

# THE *Kentucky Lawyer* <sup>sm</sup>

— the LawWire - Kentucky eLegal Law Summaries

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Vol. 2005/23

## ***The Kentucky Decisions***

- 53 [Supreme Court Decisions - May 19, 2005](#)
- **Home Page: LouisvilleLaw**
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## ***Links to Official Sites for the following decisions***

- [Ky State Appellate Opinions](#)
- [Western District of Ky - Federal](#)
- [Sixth Circuit Court of Appeals - Federal](#)
- [United States Supreme Court](#)

## ***Briefly Speaking***

### **Published -**

- Ten percent appeal damages not appealing to the Supremes and declared unconstitutional.
- JNOV is interlocutory and not final for appeal.
- Right to counsel intelligently waived to allow pro se representation.
- Ethics Opinion E-243 and subpoenas reviewed in light of amended rules.
- DVO and aggravating circumstance in capital murder case.
- Self-protection instruction not require defendant testifying
- Forfeitures not available for reimbursement of defense costs
- Scholl strip searches and immunity. Dropped shorts vs. nude searches reviewed.
- Driver convicted in robbery/murder.
- Recanted testimony and the Trinity Murder Case on 60.02 denial.
- Cir Court action arising from disciplinary proceeding against school principal.
- Changes in custody and need for affidavits to alter, amend or vacate same
- Certified question pertaining right of fiduciary to sue insurer
- Fletcher, Stumbo, and the non-budget

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appropriations.

- Whistleblowers and individual capacity to be sued as policy makers and managers.
- KOSHA and statutory violations triggering KRS 446.070 right of action.
- Black lung x-rays and the best to the panel.

James Worthington

- **Workers Compensation**

Peter Naake

- **Zoning**

Sam Hinkle

Can always use more help. Agreeing to one opinion to summarize per week makes the work go faster and spreads the job out evenly.

**NonPublished -**

- 14 unpublished cases for your reading enjoyment.

## Around the Circuit

# Kentucky Supreme Court Decisions

May 19, 2005 - 53 Decisions

**AOC LINKS - FULL TEXT**

**SUMMARIES OF DECISIONS**

### **PUBLISHED DECISIONS FROM KY SUPREME COURT FOR MAY 19, 2005**

[2002-SC-000743-DG.pdf](#)

Judge: KELLER  
REVERSING  
Date: 5/19/2005}  
PUBLISHED

#### **THE ELK HORN COAL CORP. V. CHEYENNE RESOURCES, INC. APPEALS - KRS 26.A.300 Penalty on Appeal**

This case involved an appeal of a \$9.5 million judgment and the staying of the enforcement of that judgment during the appellate process by posting a supersedeas bond and because the discretionary review to the Supremes further delayed enforcement of that judgment, the trial court assessed as additional damages a penalty equal to 10% of the superseded amount per KRS 26A.300.

SC held KRS 26A .300 violates the equal protection provisions of both the Kentucky and United States Constitutions and that it also violates the separation of powers provisions of the Kentucky Constitution and therefore vacated that part of the judgment imposing the 10% penalty.

The alternate means, i.e., CR 73 .02(4), for deterring frivolous appeals to the Supreme Court is sufficient and does not discriminate against unsuccessful appellants who have superseded a money judgment. KRS 360.040, which provides judgment interest, and was enacted to compensate for delay, also acts to deter frivolous appeals. The relationship between KRS 26A.300 and its goal is "so attenuated as to render the statute arbitrary and irrational. Although the goal of KRS 26A.300 is laudable, it is not rationally related to the statute, and that KRS 26A.300 denies Appellant equal protection. It, therefore, fails constitutional scrutiny.

**FYI:** KRS 26A.300 provides -

(1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by Section 115 of the Constitution of Kentucky.

(2) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten percent (10%) on the amount stayed shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after having been docketed in an

appellate court.

(3) Similar damages of ten percent (10%) shall be imposed when a petition for writ of certiorari, petition for rehearing, or other petition which stays collection of a judgment for the payment of money is denied by an appellate court under circumstances not constituting a first appeal under subsection (1) of this section.

(4) No additional penalty shall be imposed upon a party as a consequence of a review subsequent to a petition or a second appeal.

(5) Damages imposed under subsection (2) or (3) of this section shall not be payable and shall be void if the decision of the trial court awarding the payment of money is ultimately reversed .

