

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MAY 2013**

I. CRIMINAL:

**A. Jeston Murray v. Commonwealth of Kentucky
2011-SC-000081-MR May 23, 2013**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Keller, Nobel and Venters, JJ., concur. Scott, J., concurs in result only. Jeston Murray was convicted of two counts of complicity to commit murder, one count of first-degree robbery, one count of first-degree burglary, and two counts of tampering with physical evidence. The charges stemmed from two incidents separated by roughly nine days: the murder of Darrell Spencer and subsequent robbery of the store in which he was working; and the murder of Marcus Penney. The Court held that Murray's trial was not unfair as a result of alleged improper bolstering. The Court noted that the restrictions outlined in KRE 801A(a)(2) do not apply to testimony offered for the purpose of rehabilitation, but held that it was unnecessary to determine if the testimony in question was rehabilitative or substantive because any error was undoubtedly harmless. The Court also held that despite the incidents being multiple days apart, it was proper for the trial court to try the charges in a single trial because knives stolen during the first crime were used during the commission of the second crime. The Court further held that the crime of tampering with physical evidence is not unconstitutional because it does not involve testimonial communications and does not compel an individual to produce evidence evincing guilt. The Court held that by resting his defense on the nature of his relationship with his accomplice, Murray allowed the Commonwealth to ask probing, relevant questions and present evidence about the entirety of that relationship, including alleged homosexual behavior, to rebut any assertions of fear or intimidation. Finally, the Court held that the trial court properly denied Murray's motion for a jury instruction on criminal facilitation as a lesser-included to complicity to commit murder and robbery. Following precedent, the Court held that the case presented two competing theories, the Commonwealth's supporting murder and Murray's supporting nearly zero involvement, and the jury elected to side with the Commonwealth.

**B. Steven R. Cox v. Commonwealth of Kentucky
2011-SC-000656-MR May 23, 2013**

Opinion of the Court by Justice Abramson. All sitting. Minton, C.J.; Cunningham, Keller, Noble and Venters, JJ., concur. Scott, J., concurs in result only. Having been convicted of first-degree possession of a controlled substance and of possession of a handgun by a convicted felon, Cox was sentenced to concurrent terms of imprisonment totaling twenty years. Affirming that sentence, the

Supreme Court held that a parole officer's sentencing-trial testimony concerning sentence credits available to parolees was neither incorrect nor so vague as to amount to a palpable error.

**C. Reginald L. Grider v. Commonwealth of Kentucky
2012-SC-000454-MR May 23, 2013**

Opinion of the Court by Justice Cunningham. All sitting; all concur. The procedures enumerated in KRS 532.025, which require a capitol jury to determine the existence of aggravating circumstances, apply to a jury considering whether to sentence a youthful offender to life without the possibility of parole for twenty-five years.

**D. Stewart M. Turley v. Commonwealth of Kentucky
2011-SC-000276-MR May 23, 2013**

Opinion of the Court by Justice Venters. All sitting; Abramson, Cunningham, Keller, Noble and Scott, JJ., concur. Minton, C.J., concurs in result only. Criminal. Question Presented – Did the trial court err by concluding that the police officer's continued encounter with defendant after completion of the purpose of the traffic stop was with the defendant's consent, and therefore non-custodial, so that the officer's subsequent seizure of evidence was proper? Held – (1) based upon the testimony presented at the suppression hearing, the purpose of the traffic stop had been completed when the officer had checked the defendant's license and registration, performed a sobriety test, and issued warnings for speeding and an improperly illuminated license plate; (2) the officer did not thereafter have reasonable suspicion to undertake a separate Terry- detention of the vehicle's passengers, and his extended detention of the defendant to do so was in violation of *Florida v. Royer*, 460 U.S. 491, 500 (U.S. 1983); (3) the officer's conduct following the completion of the purpose of the stop demonstrated that he was conducting an on-going custodial detention, and not a consensual encounter; (4) because the exigent circumstance which might otherwise have justified the officer's subsequent search was caused by the defendant's effort to comply with the officer's improper demand to see the contents of a closed container, the officer created the exigency, and so could not rely upon it to justify his seizure of evidence. *Kentucky v. King*, 131 S.Ct. 1849 (2011); (5) once the purpose of a traffic stop is completed, the resumption of the conversation after conclusion of the traffic stop will be presumed to be custodial unless evidence clearly establishes that defendant initiated the prolonged conversation. Reversed and Remanded.

