PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
September 2011

I. CRIMINAL LAW

A. Kenneth Jones v. Commonwealth of Kentucky

2009-SC-000221-MR **September 22, 2011**

Opinion of the Court by Justice Schroder. All sitting; all concur. The defendant was found guilty but mentally ill of murder for shooting a neighbor on the neighbor's property. The defendant argued at trial that he shot the neighbor in self defense. Over defense objection, the Commonwealth received a "no duty to retreat" jury instruction on behalf of the victim. The instruction was based on KRS 503.055(3), and stated that a person who is not engaged in an unlawful activity and has a right to be in a place has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if necessary to prevent death or great bodily harm or to prevent a felony involving the use of force.

The Supreme Court reversed the conviction, holding that KRS Chapter 503 (General Principles of Justification), when viewed as a whole, was meant to apply to the conduct of the person who is subject to criminal prosecution, and not to the conduct of the victim. Without deciding whether a defendant would be entitled to a "no duty to retreat" instruction, the Court held that the instruction was erroneous when given on behalf of the victim. The Supreme Court also held that the trial court did not abuse its discretion in excluding evidence about the defendant's delusions while he was in jail, and that it was improper for the prosecutor to ask the defendant to comment on the veracity of certain witnesses. The Court reversed and remanded for a new trial.

B. Scott Richard Stanton v. Commonwealth of Kentucky

2010-SC-000102-MR **September 22, 2011**

Opinion of the Court by Justice Abramson. All sitting. Following the denial of his motion to suppress his confession, the defendant pled guilty to charges that he raped and sodomized his stepson. Upholding the trial court's suppression ruling, the Supreme Court held that the defendant's confession was not coerced by a social worker's accurately informing him that unless he cooperated with investigators the defendant's two other children could be removed from the home. Chief Justice Minton and Justices Cunningham, Noble, Scott and Venters concurred. Justice Schroder concurred in result only.

C. Ronnie D. Walker v. Commonwealth of Kentucky
2010-SC-000409-MR **September 22, 2011**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted, among other things, of burglary and murder for having entered his ex-girlfriend's home where he beat and strangled to death the ex-girlfriend's boyfriend. Upholding the conviction, the Supreme Court held (1) that the introduction into evidence of the defendant's entire interrogation video, including the interrogator's questions and comments, did not violate the evidence rules and was not unduly prejudicial; (2) that the trial court's opening remarks concerning how a witness's credibility might be assessed did not amount to palpable error; and (3) that the burglary instruction was not ambiguous so as to call into question the jury's unanimity.

D. Linvil Curtis Turpin v. Commonwealth of Kentucky
2010-SC-000550-MR **September 22, 2011**

Opinion of the Court by Justice Abramson. All sitting; all concur. Defendant was convicted of being a felon in possession of a firearm and was found to be a first-degree persistent felony offender. Because of his PFO status, he was given an enhanced sentence of twenty years. Upholding the sentence, the Supreme Court held that a twenty-year sentence for a third felony offense, even if all the offenses were class-D felonies and non-violent, did not violate the state and federal constitutional guarantees against cruel and unusual punishment.

E. Thomas York, Sr. v. Commonwealth of Kentucky
2010-SC-000240-MR **September 22, 2011**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Particular characteristics of a person's voice - such as tone, accent, or speech impediment - are physical characteristics. Therefore, the Fifth Amendment is not implicated where a defendant is required to demonstrate his voice for the jury so that a witness may make a courtroom identification. Any possible prejudice is further reduced where the defendant utters an innocuous phrase, rather than repeating words alleged to have been spoken by the defendant previously.

F. Reginald Lamont Whittle v. Commonwealth of Kentucky
2009-SC-000787-MR **September 22, 2011**

Opinion of the Court by Justice Noble. Whittle was convicted of possession of marijuana, trafficking in cocaine, tampering with physical evidence, and being a first-degree persistent felony offender.

The police observed Whittle running away from them and tossing a bag containing white powder onto the sidewalk. The white powder was later

determined by the state crime lab to be cocaine. The chemist at the state crime lab who authored the report identifying the powder as cocaine was unable to testify at trial because he was ill, and so the director of the lab testified in his place. The director read from and discussed the report, which was then admitted into evidence.

Applying the recent U.S. Supreme Court cases *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), this Court held that Whittle was entitled to confront the chemist who wrote the report. The violation of Whittle's right to confrontation was not harmless error with respect to the charges of trafficking in cocaine and tampering with physical evidence, but it was harmless with respect to the charge of possession of marijuana. Accordingly, the convictions for trafficking and tampering were reversed, and the conviction for possession of marijuana was affirmed. Because the two felony convictions were reversed, the PFO conviction was also vacated. Chief Justice Minton and Justices Abramson, Cunningham, Scott and Venters concurred. Justice Schroder concurred in result only.