[2003-SC-001015-DG.pdf](#)

JUDGE: LAMBERT  
VACATING AND REMANDING  
Date: 5/19/2005  
PUBLISHED

**WILSON V. RUSSELL**

**APPEALS - Final Order (Judgment NOV)**

Judgment notwithstanding the verdict in negligence case was interlocutory and not final.  
Appeal not perfected.

[2005-SC-000246-KB.pdf](#)

Date: 5/19/2005  
PUBLISHED

**CHARLES E. KING V. KBA**

**ATTORNEY DISCIPLINE**

[2003-SC-000357-DG.pdf](#)

Judge: GRAVES  
REVERSING  
Date: 5/19/2005  
PUBLISHED

**COM. V. BERRY**

**CRIMINAL - Right to Counsel and Right to Self-Representation**

In a 6-1 vote, SC reversed the CA's decision and reinstated Berry's convictions for Assault in the Second Degree and PFO 1. On the morning of trial, Berry asked the Court for permission to represent himself. After an extensive colloquy in which Berry acknowledged the risk of substantial prison time, the judge concluded that his waiver was acceptable under Faretta v. California, 422 U.S. 806 (1975). The CA concluded otherwise and reversed his convictions. SC examined the record to determine if Berry knowingly and intelligently waived his right to counsel. The majority concluded that he was "made aware of the dangers and disadvantages of self-representation," that he knew what he was doing by choosing this course of action, and that "his choice (was) made with eyes open." Justice Keller wrote a brief dissent in which he stated that the trial judge did not do an adequate job of warning Berry about the dangers of acting pro se.

SEE ALSO:

[2004-SC-000231-DG.pdf](#)

[2004-SC-000305-.pdf](#)

Date: 5/19/2005  
PUBLISHED

**COM. ATTY R. DAVID STENGEL V. KBA**

**CRIMINAL - Ethics Opinion E-243 and Use of Subpoenas**

Multiple Commonwealth's Attorneys filed motions under SCR 3.530(5) for review of Ethics Opinion E-243 which had previously been adopted by the KBA Board of Governors. The Supreme Court vacated all portions of KBA Opinion E-423 to the extent it addresses Grand Jury practices and proceedings and use of subpoena's therein. The Ethics Opinion was promulgated prior to Supreme Court's January 2005 amendment of RCr 5 .06, which added the statement that "RCr 7 .02 shall apply to Grand Jury subpoenas."

COMPANION CASES:

[2004-SC-000332-KB.pdf](#)

[2004-SC-000336-KB.pdf](#)

[2004-SC-000339-KB.pdf](#)

[2004-SC-000346-KB.pdf](#)

[2004-SC-000347-KB.pdf](#)

[2004-SC-000349-KB.pdf](#)

[2004-SC-000350-KB.pdf](#)

[2004-SC-000357-KB.pdf](#)

[2003-SC-000130-MR.pdf](#)

Judge: KELLER  
AFFIRMING  
Date: 5/19/2005  
PUBLISHED

**GUTIERREZ V. COM**

**CRIMINAL - Injunction (Validity and DVO)**

SC affirmed Gutierrez's convictions for Murder, Burglary in the First Degree, Violation of a Domestic Violence Order (DVO) and other offenses and upheld his underlying sentence of 60 years. The primary issue on appeal was whether the trial judge erred by allowing the Commonwealth to use the violation of the DVO as a substantive charge and as an aggravating circumstance in the Murder charge. A few months before breaking into the victim's home and stabbing her to death, the Trimble District Court entered a DVO against Gutierrez at the victim's request. Before trial, his counsel moved to exclude evidence of the DVO by challenging its validity. SC held that defendants like Gutierrez are generally barred from collaterally attacking DVOs in subsequent criminal prosecutions for violating the DVOs because they are civil orders that must ordinarily be attacked in the courts in which they were issued. (The only exception involves a collateral attack of a civil order on the basis that the issuing court lacked subject matter or personal jurisdiction.) The Court further held that "the validity of a DVO is (also) not a proper subject of inquiry when it is offered as proof of an aggravating circumstance in a capital murder prosecution."

[2002-SC-000095-MR.pdf](#)

Judge: GRAVES  
REVERSING AND REMANDING  
Date: 5/19/2005  
TO BE PUBLISHED

**HILBERT V. COM**

**CRIMINAL - Defenses (Self-Defense, Instructions, No Duty to Retreat)**

In a 5-2 decision, SC reversed and remanded Hilbert's convictions for a new trial on two counts of Murder. He was convicted at trial and sentenced to Life without the Possibility of Parole for 25 years. Hilbert did not testify at trial but sought self-protection instructions based on his statements, introduced through other witnesses, that the two victims assaulted him and "kept coming at me." The trial judge denied his request for such instructions, reasoning that the defendant must testify that he had a subjective belief in the need to use deadly force. SC held that defendants who seek self-protection instructions need not actually testify at their trials in order to receive them. *Hasty v. Commonwealth*, 272 S.W.2d 325 (Ky. 1954). Evidence of the defendant's subjective belief can be circumstantial, such as what happened here.

