, Citibank sold Harrell's debt to Pilot Receivables Management, which assigned the right to collect the debt to Unifund. Unifund filed an action to collect the balance of the debt Harrell owed to Citibank plus statutory interest from the date Citibank charged off the debt. Harrell filed a counter-claim alleging the Unifund violated the Fair Debt Collections Practices Act (FDCPA) by attempting to collect interest from and after the date Citibank had charged off the debt. The circuit court dismissed Harrell's action finding that Unifund had not violated the FDCPA. The Court of Appeals reversed.

The Supreme Court affirmed the Court of Appeals. In doing so, the Court first analyzed KRS 360.010(1). The Court determined that KRS 360.010(1) creates a default interest rate if the parties have not contractually agreed to a different rate. When Citibank and Harrell agreed to a different interest rate, the provisions of KRS 360.010(1) no longer applied, which meant that Citibank had effectively waived the right to collect statutory interest. The Court then noted that Citibank, by charging off Harrell's debt, had ceded the right to charge her additional interest under the contract. The Court held that Unifund, as Citibank's ultimate assignee, had no more rights than Citibank; therefore, because Citibank was foreclosed from charging Harrell either statutory or contractual interest, Unifund was also. Finally, the Court held that Harrell had alleged sufficient facts, *i.e.* that Unifund was attempting to unlawfully collect interest, to go forward with her FDCPA claim. Therefore, the Court remanded to the circuit court for reinstatement of Harrell's claim.

In his dissent, Justice Venters stated that both Citibank and Unifund retained the right to charge statutory pre-judgment interest despite Citibank's charge-off of Harrell's debt.

III. CRIMINAL LAW:

A. **Paul Lamb v. Commonwealth of Kentucky** **[2015-SC-000255-MR](#) February 16, 2017**

Opinion of the Court by Justice Venters. All sitting; all concur. Criminal Direct Appeal. *Questions presented:* Whether the trial court erred by: (1) allowing Lamb to waive counsel in favor of self-representation; (2) failing to suppress evidence from an illegal search; (3) allowing entry of improper character evidence; (4) denying a directed verdict; and (5) allowing Lamb's sentence to be enhanced as a subsequent offender. *Held:* (1) The trial court adequately cautioned Lamb so that he had an appropriate understanding of the dangers of self-representation and properly determined that Lamb had waived his right to counsel. (2) Under the collective knowledge doctrine, the arresting officer had probable cause to stop and arrest Lamb for drug trafficking. The trial court properly declined to suppress evidence obtained as a result of the search of Lamb's person as the search was incident to a lawful arrest. (3) Entry of evidence that a confidential informant's work resulted in convictions, if error, was not readily apparent error. Given the informant's and detectives' testimony about the controlled drug buy between the informant and Lamb, there was no substantial probability that the outcome of the case would have been different if the trial court had intervened *sua sponte* to reject the portion of the testimony at issue. Lamb was not entitled to relief under RCr 10.26. (4) Substantial evidence including a video recording of the illegal transaction supported the charge, such that a reasonable jury could reasonably find Lamb guilty of the charge of first degree trafficking, and therefore, Lamb was not entitled to a directed verdict. (5) Lamb's challenge to the constitutionality of KRS 218A.010(41) because it enhances subsequent

convictions for drug trafficking no matter how far in time they are removed from the defendant's previous conviction failed. The legislature may, as it deems proper, impose restrictions on the remoteness of prior offenses for the purposes of enhanced sentencing. Lamb did not meet the burden of showing KRS 218A.010(41) as clearly, completely, and unequivocally violating the constitution. The trial court did not err by allowing Lamb's sentence to be enhanced as a subsequent offender.

**B. Clarence L. Cobb v. Commonwealth of Kentucky
2016-SC-000063-DG February 16, 2017**

Opinion of the Court by Justice Wright. All sitting; all concur. A police officer on patrol spotted a car that he followed, believing the driver—who would turn out to be the Appellant—to be a man he had recently arrested for driving on a suspended license. After the driver parked in a driveway and exited his vehicle, the officer approached. The name the driver gave was not the person whom the officer had previously arrested, so the officer let him go. The driver then entered a house that was not the one in whose driveway he had parked. The officer then checked the name the driver had given him against police records and discovered that the driver did not match the picture associated with that name. When the officer then confronted the driver with the photo, he admitted that he had given the wrong name and gave his true name. He was indeed the person whom the officer had previously arrested for driving on a suspended license. After determining that the Appellant's license was still suspended, the officer arrested him. In the meantime, a neighbor informed the officer that she took care of the elderly man in whose driveway the Appellant had parked. According to the neighbor, the Appellant neither lived at that residence nor had permission to park in its driveway. Based on this information, the officer seized the vehicle, called a tow truck, and searched the vehicle before it was towed, as was department policy. The search uncovered incriminating evidence. The Appellant was charged with various crimes based on that search, and he moved to suppress the evidence found in his vehicle. After that motion was denied, he pleaded guilty to the charges but conditioned his plea on retaining his right to appeal the denial of his motion. The Court of Appeals affirmed.

After granting discretionary review, this Court also affirmed. In doing so, the Court agreed that the arresting officer's testimony constituted substantial evidence supporting the trial court's factual findings that the police department had a standard policy of conducting inventory searches on vehicles before they are towed away and that the Appellant had parked his vehicle in a place it did not belong. The Court further held that the warrantless seizure and search of the Appellant's vehicle was reasonable and lawful under the circumstances.

