



University of Kentucky  
UKnowledge

---

Law Faculty Scholarly Articles

Law Faculty Publications

---

1984

## Kentucky Law Survey: Criminal Procedure

William H. Fortune

University of Kentucky College of Law, fortunew@uky.edu

Sarah N. Welling

University of Kentucky College of Law, swelling@uky.edu

Follow this and additional works at: [https://uknowledge.uky.edu/law\\_facpub](https://uknowledge.uky.edu/law_facpub)



Part of the [Criminal Procedure Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

---

### Recommended Citation

William H. Fortune & Sarah Welling, Kentucky Law Survey, *Criminal Procedure*, 72 Ky. L.J. 381 (1984).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

---

## Kentucky Law Survey: Criminal Procedure

### Notes/Citation Information

Kentucky Law Journal, Vol. 72, No. 2 (1983-1984), pp. 381-402

# Criminal Procedure

BY WILLIAM H. FORTUNE\* AND SARAH N. WELLING\*\*

## INTRODUCTION

Significant criminal procedure decisions of the Kentucky appellate courts for the period July 1, 1982 to July 1, 1983, have been selected for discussion in this Survey. In addition, a number of other cases merit brief comment. One such case was *Blake v. Commonwealth*,<sup>1</sup> where the Kentucky Supreme Court held that a minimum sentence could not be regarded as evidence that improper comments by the prosecutor did not influence the jury.<sup>2</sup> The Court stated: "[I]t is as reasonable to surmise from a minimum sentence that the jury would have acquitted but for the unfair attack upon the testimony as to conjecture that the minimum sentence means that the jury disregarded the matter."<sup>3</sup>

In *Stamps v. Commonwealth*,<sup>4</sup> the Kentucky Supreme Court applied the test recently adopted by the United States Supreme Court in *Oregon v. Kennedy*,<sup>5</sup> and held that a new trial is barred by the double jeopardy clauses of the federal and state constitutions only in cases where the prosecutor's conduct "was intended to provoke the defendant into moving for a mistrial."<sup>6</sup> In addition, the Court applied the rationale of *Rawlings v. Kentucky*<sup>7</sup> in the case of *James v. Commonwealth*.<sup>8</sup> When arrested, James was carrying a gym bag, which he said had just been given to him. The Court followed *Rawlings* and held that James had no legitimate expectation of privacy in the bag.<sup>9</sup>

---

\* Professor of Law, University of Kentucky. A.B. 1961, J.D. 1964, University of Kentucky.

\*\* Assistant Professor of Law, University of Kentucky. B.A. 1974, University of Wisconsin; J.D. 1978, University of Kentucky.

<sup>1</sup> 646 S.W.2d 718 (Ky. 1983).

<sup>2</sup> *Id.* at 719.

<sup>3</sup> *Id.*

<sup>4</sup> 648 S.W.2d 868 (Ky. 1983).

<sup>5</sup> 456 U.S. 667, 669 (1982).

<sup>6</sup> 648 S.W.2d at 869 (quoting *Oregon v. Kennedy*, 456 U.S. at 679).

<sup>7</sup> 448 U.S. 98 (1980). In *Rawlings*, the United States Supreme Court held that the defendant had no "legitimate expectation of privacy" in his friend's purse, in which the defendant had hidden drugs. *Id.* at 104.

<sup>8</sup> 647 S.W.2d 794 (Ky. 1983).

<sup>9</sup> *Id.* at 795 (citing *Rawlings v. Kentucky*, 448 U.S. at 104).

In *Cope v. Commonwealth*,<sup>10</sup> the Kentucky Supreme Court held that a defendant may not enforce a plea bargain unless he has relied to his detriment on the bargain.<sup>11</sup> Finally, in *Turner v. Commonwealth*,<sup>12</sup> the Kentucky Court of Appeals held that the failure of the trial court to inform the defendant he would not be eligible for parole for ten years did not render his guilty plea subject to collateral attack.<sup>13</sup> The court relied on *United States v. Timmreck*,<sup>14</sup> and reasoned that a guilty plea is valid if the accused is aware of the constitutional rights he is surrendering.<sup>15</sup> The court found that a plea may be voluntary and informed even though the accused is not aware of all the consequences of pleading guilty.<sup>16</sup> The remainder of this Survey will provide more extensive discussion of selected cases in the areas of warrants, competency of counsel, pretrial discovery of witness statements, venue, belated attacks on criminal convictions, and the right to talk to an attorney before taking a breathalyzer test.

## I. WARRANTS

### A. *Who May Issue Warrants?*

The question of who has authority to issue arrest warrants in Kentucky is not expressly covered by any constitutional or statutory provision,<sup>17</sup> nor is it covered by the Kentucky Rules of Criminal Procedure (RCr).<sup>18</sup> Instead, the question has been left

---

<sup>10</sup> 645 S.W.2d 703 (Ky. 1983).

<sup>11</sup> *Id.* at 704.

<sup>12</sup> 647 S.W.2d 500 (Ky. Ct. App. 1982).

<sup>13</sup> *Id.* at 502.

<sup>14</sup> 441 U.S. 780 (1979).

<sup>15</sup> 647 S.W.2d at 501.

<sup>16</sup> *Id.*

<sup>17</sup> *Richmond v. Commonwealth*, 637 S.W.2d 642, 645 (Ky. 1982). KY. REV. STAT. ANN. § 15.725(4) (Cum. Supp. 1982) [hereinafter cited as KRS] provides that circuit clerks may issue criminal warrants if all district and circuit judges and trial commissioners are absent from the county. Although this statute implies that district and circuit judges and trial commissioners may issue warrants, it does not specifically so state and the Court did not rely on this statute for its decision. See 637 S.W.2d at 645.

<sup>18</sup> KY. R. CRIM. P. 2.04(1) [hereinafter cited as RCr] states: "If from an examination of the complaint it appears to the judge . . . that there is probable cause . . . he shall issue a warrant for the arrest of the defendant. . . ." This rule clearly seems to establish that judges may issue arrest warrants, but the Court chose not to use it in its decision. See 637 S.W.2d at 645.

to the courts, which until 1982 had not addressed the issue.<sup>19</sup> The general assumption was that all judges who had power to hear criminal matters also had power to issue arrest warrants.<sup>20</sup>

Similarly, Kentucky's constitution and statutes are silent on the question of who may issue search warrants.<sup>21</sup> The state's rules of criminal procedure do, however, state who has authority to issue search warrants: "[A] search warrant may be issued by a judge or other officer authorized by statute to issue search warrants."<sup>22</sup> This rule has been construed as merely a restatement of the common law and not as an independent source of authority regarding the issuance of search warrants.<sup>23</sup> As with arrest warrants, the general assumption has been that judges who have authority to hear criminal matters could also issue search warrants.<sup>24</sup>

The Supreme Court of Kentucky answered the above questions in *Richmond v. Commonwealth*.<sup>25</sup> In *Richmond*, state police officers in Carrollton had, after a car chase, arrested Gregory Richmond and his girlfriend on a February, 1979, Saturday afternoon, for possession of cocaine. Richmond's car was impounded and taken to a municipal garage in Carrollton.<sup>26</sup> The police attempted to locate someone from their judicial district<sup>27</sup> who could issue a search warrant for the car, but by then it was late Saturday night and they were unsuccessful.<sup>28</sup> The police officers eventually contacted a district judge from a different judicial district who traveled

---

<sup>19</sup> See *Richmond v. Commonwealth*, 637 S.W.2d at 645.