Statements from the defendant that the victims charged and assaulted him shortly before the shootings along with evidence of an injury to the defendant's forehead are sufficient to justify the giving of self-defense instructions. The Court further held that, when a trial judge correctly instructs the jury on self protection, "it need not also give a no duty to retreat instruction." Justices Wintersheimer and Keller dissent, stating that the evidence in support of a self protection instruction showed that Hilbert's belief was not subjectively reasonable.

[2002-SC-001064-MR.pdf](#)

Judge: COOPER  
AFFIRMING IN PART,  
REVERSING IN PART, AND  
REMANDING  
Date: 5/19/2005  
TO BE PUBLISHED

**HOWELL V. COM**

**CRIMINAL - Forfeitures and Defendant's Attorney Fees and Costs**

Because the trial court was required to order forfeit all property that it found "subject to forfeiture" under KRS 218A.410(1), and because the Commonwealth, not Appellant Howell, had title to the forfeited currency at all relevant times, the court had no option to use any part of that currency to reimburse the costs of Appellant's defense .

SEE ALSO:

[2003-SC-000219-TG.pdf](#)

[2003-SC-000378-MR.pdf](#)

Judge: KELLER  
AFFIRMING  
Date: 5/19/2005  
PUBLISHED

**MATTHEWS V. COM**

**CRIMINAL**

Trial court did not commit reversible error by refusing to grant mistrial after a witness referred to defendant's prior incarceration, admitting prior misdemeanor charge, and admitting victim's hospital records.

[2002-SC-000741-MR.pdf](#)

Judge: GRAVES  
AFFIRMING  
Date: 5/19/2005  
TO BE PUBLISHED

**MEREDITH V. COM.**

**CRIMINAL - Crimes (Complicity)**

SC affirmed conviction of D after jury trial on charges of Robbery and Murder. SC ruled that TC did not err in denying directed verdict motion. No error for TC to allow testimony that D needed money to pay his child support as motive for Robbery.

D was the driver in the Robbery/Murder. There was no evidence that the plan was for the co-defendant to kill the victim, and the evidence tended to show that an argument between the co-defendant and victim resulted in the shooting death of the victim. Thus, the victim's murder was "imputed" onto D. SC held that under KRS 507.020, if the D's participation in a felony (e.g. Robbery) constitutes wantonness manifesting extreme indifference to human life, D is guilty of murder. Justice Johnstone and Lambert filed a dissenting opinion saying they would vacate D's murder conviction.

[2002-SC-000216-MR.pdf](#)

Judge: KELLER  
AFFIRMING IN PART AND  
REVERSING IN PART  
Date: 5/19/2005  
TO BE PUBLISHED

**MILLS V. COM.**

**CRIMINAL - Applicability of Civil Rules; Ineffective Assistance Counsel**

D was convicted at trial of Robbery, Burglary and Murder and sentenced to death. D filed an 11.42 petition, TC denied the petition and refused to hold an evidentiary hearing. SC affirmed the trial court's order overruling RCr 11 .42 motion, except as to D's claims regarding his attorney's alleged ineffective assistance and the prosecutor's alleged misconduct relating to the possibility that another person killed the victim and possibility that exculpatory evidence was not turned over to the defense, and as to D's claim of ineffective assistance of counsel related to the presentation of mitigating evidence during the penalty phase. Case remanded for an evidentiary hearing on those issues.

[2004-SC-000402-TG.pdf](#)

AFFIRMING IN PART,  
VACATING IN PART, AND  
REMANDING  
Date: 5/19/2005  
PUBLISHED

**SMITH V. COM.**

**CRIMINAL - Sentences**

D was convicted at trial of multiple burglaries and theft charges and received a 70 year sentence. Because the highest felony D was convicted of at trial was a class C felony, the highest sentence he could receive was 20 years. Case remanded to reduce his sentence to nor more than 20 years.

Also held that it was harmless error for KY to introduce a pawn ticket from Missouri through a KY police officer as a business record because the police officer could not verify the authenticity of the receipt.

