

**KENTUCKY SUPREME COURT  
FEBRUARY 2022**

**CRIMINAL LAW:**

**Shawn Welsh v. Commonwealth of Kentucky**

**[2020-SC-0021-MR](#)**

**February 24, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Criminal Appeal. Shawn Welsh led three law enforcement agencies on a high-speed pursuit. The pursuit began in Meade County and ended in Hardin County when Welsh crashed the vehicle he was driving into a vehicle occupied by four teens. The driver and the front passenger died at the scene and the other two passengers suffered serious physical injuries. In preparation of trial, believing Welsh intended to introduce evidence that either the police officers violated their pursuit policies or that they in some way contributed to Welsh's wanton conduct, the Commonwealth filed a motion to preclude admission of the various law enforcement agencies' policies and procedures regarding pursuits. The trial court granted the motion. Welsh was convicted as charged by a Hardin County jury of two counts of wanton murder and two counts of assault in the first degree. On appeal, Welsh claims that due to the trial court excluding the police pursuit policies and procedures he was not able to give the jury all the facts and expose especially the pursuit-initiating officer's blameworthiness in the deaths and injuries, and thus was denied the right to present a full defense. *Held:* The trial court did not abuse its discretion by excluding the pursuit policies from evidence. Applying Kentucky Rules of Evidence and general principles of criminal responsibility, the Supreme Court determined that any negligence on the part of the officers was not relevant to the jury's determination of whether Welsh was guilty of the criminal offenses charged. Whatever role failure to abide by a law enforcement agency's pursuit policy may play in civil litigation, it has no bearing on a criminal prosecution where the focus is on the defendant, his state of mind and his actions.

**Gregory Shields, Sr. v. Commonwealth of Kentucky**

**[2020-SC-0060-MR](#)**

**February 24, 2022**

Opinion of the Court by Justice Hughes. All sitting. Lambert and VanMeter, JJ., concur. Minton, C.J., concurs in result only. Keller, J., dissents by separate opinion, in which Conley and Nickell, JJ., join. Criminal Appeal. Gregory Shields, Sr., the caretaker for his uncle and aunt, Samuel and Maude Murrell, was arrested for the murder of his uncle. Mrs. Murrell, the eighty-two-year-old eyewitness to the crime, testified at the preliminary hearing, detailing the events which led to Mr. Murrell's death. A Warren County grand jury indicted Shields for murder. Mrs. Murrell died before Shields's trial. Defense counsel moved the trial court to exclude from evidence Mrs. Murrell's videotaped preliminary hearing testimony and the motion was denied. *Held:* The trial court did not abuse its discretion by denying Shields's motion. Under the facts of this case, Shields's Sixth Amendment right to confront the witness was not violated because he had an adequate opportunity to cross-examine the witness at the hearing and in fact did so, asking several questions without any limitation by the presiding judge.

**Joseph Capstraw v. Commonwealth of Kentucky**  
[2020-SC-0186-MR](#)

**February 24, 2022**

Opinion of the Court by Justice Lambert. All sitting; all concur. Capstraw was convicted of the murder of his girlfriend by both blunt force trauma and strangulation. The Court held: (1) The trial court did not abuse its discretion by admitting eight post-mortem photographs of the victim. (2) The Defendant's right to a unanimous jury verdict was not violated. The United States Supreme Court's recent holding in *Ramos v. Louisiana*, \_\_ U.S. \_\_ 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) did not compel a change in Kentucky precedent regarding the allowance of "combination" jury instructions that allow a jury to find a defendant guilty of murder even though some jurors may have believed the killing intentional and others wanton as long as the evidence reasonably supported both theories. (3) The Defendant's Confrontation Clause rights were not violated because the results of a blood alcohol test introduced through the testimony of the lead detective was created for the purposes of medical treatment and was accordingly not testimonial in nature. (4) The trial court's requirement that the Defendant reimburse the county jail for the costs of his incarceration as part of his sentencing was vacated. Before a trial court may order a defendant to reimburse a jailer for the costs and fees of his or her incarceration, there must be sufficient evidence of record that a jail fee reimbursement policy has been adopted by the jailer with the approval of the county's governing body in accordance with KRS 441.265(2)(a).