<sup>20</sup> *Id.* The Court noted: "In the absence of any constitutional or statutory designation of what officers may issue warrants (whether for search or arrest, or both), it has been generally assumed that judges with authority to hear criminal matters have that power." *Id.*

<sup>21</sup> The Kentucky Supreme Court stated in *Richmond*: "Strange to say, there is no general statutory authority for the issuance of a search warrant by any officer of this state." *Id.* at 644. Cf. KRS § 15.725(4) (allows clerks to issue criminal warrants during absence of district and circuit judges and trial commissioners, but does not authorize anyone to issue the warrants originally).

<sup>22</sup> RCr 13.10(1) (1983).

<sup>23</sup> 637 S.W.2d at 645 ("RCr 13.10 is not the wellspring of authority for the issuance of warrants.").

<sup>24</sup> *Id.*

<sup>25</sup> 637 S.W.2d at 642.

<sup>26</sup> *Id.* at 645.

<sup>27</sup> Carrollton is in Carroll County, a part of the 15th Judicial District. *Id.* at 643-44.

<sup>28</sup> *Id.*

to Carrollton and issued a search warrant for the automobile.<sup>29</sup> The defendant challenged this warrant as invalid because it was issued outside the judge's district.<sup>30</sup> In answering this contention, the Court first held that all district and circuit judges have the authority to issue warrants "of any kind upon a proper showing of reasonable cause."<sup>31</sup> The Court reasoned that district and circuit judges, by nature of their offices, necessarily possess "the two constitutional qualifications of neutrality and capacity to determine the existence of probable cause."<sup>32</sup>

*Richmond* did not change the prevailing law by holding that district and circuit judges are authorized to issue warrants. The decision merely confirmed the general assumption that judges have this power and provided explicit authority for judges to act. One question raised by *Richmond* is why the Court chose to ignore existing provisions regarding who may issue warrants. Kentucky Revised Statutes (KRS) section 15.725(4) states: "In the event of the absence from a county of all district judges and all circuit judges and all trial commissioners, the circuit clerk in each county may issue criminal warrants. . . ." While this statute is not explicit, the implication is that all district and circuit judges and trial commissioners may issue warrants. Even if the Court believed an implication was not a sufficient basis for decision, it could have used the statute as an indication of legislative intent. Instead, the Court only mentioned the statute in relation to a minor point in a footnote.<sup>33</sup>

In addition to ignoring this statute, the Court also ignored RCr 2.04(1), which provides: "If from an examination of the complaint it appears to the judge . . . that there is probable cause to believe that an offense has been committed and that the defendant committed it, he shall issue a warrant for the arrest of the defendant . . . ." This rule clearly implies that judges are authorized to issue arrest warrants. However, the Court did not mention this rule,

---

<sup>29</sup> District Judge Dennis Fritz of the 12th Judicial District, consisting of Henry, Oldham and Trimble counties, issued the search warrant. *Id.* at 643.

<sup>30</sup> *Id.* at 644.

<sup>31</sup> *Id.* at 645 n.2. The Court further stated: "Someone must have authority to issue warrants, and by virtue of that necessity we confirm that all district and circuit judges of this state have it." *Id.* at 645.

<sup>32</sup> *See id.* at 645.

<sup>33</sup> *See id.* at 645 n.2.

referring only to “[t]he absence of an explicit delegation of the power to issue warrants.”<sup>34</sup> Thus, while the Court’s holding that all judges may issue warrants is sound, the Court declined to note possible existing authority for its conclusion.

### B. *The Territorial Efficacy of Warrants*

In *Richmond*, the Supreme Court of Kentucky also considered whether the power to issue warrants was constrained by territorial limits. The Court noted that while it was settled that arrest warrants could be executed statewide,<sup>35</sup> *Coleman v. Commonwealth*<sup>36</sup> had indicated that search warrants could not be executed outside the issuing officer’s jurisdiction.<sup>37</sup> Concluding that search warrants may now be executed statewide, the Court distinguished *Coleman* on two grounds.<sup>38</sup>

First, the Court saw no reason to treat search warrants differently from arrest warrants, which are valid statewide.<sup>39</sup> Second and more importantly, *Coleman* was decided before the courts were reorganized into one Court of Justice by the 1975 Judicial Amendment. The Court relied on several provisions of the Amendment<sup>40</sup> to conclude that there is only “one District Court for the entire state,” and that all district and circuit judges are “members of the same court and have equal capacity to act throughout the Commonwealth.”<sup>41</sup> The Court’s conclusion that all warrants are effective statewide was a significant change in the law regarding search warrants.

---

<sup>34</sup> *Id.* at 645.

<sup>35</sup> *Id.* (“warrants of arrest run to the four corners of the realm”).

<sup>36</sup> 292 S.W. 771 (Ky. 1927).

<sup>37</sup> 637 S.W.2d at 645-46 (citing 292 S.W. at 771-72).

<sup>38</sup> *Id.* at 646.

<sup>39</sup> *Id.* at 645. The Court noted:

[W]arrants of arrest run to the four corners of the realm; that is, a judge in Pikeville can issue a warrant for the arrest of a person in Hickman. Why, then, should he not be able to warrant the search of a place in Hickman? And if he can do this in his office at Pikeville, is there really any important end to be accomplished by drawing a line against his signing the warrant in Hickman or, for that matter, any other place in the state?

*Id.*

<sup>40</sup> *Id.* at 646 (citing KY. CONST. §§ 109, 113, 117, 122).

<sup>41</sup> *Id.*

The holding of *Richmond* raises the question whether search warrants issued by clerks pursuant to KRS section 15.725(4) will also be valid throughout the state. The Court in its opinion specifically referred only to warrants issued by district or circuit judges,<sup>42</sup> but warrants issued by clerks will also presumably be valid statewide, since the Court was aware of the statute authorizing clerks to issue criminal warrants and explicitly held that criminal warrants include search warrants.<sup>43</sup> It could be argued that *Richmond* obviates the need for KRS section 15.725(4). If all judicial officers are out of the county, law enforcement personnel can get warrants from any judge in the state and need never rely on clerks. Generally, it is better to have judges from other districts rather than local clerks issue warrants.