[2004-SC-000018-MR.pdf](#)

Judge: LAMBERT  
AFFIRMING  
Date: 5/19/2005  
PUBLISHED

**TAYLOR V. COM**

**CRIMINAL - Recanted Testimony's Reliability**

This is another opinion in the famous 1984 "Trinity Murder Case" involving defendants Wade and Taylor. In this opinion, the SC denies Taylor's appeal of TC denial of his 60.02 motion for a new trial.

Of note is that Wade gave a police confession that also implicated Taylor and also fingered Taylor as the triggerman in the double murder. Wade's confession was played for the jury at Taylor's trial, despite the fact that Wade did not testify and was not subject to cross examination. Eleven years after Taylor's trial, Wade testified at Taylor's 11.42 hearing and recanted his confession to police as it related to Taylor. The TC did not find Wade's recantation credible.

Citing Crawford v. Washington, SC held that Wade's statement should not have been admitted at trial as such violated the Sixth Amendment confrontation clause. However, looking at the remainder of the evidence, SC held that the admission of the statement was harmless error and thus, Taylor could not receive a new trial. Justice Cooper filed a dissent noting that Crawford required that Taylor be given a new trial.

[2002-SC-000368-DG.pdf](#)

Judge: KELLER  
AFFIRMING  
Date: 5/19/2005  
TO BE PUBLISHED

SEE ALSO:  
[2003-SC-000396-DG.pdf](#)

**DR. FANKHAUSER V. COBB**

**EDUCATION - Dismissal; directed verdict**

Affirmed decision of circuit court in action arising out of disciplinary proceeding against school principal. The Fayette County Board of Education had alleged on appeal that the tribunal had improperly imposed sanctions less than the termination sought by the Board. Held: the Supreme Court adopted the position of the state court of appeals in Gallatin County Board of Education v. Mann, 971 SW2d 295, that a tribunal convened under KRS 161.790 "has inherent authority to modify the sanction imposed on a teacher." The Supreme Court also rejected the Board's arguments that the hearing officer's use of jury-style instructions and presence during the tribunal's deliberations amounted to reversible error.

[2004-SC-000494-DG.pdf](#)

Judge: LAMBERT  
REVERSING AND REMANDING  
Date: 5/19/2005  
PUBLISHED

**GULLION V. GULLION**

**FAMILY LAW - Custody Changes (CR 59.05 & KRS 403.340 and Need for Affidavits to Alter, Amend or Vacate)**

SC considered Mom's motion for discretionary review to decide whether there is a basis in case law or the Kentucky Rules of Civil Procedure to require affidavits to accompany a CR 59 .05 motion to alter, amend or vacate a custody judgment. Affidavits are clearly required for KRS 403.340 motions when a party seeks to modify a custody order. However, modification of a custody order pursuant to KRS 403.340 is not possible when awaiting TC ruling on a CR 59.05 motion, thereby rendering a final judgment. Because the language of CR 59 .05 does not require affidavits to be filed, SC held that affidavits are not required in support of a CR 59.05 motion to alter, amend or vacate a judgment.

SC considered the ancillary issue whether TC abused its discretion in granting Appellant's CR 59.05 motion to alter or amend its judgment. Dad argued that TC considered evidence that occurred subsequent to its ruling that the father be the primary custodian. CR 59.05 provides: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." SC held that a party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment. Although TC may grant a CR 59.05 motion if the movant presents newly discovered evidence that was not available at the time of trial, "newly discovered evidence" must be of facts existing at the time of trial. Thus, it is improper for TC to rely upon evidence of events that occurred subsequent to the trial in ruling on a CR 59.05 motion.

[2004-SC-000270-CL.pdf](#)

Judge: LAMBERT  
CERTIFICATION OF LAW PER  
SIXTH CIRCUIT  
Date: 5/19/2005  
PUBLISHED

**BREWER V. NATIONAL INDEMNITY CO.**

**INSURANCE - Fiduciaries**

The Fourth Circuit certified a question to the Supreme Court of Kentucky essentially asking whether a personal representative may, after settling with a negligent insured and his insurer, maintain an action against the insurer for underinsuring the negligent insured.

A wrecker owned by a Kentucky corporation, driven by a Kentucky resident, and insured by an auto liability policy issued in Kentucky, struck and killed a West Virginia resident in West Virginia. Suit was filed by the personal representative and removed to the US DC for the SD of WV. The complaint was amended to include both a wrongful death claim and a negligent underinsurance claim in that the insurer allegedly negligently insured the wrecker for only \$100,000 instead of the minimum amount of commercial coverage of \$750,000. The parties settled with the insurer paying the \$100,000 coverage for a release of its insured and an agreement to litigate the underinsurance claim. Insured agreed to assign its underinsurance claim to the personal representative. The parties signed one 5-page agreement.

