PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
NOVEMBER 2009

I. CRIMINAL LAW

A. Samuel Ray Prather v. Commonwealth of Kentucky

2007-SC-000903-DG **November 25, 2009**

Opinion by Justice Schroder. All sitting; all concur. Prather was arrested for possession of a firearm while committing a violation of KRS Chapter 218, third degree assault and multiple misdemeanors. The assault charge was amended to a misdemeanor and Prather pled guilty. He was sentenced to six months in jail for the misdemeanor convictions. The felony firearm charge was handled separately, and Prather agreed to pre-trial diversion. After serving the jail sentence, Prather's diversion was revoked for violation of the terms of the agreement. Prather was sentenced to two years in prison. Prather moved for credit for time served on the misdemeanor chargers pursuant to KRS 532.110(1)(a)-- the concurrent sentencing statute. The circuit court denied the motion, ruling the statute was inapplicable since Prather was not formally sentenced on the felony until after he completed his misdemeanor sentence. The Court of Appeals affirmed. The Supreme Court granted discretionary review and reversed, holding that under Thomas, a defendant is considered convicted of the underlying offense until such time as the diversion agreement is satisfied. Hence under KRS 531.110(1)(a) the definite term-- in this case six months for the misdemeanors-- must run concurrently to the indeterminate term (the felony), and Prather was entitled to credit for the time served. The Court rejected the Commonwealth's argument that Prather waived concurrent sentencing as part of his pre-trial diversion agreement, holding that even if concurrent sentencing provisions could be waived by a defendant, the waiver must be knowing and voluntary.

B. James Hunt v. Commonwealth of Kentucky

2006-SC-000634-MR **November 25, 2009**

Opinion by Justice Venters. All sitting; all concur. Hunt was convicted of murder, burglary and first degree wanton endangerment after he shot and killed his estranged wife while she was caring for her infant granddaughter. Hunt was sentenced to death. On appeal he raised 24 arguments. The Supreme Court affirmed the conviction holding, *inter alia*:

- Shell casings removed from Hunt's car without a warrant were properly admitted into evidence under the plain view and exigent circumstances exceptions.

- The trial court's failure to hold an evidentiary hearing on Hunt's motion to suppress the shell casings was harmless error.
- There was no deficiency in the chain of custody of Hunt's clothing which was later determined to have the victim's blood upon it.
- Hunt was not entitled to an instruction on criminal trespass as a lesser included offense to burglary since there was no evidentiary basis to support a theory that Hunt did not intend to commit a crime when he entered upon the victim's property.
- The trial court did not err in refusing to quash the superseding indictment. Hunt argued the superseding indictment which added the wanton endangerment charge was issued due to prosecutorial vindictiveness over Hunt's refusal to accept a plea. The Court held that under the United States Supreme Court's decision in Bordernkircher, such behavior by a prosecutor does not violate due process, even if motivated by actual vindictiveness.
- The prosecution did not misstate the law applicable to extreme emotional disturbance during its closing argument.
- A detective's statement that an object found at the crime scene Resembled a home-made silencer was proper lay witness testimony.
- Neither the prosecutor nor the detective improperly commented on Hunt's silence during questioning or at trial.
- Hunt was not entitled to a directed verdict on the wanton endangerment charge since the evidence showed that Hunt, while intoxicated, fired multiple shots within a few feet of the infant.
- The trial court properly excluded Hunt's telephone bill--offered to show that he and the victim had a congenial relationship—since it was not properly authenticated as a business record.
- Photographic evidence concerning the infant and the victim's autopsy was properly admitted.
- Use of burglary as an aggravating circumstance in imposing the death penalty did not violate double jeopardy.
- It was not reversible error for the trial court to allow victim impact testimony from the victim's mother even though KRS 421.050(1) gives preference to the victim's daughter.
- Hunt's sentence was not arbitrary or disproportionate and Kentucky's method of proportionality review is not unconstitutional.
- The prosecutor's isolated statements to two future jurors during voir dire that in the event of a conviction they would "recommend" a sentence did not impermissibly diminish the jury's responsibility in imposing the death penalty.
- There is no requirement that the grand jury's indictment recite the aggravating circumstances necessary to seek the death penalty.

- The Court also rejected claimed errors to the voir dire, jury selection process and jury instructions. The Court also upheld the constitutionality of the death penalty.

