COMMONWEALTH OF KENTUCKY
SUPREME COURT
2007-SC-000128

On Appeal from Kentucky Court of Appeals
05-CA-971

LACY BEDINGFIELD — APPELLANT

V.

Appeal from the Fayette Circuit Court
Action No. 95-CR-00866

COMMONWEALTH OF KENTUCKY — APPELLEE

Brief for Appellant, Lacy Bedingfield

Submitted by:

Melanie L. Lowe
Assistant Public Advocate
Office of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Kentucky 40601
502-564-3948; Fax 502-56-3949

Certificate required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief was served upon the following individuals by mail on October 12, 2007: Honorable Gregory Stumbo, Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601; Hon. Gary D. Payne, Judge, Fayette Circuit Court, 553 Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, Kentucky 40507; Hon. Traci Caneer, Assistant Commonwealth Attorney, 116 N. Upper, Suite 300, Lexington, Kentucky, 40507; and by messenger mail to: Honorable Sam Givens, Clerk, Court of Appeals. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Court of Appeals on or before this date.

Melanie Lowe by

Melanie L. Lowe

INTRODUCTION

This is a criminal case in which the defendant appeals the Court of Appeals' order denying him relief under CR 60.02, RCr 10.02, and RCr 10.06.

STATEMENT OF ORAL ARGUMENT

The Appellant does request oral argument.

PREFATORY STATEMENT

The following abbreviations are used in this Brief for Appellant:

"TR" refers to the "Record on Appeal", which consists of three (3) volumes. "T" refers to "Transcript of Evidence", which consists of five (5) tapes.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE[1]

In October of 1995, the Fayette County Grand Jury indicted Lacy Bedingfield, the Appellant, on several sex offenses. TR I at 2. Count 1, Rape in the First Degree, and Count 7, Sodomy in the First Degree, allegedly involved the same complaining witness. Mr. Bedingfield was tried by a jury on the two relevant counts beginning on April 1, 1996.

THE INCIDENT

On the evening of June 2, 1995, Officer James Stockard and Officer Leroy Richardson were walking through a park that was within their HUD assignment in the Centre Parkway area of Lexington (T1; 4/1/96; 17:17:05). They heard something behind them and observed a black female, Tiffany Boulder, approaching them from behind. She was wearing only a tee shirt. They slowed down so she would catch up with them. They observed that she was crying and hysterical. She did not want to talk to them and kept repeating that she had been raped. She stated that her friend might be in the process of being raped. Other officers and Boulder's mother arrived. Boulder was able to direct the officers to the residence of Gwendolyn Bedingfield at 1265 Golden Gate, where the rape had allegedly occurred (T1; 4/1/96; 13:22:00). At that location, Appellant was apprehended by the police as he was exiting the residence through the rear door. He was not wearing a shirt and was perspiring heavily (T1; 4/1/96; 13:32:50). The Appellant was brought to the street, where Boulder identified him as the perpetrator. Gwendolyn Bedingfield and her daughter, Keye Peyton, arrived at the scene. Boulder was then taken to the University of Kentucky Medical Center, where she was examined by a nurse and a doctor (T; 4/1/96; 15:25:50). Samples for a rape kit were obtained from her. She was observed to have a contusion of the left cheek and an

[1] Portion of Statement of Case taken from Direct Appeal Brief.

abrasion of the right elbow (T1; 4/2/96; 15:51:00). An examination of her vagina found that her hymen was not intact, but detected no blood. She told them that she had been vaginally penetrated but denied having anal sex. She also said nothing about the Appellant allegedly touching her vagina with his mouth. She did not mention that she had run into a wall (T1; 4/2/96; 15:41:50).

BIOLOGICAL EVIDENCE

A warrant authorizing an examination was obtained from a judge and the Appellant was taken to Central Baptist Hospital. The Appellant cooperated fully until he was told that a swab would be inserted into his penis. He became hostile and belligerent. He told the officers to let him up. According to the nurse who collected the swab, the Appellant allegedly told him that he had sex with the girl and did not know that she was under age. One officer recalled the Appellant stating that he would say that he had done it if they would not insert the swab into his penis (T2; 4/2/96; 9:19:00). The Appellant began to struggle with the officers. His hands were handcuffed and officers held down his legs while the swab was collected. A cut on the Appellant's big toe was cleaned and bandaged (T1; 4/1/96; 13:51:40).