Insurer, National Indemnity, subsequently reneged and moved to dismiss the underinsurance claim, arguing that the personal representative and decedent had no privity and therefore no standing to sue because National Indemnity wasn't a party to the assignment agreement. The 4th Circuit held that KY law applies and certified the question to the Supreme Court of Kentucky, which held that contrary to National Indemnity's assertions, the settlement agreement shows that they were clearly a party to the agreement to assign & litigate the remaining claim.

[2005-SC-000046-TG.pdf](#)

Judge: COOPER  
AFFIRMING IN PART AND  
REVERSING IN PART  
Date: 5/19/2005  
TO BE PUBLISHED

SEE ALSO:

[2005-SC-000049-TG.pdf](#)

[2005-SC-000050-TG.pdf](#)

**GOV. FLETCHER V. ATTY GEN STUMBO**

**REVENUE AND TAXATION - Spending Without Approved Budget**

Held: the Governor does not possess the constitutional, inherent or emergency powers to appropriate funds from the state treasury, or otherwise exercise legislative powers, to maintain governmental services when the General Assembly has failed to do so. In so ruling, the Supreme Court explicitly overturned Miller v. Quertermous, Ky., 202 SW2d 389 (1947).

The Court rejected the Governor's argument that the appeal should be dismissed as moot since the General Assembly subsequently ratified the emergency appropriations and expenditures. The Supreme Court noted that legal challenges to similar actions by the previous administration had been so dismissed. Therefore, the Court availed itself of an exception to the mootness doctrine: where an issue is "capable of repetition, yet evading review."

[2003-SC-000495-DG.pdf](#)

Judge: SCOTT  
REVERSING  
Date: 5/19/2005  
PUBLISHED

**LAMB V. HOLMES**

**TORTS - Defenses (Immunity, School Searches)**

This case arose from allegations that a few teachers and administrators from a public middle school "strip searched" three female students in a locker room to find a missing pair of shorts. The local school board had a policy prohibiting "strip searches" of students but the phrase was not defined. The students claimed that they were required to pull their shorts down and their shirts up in order to reveal their underwear. The teachers and administrators countered that they merely required the students to flip their waistbands out to reveal whether the students were wearing the missing shorts. The students later filed suit against the school board and the teachers / administrators alleging various theories of liability, including negligence, intentional infliction of emotional distress, and Section 1983 violations. The school board moved for summary judgment on behalf of all defendants which the trial judge granted. CA reversed in part and remanded. On discretionary review, SC reversed the CA's opinion by a 6-1 vote and held that: (1) the teachers and administrators were entitled to qualified official immunity because the law at the time the searches were conducted did not clearly establish that searches conducted in either manner (as described above) were unreasonable; (2) "[q]ualified official immunity protects state and local officials who carry out executive and administrative functions from personal liability so long as their actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known'" citing Harlow v. Fitzgerald, 457 U.S. 800 (1982); and (3) the actions of the teachers / administrators were made in good faith, were discretionary in nature and were within the scope of their authority because the board's policy prohibiting "strip searches" contemplated nude searches only. Justice Keller dissented, stating that the policy in question covered less-than-nude searches.

[2002-SC-000788-DG.pdf](#)

AFFIRMING IN PART,  
REVERSING IN PART  
Date: 5/19/2005  
TO BE PUBLISHED

SEE ALSO

[2002-SC-000791-DG.pdf](#)

[2002-SC-000969-DG.pdf](#)

Judge: COOPER  
REVERSING AND REMANDING  
Date: 5/19/2005  
TO BE PUBLISHED

**CABINET FOR FAMILIES AND CHILDREN V. DR. CUMMINGS**

**TORTS - Kentucky Whistleblower Act**

The Kentucky Whistleblower Act is not an avenue for suits against policy makers and managers in their individual capacity.

**HARGIS V. BAIZE**

**TORTS - Negligence Per Se (statutory violation; KOSHA)**

The statute under which the KOSHA regulations were promulgated (KRS 338.031(1)(b)) specifically provides that "[e]ach employer . . . [s]hall comply with occupational safety and health standards promulgated under this chapter." Since those standards are promulgated in the regulations adopted by the Kentucky Occupational Safety and Health Standards Board, KRS 338.051(3); KRS 338.061(1), the violation of a KOSHA regulation would constitute a violation of KRS 338.031(1)(b), thus triggering the right of action created by KRS 446.070.