II. INSURANCE:

- A. **Linda Kaye Samons, Etc. v. Kentucky Farm Bureau Mutual Insurance Company**
[2011-SC-000414-DG](#) May 23, 2013

Opinion of the Court by Chief Justice Minton. All sitting; all concur. Linda Kaye Samons, the administratrix of Kenneth Crum's estate, was attempting to collect Basic Reparation Benefits (BRBs) from Kentucky Farm Bureau. Crum was injured when, riding horseback along a road in Floyd County, he was struck by an uninsured vehicle driven by Raymond K. Ousley, who was insured by Kentucky Farm Bureau. The question before the Court was whether an uninsured pedestrian could recover BRBs from an insured driver when struck by an uninsured vehicle. The Court held that Kentucky Farm Bureau, while not insuring the vehicle that struck Crum, was responsible for the payment of BRBs because they insured the driver of the vehicle. In light of the strong public policy promoting recovery of BRBs under the Motor Vehicle Reparations Act, the Court found no reason to prohibit an uninsured pedestrian from recovering BRBs from an insured driver operating a vehicle uninsured by its owner.

III. JURY SELECTION:

- A. **Linda S. Grubbs, Etc. et al. v. Norton Hospitals, Inc., et al.**
[2010-SC-000532-DG](#) May 23, 2013

Opinion of the Court by Justice Cunningham. All sitting. Noble, Scott and Venters, JJ., concur. Minton, C.J., concurs in result only by separate opinion in which Abramson and Keller, JJ., join. In this medical malpractice case, the trial court erred in failing to excuse two jurors for cause. A male juror whose son is employed by the defendant should have been excused, as well as a female juror who was a former patient of an expert witness for the defense. In analyzing the proper remedy, the Court specifically held that *Shane v. Commonwealth* applies to civil cases. As such, there is no requirement that the complained-of juror actually sat on the deliberating jury. Instead, because the plaintiff exhausted all of her peremptory strikes, and properly noted on her strike sheet that she would have excused the male juror had any strikes remained, reversal was required. Reversal would not have been required in the case of the female juror, because the plaintiff did not remove this juror using a peremptory strike, and the juror was ultimately removed as an alternate.

IV. WORKERS' COMPENSATION:

- A. Patricia Hornback v. Hardin Memorial Hospital; Honorable Caroline Pitt Clark, Administrative Law Judge; and Workers' Compensation Board**
[2012-SC-000195-WC](#) May 23, 2013

Opinion of the Court. All sitting; all concur. Hornback was severely injured during an attempted elevator rescue conducted by her employer. The rescue was not conducted using safety protocols which were provided by the elevator manufacturer. The Court applied the four part test provided in *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky. App. 2000), and determined that: 1) a stalled elevator created a condition or activity in the workplace presented a hazard to employees; 2) that employer or employer's industry recognized the hazard of negligent elevator rescues; 3) that a negligently conducted elevator rescue could lead to serious injury or death; and 4) that reasonable means existed to eliminate the potential injury to the employee. Accordingly, the Court held that Hornback is entitled to an enhancement of her workers' compensation award pursuant to her employer's violation of the general duties provision in KRS 338.031 and KRS 342.165(1), which penalizes an employer for an intentional failure to follow a safety protocol.

V. ATTORNEY DISCIPLINE:

- A. Kentucky Bar Association v. Donald A. Maze**
[2012-SC-000166-KB](#) May 23, 2013

Opinion of the Court. Cunningham, J., not sitting. Minton, C.J.; Abramson, Noble and Venters, JJ., concur. Scott, J., dissents by separate opinion in which Keller, J., joins. Maze, the former Bath County Attorney, pled guilty to vote buying and perjury charges and was sentenced to twenty-one months in prison. In connection with these matters, the KBA charged Maze with violating SCR 3.130-8.3(b) (committing criminal act that reflects adversely on honesty, trustworthiness or fitness as a lawyer) and SCR 3.130-8.3(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). Maze admitted he violated both rules. The KBA also charged Maze with violating SCR 3.130-3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and SCR 3.130-5.5(a) (practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction), for actions taken after he received notice of his suspension from the practice of law following his guilty plea on the vote buying and perjury charges. Again, Maze admitted that he violated these rules.