C. Thomas C. Bowling, Ralph Baize & Brian Keith Moore v. Ky. Dept. Of Corrections
2007-SC-000021-MR November 25, 2009

Opinion of the Court by Justice Abramson; all sitting. Appellants, inmates on Kentucky's death row, filed a declaratory judgment action seeking to enjoin the Department of Corrections from carrying out executions until it promulgated the lethal injection protocol used to implement KRS 431.020 in accordance with Kentucky's Administrative Procedures Act ("APA"). The Circuit Court initially entered an order granting Appellants' motion for summary judgment, but soon thereafter amended its order pursuant to CR 59.05, vacating its finding that the DOC must promulgate regulations. On appeal the Appellants also argued that the circuit court had no basis to amend its order. The Supreme Court held that under the principle of *res judicata*, Appellants Bowling and Baize—who had challenged the lethal injection protocol on constitutional grounds in an earlier suit—could not bring a new suit. The Court ruled that their claims should have been brought in their previous suit and would not be heard now. The Court also concluded that since the "private rights" of individuals being executed are affected by the protocol, it must be promulgated pursuant to the APA. The Court further held that there was no legal basis for the circuit court's ruling that Bowling and Baize's bench trial in their first declaratory judgment action was an acceptable substitute for the APA's public hearing requirement. Lastly, the Court held that the circuit court did not abuse its discretion by amending its original judgment pursuant to CR 59.05. Justice Scott, joined by Justice Cunningham and Justice Venters, concurred in part and dissented in part. The minority contended that since Kentucky's death row population consists of 36 people in a state of 4.2 million, it cannot be said that lethal injection is a private right or procedure available to the public—and that no one, not even those convicted of a capital offense, has a "right" to the death penalty. Justice Cunningham, joined by Justice Scott, concurred in part and dissented in part by a separate opinion that asserted that it was illogical for the majority to hold that Bowling and Baize's claims were barred by *res judicata* but then extend its ruling to them. He noted that the Court had previously refused to issue a stay to another inmate, who was subsequently executed, while this appeal was pending.

D. David Weaver v. Commonwealth of Kentucky
2008-SC-000492-MR November 25, 2009

Opinion by Chief Justice Minton; all sitting. During his trial on first degree burglary charges, Weaver attempted to present a psychologist's testimony that his voluntary intoxication prevented him from forming the requisite mental criminal intent. The trial court refused to allow the testimony during the guilt phase, but ruled it would be permitted for mitigation during the penalty phase if there was a conviction. Weaver was convicted and sentenced to 20 years on burglary and PFO-1 charges. On appeal, Weaver argued that the trial court improperly denied him the opportunity to put on a defense. The Court reversed the conviction and remanded for a new trial, holding that because burglary contains a specific intent element, under KRS 501.080 voluntary intoxication is a valid defense. The Court noted that if the jury accepts such a defense, then it is obliged to acquit on the charge, not merely reduce the punishment at sentencing. Justice Scott, joined by Justice Cunningham, dissented asserting that any error was harmless. The minority also noted that Weaver's lack of memory of the crime did not equate to a lack of intent at the time the offense occurred. They also observed that Weaver had the wherewithal to access the dwelling using a garage door opener he took from a vehicle parked outside.

II. DISCOVERY

A. Karen Saleba, CT & Good Samaritna Hospital of Cincinnati v. Hon. James R. Schrand, Judge, Boone Circuit Court & Barbara Yvette Fiser, as Executrix of the Estate of Norma Luann Soard, et al.

2009-SC-000096-MR **November 25, 2009**

Opinion by Justice Abramson. All sitting; all concur. Estate brought suit against several health care providers claiming they failed to properly diagnose and treat decedent's cervical cancer. As part of discovery, the estate requested documents related to the review of decedent's Pap smear specimen. Although decedent was treated in Kentucky, the lab sent the specimen to an Ohio hospital to be reviewed by a cytotechnologist. The cytotechnologist objected to the discovery request, arguing the documents were privileged under Ohio's peer review statute. After a hearing, the trial court ruled Kentucky, not Ohio, law applied and ordered the cytotechnologist to produce the documents. The cytotechnologist filed for a writ of prohibition in the Court of Appeals, which was denied. The Supreme Court affirmed the Court of Appeal's denial of the writ, holding that there was no "special reason" to ignore Kentucky's policy of permitting peer review documents to be discoverable in medical malpractice suits. The Court also declined to overrule Sisters of Charity Health Systems which held that Kentucky's peer review document privilege statute does not extend to medical malpractice suits.