G. James Demetrius Mullins v. Commonwealth of Kentucky
2010-SC-000263-MR **September 22, 2011**

Opinion of the Court by Justice Noble. All sitting, all concur. Mullins was convicted of murder, tampering with physical evidence, and being a persistent felony offender in the first degree. The charges arose from the shooting death of a man who went to a house to buy marijuana. Mullins admitted that he had been on the porch of the house when the shooting occurred but denied any involvement.

Mullins's conviction for tampering with physical evidence was based on evidence that he removed the murder weapon from the crime scene. There was evidence that Mullins was the shooter, that he got into a friend's car immediately after the shooting, that he was seen with a shiny object in his hand when he got in the car, and that a police search at the scene several months after the shooting failed to turn up a gun. But this evidence was not enough to support a charge of tampering under KRS 524.100 without evidence of some additional act demonstrating an intent to conceal. The statute requires that a defendant destroy, mutilate, conceal, remove, or alter physical evidence with intent to impair its availability. Simply leaving the crime scene with the weapon does not show an intent to impair its availability; instead, it is reasonable to infer that the defendant's primary intent was to get *himself* away from the scene. Accordingly, the Court reversed Mullins's conviction for tampering.

Mullins's other assignments of error were without merit. The conviction for murder was affirmed, and the case was remanded to Fayette Circuit Court.

H. Larry Ordway v. Commonwealth of Kentucky

2009-SC-000479-MR **September 22, 2011**

Opinion of the Court. All sitting. Following the execution of a search warrant at defendant's girlfriend's apartment, police found sufficient evidence to link defendant to a string of robberies, burglaries, and thefts. At trial, defendant was convicted of three counts of first-degree robbery, ten counts of third-degree burglary, six counts of TBUT over $300, receiving stolen property and PFO I, and was sentenced to a total of 70 years. On appeal, defendant argued that the Commonwealth was collaterally estopped from litigating the issue of whether he was armed during the robberies because he was acquitted on the charge of possession of a handgun by a convicted felon; that his constitutional rights were violated by the search of his girlfriend's apartment; that the jury instructions on nine counts of burglary in the third degree were improper; and that he was erroneously convicted of two thefts arising from a single offense. The Supreme Court held that collateral estoppel did not bar defendant's prosecution for robbery and that defendant did not have standing to contest the search of his girlfriend's apartment. However, with respect to the jury instructions, the Court held that giving identical jury instructions on nine counts of third degree burglary were improper, requiring reversal on those convictions. The Court also vacated one of defendant's theft convictions after determining that he was erroneously convicted of two thefts arising from a single offense. Chief Justice Minton and Justices Noble, Schroder and Venters concurred. Justice Abramson concurred in result only. Justice Cunningham and Justice Scott dissented.

II. WRITS

A. Commonwealth of Kentucky v. Angela Peters

2010-SC-000074-DG **September 22, 2011**

Opinion of the Court by Justice Schroder. All sitting; all concur. The defendant was charged with DUI, first offense in district court. The prosecutor objected to producing the complaining witness (the arresting officer) for a pretrial conference. The district court entered an order requiring the Commonwealth to produce the arresting officer at a pretrial conference to be interviewed by the defense attorney. The Commonwealth requested a writ of prohibition from the circuit court, which was granted. The Court of Appeals overturned the writ. The Supreme Court then granted discretionary review.

The Supreme Court reversed the Court of Appeals and reinstated the circuit court's writ of prohibition. The Court first held there would be no adequate remedy on appeal, and that the case falls in the "special cases" subcategory of writ where correction of the error is necessary in the interest of the orderly administration of justice. Upon review of the various rules dealing with criminal pretrial procedure, including RCr 8.03, RCr 7.24, and RCr 7.10 through RCr 7.20, the Court concluded that the district court acted erroneously in requiring the

arresting officer to be interviewed at the pretrial conference. The Court noted, however, that given the wide discretion

B. Marcus S. Minix, Sr. v. Larry Roberts, Sherry Collier, And Marcus Minis, Jr. -
2010-SC-000583-MR **September 22, 2011**

Opinion of the Court by Justice Venters. Justice Noble not sitting. The Court of Appeals denied Appellant's petition for a writ of prohibition to bar a county attorney's operation of a mediation program to resolve criminal complaints prior to filing of formal charges. On appeal, the Supreme Court held: (1) denial of the petition was proper because a writ of prohibition may be issued only against judicial officers, and neither the county attorney nor his program's mediator was a judicial officer; (2) the county attorney's mediation program did not constitute an action of the district court because the district court's jurisdiction over persons accused of a criminal offense does not arise until the issuance of a warrant or summons, or presentment of defendant to the court following a warrantless arrest; (3) original subject matter jurisdiction over actions for injunctive relief under CR 65 or actions for declaration of rights under KRS 418.040 lies within the circuit court, not the Court of Appeals. Chief Justice Minton and Justices Abramson, Cunningham and Schroder concurred. Justice Scott concurred in result only.