C. Rex Allen Murphy v. Commonwealth of Kentucky

[2015-SC-000487-MR](#)

February 16, 2017

Opinion of the Court by Justice Hughes. All sitting. Minton, C.J.; Cunningham, Keller, VanMeter, and Venters, JJ., concur. Cunningham, J., concurs by separate opinion. Wright, J., concurs in result only by separate opinion. Following his conviction for first-degree sodomy, first-degree sexual abuse, and use of a minor in a sexual performance, Murphy was sentenced to 30 years' imprisonment. The Court reversed Murphy's convictions for first-degree sodomy and first-degree sexual abuse due to the Commonwealth's failure to prove the element of forcible compulsion. Specifically, Murphy's threat to use black magic to erase his victim's mind did not satisfy the "physical" elements of forcible compulsion nor was that threat made in the requisite temporal proximity to the charged offenses. Murphy's remaining appellate claims were meritless and therefore the Court affirmed his conviction for use of a minor in a sexual performance.

IV. TRESPASS:

A. Nellie Fleming, et al. v. EQT Gathering, LLC

[2015-SC-000161-DG](#)

February 16, 2017

Opinion of the Court by Justice Venters; Minton, C.J., Cunningham, Hughes, Keller, and VanMeter, J.J. concur; Wright, J. not sitting. Common law trespass action; Appellee landowners brought suit alleging that Appellant, a natural gas transmission company (EQT) had trespassed by constructing a section of gas pipeline on Appellees' land. EQT denied tress, and claimed the pipeline was entirely within right of way granted on adjoining property. At the outset of the trial, EQT raised claim that common law trespass action could not be maintained and that Appellee's only judicial remedy was a reverse condemnation action. Trial court rejected that defense, granted directed verdict on the question of trespass, and submitted the case to jury on the question of damages. After verdict for Appellees, EQT appealed. The Court of Appeals held that directed verdict was improper and remanded for new trial. But further, the Court of Appeals sua sponte directed that upon remand, adjoining landowners must be added as necessary and indispensable parties. On discretionary review, the Supreme Court affirmed in part and reversed in part. The Supreme Court affirmed the Court of Appeals' conclusion that the directed verdict was improperly granted, and affirmed the Court of Appeals' conclusion that the trial court reevaluate the reverse condemnation issue upon remand. But, the Court reversed the Court of Appeals' directive that adjoining landowners must be added as parties. The Court held that although ownership of land underlying the pipeline was an evidentiary fact to proven as part of Appellees' trespass claim, the trespass claim was not an adjudication of the boundary line; and that judgment arising from the trespass action did not affect rights of adjoining landowners, especially since the Appellees and the adjoining property owners had not disputed their common boundary.

V. **WORKERS COMPENSATION:**

- A. **Commonwealth of Kentucky, Uninsured Employers' Fund v. Kara Sidebottom, A/K/A Kara Harville, et al.**
2016-SC-000249-WC **February 16, 2017**

Opinion of the Court by Justice Venters; All sitting; All concur. Workers' Compensation; *Question presented:* Whether injured worker's failure to report tips as income on her income tax returns compels the calculation of her average weekly wage for compensation award to be treated as fixed-income wage earner under KRS 342.140(1)(a), rather than a variable-wage earner under KRS 342.140(1)(d). Sidebottom worked in a diner earning wages of \$100 per week plus tips. Tips formed a substantial part of her take-home pay. She was injured on the job and applied for workers' compensation benefits. Pursuant to KRS 342.140(6), only tips that are reported to the IRS for tax purposes may be included in an injured employee's average weekly wage calculation. After excluding unreported tips, the ALJ calculated Sidebottom's average weekly wage pursuant to KRS 342.140(1)(d) as an employee whose weekly wage may vary because they are paid "by the hour, by the day, or by the output." Pursuant to that method, the ALJ determined that over the 52-week look back period used to calculate Sidebottom's most favorable wage captured income during a period in which her employer was reporting tip income for tax purposes. The Uninsured Employer's Fund argued that because Sidebottom's tip income was not being reported at the time she was injured, KRS 342.140(6) required that she be treated as a fixed-wage or salaried employee with her compensation benefit based upon her then-current pay of \$100 per week. *Held:* the Supreme Court agreed with the lower tribunals and held that the unreported wages provision contained in KRS 342.140(6) acted to exclude Sidebottom's tips from being used in the calculation of her average weekly wage; however, application of that provision did not also convert Sidebottom into a fixed wage employee not entitled to the "wage most favorable to the employee" look-back period contained in KRS 342.140(1)(d).

VI. **ATTORNEY DISCIPLINE:**

- A. **Marc Alan Wells v. Kentucky Bar Association**
2016-SC-000662-KB **February 16, 2017**

Opinion and Order of the Court. Minton, C.J.; Hughes, Keller, VanMeter, Venters, and Wright, JJ., concur. Cunningham, J., not sitting. The charges against Wells arose from his failure to keep personal and client funds separate; his failure to maintain an adequate balance in his escrow account; and his failure to timely respond to requests for information from the KBA. Wells admitted the violations. However, he noted that he had been involved in no prior disciplinary proceedings during his more than 40 years of practice and that he had taken steps to ameliorate any harm when he realized his errors. The parties agreed that a 61 day suspension probated for one year with conditions was appropriate. The conditions included receipt of no additional charges within the probationary period and completion of

the Ethics and Professionalism Enhancement Program. The Supreme Court concurred that the agreed to sanctions were appropriate and issued an order consistent with that agreement.