

**KENTUCKY SUPREME COURT
JANUARY 2022**

CRIMINAL LAW:

Keveon Robinson v. Commonwealth of Kentucky

[2020-SC-0447-MR](#)

[2020-SC-0443-T](#)

January 20, 2022

Opinion of the Court by Justice Conley. All sitting. All concur. Robinson was convicted of first-degree sodomy and sentenced to twenty years in prison. He appealed alleging the trial court abused its discretion by failing to strike two jurors for cause pursuant to RCr. 9.36(1). He also claimed prosecutorial misconduct when the Commonwealth's attorney called him a pedophile during closing arguments.

The Supreme Court held the trial court did not abuse its discretion by failing to strike the two jurors at issue. Although the trial court verbally articulated the standard for striking a juror incorrectly, the court's conduct and reasoning comported with the correct standard. The first juror at issue, argued Robinson, gave a reasonable basis to believe she required both sides to testify to be impartial. This argument is negated, however, by the specific juror's statements explaining why Robinson would not want to testify, evidencing her understanding that testifying is a strategic decision. The totality of circumstances did not justify her being struck. As to the second juror, Robinson alleged a reasonable belief as to her impartiality due to her history of sexual assault thirty years ago. Robinson, however, never questioned the juror on this issue and the juror had affirmed her history would not affect her impartiality at trial. Finally, the Court concluded the Commonwealth committed error by calling Robinson a pedophile at closing argument. Because juries face tremendous societal pressure to convict in child sexual abuse cases, the label of pedophile only serves to inflame the passions of the jury. In this case, however, Robinson had confessed to sodomizing the victim on three different occasions and each time blamed the victim as the initiator of the sexual conduct. Therefore, evidence of Robinson's guilt was overwhelming, and the error was harmless.

Michael Lewis v. Commonwealth of Kentucky

[2020-SC-0550-MR](#)

January 20, 2022

Opinion of the Court by Chief Justice Minton. All sitting. All concur. Lewis appealed as a matter of right his conviction on three counts of first-degree, second-offense, trafficking in a controlled substance and sentence to 32 years in prison. Lewis contended that the trial court reversibly erred on two grounds. First, he claimed that the trial court's inadvertent reading of the "second offense" portion of his indictment to the venire constituted reversible error. Second, he claimed that the trial court's admission into evidence of photos of his tattoos constituted reversible error. Upon review, the Supreme Court concluded that any error committed in reading Lewis' indictment to the venire was corrected by the trial court's provision of an admonishment to the jury, which is presumptively curative. The Court also concluded that the photos of Lewis' tattoos shown to the jury for identification purposes did not contain "badges of custody" such that their admission into evidence violated his right to a fair trial. Accordingly, the Supreme Court affirmed Lewis' conviction.

DOMESTIC RELATIONS:

M.S.S. v. J.E.B., et al.

2021-SC-0100-DGE

January 20, 2022

Opinion of the Court by Chief Justice Minton. All sitting. Hughes, Keller, Nickell, and VanMeter, JJ., concur. Lambert, J., dissents by separate opinion in which Conley, J., joins. J.E.B. and his wife, D.J.B., filed in Warren Family Court a petition to adopt a minor child (Child) without the consent of Child’s biological living parents under KRS 199.502. After a hearing, the family court found that Child’s biological mother, M.S.S., had abandoned Child for a period of not less than ninety days under KRS 199.502(1)(a). As such, the family court granted J.E.B. and D.J.B.’s petition for adoption, which terminated M.S.S.’s parental rights to Child. M.S.S. appealed to the Court of Appeals, which affirmed the family court’s judgment.