Blood, head hair, pubic hair, and other samples taken from Boulder and the Appellant were subsequently examined at the Kentucky State Police Crime Laboratory (T2; 4/2/96; 10:18:00). Sperm cells were identified in a vaginal smear and a vaginal swab taken from Boulder at the hospital. There was insufficient semen to establish a blood group or to permit DNA analysis. Group B factors and acid phosphates, a component of semen, were identified on a pair of purple pants which Boulder was given and wore after the incident. Acid phosphatase was also found on Boulder's tee shirt. A comparison of pubic hair combings

from Boulder and the Appellant found no hairs from either party on the other. The Commonwealth's serologist stated that the results of his tests could not establish that the Appellant had engaged in sexual intercourse with Boulder (T2; 4/2/96; 11:08:00).

TRIAL TESTIMONY

Tiffany Boulder testified during the first day of the trial (T1; 4/1/96; 16:08:50). She explained that the last day of school in 1995 had been on June 2. After school, about 4:00 p.m., she and a friend, Keye Peyton, met at the Tates Creek Country Club swimming pool. While they were there, the Appellant arrived. According to Boulder, she had never met the Appellant before. The two girls swam until the pool closed. Together with the Appellant, they went to 1265 Golden Gate. According to Boulder, the Appellant left for the liquor store and returned with a bottle of Mad Dog 20-20, which he drank. She testified that while she was sitting on the floor, the Appellant sat down next to her and began to rub her calf and thigh with his hand. She moved her leg and told the Appellant to stop, but he persisted. He then grabbed her, pulled off her shorts, and tried to pull off her bathing suit (T1; 4/1/96; 16:17:30). She and Peyton then went to Peyton's room and locked the door. They leaned against the door to prevent the Appellant from entering. According to Boulder, the Appellant then forced the lock and entered the room. There he grabbed her by the hair, threw her on the bed, and ripped off her bathing suit when she refused to turn over (T1; 4/1/96; 16:23:35). Boulder testified that Appellant beat her in the head with his fist. She stopped fighting when he flipped her over. She felt his penis touch, but not penetrate, her anus. He then inserted his penis into her vagina. He then pulled out of her and told her to get her things and get out. As she was collecting her things to leave, he told her that he was not through with her. He then grabbed her by the hair and forced her into the room of Peyton's brother (T1; 4/1/96;

16:29:00). There he threw her on the bed and had vaginal intercourse with her again. When Appellant got up and went to another room, Boulder was able to escape (T2; 4/1/96; 16:30:30).

On cross-examination, Boulder was questioned regarding a statement she had made to Det. Basehart (T1; 4/1/96; 16:35:00). She stated that she had told Basehart that the Appellant pulled down her shorts and bathing suit and licked her vagina while she was on the couch in the family room. She denied telling Basehart that the Appellant had not attempted to have anal sex with her (T2; 4/1/96; 16:38:20). She admitted that she had failed to tell Basehart that the Appellant had sex with her a second time. She admitted that she had run into a wall in a kitchen closet (T2; 4/1/96; 16:52:30).

During cross-examination, Appellant's counsel also suggested to Boulder that Peyton had dared her to have sexual contact with the Appellant while the two girls were in Peyton's bedroom. Boulder denied that she and Peyton were playing a game with the Appellant (T2; 4/1/96; 16:53:08). In a subsequent bench conference, the Commonwealth's attorney advised the Court that the Appellant had "opened the door" to the real subject of conversation, which was that the Appellant had been having sexual contact with Peyton for a long time (T1; 4/1/96; 16:58:20). The Commonwealth's attorney stated that she had previously told Boulder not to mention the statement because the court had ruled that the evidence was not admissible. The Appellant's counsel objected because she had never been advised of the conversation and that there was no record of the statement in any of the discovery she had received. The Commonwealth's attorney admitted that the statement was not in any written statement. The judge overruled the objection (T2; 4/1/96; 16:58:20). On redirect

examination, Boulder stated that Peyton had told her that the Appellant had done it to Peyton before (T2; 4/1/96; 17:02:50).