*Richmond* also contains at least two potential hazards. The first is that law enforcement officers, now free to get warrants anywhere in the Commonwealth, may shop around among judicial districts to find the most favorable judge.<sup>44</sup> The second hazard is the potential for conflict among judges of different districts and different circuits. If either of these problems arises, the Court may need to rethink its position, but generally this statewide approach to warrants seems acceptable since the use of warrants by police is desirable and this decision facilitates the procurement of warrants.

## II. COMPETENCY OF COUNSEL

In *Henderson v. Commonwealth*,<sup>45</sup> the Supreme Court finally abandoned the "farce and mockery" test<sup>46</sup> for evaluating the performance of defense attorneys on claims of ineffective assistance of counsel.<sup>47</sup> The Court overruled cases which had held that only

---

<sup>42</sup> *Id.* at 646.

<sup>43</sup> *Id.* at 645 n.2.

<sup>44</sup> As a practical matter, judge shopping on warrants may be minimal because such conduct by law enforcement personnel carries the risk of irritating the judge who regularly presides over their cases.

<sup>45</sup> 636 S.W.2d 648 (Ky. 1982).

<sup>46</sup> *See, e.g.,* Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965) ("In order to vacate the judgment because of poor representation of [court appointed] counsel, we must find that the circumstances of the representation were such as to shock the conscience of the court and to render the proceedings a farce and a mockery of justice."), *cert. denied*, 384 U.S. 976 (1966). *See generally* Comment, *Kentucky's Standard for Ineffective Counsel: A Farce and a Mockery?*, 63 Ky. L.J. 803 (1974-75).

<sup>47</sup> 636 S.W.2d at 650.



when the level of representation was such as to “shock the conscience” and render the proceedings a “farce and mockery” would such representation constitute “ineffective assistance,”<sup>48</sup> and held the proper standard was one of ordinary negligence.<sup>49</sup> The Court stated: “[W]e conclude that as an adequate standard the defense counsel should be required to perform at least as well as a lawyer with ordinary training and skill in criminal law, utilizing that degree of training to conscientiously protect his client’s interests.”<sup>50</sup> The Court then reviewed the evidence in light of the new standard and found that the representation was reasonably effective.<sup>51</sup>

Several observations about *Henderson* are in order. First, the Court adopted the test of *Beasley v. United States*,<sup>52</sup> “reasonably likely to render and rendering reasonably effective assistance,”<sup>53</sup> yet stated the holding in terms of ordinary negligence.<sup>54</sup> The Court of Appeals for the Sixth Circuit decided *Beasley* in 1974, borrowing the above language from the Fifth Circuit.<sup>55</sup> While *Beasley* involved a federal prosecution, the decision is one of constitutional law—a construction of the Sixth Amendment<sup>56</sup>—and has been applied to state convictions reviewed in the federal courts on petition for writ of habeas corpus.<sup>57</sup> Thus the *Beasley* formulation has been the operative test for federal review of Kentucky convictions for almost a decade, and it was sensible for the Kentucky Supreme Court to adopt the same standard.<sup>58</sup>

---

<sup>48</sup> See, e.g., *Vaughan v. Commonwealth*, 505 S.W.2d 768 (Ky. 1974); *Wahl v. Commonwealth*, 396 S.W.2d 774.

<sup>49</sup> 636 S.W.2d at 650.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 651.

<sup>52</sup> 491 F.2d 687 (6th Cir. 1974).

<sup>53</sup> *Id.* at 696. “We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance.” *Id.*

<sup>54</sup> 636 S.W.2d at 650 (citing *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. Ct. App. 1979) (an attorney malpractice case)).

<sup>55</sup> 491 F.2d at 694 (quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961), modified on other grounds, 289 F.2d 928 (5th Cir. 1961)).

<sup>56</sup> See *id.*

<sup>57</sup> See, e.g., *Gilbert v. Sowders*, 646 F.2d 1146, 1150 (6th Cir. 1981); *Canary v. Bland*, 583 F.2d 887, 889 (6th Cir. 1978); *Wilson v. Cowan*, 578 F.2d 166, 168 (6th Cir. 1978).

<sup>58</sup> In a case decided soon after *Beasley*, Kentucky’s highest court refused to acknowledge *Beasley* as controlling authority. *Perkins v. Commonwealth*, 516 S.W.2d 873, 874 n.1 (Ky. 1974), cert. denied, 421 U.S. 971 (1975). The appellate courts of Ken-

The *Beasley* formulation, however, implies that a reviewing court must determine not only that the attorney performed competently but also that the attorney was *likely*, by preparation, training and experience, to render competent service.<sup>59</sup> While preparation, training and experience unquestionably are factors to be considered in determining the adequacy of an attorney's performance, it would make no sense to reverse a conviction where an ill-prepared lawyer unexpectedly did an adequate, or more than adequate, job. However, the court in *Beasley* made it clear that the focus should be on the attorney's performance in the case at bar.<sup>60</sup> There is no reported case from the Sixth Circuit reversing a conviction because the attorney was not "reasonably likely to render . . . effective assistance"; the issue has always been whether the attorney in fact did "render reasonably effective assistance."<sup>61</sup> That portion of the *Beasley* formulation which looks to the *likelihood* of the attorney performing competently is misleading and has been rightly disregarded by the courts. Because the decisions of the Sixth Circuit on matters of federal constitutional law are *de facto* controlling in Kentucky state courts,<sup>62</sup> the Kentucky Supreme Court adopted

---

tucky did apply the farce and mockery test in later cases but added that, in any case, the level of representation satisfied *Beasley*. See, e.g., *Bishop v. Commonwealth*, 549 S.W.2d 519, 523 (Ky. Ct. App. 1977).

<sup>59</sup> See 491 F.2d at 696.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *Wiley v. Sowders*, 647 F.2d 642, 648 (6th Cir.) (attorneys presented guilty plea without petitioner's acquiescence), *cert. denied*, 454 U.S. 1091 (1981); *Gilbert v. Sowders*, 646 F.2d at 1150 (petitioner's due process violated when case dismissed in state court because of procedural error by attorney); *McKeldin v. Rose*, 631 F.2d 458, 460-61 (6th Cir. 1980), *cert. denied*, 450 U.S. 969 (1981) (attorney's failure to appear in preliminary hearing held harmless mistake); *Canary v. Bland*, 583 F.2d at 889 (attorney failed to challenge the use of petitioner's previous criminal record in sentence calculation); *Wilson v. Cowan*, 578 F.2d at 168 (attorney failed to call on witness able to prove petitioner's absence when armed robbery took place).