The Kentucky Supreme Court granted discretionary review to consider, among other things, whether the Cabinet for Health and Family Services was required to initiate an action to involuntarily terminate Child’s biological living parents’ parental rights under KRS Chapter 625 before J.E.B. and D.J.B. could file a petition for adoption without the consent of the biological living parents under KRS Chapter 199. The Court held that the Cabinet, or any other entity, is not required to initiate an action for involuntary termination of parental rights under KRS Chapter 625 before the filing of a petition to adopt a child without the consent of the biological parents under KRS 199.502. KRS 199.502 makes clear that an adoption under that statute itself terminates the biological parents’ parental rights. As such, it was not error for the family court to grant the adoption of Child under KRS 199.502 without the biological parents’ parental rights first having been terminated under KRS Chapter 625. Additionally, the Court concluded that the family court’s determination under KRS 199.502(1)(a) was supported by substantial evidence. Accordingly, the Court affirmed the decision of the Court of Appeals.

EMPLOYMENT LAW:

Paul Kearney, M.D. v. University of Kentucky

2020-SC-0010-DG

January 20, 2022

Opinion of the Court by Justice Hughes. Minton, C.J.; Conley, Keller, Nickell, and VanMeter, JJ., not sitting. All concur. Lambert, J., not sitting. Dr. Paul Kearney, a trauma surgeon and tenured professor of surgery at the University of Kentucky (UK or University), initiated an action against UK under the Kentucky Whistleblower Act (KWA). Dr. Kearney claimed that the University retaliated against him, including suspending his clinical privileges to practice medicine at the University’s hospital and clinics, because he brought to light the University administration’s non-compliance with an internal administrative regulation, mismanagement, waste, fraud or abuse of authority. UK countered that the acts which Dr. Kearney complained about were disciplinary-related acts only and were the result of Dr. Kearney’s improper, unprofessional behavior over many years when interacting with staff and students, and more recently, a patient. UK moved for summary judgement asserting the Dr. Kearney could not establish a prima facie case of whistleblower retaliation. The trial court granted summary judgment and the Court of Appeals affirmed that decision. This Court granted discretionary review to determine if any of Dr. Kearney’s statements at issue are protected disclosures under the KWA. *Held:* Summary

judgment was properly granted. Kentucky Revised Statute 61.102(1) refers to an administrative regulation duly promulgated pursuant to KRS Chapter 13A, and thus Dr. Kearney's allegations related to UK's internal administrative regulation, AR 3:14, did not constitute a disclosure protected by the KWA. Dr. Kearney's other identified communications also did not meet the KWA's requirements. The communication related to UK's alleged mismanagement of the Kentucky Medical Services Foundation's (KMSF) funding lacked objective facts or information, a prerequisite for a disclosure protected by the KWA. Furthermore, the affidavit related to KMSF's use of funds, which was filed in the record of the case after Dr. Kearney's disciplinary action concluded and after UK notified him that his salary was being reviewed due to the material change in his employment status, was not evidence sufficient to allow a reasonable person to conclude the affidavit's disclosures were a contributing factor in Dr. Kearney's May 2016 salary reduction.

WRIT OF MANDAMUS:

The Cincinnati Enquirer, a Division of Gannett GP Media, Inc. v. Honorable Donna L. Dixon, et al.

[2021-SC-0379-OA](#)

January 20, 2022

Opinion of the Court by Justice Nickell. All sitting. All concur. The Cincinnati Enquirer sought intervention in the Court of Appeals for purposes of seeking redacted copies of briefs filed in four actions concerning challenges to the constitutionality of the Matthew Casey Wethington Act for Substance Abuse Intervention, commonly known as Casey's Law. The Cincinnati Enquirer sought only access sufficient to determine the contents of any constitutional arguments relative to Casey's Law. The Court of Appeals denied intervention in each action. The Cincinnati Enquirer filed a petition seeking a writ of mandamus directed at the two presiding judges of the Court of Appeals panels which denied intervention.

The Supreme Court held the statutory language contained no mechanism for a nonparty to access any portion of the record once a Casey's Law case reaches the appellate courts and thus, any disclosure is governed by the appellate court's inherent, supervisory power over its own records. Utilizing the balancing test set forth in *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 728 (Ky. 2002), the Court concluded appellate briefs are presumptively open to the public and only the most compelling reasons could justify denying access to them. Discerning no overriding interest favoring non-disclosure, and finding the Court of Appeals erred in denying access to redacted briefs, the requested writ was issued. The matters were remanded with instructions to provide the Cincinnati Enquirer copies of the briefs submitted after specifically detailed redactions were completed.