The KBA further charged Maze with violating SCR 3.130-3.4(a) (unlawfully obstructing another party's access to evidence by destroying a document having potential evidentiary value); SCR 3.130-5.3(b) (ensuring the conduct of a non-lawyer over whom the lawyer has supervisory power is compatible with the professional obligations of the lawyer); SCR 3.130-3.5(a) (influencing a judge,

juror, prospective juror or other official by means prohibited by law); SCR 3.130-8.3(b) (criminal act that reflects adversely on honesty, trustworthiness or fitness as a lawyer); and SCR 3.130-8.3(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), based on allegations that Maze attempted to tamper with the jury and destroy evidence in his federal vote buying case. Maze denied violating these rules.

The Trial Commissioner and Bar Counsel recommended permanent disbarment, while the Board of Governors recommended a five-year suspension. Upon review of the entire record, the Rules of Professional Conduct and relevant case law, the majority of the Court found permanent disbarment to be the appropriate sanction for Maze's misconduct. Accordingly, Maze was permanently disbarred from the practice of law in the Commonwealth and ordered to pay all costs associated with the disciplinary proceedings.

- B. Kentucky Bar Association v. Eric C. Deters**
[2012-SC-000666-KB](#) **May 23, 2013**
[2012-SC-000667-KB](#) **May 23, 2013**

Opinion of the Court. Scott, J., not sitting. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., concur. The Board of Governors recommended that Deters be found guilty of four counts of misconduct relating to two separate disciplinary files and that he be suspended from the practice of law for a total of 60 days. After reviewing the record, including Deters' disciplinary history, the Court adopted the recommendation of the Board and suspended Deters for 60 days.

- C. Kentucky Bar Association v. Kathleen S. Hardy**
[2012-SC-000799-KB](#) **May 23, 2013**

Opinion of the Court. All sitting; all concur. Hardy was suspended from the practice of law in Ohio for failing to comply with an order to undergo a psychiatric examination. The KBA petitioned the Supreme Court to impose reciprocal discipline under SCR 3.435(4). A show cause order was issued in February 2013 and Hardy failed to respond. Accordingly, the Court suspended Hardy from the practice of law in the Commonwealth until Hardy files proof that she has completed the requirements as ordered by the Ohio Supreme Court.

- D. Kentucky Bar Association v. Murray J. Porath**
[2012-SC-000832-KB](#) **May 23, 2013**

Opinion of the Court. Abramson, J., not sitting. Minton, C.J.; Cunningham, Keller, Noble, Scott and Venters, JJ., concur. A client paid Porath \$50 to write a collection letter. Although Porath provided the client with a receipt on the back of a business card, he never wrote the collection letter and did not return the funds or respond to the client. Porath was served with, and signed for, a Bar complaint and a subsequent reminder letter by certified mail. However, Porath never responded to the complaint. Thereafter, the Inquiry Commission filed a charge against

Porath. Against, Porath failed to respond. The Inquiry Commission charged Porath with violation of four Rules of Professional Conduct: SCR 3.130-1.3 (failing to act with reasonable diligence); SCR 3.130-1.4(a)(4) (failing to promptly reply to reasonable requests for information); SCR 3.130-1.16(d) (failing to promptly refund any advance payment of fees that had not been earned); and SCR 3.13-8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority). The Board found that Porath had violated the rules and recommended a 30-day suspension from the practice of law. The Court adopted the Board's decision and suspended Porath for 30 days.