III. FAMILY LAW

A. Saeid Shafizadeh v. Honorable Jerry J. Bowles, Judge Jefferson Circuit Family Court
2010-SC-000747-MR **September 22, 2011**

Opinion of the Court by Justice Cunningham. All sitting; all concur. Supreme Court affirmed the Court of Appeals' denial of Appellant's petition for a writ of prohibition. Pursuant to their divorce decree, Appellant and his ex-wife had joint custody of their children. Appellant's wife sought court approval to relocate with the children outside of the jurisdiction. Appellant claimed that the relocation constituted a modification of custody. Supreme Court held that a joint custodial parent's relocation with children outside the jurisdiction is properly construed as a modification of timesharing, not custody, as long as the other parent's decision making authority for the children is unaltered.

B. Suzanne Anderson v. Joseph Johnson
2010-SC-000646-DGE **September 22, 2011**

Opinion of the Court by Justice Noble. All sitting. The Franklin Circuit Family Court denied Anderson's motion for a change in timesharing of the parties' minor child to allow her to relocate with the child. The Court of Appeals affirmed the denial. Anderson argues that the family court's order cannot stand because no findings of fact were made. Johnson responds that no findings of fact are required

for a motion pursuant to CR 52.01, and he further responds that Anderson has failed to preserve any issues for appeal.
This Court held that, although a motion for modification of timesharing or visitation is termed a "motion," it is actually an "action[] tried upon the facts without a jury" under CR 52.01. Thus, specific findings of fact and separate conclusions of law are required.

This Court further held that Anderson was not required under CR 52.04 to file a motion with the family court requesting findings of fact, because the family court made *no* findings of fact at all. CR 52.04 applies if the court makes a good faith effort to make findings of fact but misses some key fact in its findings. In such a situation, the litigant must assist the court by requesting that specific finding. In this case, the family court made no findings of fact, and so CR 52.04 does not apply and Anderson was properly before this Court. Chief Justice Minton and Justices Cunningham, Schroder and Scott concurred. Justices Abramson and Venters concurred in result only.

IV. BOARD OF CLAIMS

A. Patricia Greene, et al. v. Commonwealth of Kentucky, Administrative Office of the Courts; Honorable Jerry Winchester, Judge of McCreary Circuit Court; Charles E. King; and Kentucky Board of Claims

AND

Commonwealth of Kentucky, Administrative Office of the Courts v. Patricia Greene, et al.
2008-SC-000783-DG
2007-SC-000511-DG **September 22, 2011**

Opinion of the Court by Special Justice Rhoads. Chief Justice Minton and Justice Abramson not sitting. King was a Master Commissioner appointed for a four year term; he was not reappointed per statute but continued to serve in that capacity for an additional ten years. During the course of his "term" as master commissioner he criminally withheld over $300,000.00 in funds from judicial sales. Action was brought in the Board of Claims by heirs of one such sale against King, Judge Winchester (the appointing judge) and the Administrative Office of the Courts. The Board of Claims dismissed for lack of jurisdiction and the Court of Appeals affirmed on other grounds. The Court held that the Board of Claims Act authorizes suit against the all branches of the Commonwealth within the Board of Claims for negligent ministerial acts of state officers, agents and employees. Under this finding King's acts do not meet the Act because they were intentional, whether AOC is the employer of King is moot and AOC is not the employer of Judge Winchester who is an elected constitutional officer so they are not proper parties. However, Judge Winchester failed to perform the ministerial act of reappointing King as master commissioner and verifying his bond requirement

and so the claimants may bring an action in the Board of Claims to determine whether the Appellants suffered damages as a proximate cause of any alleged negligence in Judge Winchester's ministerial duties. Allowing such a claim in the Board of Claims does not diminish Judge Winchester's judicial immunity. Justices Schroder, Scott and Venters concurred. Justice Noble dissented by separate opinion, in which Justices Cunningham and Special Justice Connolly joined.

V. LIENS

A. The Dreamers, LLC; Willie M. Neal, Jr.; and Glenda Hoffman v. Don's Lumber & Hardware, Inc.

2010-SC-000227-DG **September 22, 2011**

Opinion of the Court by Justice Noble. All sitting; all concur. The Dreamers, LLC ("Dreamers") allegedly failed to pay Don's Lumber for the materials it used to build a house. Don's Lumber obtained summary judgment against Dreamers for the debt, and the house was ordered sold. After making several unsuccessful procedural efforts to delay the sale, on the day of the sale Dreamers paid the full judgment amount of $48,309.95 to Don's Lumber. Dreamers continued to pursue a direct appeal of the trial court's order. Don's Lumber filed a motion to dismiss the appeal as moot because the judgment had been paid. The Court of Appeals entered an order dismissing the appeal.