B. Courier-Journal, Inc. v. Hon. Judith McDonald-Burkman, Judge Jefferson Circuit Court & Cecil New
2009-SC-000250-MR November 25, 2009

Opinion by Justice Cunningham. All sitting; all concur. Prosecutors filed nearly 3,000 pages of discovery in a high-profile murder case pending in Jefferson Circuit Court. The court granted the defendant's motion to seal the discovery over the local newspaper's opposition. The newspaper sought a writ of mandamus from the Court of Appeals ordering the discovery unsealed. The Court of Appeals denied the writ and the newspaper appealed, arguing it had First Amendment and common law rights to inspect and copy the discovery records. The Supreme Court affirmed the Court of Appeals' denial of the writ, holding the newspaper had no constitutional right to discovery materials. Further, the Court held that, in this instance, the public's common law right to inspect public documents was outweighed by the defendant's right to a fair trial. The Court noted that the trial court's order was narrowly tailored to balance the rights of the press and defendant since the records were sealed only until such time as a jury was seated.

III. INSURANCE

A. Auto Owners Insurance Company v. Omni Indemnity Company
2008-SC-000606-DG November 25, 2009

Opinion by Justice Scott. All concur; Justice Abramson not sitting. Plaintiff was injured in a motor vehicle accident and sued the tortfeasor and her under-insured motorist ("UIM") insurance carrier. The UIM carrier filed a third-party complaint against the tortfeasor's liability insurance carrier seeking subrogation of the Coots payment made to the plaintiff. The tortfeasor filed Chapter 13 bankruptcy and neither the plaintiff nor UIM carrier filed a proof of claim. The trial court granted the tortfeasor's subsequent motion to have all claims against him dismissed on the basis of discharge in bankruptcy. The trial court also dismissed the UIM carrier's subrogation claim against the tortfeasor's liability insurance carrier. The Court of Appeals affirmed. On appeal, the liability carrier argued that since the plaintiff and UIM carrier could no longer recover from the tortfeasor, it could not be sued for subrogation. The Supreme Court reversed, holding that KRS 304.39-320(4) "does not inextricably link these two subrogation rights together such that if one is lost, the fate of the other is determined." Further, the Court noted that the bankruptcy of a tortfeasor does not prevent the plaintiff's claims from being heard; rather any judgment obtained is only collectible against the insurance company.

IV. PROBATION & PAROLE

A. Com. of Ky., ex rel. Attorney General Jack Conway v. LaDonna Thompson, Commissioner, Ky. Dept. of Corrections
2009-SC-000107-TG November 25, 2009

and

LaDonna Thompson, Commissioner, Ky. Dept. of Corrections v. Hon. David A. Tapp (Judge, Pulaski Circuit Court) & Com. of Ky., ex rel. Commonwealth's Atty. Eddy F. Montgomery (Real Party in Interest)
2009-SC-000252-TG November 25, 2009

Opinion by Chief Justice Minton; all sitting. Part of House Bill 406—the biennial budget passed in 2008—allowed time spent on probation or parole to count towards a prisoner or parolee's unexpired sentence ("street credit"). This provision effectively suspended KRS 439.354 which does not permit street credit. The Commonwealth's Attorney for the 28th Judicial Circuit filed a petition for a declaratory judgment in Pulaski Circuit Court seeking to prevent the Department of Corrections from applying HB 406 retroactively. That court entered a restraining order preventing retroactive enforcement within the 28th Judicial Circuit. Later the court entered a permanent injunction expanding the prohibition statewide. While the action in Pulaski Circuit Court was pending, the Attorney General filed a similar action in Franklin Circuit Court. However, that court denied the request for an injunction.

The Supreme Court combined the two appeals and upheld the DOC's retroactive application of HB 406's street credit provision. While the bill did not explicitly state it was to be applied retroactively, the Court held that the only way for the state budget offices' proposed savings to be realized was through retroactivity. The Court also held that Pulaski Circuit Court had authority to enter a state-wide injunction, noting that under Section109 of the state constitution, all circuit judges are members of Kentucky's one unified circuit court and, absent specific authority to the contrary, enjoy equal capacity to act throughout the state. The Court noted that the General Assembly could have limited these type of actions to the Franklin Circuit Court but did not. Lastly, the Court held that the Attorney General had standing to seek a temporary injunction, overruling Wilkinson, which previously required that the AG have a "personal right" involved in the action before seeking an injunction. Justice Scott concurred in result only, contending that KRS 69.010(1) prohibited the Commonwealth's Attorney from seeking a state-wide injunction and expressed his concern that recognizing the statewide power of all circuit courts would "diminish the power of the Attorney General , dilute the

jurisdiction of the Franklin Circuit Court, and encourage 'circuit shopping.'"

