Supreme Court Case Law Update

Chief Justice
Laurance B. VanMeter

Criminal Law

KRS 532.110(1)(d) provides "[t]he sentences of a defendant convicted of two (2) or more felony sex crimes, as defined in KRS 17.500, involving two (2) or more victims shall run consecutively." The statute is an exception to the general rule that trial judges have discretion to determine whether sentences should run concurrently or consecutively.

Defendant was convicted of 19 counts of felony sex crimes involving four victims. The trial court ordered each of the individual sentences to run consecutively as it believed was required under KRS 532.110(1)(d). Defendant argued that statute permitted sentences for offenses against the same victim to run concurrently to each other and only required sentences imposed for offenses against different victims to run consecutively.

Does KRS 532.110 require sentences for felony sex crimes against the same victim to run consecutively?

Yes. *Payne v. Commonwealth*, 681 S.W.3d 1 (Ky. 2023). The Supreme Court held the plain language of KRS 532.110(1)(d) does not permit a trial court to order multiple sentences pertaining to the same victim to run concurrently with each other. The Court clarified that the legislature intended for sentencing judges to run sex offense sentences consecutively, but with a limit on the aggregate sentence under KRS 532.110(1)(c).

Under Marsy's Law, a crime victim "as defined by law" has a constitutional right to be "present at the trial and all other proceedings, other than grand jury proceedings, on the same basis as the accused." Ky. Const. § 26A. Under KRS 421.500(1)(a), "[i]f the victim is a minor . . . , 'victim' also means one (1) or more of the victim's parents[.]" However, under KRE 615, "[a]t the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."

Defendant was convicted of rape and argued on appeal that the trial court erred by allowing the minor victim's father, as the victim's representative under Marsy's Law, to remain in the courtroom prior to his testimony.

Did the trial court err by allowing the victim's father to remain in the courtroom?

No. *Robertson v. Commonwealth*, 677 S.W.3d 309 (Ky. 2023). The Court held that the trial court did not err but set forth best practice for when the issue arises in the future.

The Court explained that both the defense and the Commonwealth should consider in their trial preparations whether a conflict may arise between Marsy's Law and KRE 615. If there is an anticipated conflict, the parties should bring it before the court pretrial. At that time, the trial court should conduct a hearing at which the parties can discuss the potential conflict, and the Commonwealth can put forth its proposed order of witnesses and the basic substance of the victim's testimony. With that information, the trial court should, to the best of its ability, determine the impact of the conflict on the proposed testimony of the victim. Then the court should determine if, in the interest of maintaining the integrity of the trial, a different order of Commonwealth witness presentation is mandated.

KRS 431.076(1) makes eligible for expungement only those dismissed charges that were not dismissed "in exchange for a guilty plea to another charge[.]" Defendant pleaded guilty to a Medicaid fraud charge, and his theft by deception charge was dismissed in accordance with his plea agreement. The trial court's judgment did not specify the circumstances underlying the dismissal of the theft by deception charge. Later, the defendant filed a petition to expunge his theft by deception charge, and the trial court granted the motion on the basis that the judgment did not indicate the charge was dismissed pursuant to a plea agreement.

Could the trial court look beyond the sentencing court's judgment to determine whether the defendant's dismissed charge was dismissed in exchange to a guilty plea for another charge?

Yes. *Commonwealth v. Davis*, 686 S.W.3d 167 (Ky. 2024). The Supreme Court held that trial courts, in determining expungement eligibility under KRS 431.076(1), are not prohibited from considering other evidence outside of the sentencing court's final judgment of conviction and, in fact, must often do so. The Court noted that expungement statutes have often asked our trial courts to determine expungement eligibility using facts that would be traditionally found outside the sentencing court's judgment.

Defendant pleaded guilty to felony charges and agreed to a twenty-year sentence with ten years to be served in prison and ten years to be served on probation, commonly known as a split sentence. When the Commonwealth later sought to revoke defendant's probation, he argued split sentences were not authorized by the probation statute, KRS 533.020(1). That statute provides that, when a person is convicted of or pleads guilty to an offense, and "is not sentenced to imprisonment, the court shall place him on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide."

Does KRS 533.020(1) authorize split sentences?