Peyton also testified (T2; 4/2/96; 11:23:50). She stated that she had seen the Appellant on the floor with Boulder, touching her legs. She stated that she and Boulder got up and went first into her mother's room. There she told Boulder that the Appellant had touched her before. They went to her room, where Appellant popped the lock and forced his way into the room (T2; 4/2/96; 11:35:35). She claimed that the Appellant had grabbed Boulder by the hair, thrown her on the bed, torn off her bathing suit, and put his penis in Boulder's bottom and vagina. According to Peyton, when Boulder began to escape, the Appellant told Peyton to take her clothes off. Peyton then exited the residence though her bedroom window and went to a friend's house (T2; 4/2/96; 11:44:20).

On cross-examination, Peyton admitted that she did not go to school that day because she had been hospitalized for depression (T2; 4/2/96; 13:34:50). She admitted that she had previously made similar accusations towards her mother's boyfriends. She denied that she had previously stated that Boulder had said it hurt when the Appellant inserted his penis into her anus. She could not explain how the Appellant had pushed aside Boulder's shorts and bathing suit and put his mouth to her vagina (T2; 4/2/96; 14:58:45).

The Appellant testified in his own behalf (T2; 4/2/96; 15:40:40). He agreed that he had walked home from the pool with the two girls. He explained that he was sitting on the couch when Boulder came in and sat beside him. When she raised her leg and ran her hand down the center of his chest, he told her to leave. According to the Appellant, he later heard the girls talking in Peyton's bedroom. He heard Peyton ask Boulder if she would do it. He became mad and told Boulder to leave. He told her that he was going to tell her mother what

she had been doing (T2; 4/2/96; 15:52:40). When she began to curse at him, he chased her and she tripped. When he went to look for Peyton, she had left through the bedroom window (T2; 4/2/96; 16:57:40). The Appellant testified that he had cooperated with the collection of the rape kit samples until he learned that they were going to insert a swab into his penis. He stated that he told the police he had done it so they would not insert the swab up his penis (T2; 4/2/96; 16:01:40).

Gwendolyn Bedingfield testified that Peyton was not good at telling the truth (T2; 4/2/96; 15:27:30).

COMMONWEALTH'S THEORY

At the conclusion of the evidence, the Commonwealth argued that the lab chemist's testimony cannot be dismissed (T2 4/2/96; 17:59:06). The Commonwealth went through the explanation of why Bedingfield's O-factor secretions are not located as part of the seminal fluid identified by the lab (T2 4/2/96;17:59:40). Further, the prosecution stated that the fluid on the purple pants could not have come from some supposed prior partner but the recent rape by Bedingfield (T2 4/2/96; 18:00:21). This is especially true, argued the Commonwealth, given the fact that the child had been swimming for several hours prior to the time of the alleged attack (T2 4/2/96; 18:00:52). In fact, the Commonwealth Attorney attacked the defense theory by saying that there was no evidence that the child had sex with anyone else and dismisses the assertion as "another one of their bizarre theories" (T2 4/2/96; 18:00:32). The Commonwealth claimed that the only way that semen could have been deposited in this garment is because the child had "recently been violated" by Bedingfield (T2 4/2/96; 18:01:13).

After these arguments, the Appellant was convicted of Rape in the First Degree, acquitted on the Sodomy charge, TR I at 114, and found to be PFO I. The jury recommended a sentence of twenty-five (25) years. TR I at 119. On May 17, 1996, the trial court sentenced the Appellant consistent with the recommendation of the jury. TR II at 196.

POST CONVICTION HISTORY

The sentence was affirmed on direct appeal in an opinion dated September 25, 1997. TR III at 299. On April 10, 1997, the Appellant filed an RCr 11.42 motion. TR II at 266. One of the allegations raised was that his trial attorney was ineffective when she did not follow up on DNA testing initiated by the Commonwealth. The Commonwealth responded by stating that trial counsel was not ineffective because there was not enough sample to yield a DNA result. TR II at 284. The trial court overruled the RCr 11.42 motion on this issue finding there was insufficient semen to permit DNA analysis and independent testing would have been pointless. TR II at 287. The denial of the RCr 11.42 was affirmed by the Court of Appeals in an order that became final on September 10, 1998. TR III at 308. The sole issue in that appeal was whether trial counsel was constitutionally ineffective for failing to follow up on DNA testing of evidence. TR III at 3.