<sup>62</sup> The truth of this proposition may be illustrated by reference to habeas corpus proceedings. Federal courts are empowered by federal statute to issue writs of habeas corpus to state prisoners whose convictions were obtained in violation of the United States Constitution. See 28 U.S.C. 2254(a) (1976). The granting of a writ of habeas corpus by a federal court is in fact a reversal of a state court decision. Cf. *Stumbo v. Seabold*, 704 F.2d 910, 912 (6th Cir. 1983) (reversing a federal district court that denied a writ of habeas corpus and ordering the state to either release the petitioner or retry him in 90 days).

If the state court were to follow a different standard for determining whether the assistance of counsel had been effective, it would risk being reversed through habeas corpus proceedings. In *Canary v. Bland*, 583 F.2d 887, this very thing occurred. The defend-

the *Beasley* formulation while making it clear that the test is one of ordinary negligence.<sup>63</sup>

Assuming the attorney's performance is substandard, must the defendant establish that his defense was "prejudiced" thereby? Though the *Beasley* court stated that ineffective assistance of counsel could not be considered harmless error,<sup>64</sup> it is reasonably clear that the Sixth Circuit will not set aside a conviction unless the attorney's derelictions are substantial.<sup>65</sup> While *Beasley* nominally does not permit a harmless error analysis, it does permit a review of the entire record to see if the attorney's performance, taken as a whole, was deficient.<sup>66</sup> This approach precludes reversals for minor errors and is consistent with a negligence standard, in which the complainant has the burden of showing that the conduct of the attorney resulted in injury.<sup>67</sup> The Kentucky high court has stated that it will not reverse for an attorney error characterized as "non-prejudicial."<sup>68</sup> This position is consistent with the only statement on the matter by the United States Supreme Court.<sup>69</sup>

It is possible, however, that the courts will ultimately adopt a test which will require only that the defendant show substantial

---

ant in *Canary* had been convicted of being a habitual criminal after his attorney failed to object to the use of an earlier conviction to prove the charge. *Id.* at 890-91. The claim of ineffective assistance based on the attorney's failure to raise the objection was rejected by the Kentucky Supreme Court because the "counsel's failure did not reduce the trial to the level of a 'farce and a mockery of justice.'" *Id.* at 889.

On a petition for a writ of habeas corpus, the Sixth Circuit Court of Appeals reversed the conviction on the ground of ineffective assistance of counsel, noting the Sixth Circuit no longer followed the farce and mockery test with respect to sixth amendment claims. *Id.* at 889, 891.

<sup>63</sup> 636 S.W.2d at 650. *Cf.* *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (the test is "whether that advice was within the range of competence demanded of attorneys in criminal cases").

<sup>64</sup> 491 F.2d at 696.

<sup>65</sup> *Cf.* *United States v. Yelardy*, 567 F.2d 863 (6th Cir.) (attorney's conduct was reasonable as seen in the light of total circumstances), *cert. denied*, 439 U.S. 842 (1978).

<sup>66</sup> *See* *Roland v. Mintzes*, 554 F. Supp. 881, 888-89 (E.D. Mich. 1983) (quoting *United States v. Yelardy*, 567 F.2d at 865-66).

<sup>67</sup> *Cf.* *Daugherty v. Runner*, 581 S.W.2d at 12 (malpractice of attorney judged by ordinary standard of care used by legal profession).

<sup>68</sup> *See* *McHenry v. Commonwealth*, 490 S.W.2d 766, 768 (Ky. 1973) (an attorney has discretion in selecting the trial strategy he deems most reasonable at the time).

<sup>69</sup> *See* *Chambers v. Maroney*, 399 U.S. 42, 54 (1975) (court will defer to state record regarding quality of counsel's representation).

attorney negligence, with the burden then shifting to the state to prove beyond a reasonable doubt that the error was harmless.<sup>70</sup> The United States Supreme Court has granted certiorari in a case where the Court of Appeals for the Tenth Circuit reversed a conviction by presuming ineffectiveness and prejudice from a lack of both experience and adequate time to prepare.<sup>71</sup> The forthcoming opinion may be helpful in providing guidelines for the appointment of counsel,<sup>72</sup> but it is doubtful that the Court will uphold the reversal of a conviction where the petitioner could not point to any specific error.

As appropriate cases arise, it would be helpful to the trial courts for the Kentucky Supreme Court to provide specific criteria by which to judge the competence of defense counsel. For example, in *Washington v. Strickland*,<sup>73</sup> the Fifth Circuit Court of Appeals considered the general problem of alleged failure to investigate in the context of five common fact patterns.<sup>74</sup> The hornbook type analysis in *Washington* should greatly help trial judges decide whether a given attorney's performance was deficient.

---

<sup>70</sup> This approach, titled the requirement of "actual and substantial detriment," was developed in *Washington v. Strickland*, 693 F.2d 1243, 1262 (5th Cir. 1982), cert. granted, 103 S.Ct. 2451 (1982) and is favorably commented on in Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 41-43 (1983).

<sup>71</sup> See *United States v. Cronin*, 675 F.2d 1126 (10th Cir. 1982) (court appointed attorney who specialized in real estate to represent a criminal defendant and allowed only a short time to prepare), cert. granted, 103 S.Ct. 1182 (1983).

<sup>72</sup> See Slonim, *How Effective Does a Criminal Defense Have to Be?* 69 A.B.A. J. 1030 (1983).

<sup>73</sup> 693 F.2d at 1243.

<sup>74</sup> The court categorized and analyzed the situations as follows:

[1] [C]ounsel fails to conduct substantial investigation into the one plausible line of defense in the case. . . . [2] [C]ounsel conducts a reasonably substantial investigation into the one line of defense that is presented at trial. . . . [3] [C]ounsel conducts a reasonably substantial investigation into all plausible lines of defense and chooses to rely upon fewer than all of them at trial. . . . [4] [C]ounsel fails to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial. . . . [5] [C]ounsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice.

*Id.* at 1252-58.

## III. PRE-TRIAL DISCOVERY OF WITNESS STATEMENTS

Prior to the Kentucky Supreme Court's decision in *Wright v. Commonwealth*<sup>75</sup> it was clear that a prosecutor could not be required to give witness statements to defense counsel before trial. RCr 7.24(2) states that a trial court may order the attorney for the Commonwealth to produce certain things for inspection but, "[t]his provision does not authorize pretrial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses."<sup>76</sup> Prior decisions of the Court had held that witness statements are not discoverable under this rule.<sup>77</sup>

In *Wright*, however, the Court held that it is within the discretion of the trial court to order the pre-trial production of prosecution witness statements.<sup>78</sup> In so holding, the Court relied on RCr 7.26, a rule which is limited on its face to the production of witness statements at trial.<sup>79</sup> Prior to 1981, RCr 7.26 had provided that *after* a witness for the prosecution testified on direct examination, the court could order the prosecutor to give defense counsel any prior statements of the witness.<sup>80</sup> In 1981, the Court modified RCr 7.26(1) to provide that "[b]efore a witness called by the Commonwealth testifies on direct examination the attorney for the Commonwealth shall produce any statement of the witness . . . for examination and use by the defendant."<sup>81</sup> These changes were designed to: (1) eliminate the ritual motion to the court for production; (2) enable the defense attorney to spot inconsistencies in

---

<sup>75</sup> 637 S.W.2d 635 (Ky. 1982).