ATTORNEY DISCIPLINE:

Kentucky Bar Association v. Christy Smith Grayson

[2017-SC-0659-KB](#)

[2021-SC-0322-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. The Supreme Court consolidated two separate appeals relating to Grayson's disciplinary violations. In the first, the Kentucky Bar Association trial commissioner recommended that Grayson be found guilty of fifty-one counts of violating the Supreme Court Rules across twelve

disciplinary cases; that she be suspended from the practice of law in Kentucky for five years; that she be ordered to pay restitution to twelve former clients; and that she submit herself for evaluation and treatment of her alleged mental health conditions. In the second, the KBA Board of Governors (Board) recommended that Grayson be found guilty of twenty counts of violating the Supreme Court Rules across six disciplinary cases; that she be permanently disbarred from the practice of law in Kentucky; and that she be assessed the cost of the disciplinary proceeding.

In reviewing the recommendations of the trial commissioner and the Board, the Supreme Court noted that Grayson had stopped participating in both disciplinary proceedings and did not dispute the facts of the charges against her. Accordingly, the Court adopted the factual findings of both the trial commissioner and the Board and found Grayson guilty of violating twelve counts of SCR 3.130(1.16); fourteen counts of SCR 3.130(1.3); twenty-three counts of SCR 3.130(1.4); one count of SCR 3.130(3.2); nine counts of SCR 3.130(8.1); and twelve counts of SCR 3.130(8.4).

The Court further reviewed Grayson's prior discipline and any mitigating and aggravating circumstances before concluding that she should be permanently disbarred from the practice of law. Accordingly, the Court ordered Grayson permanently disbarred and ordered her to pay all costs associated with these proceedings.

Kentucky Bar Association v. Kurt Richard Denton
[2021-SC-0320-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. Denton was served with a Bar Complaint in February 2021. Although he acknowledged receipt of the complaint and requested additional time to respond, he never filed a response. The Inquiry Commission issued a charge against Denton in May 2021, alleging violations of SCR 3.130(1.3); SCR 3.130(1.4)(a); SCR 3.130(1.16)(d); and SCR 3.130(8.10)(b).

The Office of Bar Counsel subsequently attempted serve on Denton in a variety of ways, including by certified mail and through the sheriff's office. However, all attempts were unsuccessful. Under SCR 3.035, the Executive Director also served Denton at both his Bar Roster address and an additional service address listed but Denton failed to respond.

The Court noted that Denton had no prior discipline. But because he failed to actively participate in the Complaint stage or the formal Charge stage and did not reply to any attempts at communication through mail, email, or any other attempts at service, the KBA requested that the Court suspend him under SCR 3.380(2). Upon review of the motion, the Court agreed and indefinitely suspended Denton from the practice of law in the Commonwealth.

Robert Brian Ousley v. Kentucky Bar Association
[2021-SC-0369-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. To resolve his pending disciplinary action, Ousley moved the Supreme Court to impose a sanction of a thirty-day suspension from the practice of law under SCR 3.480(2). The KBA did not object.

Ousley's case arose from a single disciplinary file relating to his failure to communicate, failure to act with diligence, and failure to return an unearned fee in a divorce case. All attempts to serve Ousley with the complaint were unsuccessful, leading to an additional charge for violating SCR 3.130(8.1)(b), failure to respond to a lawful demand from a disciplinary authority.

During much of the time of this disciplinary action, Ousley had been incarcerated on criminal charges. He stopped practicing law altogether and began working full-time as a manual laborer. Per the condition of his release on bond in the criminal charges, Ousley was required to live in a sober environment. He also signed an agreement with KYLAP.

Ousley admitted his disciplinary violations and requested a thirty day suspension as an appropriate sanction. The KBA did not object. The Supreme Court considered the facts of this case and relevant case law and concluded the negotiated sanction was appropriate. Accordingly, the Court ordered Ousley suspended from the practice of law for thirty days.