**Johnny R. Cox v. Commonwealth of Kentucky**  
[2020-SC-0391-DG](#)

**February 24, 2022**

Opinion of the Court by Justice Lambert. All sitting. Minton, C.J.; Hughes, Keller, and Nickell, JJ., concur. Conley, J., concurs in part and dissents in part by separate opinion in which VanMeter, J., joins. Cox was arrested after two witnesses accused him of touching his nine-year-old niece's vagina while giving her a hug. On the day of his arrest, he agreed to speak to a detective at the police station regarding the allegations. Prior to the interview, the detective mirandized the Defendant. Cox stated that he understood his rights and eventually confessed. Defense counsel later filed two motions to suppress the Defendant's interview with the detective. The defense argued, first, that the interview should be suppressed because the Defendant's intellectual disability and long history of mental illness prevented him from providing an adequate waiver of his Miranda rights. Following a suppression hearing, the trial court found that the Defendant provided an adequate waiver. Second, the defense asserted that the interview should be suppressed because the Defendant invoked his right to counsel during the interview, but the detective did not stop the interview immediately thereafter. The detective testified during the suppression hearing that he did not hear the Defendant invoke his right to counsel. The trial court found that, even if the Defendant did ask to speak to a lawyer, it was not unreasonable for the Detective to have misunderstood or misheard the invocation. Therefore, the trial court reasoned, the Defendant did not invoke his right to counsel. The Defendant later entered a conditional guilty plea and appealed both rulings to the Court of Appeals, which affirmed.

The Supreme Court held: (1) Based on the totality of the circumstances, the Defendant gave a voluntary, knowing, and intelligent waiver of his Miranda rights before speaking

to the detective. (2) The trial court’s factual finding that the Defendant said to the Detective, “So when they try to accuse me of doing something [inaudible] talk to a goddamn lawyer. I’m serious, man” was not clearly erroneous. And, that statement was unambiguous and unequivocal. Further, the trial court erred by applying a subjective standard to determine whether it was reasonable for the detective not to hear the Defendant’s unambiguous and unequivocal statement that he wanted to speak with an attorney. As a matter of first impression, the Court held that when an officer claims to have either misheard or misunderstood a suspect’s alleged invocation of counsel, the trial court must determine whether a reasonable officer under the circumstances would have heard or understood the alleged invocation. A “reasonable officer” in those circumstances is an officer with ordinary hearing abilities who has taken steps to ensure that clear communication can occur between the officer and the suspect. Further, a reasonable officer is attentive to the suspect’s answers to questions. The Court vacated the Defendant’s conviction and remanded the case to allow the trial court to address the Defendant’s motion to suppress on invocation of counsel grounds under this newly adopted standard.

**Deverious Jones v. Commonwealth of Kentucky**

**[2021-SC-0009-MR](#)**

**February 24, 2022**

Opinion of the Court by Justice Keller. Minton, C.J.; Conley, Hughes, Lambert, and Nickell, JJ., sitting. VanMeter, J., not sitting. Deverious Dajewon Jones, the Appellant, and his co-defendant, Tahjee Winters, were indicted for a string of robberies that occurred in Lexington between September 7, 2016 and September 17, 2016. Five separate incidents gave rise to Jones being found guilty of one count of complicity to assault in the first degree, one count of burglary in the first degree, six counts of robbery in the first degree, three counts of complicity to robbery in the first degree, and four counts of principal or complicitor to robbery in the first degree. He was sentenced to twenty-four years’ imprisonment. He appeals his conviction claiming he did not have conflict-free representation and that his *Miranda* rights were violated.

On review, the Court first held that Jones’s counsel did not have a conflict. A witness who had been called to testify against Jones was previously represented by Jones’s counsel in an unrelated matter. However, the witness never testified, and so no actual successive conflict existed at trial. Second, the Court held that several of the questions asked of Jones at arrest did not fall under the booking exception to *Miranda*. However, the prejudice resulting from the error was harmless beyond a reasonable doubt. Therefore, the Court affirmed the conviction.

**ESTATES:**

**Mitzi Simpson, as Co-Administrator of the Nannie Catherine Wethington Estate, et al. v. Kerry T. Wethington, et al.**

**[2020-SC-0567-DG](#)**

**February 24, 2022**

Opinion of the Court by Justice Conley. All sitting; all concur. After a bench trial, the Marion Circuit Court determined the Estate of Nannie Wethington was not entitled to any portion, pursuant to the dower statute, KRS 392.020, of a \$38,500 gift made by her husband, James, to their son. The gift was from money in a joint account between James and Nannie. It was made two days prior to James’ death, was unknown to Nannie, and James had expressed his desire to prevent Nannie and his other children

from “stealing” the money after his death. The trial court determined it was a valid *inter vivos* gift and refused to apply the dower statute. The Court of Appeals affirmed.

The Supreme Court reversed and remanded. It held Kentucky has long recognized the common law rule against fraudulent deprivation of dower, prohibiting a husband from giving a substantial portion of his estate without his wife’s knowledge in order to defeat her dower right. The court also ruled KRS 392.020 has no language plainly abolishing the common law rule, nor are the statute and the common law rule irreconcilable. Per the rule, a *prima facie* case of fraud arises when a substantial portion of an estate is secretly gifted prior to the donor’s death. In this case, the gift was 52% of the total personalty of the estate and was unknown to Nannie therefore, the trial court should have applied the presumption of fraud and obliged the son to overcome it with evidence from the totality of the circumstances. The Supreme Court’s application of the law is *de novo* and it determined the testimony of the son confirmed the presumption of fraud. Finally, the Supreme Court remanded to the trial court to determine the amount of money from the gift Nannie’s estate was entitled to, to fulfill her 50% statutory share.