<sup>76</sup> RCr 7.24(2).

<sup>77</sup> See, e.g., *Moore v. Commonwealth*, 634 S.W.2d 426, 431 (1982).

<sup>78</sup> See 637 S.W.2d at 636.

<sup>79</sup> RCr 7.26.

<sup>80</sup> See RCr 7.26(1) (Cum. Supp. 1980) (amended 1981). That rule corresponded to the practice in federal court under 18 U.S.C. § 3500 (1970), the so-called 'Jencks Act,' passed by Congress in response to *Jencks v. United States*, 353 U.S. 657 (1957). The Jencks Act has been superseded by FED. R. CRIM. P. 26.2 [hereinafter cited as FRCRP] providing for discovery of the statements of all witnesses (other than the defendant) after direct examination.

<sup>81</sup> RCr 7.26(1) (1981) (emphasis added).

testimony by putting the statement in his hands during direct examination; and (3) eliminate the break between direct and cross for the reading of the witness's statement.<sup>82</sup> The change was not designed to give a court discretion to order pre-trial discovery of witness statements, a practice specifically prohibited by RCr 7.24.

The Court in *Wright* stated that the modification of RCr 7.26(1) was in response to the 1981 proposal of the Judicial Council for a discovery rule similar to Rule 422 of the Uniform Rules of Criminal Procedure.<sup>83</sup> The Council had proposed that the defense attorney have access to the prosecutor's entire file, including witness statements, but excluding attorney work product.<sup>84</sup> The Council would also have required the prosecutor to give written notice of the names and addresses of witnesses and their criminal records.<sup>85</sup> While the Supreme Court rejected these proposals it did provide for the discovery of grand jury testimony,<sup>86</sup> a change clearly intended to allow additional discovery. While the absence of official commentary makes statutory construction difficult,<sup>87</sup> the change in RCr 7.26 was likely *not* intended as an ancillary means of obtaining pre-trial discovery of witnesses' statements.

The *Wright* decision invites routine defense motions for witness statements, but provides no direction for the exercise of discretion by the trial court.<sup>88</sup> Is it an abuse of discretion to deny pre-trial discovery on the ground that the defendant has failed to demonstrate a particularized need for the material? Is it an abuse of discretion to make the discovery order reciprocal? Is it an abuse of discretion simply to deny pre-trial discovery under the authority of the prohibition in RCr 7.24? Unless *Wright* is overruled, the

---

<sup>82</sup> Plymale & McSwain, *Developments in Criminal Procedure: RCr 7.26, An Open File Discovery Rule?* 47 BENCH & BAR 14 (1983).

<sup>83</sup> 637 S.W.2d at 636.

<sup>84</sup> See RCr 7.32 (Proposed Official Draft 1981). See also UNIFORM RULES OF CRIMINAL PROCEDURE 421, 10 U.L.A. 114 (1974).

<sup>85</sup> See RCr 7.34 (Proposed Official Draft 1981). See also UNIFORM RULES OF CRIMINAL PROCEDURE 422(b)(2) 10 U.L.A. 120 (1974) (a statement of the name, address and occupation of each intended witness must be furnished, upon request, to the attorney for the defendant).

<sup>86</sup> See RCr 5.16(1), (3).

<sup>87</sup> The Criminal Rules Advisory Committee included a proposed "Official Commentary" but was not adopted by the Kentucky Supreme Court. Fortune, *Criminal Rules*, 70 KY. L.J. 395, 396 (1981-82).

<sup>88</sup> See Plymale & McSwain, *supra* note 82, at 58-59.

rules are changed, or specific guidance is provided, the Court will have to answer these questions.

#### IV. VENUE

When a criminal offense is committed in more than one county, venue is proper in either county under the Kentucky statute.<sup>89</sup> Thus, the prosecutor may choose the county in which to proceed.<sup>90</sup> Recently the Kentucky Supreme Court considered, in *Evans v. Commonwealth*,<sup>91</sup> whether trial courts have authority to supersede the prosecutor's choice and transfer a criminal case to another county where venue is proper for the convenience of parties and witnesses.<sup>92</sup>

*Evans v. Commonwealth* arose when Evans, a doctor practicing in Bell County, and Thomas, a dentist practicing in Clay County, were separately indicted for Medicaid fraud.<sup>93</sup> Indictments were returned in Franklin County since part of the crime was committed in that county when the defendants submitted their fraudulent claims to the Commonwealth. The circuit court agreed that venue was proper in Franklin County, but determined that venue was also proper and more appropriate in the doctors' home counties for the convenience of the parties and witnesses.<sup>94</sup> The circuit court then entered an order transferring the two cases from Franklin County to Bell and Clay Counties, respectively. The court of appeals, with one judge dissenting, held this transfer to be improper because of the absence of statutory authority.<sup>95</sup>

The Kentucky Supreme Court agreed with the court of appeals

---

<sup>89</sup> See KRS § 452.550 (1983) ("When an offense is committed partly in one and partly in another county, or if acts and their effects constituting an offense occur in different counties, the prosecution may be in either county in which any of such acts occurs.")

<sup>90</sup> See, e.g., *Commonwealth v. Evans*, 645 S.W.2d 350, 352 (Ky. Ct. App. 1982), *aff'd*, 645 S.W.2d 346 (Ky. 1983).

<sup>91</sup> 645 S.W.2d 346 (Ky. 1983).

<sup>92</sup> *Id.* at 347. The transfer of a case from one site where venue is proper to a different site where venue is proper for the convenience of the parties and witnesses is referred to as a transfer based on the doctrine of *forum non conveniens*. See, e.g., *id.* at 347. This term will be used throughout this portion of the article to refer to such transfers.

<sup>93</sup> *Id.* at 346. The defendants were indicted under KRS §§ 194.505(6), 205.850(4), 514.040(1)(a) (1983).

<sup>94</sup> See *Commonwealth v. Evans*, 645 S.W.2d at 351.