E. Kentucky Bar Association v. Rodney S. Justice

2013-SC-000154-KB

May 23, 2013

Opinion of the Court. All sitting; all concur. In 2006, Justice was suspended from the practice of law for 30 days. The Office of Bar Counsel objected to his reinstatement due to pending disciplinary complaints, which eventually resulted in Justice receiving two additional suspensions of 60 days and 30 days. In 2010, Justice filed an application for reinstatement with the Kentucky Office of Bar Admissions. In support of his reinstatement, Justice attached a Certificate of Good Standing from the West Virginia State Bar Association. While his application for reinstatement was pending, Justice testified before the Boyd Circuit Court. When asked if he was suspended from the practice of law, Justice testified that he was not suspended but was not actively practicing law. The Office of Bar Counsel considered this testimony to be false and the Inquiry Commission issued a two-charge count alleging violations of SCR 3.130-3.3 (a)(1) (knowingly making a false statement of fact or law to a tribunal) and SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). A trial commissioner found Justice not guilty of both counts on the basis that Justice's statements were not false because at the time of his testimony he was licensed to practice law in West Virginia. The Office of Bar Counsel appealed and the Board of Governors found Justice guilty of both counts and recommended a 30-day suspension. The Court agreed with the Board that Justice's testimony was false and accepted the recommended sanction.

F. Kentucky Bar Association v. Murray J. Porath

2013-SC-000162-KB

May 23, 2013

Opinion of the Court. Abramson, J., not sitting. Minton, C.J.; Cunningham, Keller, Noble, Scott and Venters, JJ., concur. A client paid Porath \$300 to defend him in a civil action. The client specifically asked Porath to request an extension of time to answer the plaintiff's complaint, but Porath failed to do so, even after plaintiff's counsel agreed to an extension. Porath also failed to enter an appearance in the case, respond to plaintiff's discovery requests, and return the client's money and his file. A copy of the Bar complaint was sent to Porath's roster address but was returned as unclaimed mail. It was eventually forwarded to an address in Florida, where Porath signed for the letter but did not respond to the complaint. Porath also signed for and accepted the Inquiry Commission's charge at the Florida address. Again, he failed to respond. The Inquiry Commission's

charge alleged five violations of the Rules of Professional Conduct: SCR 3.130-1.3 (failing to act with reasonable diligence in representing a client); SCR 3.130-1.4(a)(3) and (4) (failing to keep a client reasonably informed); SCR 3.130-1.16(d) (failing to return unearned fee); SCR 3.130-8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority); and SCR 3.130-3.4(c) (failing to maintain a valid Bar roster address, as required by SCR 3.175(1)(a)). Because Porath never responded, the matter went to the Board of Governors as a default case. The Board found Porath guilty of the five violations as charged and recommended a 181-day suspension, based in part on Porath's disciplinary history. Neither Porath nor the Office of Bar Counsel filed for review. So the Court adopted the decision of the Board under SCR 3.370(9).

**G. Kentucky Bar Association v. Kimberly S.I. Gevedon
2013-SC-000163-KB May 23, 2013**

Opinion of the Court. All sitting; all concur. The Inquiry Commission issued a six-count charge against Gevedon, alleging violations of SCR 3.130-1.3 (failing to act with reasonable diligence); SCR 3.130-1.4(a)(3) (failing to keep a client reasonably informed); SCR 3.30-1.4(a)(4) (failing to promptly reply to reasonable requests for information); SCR 3.130-1.16(d) (failing to promptly refund any advance payment of fees that had not been earned); SCR 3.130-8.1(b) (failing to respond to a lawful demand for information from a disciplinary authority); and SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). The Board of Governors found Gevedon guilty of all six counts of professional misconduct and, after considering her prior discipline, recommended that she be suspended from the practice of law for 30 days and be referred to KYLAP. The Court adopted the Board's decision and recommended sanction and suspended Gevedon from the practice of law for 30 days, with the requirement that she schedule an assessment with KYLAP.