Kentucky Bar Association v. Grace Ingrid Gardiner
[2021-SC-0468-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. The Bankruptcy Court of the Eastern District of Tennessee suspended Gardiner from practicing law in the Bankruptcy Court of the Eastern District of Tennessee for five years. Following this sanction, the Disciplinary Counsel for the Tennessee Board of Professional Responsibility filed a Petition for Discipline. After investigation and a hearing, the Hearing Panel suspended Gardiner for three years, with four months to be served and the remainder probated.

The KBA subsequently moved the Supreme Court of Kentucky to impose reciprocal discipline on Gardner, who agreed to the KBA's motion. The Supreme Court concluded that the Tennessee Rules of Professional Conduct that Gardiner violated were substantially similar to Kentucky's rules and that the exceptions under SCR 3.435 did not apply. Accordingly, the Court ordered Gardiner suspended from the practice of law for three years, with four months to be served and the rest to be probated.

Kentucky Bar Association v. Arthur Joseph Morburger
[2021-SC-0511-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. The Inquiry Commission of the Kentucky Bar Association moved the Supreme Court to temporarily suspend Morburger, asserting there was probable cause to believe he was misappropriating funds for others to his own use or was otherwise improperly dealing with said funds. The Commission further asserted there was probable cause to believe Morburger's conduct posed a substantial threat of harm to his clients or the public. In its motion, the Inquiry Commission noted there was an ongoing disciplinary matter pending against Morburger in Florida for which the Supreme Court of Florida had issued an order of emergency suspension from the practice of law on June 16, 2021.

Morburger did not respond to the Kentucky Supreme Court's December 21, 2021, order to show cause why he should not be subject to the requested temporary suspension. The Court reviewed uncontroverted allegations of the Inquiry Commission and agreed there was probable cause to believe Morburger was misappropriating or otherwise improperly dealing with funds. Accordingly, the Court temporarily suspended Morburger from the practice of law.

Allison Coffeen Mohon v. Kentucky Bar Association
[2021-SC-0525-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. Mohon moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against her by imposing a 181-day suspension from the practice of law, with 60 days to serve, and the remaining 121 days probated for 2 years, subject to conditions. The disciplinary proceeding at issue arose out of Mohon's admitted violations of the Rules of Professional Conduct as charged in five separate disciplinary files.

The violations all involved financial or accounting issues, leading Mohon and Bar Counsel to agree to the following conditions: Mohon making a refund or partial refund to two former clients; attending the Office of Bar Counsel's Trust Account Management Program; opening an escrow account with a financial institution that reports overdrafts to the KBA; and providing quarterly reports to the Office of Bar Counsel during the period of probation listing open and closed escrow accounts in Mohon's or her firm's name, and her current employees.

The Court agreed that Mohon's misconduct was severe and not up to the professional standards expected from lawyers practicing in this Commonwealth. But after considering the nature of Mohon's violations along with her lack of any prior disciplinary history, her full participation in these proceedings, and her proactive steps to ensure her misconduct is not repeated, the Court agreed that the proposed discipline was adequate. Accordingly, Mohon was suspended pursuant to the negotiated sanction.

John Coleman Kirk v. Kentucky Bar Association
[2021-SC-0549-KB](#)

January 20, 2022

Opinion and Order of the Court. All sitting. All concur. Kirk moved the Supreme Court to enter an Order resolving the pending disciplinary proceeding against him by imposing a public reprimand for his admitted violations of SCR 3.130(3.3)(a)(1), (5.7)(b), (8.1)(a), (8.1)(b), and (8.4)(c). Kirk's misconduct involved his submission of false evidence, false statements, and other deceptive practices during a separate, original disciplinary proceedings against a former employee of his law firm.

In considering the proposed sanction, the Court noted that Kirk had no prior discipline, other than a private admonition, was cooperative during the disciplinary proceeding, and admitted his conduct violated the Rules. Given these factors and relevant case law, the Court concluded that the proposed discipline was adequate. Accordingly, Kirk was found guilty of the admitted violations of the Rules of Professional Conduct and publicly reprimanded.