<sup>95</sup> *Id.* at 350.

that the transfer of these cases was an abuse of discretion.<sup>96</sup> The Court concluded that authority for a change of venue can only be conferred by statute; a court has no inherent power to order a *forum non conveniens* transfer of venue in criminal cases.<sup>97</sup> The Court then examined the applicable statute and decided it did not authorize the trial judge to transfer prosecutions to other counties for convenience.<sup>98</sup> The Court further stated that even if transfers of venue were characterized as procedural and therefore within the province of the judiciary, such transfers would have to be mandated by rule to insure uniform use and application throughout the system.<sup>99</sup> Since no statute or rule authorized the change of venue, the trial court had no authority to transfer the cases on a theory of *forum non conveniens*.<sup>100</sup>

This conclusion that a trial court is without inherent power to alter venue for convenience is unique to criminal cases. In civil cases, the doctrine of *forum non conveniens* has been recognized without authority in statutes or rules to allow the trial judge to dismiss a case if the forum is inconvenient and another more convenient forum is available.<sup>101</sup> This contrast between criminal and

---

<sup>96</sup> *Evans v. Commonwealth*, 645 S.W.2d at 347.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

KRS 452.550 means only that certain offenses are indictable and may be prosecuted in either county. Once an indictment is returned, however, the statute does not purport to empower a trial judge of that particular circuit to transfer the prosecution to another county, as if the indictment had been returned there in the first instance.

*Id.* See note 89 *supra* for the relevant provisions of KRS 452.550.

<sup>99</sup> 645 S.W.2d at 347 ("Even if it were assumed that venue is a procedural matter and thus comes within the judicial province, it would be necessary that an appropriate rule of procedure be promulgated for uniform use and application throughout the system.").

<sup>100</sup> Two justices dissented from the decision. Justice Aker thought the appeal was improper procedurally. *See id.* at 348 (Aker, J., dissenting). Justice Sternberg also believed the procedural propriety of the appeal was improper, but agreed with the majority on the venue issue. *See id.* at 349 (Sternberg, J., dissenting). Justice Sternberg concluded that the doctrine of *forum non conveniens* should be applied in criminal cases to insure the defendant a fair trial. *See id.* at 350. However, the defendant's constitutional right to a fair trial was not implicated here as the defendant did not claim he would receive an unfair trial in Franklin County, but only that he would receive an *inconvenient* trial in Franklin County. *See id.* at 347. Furthermore, if the defendant had raised a valid fair trial claim, an existing statute would have allowed the court to transfer the action. *See* KRS § 452.210 (1983).

<sup>101</sup> *See, e.g., Carter v. Netherton*, 302 S.W.2d 382 (Ky. 1957); *Allen v. Appalachian Regional Hosps., Inc.*, 30 Ky. L. SUMM. 7, at 6 (Ky. Ct. App. June 3, 1983) [hereinafter cited as KLS].



civil practice was noted in Judge Wilhoit's dissent in the court of appeals where he stated that *forum non conveniens* had not been applied to criminal cases only because "the circumstances surrounding a criminal prosecution would very rarely present a situation justifying application of the doctrine."<sup>102</sup> Judge Wilhoit concluded that there was no reason why *forum non conveniens* should not be recognized in the rare criminal cases where the principles of the doctrine would apply.<sup>103</sup>

The Supreme Court did not directly address the question of why a change of venue on *forum non conveniens* grounds is within the trial judge's inherent powers in civil but not criminal cases. One distinction between the doctrine as it operates in civil cases and the issue in *Evans* is that in civil cases, the doctrine of *forum non conveniens* merely allows a trial judge to *dismiss* an action if another more convenient forum is available,<sup>104</sup> whereas the judge in *Evans* attempted affirmatively to *transfer* the cases to other courts.<sup>105</sup> The Supreme Court found this distinction significant. It stated that *forum non conveniens* was not a good model for a change of venue because it "provides a basis on which one court may decline to entertain a case, but does not enable that court to force another court to take it."<sup>106</sup>

*Evans* establishes that Kentucky trial courts have no inherent authority to transfer criminal cases for the convenience of the parties and witnesses.<sup>107</sup> The Court stated such authority can only

---

<sup>102</sup> Commonwealth v. Evans, 645 S.W.2d at 353 (Wilhoit, J., dissenting).

<sup>103</sup> *Id.* (Wilhoit, J., dissenting).

<sup>104</sup> See Carter v. Netherton, 302 S.W.2d, at 384; Allen v. Appalachian Regional Hosps., Inc., 30 KLS 7, at 6.

<sup>105</sup> Evans v. Commonwealth, 645 S.W.2d at 646.

<sup>106</sup> *Id.* The reliance of the Supreme Court on this distinction suggests that although a trial court clearly cannot transfer a criminal case, it might have discretion to dismiss the case on a *forum non conveniens* basis. Of course, as a practical matter, dismissing a case where venue is also available in another forum and transferring the case to that other forum amount to the same thing, at least where the prosecutor wants to continue with the case.

<sup>107</sup> This holding is consistent with the common law view. See *People v. Harris*, 4 Denio 150 (N.Y. 1847), quoted in *People v. Jackson*, 341 N.W.2d 253 (Mich. Ct. App. 1983):

We must look, therefore, to the established practice of the courts on this subject; which is, to allow a suggestion, and make an order, when it clearly appears, that a fair and impartial trial cannot be had in the county where the indictment was found. The convenience of the prosecutor, the accused, or the witnesses, has never been allowed, either here or in England,

be conferred by statute or perhaps by rule.<sup>108</sup> As such, the decision limits the discretion of trial courts. The question raised by the decision is whether such discretion is desirable.<sup>109</sup>

The impact of allowing such transfers would be felt in two ways. First, the prosecutor's power would be limited because his or her choice of forum would no longer be final. Of course, the prosecutor's choice of forum is already limited, both by the statute which provides that venue is proper only where part of the crime occurs<sup>110</sup> and by the defendant's constitutional right to a fair trial.<sup>111</sup> There is no justification for further limiting the prosecutor's choice of forum merely for the convenience of the defendant.<sup>112</sup>

The second impact of granting trial courts the power to transfer criminal cases for the convenience of parties and witnesses would be to invite conflict among the trial judges. All trial court judges in Kentucky are elected officers, and the temptation to transfer a politically unattractive case to someone else's docket might be irresistible. Likewise, it might be tempting to transfer cases that are particularly long and complex. Of course, the recipients of such cases might not be pleased with the transfer and might even consider transferring them back. Thus, the possibility exists that application of the *forum non conveniens* doctrine in criminal cases would end up encouraging political transfers and conflict within the judiciary. Considering the only marginal benefit to the

---

as a ground of changing the place of trial in a criminal case; and we do not feel ourselves at liberty to make such a precedent. The statute has not introduced a new rule, the practice has been the same since 1830, that it was before that time.

*Id.* at 152.

The conclusion that the doctrine of *forum non conveniens* does not apply in criminal cases is also consistent with the holdings of other state courts. *See, e.g.,* *People v. Jackson*, 341 N.W.2d at 256; *Seaton v. State*, 29 S.W.2d 375, 377 (Tex. Crim. App. 1930).

<sup>108</sup> *See Evans v. Commonwealth*, 645 S.W.2d at 347.

<sup>109</sup> *Cf. FRCrP 21(b)* ("For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the courts thereof to another district.").