On July 6, 2004, the Appellant filed a motion for release of evidence for DNA testing. TR III at 326. In said motion, Appellant requested that the vaginal smear from the rape kit be tested. TR III at 328. While this vaginal smear did not contain enough of a semen sample for DNA testing in 1995, Appellant contended that the technological advances in the field of DNA now permitted the small sample to be tested. TR III at 327. The testing was to be paid for by the Kentucky Innocence Project through an IOLTA grant from the Kentucky Bar Association. TR III at 339.

In an order dated September 3, 2004, the trial court ordered that: 1) the Lexington Police Department seal and deliver the rape kit to Reliagene Technologies, 2) the Lexington Police Department take a mouth swab standard from the Appellant and send it to Reliagene Technologies, 3) that Reliagene Technologies send a copy of the results to both parties, and 4) that the Appellant, through KIP, bear the costs. TR III at 343.

DNA testing conclusively excluded the Appellant as a source of the DNA from the semen on the vaginal smear taken from Boulder's rape kit. TR III at 348, 352-53. (*See* Attachment 3). On January 26, 2005, the Appellant filed a motion to vacate judgment and grant a new trial pursuant to CR 60.02, RCr 10.02, and RCr 10.06 based on newly discovered evidence. The Commonwealth responded to the motion, TR III at 357, and the Appellant replied. TR III at 364. The trial court overruled the Appellant's motion in an order entered April 6, 2005. TR III at 376. The Court of Appeals affirmed in an opinion rendered January 12, 2007. Motion for Discretionary Review was granted on August 15, 2007. This brief follows.

ARGUMENT I

THE LOWER COURTS ERRED WHEN THEY DENIED THE APPELLANT'S MOTION TO VACATE CONVICTION PURSUANT TO CR 60.02(E) & (F), RCR 10.02(1), AND 10.06(1) BASED UPON NEWLY DISCOVERED EVIDENCE OF INNOCENCE.

The trial court erred when it denied the Appellant's motion to vacate conviction pursuant to CR 60.02(e)&(f), RCr 10.02(1), and RCr 10.06(1) based upon the newly discovered evidence that the semen in the rape kit did not belong to the Appellant.

STANDARD OF REVIEW

The standard of review used to determine if a new trial is to be granted under RCr 10.02(1) and RCr 10.06(1) is whether the newly discovered evidence is of such significance

that it would probably change the result if a new trial were granted. Ferguson v. Commonwealth, 373 S.W.2d 729 (Ky. 1963); Shepherd v. Commonwealth, 101 S.W.2d 918 (Ky. 1937); Kinmon v. Commonwealth, 384 S.W.2d 338 (Ky. 1964); Collins v. Commonwealth, 951 S.W.2d 569 (Ky.1997); Coots v. Commonwealth, 418 S.W.2d 752 (Ky. 1967); Wheeler v. Commonwealth, 395 S.W.2d 569 (Ky. 1963); Gilbert v. Commonwealth, 317 S.W.2d 175 (Ky. 1958).

In addition, CR 60.02 provides in part:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:
>
> (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (f) any other reason of an extraordinary nature justifying relief.

CR 60.02. CR 60.02 was enacted as a substitute for the common law writ of *coram nobis.* Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). CR 60.02 deals with extraordinary situations which do not as a rule appear during the progress of a trial. Howard v. Commonwealth, 364 S.W.2d 809 (Ky. 1963). The reasons behind CR 60.02 listed in the rule and in Gross, *supra,* have to do with some significant defect in the trial proceedings or evidence at trial, etc., such that "a substantial miscarriage of justice will result from the effect of the final judgment." Wine v. Commonwealth, 699 S.W.2d 752, 754 (Ky.App. 1985), *citing* Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966).

ANALYSIS

The Court of Appeals erred in concluding that the DNA evidence solely affected the credibility of the victim. In order to reach this conclusion, the Court only viewed the newly discovered DNA evidence in light of one witness' testimony. In order for the Court to determine whether this evidence is "of such decisive value or force" that it would "change the verdict or that it would probably change the result if a new trial should be granted," the Court must look at all of the evidence in the case, Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky.2000). As such it is appropriate and proper for the Court to review all of the inconsistent and unreliable evidence presented at Bedingfield's trial.