No. *Commonwealth v. Moreland*, 681 S.W.3d 102 (Ky. 2023). The Supreme Court held that the plain text of KRS 533.020(1) creates an either/or option regarding imprisonment and probation. Under that statute, probation is *only* available when the defendant is not sentenced to imprisonment. The Court determined the entirety of the sentence was void—not just the belated term of probation—and remanded for resentencing.

Estate Law

During the pendency of a wrongful death action brought by the administrator of the decedent's estate, the administrator died. No new administrator of the estate was appointed until two years later, but the case was practiced as though nothing had changed.

Defendants discovered this fact and moved for dismissal. The trial court granted the motion, concluding the one-year time limit on revival found in KRS 395.278 applied and the claims were not timely revived.

Does the one-year limitation on revival in KRS 395.278 apply when the administrator of an estate dies or is removed?

Yes. *Mr. Roof of Louisville, LLC v. Estate of Henry,* 681 S.W.3d 115 (Ky. 2023). The Supreme Court affirmed the trial court, looking to the history of KRS 395.278 and KRS 305.280.

At common law, when a plaintiff passed away while prosecuting a case, the case died with him. However, under KRS 395.280, an action brought by a personal representative who then dies is not extinguished but may instead be revived by a successor. KRS 395.278, in turn, provides the one-year period allowed for substitution. Further, KRS 395.278 contemplates the possibility of sequential revivals in requiring "[a]n application to review an action in the name of the representative or *successor of a plaintiff* . . . shall be made within one year after the death of the deceased party." In the context of estate administration, "successor" is a term of art and refers to a second or subsequent person appointed by the district court.

KRS 381.350 provides that a tenant who commits waste against the corpus of an estate "shall lose the thing wasted and pay treble the amount at which the waste is assessed."

Bank, as executor and trustee for testator's residuary estate, brought an action against Willena Ferrill, recipient of the life estate, asserting claims of waste for sales of estate property. The wasteful transactions occurred at various times between the late 1990s and 2011, and Bank brought its action in 2013, when Ferrill was still living.

Were any of Bank's waste claims untimely under the statute of limitations?

Yes. *Ferrill v. Stock Yards Bank and Trust Co.*, 671 S.W.3d 339 (Ky. 2023). The Court recognized Kentucky's longstanding distinction between voluntary and permissive waste and reaffirmed that KRS 381.350 applies only to voluntary waste. The Court further reaffirmed that the five-year statute of limitations for voluntary waste—as prescribed in Ky. Stat. § 2525, the predecessor to current KRS 413.120—is five years. Because many of Bank's waste claims were brought more than five years after the waste was committed, the Court held those claims were untimely.

Constitutional Law

Senate Bill 126's amendment to KRS 452.005 grants a party or intervening Attorney General in any action that challenges the constitutionality of a statute, executive order, administrative regulation or order the unilateral authority to transfer the case to another circuit court. Under the amendment, when a party files a "notice of transfer" with the circuit clerk of the county in which the case was originally filed, the Clerk of the Kentucky Supreme Court must, by lottery, re-assign a different circuit court to hear the case.

Is Senate Bill 126's amendment to KRS 453.005 constitutional?

No. *Arkk Properties, LLC v. Cameron*, 681 S.W.3d 133 (Ky. 2023). The Supreme Court held the amendment violates the separation of powers doctrine set forth in Sections 27 and 28 of the Kentucky Constitution. The venue-transfer mechanism encroached on the judiciary's power under Section 109 of the Kentucky Constitution by circumventing the well-established recusal process, divesting the circuit court of its inherent authority to decide when and if a case should be transferred to another venue, invading the Court's rule-making authority by permitting a "notice of transfer" pleading not authorized by the civil rules, and exercising control over the Court's clerk by directing them to take certain action.

Election Law

Plaintiffs challenged the General Assembly's 2022 legislative and Congressional apportionment plans as unconstitutional partisan gerrymanders. They alleged HB 2, defining new boundaries for the General Assembly's house districts, violated Section 33 by splitting counties, adding portions of one county to another county, and including three or more counties in a single district more times than necessary to achieve population equality. Plaintiffs also alleged both HB 2 and SB 3, which defined new boundaries for Congressional districts, violated constitutional guarantees of free and equal elections, equal protection, freedom of speech and assembly, and freedom from arbitrary government action.