<sup>110</sup> *See KRS* § 452.550.

<sup>111</sup> *See U.S. CONST. amend. VI; KY. CONST. § 11. See also KRS* § 452.210 (1983) (grants the trial court authority to transfer a criminal action if it appears that the defendant or Commonwealth cannot receive a fair trial where it is pending).

<sup>112</sup> As a practical matter, application of *forum non conveniens* would promote only the defendant's choice of forum because presumably the prosecution would have made a convenient choice when it filed the action.

defendant—an allegedly more convenient forum—the better policy is not to adopt a statute or rule authorizing *forum non conveniens* transfers in criminal cases.

## V. BELATED ATTACKS ON CRIMINAL CONVICTIONS

The Supreme Court of Kentucky used *Gross v. Commonwealth*<sup>113</sup> and *Alvey v. Commonwealth*<sup>114</sup> to establish rules for trial courts to use in deciding whether to dismiss, without an evidentiary hearing, belated attacks on criminal convictions.<sup>115</sup> The recurring pattern is a conviction (by plea of guilty or otherwise), followed by probation or eventual parole, and then a second felony conviction, with a persistent felony offender conviction resulting from the second conviction. This is followed by an attack on the first conviction in an attempt to undermine the persistent felony offender conviction.<sup>116</sup> The attack may take the form of a Kentucky Civil Rule (CR) 60.02<sup>117</sup> motion in the court of the first conviction<sup>118</sup> or a RCr 11.42<sup>119</sup> motion in the court of either the first or second conviction.<sup>120</sup>

In *Gross* the Court pointed out that errors are to be corrected, if possible, on direct appeal, and if that is not possible, by a motion pursuant to RCr 11.42.<sup>121</sup> An individual filing a CR 60.02 motion

---

<sup>113</sup> 648 S.W.2d 853 (Ky. 1983).

<sup>114</sup> 648 S.W.2d 858 (Ky. 1983).

<sup>115</sup> *Gross* and *Alvey* were two of seven cases consolidated for oral argument. 648 S.W.2d at 853.

<sup>116</sup> See, e.g., *Gross v. Commonwealth*, 648 S.W.2d at 853; *Ray v. Commonwealth*, 633 S.W.2d 71 (Ky. Ct. App. 1982).

<sup>117</sup> Ky. R. Civ. P. 60.02 [hereinafter cited as CR] provides that a trial court may grant relief from a final judgment for (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence; (c) perjury or falsified evidence; (d) fraud affecting the proceedings other than perjury or falsified evidence; (e) the judgment is void, satisfied, or a prior judgment on which it is based has been reversed; and f) any other reason of an extraordinary nature justifying relief. A motion for relief on the first three grounds must be made within a year of judgment. CR 60.02 is made applicable to criminal proceedings by RCR 13.04.

<sup>118</sup> See, e.g., *Gross v. Commonwealth*, 648 S.W.2d at 853.

<sup>119</sup> RCr 11.42(1) provides that a prisoner in custody or a defendant on probation, parole or conditional discharge who claims that the judgment of conviction is subject to collateral attack may move for relief in the court that imposed the sentence.

<sup>120</sup> *Alvey v. Commonwealth*, 648 S.W.2d at 858.

<sup>121</sup> 648 S.W.2d at 856.

must explain the failure to raise the matter by appeal or RCr 11.42 motion.<sup>122</sup> The Court declared:

The structure provided in Kentucky for attacking the final judgment of a trial court in a criminal case is not haphazard and overlapping, but is organized and complete. That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02. CR 60.02 is not intended merely as an additional opportunity to raise *Boykin* defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42. The movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.<sup>123</sup>

The Court then explicitly held that failure to raise a matter by direct appeal or RCr 11.42 motion normally forecloses consideration of a CR 60.02 motion. The Court stated:

We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

Next, we hold that a defendant is required to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him. Final disposition of that motion, or waiver of the opportunity to make it, shall conclude all issues that reasonably could have been presented in that proceeding. The language of RCr 11.42 forecloses the defendant from raising any questions under CR 60.02 which are "issues that could reasonably have been presented" by RCr 11.42 proceedings.<sup>124</sup>

The Supreme Court adopted and released the court of appeals opinion in *Alvey* to make it clear that a defendant facing a persistent felony offender charge who wishes to claim that the prior conviction is invalid must do so at the time he or she is tried as a persistent felon.<sup>125</sup> A failure to raise the matter during the trial

---

<sup>122</sup> *Id.* at 856.

<sup>123</sup> *Id.* (emphasis in original).

<sup>124</sup> *Id.* at 857.

<sup>125</sup> See *Alvey v. Commonwealth*, 648 S.W.2d at 858.

will foreclose the defendant from raising it by a motion pursuant to RCr 11.42 or CR 60.02.<sup>126</sup> In *Alvey* the defendant claimed that the record of his earlier conviction did not show that he knowingly and voluntarily entered his plea of guilty.<sup>127</sup> Assuming the record was deficient under the rationale of *Boykin v. Alabama*,<sup>128</sup> the Court held the defect waived by the failure of counsel to make a timely objection during the persistent felony proceeding.<sup>129</sup> As a practical matter, this means defense attorneys must question their clients about the circumstances of convictions charged in a persistent felony offender indictment, obtain the court records of the previous convictions if necessary, and file an appropriate motion attacking any convictions which are potentially voidable.<sup>130</sup>

*Alvey* and *Gross* do not address the problems which arise if the conviction under attack occurred in a court different from the court handling the persistent felony offender proceeding. The defense attorney might file a motion to vacate in the court which rendered the conviction; the issue then would be whether the forum court should stay the proceedings pending a resolution. Alternatively, the defense attorney might file a motion to suppress in the second court;<sup>131</sup> the issue then would be whether the second court should rule on the validity of the conviction or transfer the matter to the first court.

## VI. RIGHT TO TALK TO AN ATTORNEY BEFORE DECIDING WHETHER TO TAKE A BREATHALYZER TEST

RCr 2.14 provides that a person in custody shall have the right to "make communications as soon as practicable for the purpose

---

<sup>126</sup> *Id.* at 859.

<sup>127</sup> *Id.*

<sup>128</sup> 395 U.S. 238, 242-43 (1969) (waivers cannot be presumed from a silent record; the record must show an affirmative waiver of the right to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers). *But cf.* North Carolina v. Alford, 400 U.S. 25, 29 n.3 (1970) (if it is established that the defendant was made aware of his rights by his attorney no issues of substance under *Boykin* would be presented).

<sup>129</sup> *Alvey v. Commonwealth*, 648 S.W.2d at 860.

<sup>130</sup> A defense attorney could forgo a pre-trial motion and simply object at trial to proof of the prior conviction, since the criminal rules do not require that matters requiring evidentiary hearings be raised prior to trial. *See* RCr 9.78.