INCONSISTENT AND UNRELIABLE TRIAL EVIDENCE

In sum, the alleged victim, Boulder, claimed that Appellant forcibly raped her. Appellant testified that he did not have sex with the alleged victim forcibly or otherwise. In an effort to bolster Boulder's claim that a rape occurred, the Commonwealth introduced the semen evidence, and tied said evidence to the Appellant. In specific, the Commonwealth:

- Argued throughout the trial that the semen found corroborates Boulder's story that she was raped.
- Argued in closing that, although emission is not required to prove rape, there was semen in the instant case (T2; 4/2/96; 17:47:35).
- Elicited testimony that Bedingfield had been drinking and argued in closing that this was the reason that there was not much semen (T2; 4/2/96; 18:01:18).
- Elicited testimony about blood secretions and argued to the jury that Bedingfield's O factors were not found in the semen/vaginal fluid mixture because they were masked by Boulder's B factors (T2; 4/2/96; 17:59:26).
- Argued that the discharge in the purple pants had to be from recent intercourse (T2; 4/2/96; 18:00:06).

- Argued that Boulder had been in and out of the pool for hours and inferred that any alleged semen would have leaked out or been washed away (T2; 4/2/96; 18:00:46, 18:01:10).

- Argued that Boulder had not had sex with anybody else that day and called the defense argument that she had sex with someone else as another one of their "bizarre theories." (T2; 4/2/96; 18:00:24).

Given these testimonial problems, it is obvious why the Court of Appeals focused on the victim's credibility. Accordingly, it is clear that the semen evidence played an important part in the Commonwealth's case and ultimately in the conviction of the Appellant. This fact is especially true given the quality of the remaining evidence.

First, Boulder's testimony was clearly not consistent with the story that she told Detective Basehart during a taped interview that occurred only six (6) days after the alleged rape (See T2: 4/2/96; 10:03:46).

- First, Boulder testified on cross-examination that she did not tell Basehart that Peyton did not know what was going on in the family room (T1; 4/1/96; 16:40:24, 16:43:15, 17:05:20). The tape played to the jury of the interview makes it clear that she did tell Basehart this several times in her statement (T2; 4/2/96; 9:47:21-9:48:28, 9:59:48). In fact, Basehart also testified that Boulder told her this information (T2; 4/2/96; 10:12:12).

- Boulder testified on direct examination that her bathing suit was ripped off by Bedingfield (T2; 4/1/96; 16:23:22-16:25:45). However, later on cross-examination she testified that she was not sure how her bathing suit came off and that it must have fallen off (T2; 4/1/96; 16:50:35, 16:51:32). Further, Boulder testified on cross-examination that she did not tell Basehart that Bedingfield ripped of her bathing suit and threw it on the ground (T2: 4/1/96; 16:45:26). The tape played to the jury clearly reveals that she did in fact tell Basehart that Bedingfield ripped her suit off (T2; 4/2/96; 9:50:00, 9:55:55).

- Boulder testified on direct examination that Bedingfield also had sexual intercourse with her in the second bedroom (T2 4/1/96; 16:31:28). She testified at trial that she told Basehart in the interview that there was sexual intercourse in the second bedroom (T2: 4/1/96; 16:48:51,

16:49:15). The tape of the interview played for the jury revealed that no such statement was made to Basehart (*See generally* T2; 4/2/96; 9:41:56-10:01:01). In fact, the record appears to indicate the opposite (T2; 4/2/96; 9:58:40).

- Boulder testified on cross-examination that she did not tell Basehart that Bedingfield did not put his penis in her behind (T2; 4/1/96; 16:46:23, 16:50:14). However, in the taped interview with Basehart she clearly states that Bedingfield did not put his penis in her behind (T2; 4/2/96; 9:57:27).

- Boulder testified at trial that she was on her stomach and Bedingfield attempted to have anal sex with her (T1; 4/2/96/ 16:25:48-16:27:25, T2; 4/1/96; 16:45:47). In the taped statement to Basehart she never mentioned an attempt at anal intercourse and even says that she was never turned over on her stomach (T2; 4/2/96; 9:57:27).

Secondly, Boulder's testimony was not consistent with what she told Dr. Stapczynski during her sexual assault exam. Boulder testified throughout trial that Bedingfield touched his penis to her anus and attempted anal sex. Dr. Stapczynski testified that Boulder denied anal contact (T1; 4/1/96/ 15:51:38). He later testified that he specifically asked Boulder if there was any attempt or touch or to penetrate her anus and she answered no (T1; 4/1/96/ 15:55:15, 15:55:56).