**H. Kentucky Bar Association v. Earl C. Mullins, Jr.
2013-SC-000169-KB May 23, 2013**

Opinion of the Court. All sitting; all concur. The Inquiry Commission charged Mullins with nine counts of misconduct arising from his representation of a criminal defendant: SCR 3.130-1.5(a) (charging an unreasonable fee); SCR 3.130-1.8(a) (entering into a business transaction with a client); SCR 3.130-1.8(e) (providing financial assistance to a client); SCR 3.130-1.15(a) (failing to keep a client's property separate from the lawyer's own property); SCR 3.130-1.15(b) (failing to promptly notify client of receipt of funds or deliver funds to a client); SCR 3.130-1.15(c) (commingling funds); SCR 3.130-1.4(a) (failing to keep client reasonably informed); SCR 3.130-1.4(b) (failing to reasonably explain matters to a client); and SCR 3.130-8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation). Mullins admitted his guilt to all nine violations and further admitted that he should be disciplined for the totality of his misconduct. The Office of Bar Counsel and Mullins agreed to submit the case to the Board of Governors and filed Joint Stipulations that included the stipulated facts and a

proposed disciplinary sanction of a 90-day suspension from the practice of law, with 60 days probated for a period of two years on the condition that Mullins receive no additional charges of misconduct during that period. The Board found Mullins guilty of all nine-counts and agreed with the stipulated sanction. The Court adopted the Board's recommendation, noting that the proposed discipline was both appropriate and supported by previous disciplinary decisions.

**I. David Won-Ihl Son v. Kentucky Bar Association
2013-SC-000213-KB May 23, 2013**

Opinion of the Court. All sitting; all concur. The Inquiry Commission charged Son with three violations of the Rules of Professional Conduct arising from his representation of a client in a personal injury case: SCR 3.130-1.3 (failing to act with reasonable diligence); SCR 3.130-1.4(a) (failing to keep client reasonably informed); and SCR 3.130-1.15(a) (failing to keep a client's property separate from the lawyer's own property). Son admitted to the above violations and negotiated a sanction with Bar Counsel for a 30-day suspension, probated for two years upon the condition that he attend and successfully complete the KBA's Ethics and Professionalism Enhancement Program ("EPEP"). After reviewing the record and the applicable law, the Court found the negotiated sanction to be appropriate and suspended Son from the practice of law for 30 days, probated for two years.

**J. W. Craig Aulenbach v. Kentucky Bar Association
2013-SC-000222-KB May 23, 2013**

Opinion of the Court. All sitting. Minton, C.J.; Abramson, Cunningham, Keller, Noble and Venters, JJ., concur. Scott, J., dissents. The Inquiry Commission issued a three-count charge against Aulenbach, alleging violations of SCR 3.130-1.15(b) (failing to promptly notify client of receipt of funds or deliver funds to a client); SCR 3.130-1.15(c) (commingling funds); and SCR 3.130-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). Aulenbach admitted violating each of the rules and moved the Court to impose the sanction of a 30-day suspension from the practice of law, probation for one year, with conditions. The KBA did not object to Aulenbach's motion. The Court agreed that the sanction was appropriate and suspended Aulenbach from the practice of law for 30 days, probated for one year.

**K. Robert M. Alexander v. Kentucky Bar Association
2013-SC-000229-KB May 23, 2013**

Opinion of the Court. Minton, C.J., not sitting. Abramson, Cunningham, Keller, Noble, Scott and Venters, JJ., concur. Alexander moved the Court to impose the sanction of 30-days suspension for his violations of SCR 3.130-1.3 (failing to act with reasonable diligence); SCR 3.130-1.15(a) (failing to keep a client's property separate from the lawyer's own property); and SCR 3.130-1.16(d) (failing to promptly refund any advance payment of fees that had not been earned). The

Court agreed that the sanction was appropriate and suspended Alexander from the practice of law for 30 days, with conditions.

L. William R. Palmer, Jr. v. Kentucky Bar Association
[2013-SC-000233-KB](#) May 23, 2013

Opinion of the Court. All sitting; all concur. Palmer moved the Court to enter an Order resolving the pending disciplinary proceedings against him by imposing a one-year suspension from the practice of law, to be served concurrently with the suspension ordered in *Kentucky Bar Ass'n v. Palmer*, 391 S.W.3d 373 (Ky. 2013). Palmer's motion reflected a negotiated settlement with the Kentucky Bar Association. After reviewing the allegations and Palmer's disciplinary record, the Court concluded that the agreed sanction was adequate and suspended Palmer from the practice of law for one year.