<sup>131</sup> RCr 11.42(9) requires that *original* applications for relief of the nature of that set out in RCr 11.42 are to be transferred to the sentencing court. CR 60.03 (1954) preserves the right of a party to bring an independent action seeking relief from judgment.

of securing the services of an attorney."<sup>132</sup> Following his arrest for driving under the influence of alcohol, Robert Elkin sought permission to call his attorney for advice on whether to submit to a breathalyzer test urged on him by the arresting officer.<sup>133</sup> The officer refused to let Elkin make the call, and Elkin insisted that he would not take the test until he talked to his lawyer. This standoff was resolved by the officer treating Elkin's actions as an unwarranted refusal to take the test, a position that was subsequently upheld by the Department of Transportation in suspending Elkin's license.<sup>134</sup>

On appeal, the court of appeals held there is no right to consult counsel before deciding whether to submit to a breathalyzer test.<sup>135</sup> The court relied on *Newman v. Hacker*,<sup>136</sup> a 1975 case which held there is no right to have counsel *present* during the administration of a breathalyzer test.<sup>137</sup> Elkin attempted to avoid *Hacker* by arguing that the right to have an attorney present is distinct from the right to consult an attorney, but the court of appeals concluded that no real difference exists between the two.<sup>138</sup>

There is a vital difference, however, between submitting to the test and deciding whether to take the test. The difference is between passive cooperation and active decisionmaking. In *Hacker* the Court stated that such procedures as fingerprinting and taking blood and breath samples are not critical stages of a proceeding for purposes of the sixth amendment right to counsel.<sup>139</sup> Unquestionably the state can *force* an individual to yield a blood or breath sample if there is probable cause of driving under the influence.<sup>140</sup> The Kentucky statute, however, does not authorize the taking of a blood or breath sample by force, but rather gives the accused the choice of submitting to a test or risking suspension of his or her license for up to six months.<sup>141</sup> Since there is no guarantee that

---

<sup>132</sup> RCr 2.14.

<sup>133</sup> *Elkin v. Commonwealth*, 646 S.W.2d 45, 46 (Ky. Ct. App. 1982).

<sup>134</sup> *Id.* at 46. KRS § 186.565(4) (1980) provides for suspension of an operator's license for up to six months for refusal to submit to a breathalyzer test.

<sup>135</sup> 646 S.W.2d at 46-47.

<sup>136</sup> 530 S.W.2d 376 (Ky. 1975).

<sup>137</sup> *Id.* at 377.

<sup>138</sup> 646 S.W.2d at 47.

<sup>139</sup> 530 S.W.2d at 377. *Cf.* *Schmerber v. California*, 384 U.S. 757, 765-66 (1966).

<sup>140</sup> *Schmerber v. California*, 384 U.S. at 760-66.

<sup>141</sup> *See* KRS § 186.565(4).

the individual will be permitted to keep his or her license by consenting to the test,<sup>142</sup> and since the results of the test will be admissible in court,<sup>143</sup> the accused is faced with a difficult choice.<sup>144</sup>

The courts of several states have recognized a statutory right to the assistance of counsel in deciding whether to submit to a breathalyzer test.<sup>145</sup> In excluding evidence obtained in violation of a statutory right to counsel, the Alaska Supreme Court stated:

[T]he law has deliberately given the arrested person a choice between two very different alternatives and potential sanctions. The arrested driver must weigh and evaluate a number of different factors. He may only be vaguely aware of some of these and need not be informed of all of them by the police.

The decision as to whether to comply with an arresting officer's request to take a sobriety test is not a simple one. Clearly, an attorney's advice at this stage would not only be ethical and lawful, but helpful. . . . Where the important chemical testing procedures are not unreasonably delayed, the driver should, upon request, have the benefit of the advice of his own counsel, with whom he has a statutory right to communicate.<sup>146</sup>

Kentucky also provides a statutory right to communicate with counsel after arrest.<sup>147</sup> While the Kentucky appellate courts have held that there is no *constitutional* right to counsel,<sup>148</sup> it is not clear

---

<sup>142</sup> The operator's license may also be suspended if he or she is convicted of driving under the influence. *Id.*

<sup>143</sup> *Id.* KRS § 189.520 (1968) establishes a presumption of intoxication for a person with a blood alcohol level of 0.10 alcohol by weight or above.

<sup>144</sup> "We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make." *South Dakota v. Neville*, 103 S.Ct. 916, 923 (1983). In *Neville* the Court held that a state may introduce evidence of an individual's refusal to take the test as proof of his intoxication, but the Court rejected the contention that the privilege against self-incrimination barred such comment. *Id.* at 923.

<sup>145</sup> *See, e.g., Copelin v. State*, 659 P.2d 1206 (Alaska 1983); *Prideaux v. State*, 247 N.W.2d 385, 391 (Minn. 1976).

<sup>146</sup> 659 P.2d at 1213.

<sup>147</sup> *See* RCR 2.14.

<sup>148</sup> *Newman v. Hacker*, 530 S.W.2d at 376; *Elkin v. Commonwealth*, 646 S.W.2d at 45. The U.S. Supreme Court has held that the right to counsel under the sixth amendment attaches at the commencement of formal proceedings, *Kirby v. Illinois*, 406 U.S. 682 (1972), and that prior to the commencement of judicial proceedings the right to counsel to safeguard the privilege against self-incrimination attaches only in situations of custodial interrogations. *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Beckwith v. United States*, 425 U.S. 341 (1976); *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court has further

that the courts have considered the argument that denial of the statutory right to counsel provides a defense to a proceeding to suspend an operator's license. For these reasons, the court should reconsider its decision in *Elkin*.

An additional argument, apparently not raised in *Elkin*, is that the due process clause of the fourteenth amendment requires the assistance of counsel in a proceeding brought by the state when the issues are complex and the consequences of error are severe.<sup>149</sup> Assuming there is no undue delay<sup>150</sup> it does not appear that the state has any legitimate interest in preventing the suspect from talking to an attorney. On the other hand, the suspect has a substantial interest at stake and clearly would benefit from an attorney's advice. It is not suggested that the state is required to secure counsel for the indigent,<sup>151</sup> only that the police should not stand in the way of legitimate attorney-client communications.

---

held that the privilege against self-incrimination is not violated by forcing a suspect to choose whether to take the breathalyzer test. *South Dakota v. Neville*, 103 S.Ct. at 916.

<sup>149</sup> *Cf. Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (appointment of counsel on a case-by-case basis in proceedings to terminate parental rights); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (appointment of counsel on case-by-case basis in proceedings to revoke probation).

<sup>150</sup> *See State v. Fitzsimmons*, 610 P.2d 893, 900 (Wash. 1980).

<sup>151</sup> *But see id.* at 896 (holding that in some circumstances there is a constitutional right to appointed counsel under the sixth amendment).