Clearly, these inconsistencies are troubling. In addition, it is interesting to note that when Boulder was going through direct examination, she never mentioned that the Appellant performed oral sex on her despite talking in detail about what allegedly happened in the living room (T1; 4/2/96; 16:17:09-16:21:50). In fact, the Commonwealth asked her if Bedingfield had done anything to her besides rub her that made her want to ask questions and she responded "not really" (T1; 4/2/96; 16:21:06). It was not until cross-examination that the alleged oral sex comes up.

Boulder and Peyton's stories were also inconsistent in key areas. Remember, Boulder told Basehart that Peyton did not know what was going on or see what was happening in the living room because she was on the phone. According to Boulder's statements in this interview, Peyton did not know what happened until she told her in the bedroom (T2; 4/2/96; 9:47:21-9:48:28, 9:59:48). Peyton testified at trial that she saw the alleged oral sex and touching in the living room (T2; 4/2/96; 11:32:26). In addition, Peyton testified at trial that the Appellant had anal sex with Boulder before having vaginal intercourse (T2; 4/2/96; 11:43:09, 14:58:48, 14:58:58). Specifically, she stated that the Appellant stuck his penis in Boulder's anus and started having intercourse, that Boulder then said that it hurt and asked him to let her turn around, that the Appellant turned her around and started having vaginal intercourse. Conversely, Boulder testified that this never happened and that there was only vaginal intercourse and no anal penetration (T1; 4/1/96; 16:26:54, T2; 4/2/96; 9:57:22 (interview)).

Peyton's credibility was also lacking for reasons other than the above inconsistencies. Peyton admitted that she had just gotten out of the hospital that day for depression (T2; 4/2/96; 13:34:50). She further admitted that she had previously made similar accusations against at least three (3) of her mother's boyfriends in the past (T2; 4/2/96; 13:57:58). Even Peyton's mother testified that Peyton was not good at telling the truth (T2; 4/2/96; 15:27:30).

Further, Boulder's testimony was not supported by the evidence found at the scene. In fact, Boulder testified to things that were physically impossible given the physical evidence at trial. In specific, as stated earlier, Boulder testified on direct exam that Appellant ripped her bathing suit off; she told Basehart in her statement that the Appellant ripped her bathing suit off and threw it; and she testified on cross-examination that her bathing suit must

have somehow fallen off. Despite these inconsistencies about how her bathing suit got off of her body, she consistently testified that her tee shirt remained on throughout the encounter (T2: 4/1/96; 16:57:56, 16:50:35). She also made this claim in her interview with Basehart (T2; 4/2/96; 9:59:02). As defense counsel pointed out to the jury, since the leg holes and arm holes in the suit were intact, it was physically impossible to get the suit off without taking off the shirt. Boulder was unable to explain how this occurred (T2; 4/1/96; 16:51:32).

While it is clear that Boulder's credibility was at issue because much of her testimony at trial contradicted her earlier statement to police, her statement contradicted Peyton's testimony in significant ways, and it was physically impossible for some of her testimony to be true. Likewise, Peyton had her own credibility problems due to her history of accusations, her contradictions with Boulder's testimony, and her problem with telling the truth.

Interestingly enough, the Commonwealth, at trial, apparently recognized the inconsistencies in the testimony. In closing the Commonwealth conceded that Boulder and Peyton were not great witnesses, but argued that they would have told the story better if they were lying (T2; 4/2/96; 17:53:05). Later in the closing argument, the prosecutor suggested trauma as an excuse for the inconsistent stories (T2; 4/2/96; 18:06:23). But acknowledging the inconsistencies was okay at the time because the prosecutor had an ace in the hole – the semen evidence – for which there was no explanation.