**GUARDIANSHIP:**

**Christopher Jackson, III, as Administrator of the Estate of Christine Jackson, Deceased v. Legacy Health Services, Inc., et al.**

**[2021-SC-0062-DG](#)**

**February 24, 2022**

Opinion of the Court by Justice Lambert. All sitting; all concur. This appeal arose from an order of the Fayette Circuit Court denying the motion of the Defendants to dismiss or, in the alternative, stay a lawsuit and compel arbitration of medical malpractice claims brought by Christopher Jackson, III, as guardian for his mother. The circuit court determined that Christopher did not have the authority as his mother’s guardian to enter into a binding but voluntary arbitration agreement on his mother’s behalf. Defendants appealed. The Court of Appeals reversed. After review, the Supreme Court held that a guardian has the authority to bind their ward to contracts that limit or deprive the civil rights of their ward only to the extent necessary to provide needed care and services to the ward, as clearly indicated by the plain language of KRS 387.660. To determine if a contract is voidable for a guardian’s lack of authority demands a two-part analysis: courts must determine if (1) there was a limitation or deprivation of the ward’s civil rights, and (2) the limitation or deprivation of rights was only to the extent necessary to provide needed care and services to the ward. If the contract restricted the civil rights of the ward beyond that which was required for the guardian to secure needed care and services to the ward, then the guardian lacked the authority to enter into the contract on their ward’s behalf, and the contract is void. If it deprives the ward of her rights only to the extent necessary, then the guardian has the authority to enter the contract and it is valid. In the instant case, the Supreme Court determined that, because the arbitration agreement was not a condition of the guardian’s admission to the facility, and the arbitration agreement waived the ward’s right to a trial by jury, it was void.

**STANDING:**

**Andy Beshear, in his Official Capacity as Governor of the Commonwealth of Kentucky, et al. v. Ridgeway Properties, LLC d/b/a Beans Café & Bakery, et al.**  
**2021-SC-0228-I** **February 24, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Minton, C.J., also concurs by separate opinion, in which Keller and VanMeter, JJ., join. Beans Cafe initially filed a complaint in Boone Circuit Court on June 16, 2020 challenging the Governor’s COVID-19 mandates. Attorney General Daniel Cameron intervened as a Plaintiff in the action. The Kentucky Supreme Court reversed the Boone Circuit Court’s temporary injunction order that would have enjoined the enforcement of the Governor’s COVID-19 orders in *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020).

In its 2021 regular session, the Kentucky General Assembly passed three bills which amended the Governor’s emergency powers under Kentucky Revised Statutes (KRS) Chapter 39A. This legislation (the 2021 Legislation) significantly lifted the restrictions on businesses, limited the Governor’s orders to thirty days unless an extension is approved by the General Assembly, and directed the Cabinet for Health and Family Services to promulgate any regulations regarding infectious diseases pursuant to KRS Chapter 13A. The 2021 Legislation became effective February 2, 2021 when the Governor’s vetoes were overridden by the General Assembly. That same day, the Governor filed an action in Franklin Circuit Court against the Legislature and Attorney General Daniel Cameron and that court eventually enjoined the implementation of the 2021 Legislation.

On March 11, 2021 Beans filed a Third Amended Complaint in the still-pending Boone County case advocating for the constitutionality of the 2021 Legislation. The Boone Circuit Court entered an order declaring the constitutionality of the 2021 Legislation, holding any orders to the contrary imposed by the Governor unconstitutional, and prohibiting the enforcement of any order in conflict with the 2021 Legislation against any person in the Commonwealth. Meanwhile, the Kentucky Supreme Court determined that the Franklin Circuit Court’s temporary injunction enjoining the enforcement of the 2021 Legislation was improper in *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021).

On appeal of the Boone Circuit Court’s order in *Beshear v. Ridgeway Properties*, the Kentucky Supreme Court held that Beans lacked standing because it has no injury, actual or imminent, caused by the Governor or any of the other defendants named in its Third Amended Complaint. The trial court stated that Beans “presented evidence of the injury it is suffering” but that limited evidence all predated the passage of the 2021 Legislation. Since that legislation, and pursuant to it, Beans operated under its own COVID-19 plan, choosing to comply with the Centers for Disease Control guidelines without any harm or interference from the Governor. Given Beans’ lack of concrete actual or imminent injury, there was no constitutionally-required justiciable cause and the Boone Circuit Court lacked jurisdiction to grant “relief” by opining on the constitutionality of the 2021 Legislation.