[2004-SC-000485-WC.pdf](#)  
 EN BANC OPINION OF COURT  
 AFFIRMING IN PART,  
 REVERSING IN PART, AND  
 REMANDING  
 Date: 5/19/2005  
 PUBLISHED

**HUNTER EXCAVATING V. BARTRUM**  
**WORKERS COMP - X-Rays (Constitutionality of limiting number)**

This decision will have considerable impact on the practice of black lung law in Kentucky. Over 400 cases have been held in abeyance waiting for the ruling. Essentially, the statute governing black lung claims requires that the best lung x-rays be sent to a panel of experts. If the expert panel reaches a consensus on what the x-rays find, that consensus carries presumptive weight. However, it may be rebutted by clear and convincing evidence that the consensus is incorrect. The Supreme Court held that the procedure allows additional interpretations of the same x-rays previously submitted to be used to rebut the consensus. However, no new x-rays can be submitted. The statute allows the ALJ to conduct further proceedings, so it is not unconstitutional as violating due process, but the regulations which do not allow additional readings to be submitted were beyond the Commissioner's authority to promulgate regulations, and were therefore stricken.

**NON-PUBLISHED DECISIONS FROM KY SUPREME COURT FOR MAY 19, 2005**

[2003-SC-000517-MR.pdf](#)  
 AFFIRMING  
 Date: 5/19/2005  
 NOT PUBLISHED

**COM. V. GORDIN**  
**CRIMINAL - Certification vs. appeal (Jurisdiction)**

SC held that although "the jury shall `recommend' whether the sentences shall be served concurrently or consecutively[,] [t]here is nothing mandatory or binding upon the judge as to the recommendation ." "The recommendation remains only a recommendation and has no mandatory effect. Here, the jury recommended consecutive sentences. The judge, however, disagreed with the jury's recommendation and ordered the sentences to be served concurrently ; this action was well within his power." If the Commonwealth had sought a certification of law pursuant to CR 76 .37(10), then the Supremes would have had jurisdiction to address this issue. Here, however, the Commonwealth seeks a reversal of the lower court's dismissal of the wanton endangerment charge by way of a matter of right appeal, and the Supremes are without jurisdiction to do so.

[2004-SC-000199-MR.pdf](#)  
 AFFIRMING  
 Date: 5/19/2005  
 NOT PUBLISHED

**DAVIS V. COM.**  
**CRIMINAL - Crimes (Medical testimony and proof of serious injury)**

As held previously in Commonwealth v. Hocker, 865 S.W.2d 323, 325 (Ky. 1993), "medical testimony is not an absolute requisite to establish serious physical injury or even physical injury" and, further, the victim is competent to testify as to his own injuries. See also Ewing v. Commonwealth, 390 S.W.2d 651 (Ky. 1965), see also CR 76.12 (4)(g).

[2003-SC-000328-MR.pdf](#)  
 AFFIRMING  
 Date: 5/19/2005  
 NOT PUBLISHED

**ENGLAND V. COM**  
**CRIMINAL - Self-Incrimination and 6th Amendment Right to Counsel**

Defendant who merely said that "I guess you will have to call my lawyer and I don't know if I need my lawyer because I don't want to get into trouble" do not rise to the level of impressing upon the interrogator that the suspect has requested an attorney before continuing the questioning . The statements were properly admitted at trial .

[2004-SC-000506-TG.pdf](#)

[2003-SC-000657-MR.pdf](#)  
 AFFIRMING  
 Date: 5/19/2005  
 NOT PUBLISHED

**GOODAN V. COM**  
**CRIMINAL - Instructions (Eyewitness Identification)**

An instruction on eyewitness identification is not required in Kentucky. The trial court's decision not to grant the requested jury instruction was proper under Evans v. Commonwealth , and no KRE 404(b) evidence was proffered at trial.

SEE ALSO:

[2003-SC-000658-MR.pdf](#)

[2003-SC-001062-MR.pdf](#)

AFFIRMING  
Date: 5/19/2005  
NOT PUBLISHED

**GRIMES V. COM**

**CRIMINAL - Defendant's right to be present at trial**

When the youngest victim began to cry during her direct testimony, defense counsel asked to take a break. The trial judge declared a five-minute recess and then went off the record. Twenty-five seconds later, the trial judge went back on the record, and the trial videotape shows the prosecutor at the bench and the jury still in the jury box. Defense counsel was not present at the bench, but the videotape record does not show whether he or the defendant are outside the courtroom. The prosecutor advised the trial judge that the youngest victim needed her mother. The trial judge indicated that she could see her mother, but that they were not to talk about her testimony. The prosecutor agreed and the trial judge went off the record again until the testimony of the youngest victim resumed. The entire exchange between the prosecutor and the trial judge lasted approximately twenty seconds.