V. TORTS

A. Evelyn Deaton v. City of Florence

2008-SC-000324-DG **November 25, 2009**

Opinion by Justice Scott; all sitting. Denton suffered injuries in a slip-and-fall accident outside the City Building in Florence, Kentucky. She sent a letter to city officials and legal counsel notifying them that the accident occurred "on or about January 18, 2006." Her complaint was amended once she ascertained the accident occurred on January 20, 2006. The circuit court granted a judgment on the pleading to the city, concluding Denton had not strictly complied with the notice provisions of KRS 411.110. The Court of Appeals affirmed holding that under Baldridge, "literal compliance" with KRS 411.110 is necessary. On appeal, Denton argued that the city unquestionably had actual notice of the accident, citing contemporaneous incident reports of her accident. However, the Supreme Court stressed that actual or constructive notice is insufficient to satisfy the requirements of the statute. The Court held that whether a particular date falls within the window of "on or about" is a fact-intensive review relative to the circumstances of a particular case. Under the circumstances, the Court concluded that Denton met the statute's purpose of protecting public safety by apprising the city of a defective condition so that it had an opportunity to investigate and correct the situation. The Court held that Denton had fully—not merely substantially-- complied with the statute, and remanded the case back to the circuit court. Justice Noble concurred in result only, stating she would have explicitly overruled Baldridge.

VI. WORKERS COMPENSATION

A. Baptist Hospital East v. August Possanza; Hon. Grant S. Roark, ALJ; & Workers' Compensation Board

2009-SC-000563-WC **November 25, 2009**

Opinion of the Court. All sitting; all concur. Claimant, a psychiatric nurse, injured his neck while moving a patient. The ALJ dismissed the claim because the employee misrepresented his physical condition when applying for employment by omitting his history of lumbar surgery and related medical restrictions. The Workers Compensation Board reversed the ALJ and the Court of Appeals affirmed the Board. On appeal, the employer argued that that under KRS 342.165(2)(c), since there was a causal relationship between the false representation and the injury—

namely that it would not have hired the claimant had he disclosed the prior surgery—the ALJ's dismissal was proper. The Supreme Court affirmed the Court of Appeals holding that the "causal connection" referenced in the statute is a medical question. Further, the Court held that the ALJ had based his decision solely on subsection (c) of KRS 342.165(2) without considering the factors in subsections (a) and (b).

VII. ATTORNEY DISCIPLINE

A. In Re: Victor Yisa
2009-SC-000470-CF November 25, 2009

The Supreme Court upheld the Kentucky Bar Association's Board of Bar Examiners determination that applicant's Nigerian legal education was not the substantial equivalent of the education at a Kentucky law school and he therefore could not sit for the Kentucky bar exam. The Board had rejected the applicant since the Nigerian legal education process consists of obtaining a bachelor of law degree, followed by one year of professional legal studies. The Court held that applicant's undergraduate and graduate experience totaled five years and 159 credit hours and did not meet the "substantial equivalent" requirement of SCR 2.014(3)(a). The Court distinguished this matter from a Massachusetts proceeding wherein a Nigerian-educated attorney was permitted to take that state's bar exam. In that case, the attorney had obtained his master of laws degree from a U.S. law school. Further, the Massachusetts court had access to detailed course descriptions from the Nigerian schools—something that was not in the record in this case.

B. Jimmy Charles Webb v. Kentucky Bar Association
2009-SC-000642-KB November 25, 2009

The Supreme Court granted attorney's motion to impose a public reprimand. The attorney admitted to representing two clients who were involved in a motor vehicle accident with one another. When the attorney learned of the conflict, he stopped representing one of the clients, but continued to represent the other until the former client's new counsel objected. The attorney admitted this conduct created a conflict of interests in violation of SCR 3.130-1.7(a).

C. Micah G. Guilfoil v. Kentucky Bar Association
2009-SC-000672-KB November 25, 2009

The Supreme Court granted attorney's motion to impose the sanction of public reprimand. The attorney admitted that while obtaining a mortgage in an uncontested divorce action, she knowingly presented a power of attorney document that was signed by an inmate in a Tennessee

correctional facility but certified by a Jefferson County, Kentucky notary. The attorney admitted this was a violation of SCR 3.130-4.1 (truthfulness in statements to others) and SCR 3.130-8.4(c) (conduct involving dishonest, fraud, deceit or misrepresentation).