Plaintiffs presented the following proof at the trial court:

- HB 2 splits counties a total of eighty times, while the Democrats' alternative map contained in HB 191, split counties only 60 times.
- HB 2 includes 45 districts composed of one portion of a county added to another county, while HB 191's map included only 31 such districts.
- HB 2 includes 31 districts composed of three or more counties, while HB 191's map includes only 23.
- SB 3 is uncompact, stretching from Fulton Co. to Franklin Co.
- An expert testified that a comparison of HB 2 with ten thousand simulated alternative maps demonstrates HB 2 is an effort to make Republican-leaning districts safer while reducing the Democratic advantage in Democratic-leaning districts. Additionally, HB 2 results in more Republican-leaning districts and less Democratic-leaning districts.

Were the apportionment maps in HB 2 and SB 3 unconstitutional?

No. *Graham v. Sec. of State Michael Adams*, 684 S.W.3d 663 (Ky. 2023). The Supreme Court first held that Plaintiffs had standing to pursue their claims and that the question of whether an apportionment plan is unconstitutionally partisan is justiciable. The Court set forth the constitutional guardrails for considering such claims and held that the 2022 apportionment plans were not unconstitutionally partisan because they did not involve partisanship either rising to the level of a clear, flagrant, and unwarranted violation of constitutional rights or so severe as to threaten the democratic form of government.

The Court also held the apportionment plans did not violate equal protection guarantees, the freedoms of speech or assembly, or the right to free and equal elections.

Finally, the Court held that the apportionment plans also did not violate the population equality and county integrity provisions of Section 33. The Court noted that where actual compliance with that provision is possible, it is required. The Court further held that where actual compliance is not possible, even unnecessary deviations from Section 33 may be allowable, provided the deviations do not clearly and flagrantly disregard the purpose of that Section or threaten the democratic form of government.

Civil Childhood Sexual Abuse

As a child, Killary was subjected to sexual abuse at the hands of her adoptive father, Rick Jackman, which only ended when Killary turned 18 in 2009. In 2017, the General Assembly amended the statute creating a civil action for childhood sexual abuse, KRS 413.249, to create a new triggering event: the conviction of the abuser.

In 2017, the General Assembly amended KRS 413.249 to extend the statute of limitations from five years to ten years and add a new triggering event: the conviction of the abuser. In 2018, Jackman was convicted of offenses related to the abuse, and Killary brought an action for childhood sexual abuse. Jackman moved to dismiss based on the 2007 version of KRS 413.249, which was in effect when that limitations period on Killary's claims began to run. While the appeal was pending, the General Assembly again amended the statute to make the 2017 amendments retroactive and to allow for revival of time-barred claims.

Does the 2017 version of KRS 413.249 apply to Killary's claims?

No. *Thompson v. Killary*, 683 S.W.3d 641 (Ky. 2024). The Supreme Court held that although the General Assembly made the 2017 amendments retroactive, Jackman had a vested interest in his statute of limitations defense that could not be taken away by the General Assembly. Under the 2007 version of the statute, which was in effect when the statute of limitations on Killary's claims first began to run, an action against Jackman needed to have been brought within five years. When that did not occur, Jackman's right to a statute of limitations defense vested and could not be divested by later actions of the General Assembly.

Family Law

Kentucky Supreme Court Administrative Order 2018-11 governs electronic filing for attorneys and allows electronic filing in termination of parental rights ("TPR") cases. That order also provides, in part, that "[s]ealed cases are not eligible for [electronic] filing[.]" KRS 625.108(2) provides that "[u]pon the entry of the final order in the case, the clerk shall place all papers and records in the case in a suitable envelope which shall be sealed[.]"

In a TPR case, defendant's counsel attempted to electronically file a notice of appeal but discovered the circuit clerk had sealed the case after entry of the final order, rendering it ineligible for electronic filing. Defendant's counsel electronically filed in a related case involving the same parties. The Court of Appeals concluded the notice of appeal was properly filed, noting that the Court's electronic filing rules were intended to provide more convenient access to the courts.

Did the Court of Appeals have jurisdiction to hear this case?