Further, the Attorney General’s presence in the Boone Circuit Court action did not remedy Beans’ lack of standing. Kentucky’s doctrine of “exclusive concurrent jurisdiction” prevents the same parties from litigating the same issue in two courts by

giving priority to the court that first properly acquired jurisdiction over the parties and their dispute. The first court to acquire jurisdiction over the dispute between the Attorney General and the Governor regarding the constitutionality of the 2021 Legislation was the Franklin Circuit Court on February 2, 2021. As a result, the Attorney General was precluded from presenting a justiciable cause in Boone Circuit Court in March 2021. The Court reversed the Boone Circuit Court and remanded the matter for dismissal of the action in its entirety.

**WORKERS' COMPENSATION:**

**Dee Whitaker Concrete v. Austin Ellison, et al.**

**[2021-SC-00070-WC](#)**

**February 24, 2022**

Opinion of the Court by Justice Hughes. All sitting; all concur. Austin Ellison was employed by Dee Whitaker Concrete as a general laborer. Whitaker Concrete employees, including Ellison, routinely met at the employer's premises and traveled together to various jobsites. While leaving a jobsite and traveling back to the employer's premises, Ellison was injured in an automobile accident. Whitaker Concrete denied Ellison's workers' compensation claim, asserting that injuries sustained while going to or returning from the workplace are not compensable. The Administrative Law Judge (ALJ) determined that the "service to the employer" and "traveling employee" exceptions to the "going and coming" rule were applicable and awarded disability benefits. On appeal, the Workers' Compensation Board and Court of Appeals affirmed.

The Kentucky Supreme Court held that the traveling employee exception is applicable. Grounded in the positional risk doctrine, the traveling employee exception considers that an injury that occurs while the employee is in travel status is work-related unless the worker was engaged in a significant departure from the purpose of his trip. Ellison's work required travel away from the employer's premises and Ellison's employment was the reason for his presence at what turned out to be a place of danger. Travel was an implicit part of Ellison's employment and Whitaker Concrete acquiesced to this practice by providing company vehicles and paying for gas. Additionally, the service to the employer exception also applies because the employees traveling together ensured that employees arrived at jobsites on time and as a group, which was essential to the coordination of the arrival of concrete. The travel benefitted the employer by furthering his business. The Court affirmed the Court of Appeals.

**Deborah Robbins French v. Rev-A-Shelf, et al.**

**[2021-SC-0146-WC](#)**

**February 24, 2022**

Opinion of the Court by Justice Keller. All sitting; all concur. Robbins was employed by Rev-A-Shelf as an assembly line leader. While in that employment, Robbins tripped over a pallet and fell on her extended left arm. She was eventually diagnosed with a Type II SLAP tear. She sought workers' compensation benefits. The Administrative Law Judge (ALJ) awarded Robbins temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits. He enhanced the PPD benefits by the two-times multiplier from Kentucky Revised Statute (KRS) 342.730(1)(c)2.

On appeal, the Supreme Court held that the ALJ's award of TTD benefits was supported by substantial evidence and affirmed that award. In order to determine if the ALJ erred in enhancing Robbins's PPD benefits by the two-times multiplier, the Court had to determine if the ALJ properly included the wages from her concurrent employment in the calculation of her post-injury weekly wage. The Court held that because Robbins did not obtain her concurrent employment until after she sustained the work-related injury, the requirement that Rev-A-Shelf have knowledge of the concurrent employment before the date of injury found in KRS 342.140(5) did not apply. Further, the Court held that the ALJ failed to make any findings regarding whether Robbins's earnings from her concurrent employment were covered by the Workers' Compensation Act. Therefore, the Court could not determine if those findings were supported by substantial evidence. Accordingly, the Court vacated the ALJ's enhancement of Robbins's PPD benefits by the two-times multiplier and remanded for further factual findings on that issue.

**ATTORNEY DISCIPLINE:**

**Kentucky Bar Association v. Benjamin Gerald Dusing**  
**[2021-SC-0512-KB](#)**

**February 24, 2022**

Opinion and Order of the Court. All sitting; all concur. The Inquiry Commission filed a petition to temporarily suspend Dusing based on allegations contained in two separate disciplinary files. The petition was based primarily on concerns related to Dusing's lengthy course of abusive and menacing behaviors in two family court cases. The Inquiry Commission specifically raised concerns regarding a video Dusing posted to Facebook that threatened his opposing counsel and a family court staff attorney. The Inquiry Commission further cited a complaint filed by one of Dusing former clients, which contained allegations of prescription drug abuse.

Based on these allegations, the Supreme Court concluded there was probable cause to believe Dusing's conduct posed a substantial threat of harm to his clients or the public. Accordingly, under SCR 3.165, the Court temporarily suspended Dusing from the practice of law and ordered him to submit to a psychological examination.