This Court granted discretionary review to consider whether a party must specifically reserve a right to appeal when paying a judgment in full in lieu of a supersedeas bond if the appeal is to continue. Although payment of a judgment can extinguish the right of appeal where the payment is part of a settlement or compromise, there must be clear and decisive evidence of such an agreement before a party will be deemed to have waived his right of appeal. Here, there was not clear and decisive evidence of waiver, and so the Court of Appeals erred in dismissing Dreamers' appeal.

VI. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. David L. Helmers

2011-SC-000106-KB **September 22, 2011**

All sitting. All concur. The Court permanently disbarred Respondent David L. Helmers from the practice of law in this Commonwealth for violations of SCR 3.130-1.4(b), SCR 3.130-1.8(g), SCR 3.130-2.1, SCR 3.130-5.2(a), SCR 3.130-8.3(a), and SCR 3.130-8.3(c). These ethical violations occurred while Respondent negotiated settlements with clients involved in a class action lawsuit against a drug manufacturer. While Respondent was relatively new to the practice of law and was acting under the direction of senior attorneys when these violations occurred, the Court found that these violations were so basic and

egregious that Respondent should have known that his course of conduct was unethical.

B. Kentucky Bar Association v. Fielding E. Ballard III
2011-SC-000213-KB **September 22, 2011**

Opinion and Order Suspending Respondent from the Practice of Law. All sitting; all concur. Ballard was suspended from the practice of law for a total of 120 days for his conduct in two consolidated KBA case files. At all relevant times, Ballard was the Commonwealth's Attorney for the 53rd Judicial Circuit. In the first KBA file, Ballard represented a creditor in a civil suit against a debtor. The debtor claimed partial payment of the debt to the creditor's manager. At the same time, Ballard obtained an indictment against the creditor's manager for possession of two forged checks on the creditor's account. The Supreme Court held that a 60-day suspension was warranted for the conflict of interest.

In the second KBA file, Ballard mishandled three felony cases – including two murder cases – in which he was appointed special prosecutor by the Attorney General. Ballard missed court appearances and other deadlines, resulting in all three cases being dismissed with prejudice. He also failed to return the case files to the Attorney General after his appointments were rescinded. The Supreme Court held that a 60-day suspension was warranted, with the two suspensions to be served consecutively for a total suspension of 120 days.

C. Kentucky Bar Association v. Ruth Ann Sebastian
2011-SC-000311-KB **September 22, 2011**

All sitting; all concur. The Court adopted the recommendation of the trial commissioner that Sebastian be suspended from the practice of law for 270 days. The matter stems from three separate case files, which were consolidated. Sebastian violated SCR 3.130-1.3, -16(d), -1.9(a), -8.1(b), and -3.4(c).

D. Kentucky Bar Association v. Terence K. Mulliken
2011-SC-000229-KB **September 22, 2011**

All sitting; all concur. Respondent was convicted of promoting contraband in the first degree and conspiracy to trafficking in a controlled substance in the second degree in 2004 due to the convictions he was temporarily suspended from the practice of law. The Trial Commissioner concluded that Mulliken had violated the former SCR 3.130-8.3(b) by his conviction in the Pike Circuit Court. The Trial Commissioner concluded that he should remain suspended until he is fully released from probation and parole, and for five years thereafter. Further, it was recommended that Mulliken be evaluated by an appropriate substance abuse professional and also be required to enter into a five-year agreement with the Kentucky Lawyer Assistance Program (KYLAP). Finally, in light of Mulliken's ongoing seven-year suspension and his employment record, the Trial

Commissioner recommended the five-year suspension be probated upon his release from probation and parole and on the condition that he follow the requirements set forth in a KYLAP contract.

E. Kentucky Bar Association v. David R. Schott
2011-SC-000261-KB **September 22, 2011**

All sitting; all concur. The Court ordered Respondent permanently disbarred for multiple ethical violations stemming from real estate transactions with a client. Additionally Respondent has a history of disciplinary action and failed to respond to all attempts to communicate regarding his multiple violations.

F. Kentucky Bar Association v. Michael Ray McDonner
2011-SC-000350-KB **September 22, 2011**

All sitting; all concur. Respondent was suspended from the practice of law for failure to comply with CLE requirements. Respondent continued to engage clients and failed in two cases to adequately represent said clients. Court adopts the recommendation of the Board to suspend Respondent for 60 days and require him to complete the EPEP offered by the KBA.

G. Kentucky Bar Association v. Donald L. Richardson
2011-SC-000353-KB **September 22, 2011**

All sitting; all concur. Respondent failed to file a mortgage for three years and when he filed it with the County Clerk it contained a forged notary clause. Court adopted the recommendation of the trial commissioner to suspend Respondent for 5 years