No. *Cabinet for Health & Fam. Servs. v. D.W.*, 680 S.W.3d 856 (Ky. 2023). The Court held that the circuit clerk properly sealed the case under KRS 625.108(2), making it ineligible for electronic filing under Administrative Order 2018-11. After sealing, defendant's counsel was required to conventionally file the notice of appeal. Because the notice of appeal was electronically filed in the wrong case, the Court of Appeals lacked jurisdiction to hear the appeal.

Medical Malpractice

The trial court dismissed a medical malpractice claim because the plaintiff failed to file a certificate of merit with his complaint as required by KRS 411.167. On appeal, plaintiff argued KRS 411.167's certificate of merit requirement applies only to parties not represented by counsel. Alternatively, plaintiff argued that he complied with KRS 411.167(7), which allows the plaintiff to provide "expert information in the form required by the Kentucky Rules of Civil Procedure" in lieu of a certificate of merit because he provided expert information in discovery.

(1) Does KRS 411.167 apply to parties represented by counsel?

(2) Can a plaintiff comply with KRS 411.167(7) by providing expert information in response to requests for admission?

(1) Yes and (2) no. *McMillin v. Sanchez*, 686 S.W.3d 145 (Ky. 2024). Looking to the plain language of the statute, the Supreme Court held KRS 411.167 applies to both *pro se* plaintiffs and plaintiffs represented by counsel. Further, the Court held that merely providing expert information during discovery does not satisfy KRS 411.167(7). Such an interpretation would render the statute meaningless and would undermine the intent of the legislature to protect medical professionals from having to defend themselves against frivolous lawsuits. Instead, the plaintiff must file either a certificate of merit or expert information under KRS 411.167(7) *with the complaint*.

Workers' Compensation

Hicks worked in a Kentucky coal mine for twenty-one years before he was asked to transfer to a mine in West Virginia owned by a subsidiary of his employer. Although he remained a Kentucky resident, for seventeen months he commuted and worked as an underground foreman in West Virginia six days a week. He would occasionally visit the Kentucky headquarters or other mines of the parent company for safety training or to pick up supplies for the West Virginia mine. He sustained a work-related injury in the West Virginia mine and did not return to work.

Is Hicks entitled to workers' compensation benefits in Kentucky?

No. *Hicks v. Kentucky Emp'rs Mut. Ins. Co.*, 686 S.W.3d 215 (Ky. 2024). KRS 342.670(1) provides that an employee who suffers an injury for which he would have been entitled to workers' compensation benefits had the injury occurred within the state is still entitled to workers' compensation benefits in Kentucky if, at the time of injury, his employment is "principally localized" in this state. KRS 342.670(5)(d) provides in relevant part that a person's employment is "principally localized" in this or another state if his "employer has a place of business in this or the other state and he regularly works at or from that place of business[.]" Because Hicks's employer had a place of business in West Virginia and nearly all of Hick's work was completed in West Virginia *at the time of his injury*, his employment was principally localized in West Virginia, not Kentucky.

An injured worker's medical provider submitted billings to the worker's employer more than 45 days after treatment was provided. The employer rejected the tardy billings under KRS 342.020(4), which states that medical providers "shall submit the statement of services within forty-five (45) days of the day treatment is initiated[.]" The ALJ found the employers liable for billings, determining that KRS 342.020(4) did not apply until after an award has been made in the employee's worker's compensation claim.

Does the 45-day submission requirement in KRS 342.020(4) apply only after an award has been made?

No. *Farley v. P&P Construction*, 677 S.W.3d 415 (Ky. 2023). The Supreme Court determined the 45-day requirement in KRS 342.020(4) unambiguously applied regardless of whether an award had been made in the employee's workers' compensation claim. The employer was not liable for the tardy billings. Further, the Court noted that 803 KAR 25:096 § 10(3) prohibits the employer from billing the injured worker for services which have been denied payment for failure to submit bills within 45 days under KRS 342.020(4).

KRS 342.316(2) provides that notice of an impending workers' compensation claim for occupational disease "shall be given as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, or a diagnosis of the disease is first communicated to him or her, whichever shall first occur."

Is a claimant required to provide notice to his employer of an impending claim for an occupational disease when the claimant has received workers' compensation benefits for the disease from a previous employer?