A defendant has a right to be present at all critical stages of his prosecution. RCr 8 .28(1) . The test with respect to whether an ex parte communication violates that right is whether the presence of counsel was necessary to insure fundamental fairness or whether the defendant was deprived of a "reasonably substantial . . . opportunity to defend against the charge." Gabow v. Commonwealth , 34 S.W.3d 63, 74 (Ky. 2000), quoting, United States v. Gagnon, 470 U .S. 522, 105 S.Ct . 1482, 84 L.Ed .2d 486 (1985).

Here, Grimes has not been denied any fundamental rights. His claim that the mother could have coached the victim is highly speculative.

[2003-SC-000596-MR.pdf](#)

Judge: COOPER  
AFFIRMING  
Date: 5/19/2005  
NOT PUBLISHED

**PARTIN V. COM**

**CRIMINAL - Cross Examination; Right to Act as Co-Counsel**

In a 6-1 decision, SC affirmed Partin's convictions for Kidnapping, Wanton Endangerment in the First Degree and other offenses and upheld his underlying sentence of life in prison. The primary issue on appeal was whether the trial court erred by disallowing Partin, who was acting as co-counsel, to personally cross-examine the victims. Citing Maryland v. Craig, 497 U.S. 836 (1990), the SC found no error because the purposes of self-representation were otherwise assured (i.e. Partin helped to prepare the questions to be asked and did not challenge the content of his co-counsel's examination of the victims). Justice Keller offered a compelling dissent, noting that the cases cited in the majority opinion restricted the defendant's right of "personal" cross examination of victims to child-sex offense cases only.

[2002-SC-001079-MR.pdf](#)

AFFIRMING  
Date: 5/19/2005  
NOT PUBLISHED

**RINE V. COM**

**CRIMINAL - Severance (Discretion of Court)**

The trial court is vested with considerable discretion in ruling on motions for severance . Humphrey v. Commonwealth, 836 S .W .2d 865, 868 (Ky. 1992).

SEE ALSO:

[2003-SC-000012-MR.pdf](#)

[2003-SC-000770-MR.pdf](#)

AFFIRMING  
Date: 5/19/2005  
NOT PUBLISHED

**WAGNER V. COM**

**CRIMINAL - 5th Amendment**

SC affirmed Wagner's conviction for Criminal Attempt to Commit Sodomy in the First Degree and his underlying sentence of 20 years. Substantial evidence indicated that he was competent to stand trial. There was also no error in the trial court's denial of his motion to suppress his confession.

[2002-SC-001091-MR.pdf](#)

AFFIRMING  
Date: 5/19/2005  
NOT PUBLISHED

**GABBARD V. COM**

**EVIDENCE - Hearsay (KRE 803(3), State of mind, etc)**

SC affirms TC murder conviction and life sentence. On appeal, defendant argues improper admission of hearsay; improper denial of recusal motion; improper bolstering of prosecution witness; and misstatement as to parole eligibility.

TC permitted hearsay testimony of neighbor that victim said defendant "would be angry whenever he found out about" their impending divorce under the "state of mind" exception. SC held it was error to admit the statement under this exception because it does not reflect the victim's present intention, but rather her belief about defendant's reaction to a past action she had taken. SC held, however, that error was rendered harmless by the testimony of other witnesses. On recusal, SC held judge was not precluded from hearing the case

because 10 years prior he had the prosecutor against the defendant on an unrelated charge. SC also held that Commonwealth did not improperly bolster the credibility of two witnesses during closing argument. Finally, though parole officer incorrectly testified that defendant would be eligible for parole sooner with a life sentence than with a 50-year sentence, SC held that it is unlikely this error would have made a difference in sentencing.

[2004-SC-000483-WC.pdf](#)

AFFIRMING

Date: 5/19/2005

NOT PUBLISHED

**AUBURN HOSIERY MILLS, INC. V. ELVIS BIKIC**

**WORKERS COMP - Statute of Limitations (Tolling Per KRS 342.040(1))**

In this case the claimant, who could not speak English, was injured on the job but never paid TTD benefits. He filed his claim more than two years after the date of the injury, and argued that the Employer was estopped from arguing statute of limitations, because it had never notified the Commissioner that the claimant's TTD benefits were denied, and therefore the Commissioner never notified the claimant that his statute of limitations would run two years from the date of injury. The ALJ awarded benefits, but the Board reversed, stating that the employer was not estopped from asserting a limitations defense. The Court of Appeals reinstated the award, and the Supreme Court Affirmed, finding that the claimant gave un rebutted testimony that he told his employer he would be off from work for a surgery, and that therefore the plain wording of KRS 342.040(1) required the employer to notify the Commissioner's office of the denial. Because the employer failed in its statutory duty, and consequently the Commissioner did not notify the claimant of his deadline for filing, the employer was estopped from asserting the S.O.L. defense.

[2004-SC-000524-WC.pdf](#)

AFFIRMING

Date: 5/19/2005

NOT PUBLISHED

**AUDOBON METALS LLC V. THOMAS**

**WORKERS COMP - BEGINNING DATE OF PERMANENT AWARD**

The claimant had a facial fracture and cervical injury which resulted in a high impairment rating. At issue in this appeal was when the period of permanent disability began. Since the worker's award would end when he became eligible for normal old-age Social Security benefits (66, in this case), the beginning date of the permanent award would make a large difference. The employer argued that, because he had some time off in 2003 for dental surgery, the day he returned to work after that period of TTD would begin his period of permanent disability. The ALJ agreed, however, the Board reversed stating that the PPD award began following the date he first returned to work, not some two years later when the dental surgery was performed. The Supreme Court affirmed, based on the wording of the statutes, which allow a period of permanent disability to be interrupted by periods of temporary total disability.

[2004-SC-000460-WC.pdf](#)

AFFIRMING

Date: 5/19/2005

NOT PUBLISHED

**BEATTY V. NORTON HEALTHCARE**

**WORKERS COMP - Idiopathic Falls and Employer's Responsibility**

This appeal is a recitation of the existing law on whether workers' compensation is applicable when a worker falls from a non-work related medical condition and injures themselves while on the job. The law is basically that, if the employment in any way caused the injury to be worse, such as if the worker strikes her head on a work bench while falling, then it is a work related event. If the worker falls without hitting anything but the floor, it is not a work related event. The ALJ found that the claimant fell from an unrelated medical condition, and that her fall was not made worse by anything connected with the work. The Courts affirmed the finding and the dismissal.

[2004-SC-000539-WC.pdf](#)

AFFIRMING

Date: 5/19/2005

NOT PUBLISHED

**COM. V. TRAVIS**

**WORKERS COMP - Substantial Evidence**

The ALJ awarded benefits based on Dr. Auerbach's report. However, a defense medical examination mentioned a previous doctor's report that was not entered into evidence, and not reported to Dr. Auerbach. The Board reversed the ALJ's finding because it found that the claimant had given an inaccurate history to Dr. Auerbach. The Court of Appeals reversed, holding that the Board exceeded its authority by substituting its findings for those of the ALJ. There was no proof other than the defense expert's evaluation of a pre-existing condition, and as such the ALJ could believe either doctor. The Supreme Court affirmed the Court of Appeals, finding that there was substantial evidence to support the award. The Supreme Court distinguished *Cepero v. Fabricated Metals* 132 SW3d 839 (2004), in which the claimant failed to report his previous injury to his own doctors, and when it was found out, discounted as "no big deal" his injury which caused him to be in a wheelchair for several

weeks. Here, the question was which expert to believe, and if there had been the report discussed by the defense expert, why wasn't it introduced into evidence?

[2004-SC-000403-WC.pdf](#)

AFIRMING

Date: 5/19/2005

NOT PUBLISHED

**HARRINGTON V. WCB (WORKERS COMPENSATION BOARD)  
WORKERS COMP - Substantial Evidence**

The ALJ dismissed the claim because he did not believe the claimant's testimony of how his back injury occurred at work. The employer vigorously defended and found that the claimant had taken several days off immediately before the injury because he stated he suffered a severe sunburn. However, records of the weather at that time showed it to be overcast for some time, and the employer's witnesses testified that the claimant did not appear sunburned or peeling when he came back to work. The ALJ wrote in his decision that he believed the claimant was experiencing back pain, went to work, and falsely reported it as a work injury. The claimant appealed, stating that this was mere speculation by the ALJ, and was not supported by substantial evidence. The Supreme Court affirmed, noting that if a claimant with the burden of proof fails to convince the ALJ that his claim is meritorious, he must show to the appellate Courts that the evidence was overwhelming in his favor in order to reverse the fact finder. Despite the fact that the medical evidence all gave the same history of the injury that the claimant did, the judge was authorized to disbelieve it based on other evidence that the injury did not happen the way the claimant testified it did.

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