Yes. *Tennco Energy. Inc. v. Lane*, 677 S.W.3d 445 (Ky. 2023). In a case involving benefits for coal workers' pneumoconiosis (CWP), the Supreme Court held that KRS 342.316(2) required a claimant who received benefits from a previous employer for CWP to provide his current employer notice of a subsequent CWP claim when he was reasonably apprised that he had sustained a harmful change in his CWP condition attributable to his employment with his current employer.

Attorney Discipline

Attorney told his client he was paying the client's creditors with a portion of the client's workers' compensation settlement proceeds but failed to pay any creditors. Attorney also failed to file a motion seeking attorney's fees from the settlement, but withheld attorney's fees anyway. In another case, Attorney settled a claim for his client against an insurer for long-term disability benefits. Attorney informed the client that she had a $28,000 check from the insurer, but never communicated the terms of the settlement to the client. Years later, the client learned from the insurer that it had sent Attorney a check for $38,000. Attorney had withheld $8,000 and never accounted for those funds to the client.

Attorney had also been administratively suspended for failure to pay his bar dues in 2021, suspended for 5 years in 2021, and again suspended for 5 years in 2022, to run concurrently with his previous suspensions. Attorney had failed to comply with any of the conditions of his suspensions.

Based on Attorney's actions in these two cases, the Inquiry Commission filed two charges totaling ten counts of professional misconduct. Attorney did not respond to the charges.

Result: The Court found Attorney guilty of eight of the ten charges, and permanently disbarred Attorney from the practice of law. *Kentucky Bar Ass'n v. Weiner*, 681 S.W.3d 79 (Ky. 2023).

Attorney was employed by a law firm. For several years, Attorney had directly accepted payments from multiple clients without disclosing or remitting payments to his law firm. Attorney had also applied for and received reimbursements for fraudulent expense reports and had taken blank checks from the firm's account and written checks to himself. Attorney's actions resulted in a loss of $44,000 to his firm.

The Inquiry Commission charged Attorney with one count of violating SCR 3.130(8.4)(c), which provides "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation," and one count of violating SCR 3.130(1.15)(a) for depositing fees into a personal account rather than an escrow account.

Result: The Court imposed a three-year suspension, followed by a two-year probationary period contingent upon monthly reporting to a KYLAP mentor to determine Attorney's commitment to the Rules of Professional Conduct. *Kentucky Bar Ass'n v. Cohen*, 677 S.W.3d 356 (Ky. 2023).

Attorney filed a federal employment discrimination action. Defendants filed a motion for summary judgment, and Attorney failed to respond. After the federal court granted summary judgment, Attorney filed a motion requesting the court to reconsider due to excusable neglect. The court granted relief on equitable grounds and ordered Attorney to respond "with specificity" to the analysis underlying the order of summary judgment.

Attorney again failed to respond. The federal court entered an order requiring Attorney to show cause why she should not be subject to discipline under the federal local rules. Attorney untimely filed a response to the order and a response to the motion for summary judgment. Attorney failed to keep her client reasonably informed about the case and failed to reply to requests for information. The client eventually asked for her file, which Attorney never returned. The client filed a complaint to which Attorney did not respond.

In a separate case, Attorney was paid $1,000 by a client to probate a will and prepare a quitclaim deed. Attorney told the client she would hold the check until the representation was complete, but she cashed the check the next day. Attorney stopped responding to messages from the client. The client eventually sent Attorney a letter terminating representation and requesting Attorney return the fee and any documents in her possession. Attorney did not respond.

The Inquiry Commission charged Attorney with failing to act with reasonable diligence and promptness in representing a client, SCR 3.130(1.3), failing to comply with reasonable requests for information, SCR 3.130(1.4)(a)(4), failing to return documentation and any unearned portion of her fee, SCR 3.130(1.16)(d), and failure to respond to a lawful demand for information from a disciplinary authority, SCR 3.130(8.1)(b).

Result: Attorney and the KBA negotiated a sanction of a 181-day suspension, probated for two years. The Court agreed with and imposed the negotiated sanction along with conditions that Attorney pay back the unearned fee and comply with provisions of a KYLAP Supervision Agreement. *Miranda v. Kentucky Bar* Ass'n, 680 S.W.3d 844 (Ky. 2023).