Lastly, it should be noted that the Commonwealth below made much of the so-called confession that the Appellant gave the police (Commonwealth's Response, TR III at 357). However, looking at the context of the Appellant's statement, it becomes clear that it was anything but a confession. In specific, the Appellant was taken to Central Baptist Hospital because a warrant had been obtained to conduct an examination on him. A nurse informed

the Appellant of the procedure (T2; 4/2/96; 9:17:18). Officer Phil Taylor testified that the Appellant was mostly cooperative up until the point the nurse explained that he was going to do an internal penile swab. The Appellant then became upset and didn't want it done. He had to be restrained by other officers (T2; 4/2/96; 9:17:45). As long as the nurse was not attempting the penile swab, he was calm (T2; 4/2/96; 9:18:36). Eventually, as the Appellant was struggling and the officers were restraining him, he said that he did it, he had sex with her and something to the effect that he would tell them about it if they just wouldn't do the penile swab (T2; 4/2/96; 9:19:02). The Appellant himself testified that he had cooperated with the collection of the rape kit samples up until the point when he learned that they were going to insert a swab into his penis. He then told the police that he had done it so that they would not insert the swab in his penis (T2; 4/2/96; 16:01:40). Clearly, a so-called confession under these circumstances must be skeptically viewed.

Considering all of the problems with the evidence Bedingfield's trial, it was erroneous for the lower courts to limit their view of the newly discovered evidence.

NEWLY DISCOVERED SCIENTIFIC EVIDENCE OF INNOCENCE

Technological advances in the field of DNA testing in recent years permit examiners to conduct forensic tests on minute samples of physical evidence that were impossible to test just a few years ago. Such advances have resulted in testing that has provided conclusive results on the vaginal smear slide from the evidence in Appellant's case. Reliagene Technologies, Inc. has conducted a Y-STR DNA[2] test on the smear slide from the rape kit that was introduced at trial. The Y-STR test looks at thirteen different regions or markers

[2] The Y-STR test is a polymarese chain reaction test and as such is admissible in Kentucky *per se*. *See* Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999).

found in the male specimen of a mixture of fluids. If there are any differences of the markers in the loci of the standard sample and the unknown sample then there is a definitive exclusion of the source of the standard sample as the donor of the male specimen. As the Reliagene report indicates, there are different markers in several different regions or loci between the known standard of the Appellant and the semen specimen collected from the vaginal smear. Consequently, the Appellant has conclusively been excluded as source of the semen found by the victim's rape kit. TR III at 353-354.

Unquestionably, the semen evidence in the instant case played a key role in the Commonwealth obtaining a conviction. The Appellant has been convicted based on arguments and material testimony that we now know were fundamentally false. The test, the report, and the exclusion of the Appellant as the source of the semen found on the vaginal smear slide from the victim's rape kit are new evidence. This evidence, through no fault of Appellant or his counsel, was not available at the time of the Appellant's trial. If the evidence had been available at trial and the jury told that the Appellant could not have been the source of the semen, it would likely have induced a different result. Consequently, the Appellant is entitled to a new trial under RCr 10.02 and RCr 10.06. Further, this new evidence of actual innocence is of an extraordinary nature justifying the relief under CR 60.02 and the Appellant should also be given a new trial pursuant to that vehicle.

The Appellant's conviction stemmed from that allegation that on June 2, 1995, he forcibly had sexual intercourse with the complaining witness, Tiffany Boulder. On the night of the alleged rape, Boulder was transported to the University of Kentucky Medical Center where a sexual assault exam was conducted. As part of the exam, a rape kit was collected which included vaginal swabs, vaginal smear slides, and pubic hair combings. The

investigating officer also collected the complaining witness's clothes, including her tee-shirt and a pair of purple pants that she was wearing. The entire rape kit was introduced into evidence at trial as were the tee-shirt and purple pants.

The semen evidence collected from these items clearly had a significant impact on Appellant's trial. The Commonwealth first stressed this evidence by calling Edward Taylor, from the Kentucky State Police Crime Lab, as a witness. Taylor testified that a rape kit was submitted to the crime lab for testing (T2; 4/2/96; 10:20:10). He stated, in part, that the vaginal smear slide indicated a trace amount of semen and a few spermatozoa (3 sperm cells) (T2; 4/2/96; 10:27:48); that the vaginal swabs contained semen (3 sperm cells) (T2; 4/2/96; 10:29:48); that the purple pants had constituents of spermatozoa on them, but no sperm cells were located (T2; 4/2/96; 10:55:00); that the tee-shirt submitted had constituents of semen (T2; 4/2/96; 10:58:28). Taylor further testified that the semen was insufficient in quantity to do DNA testing (T2; 4/2/96; 10:10:18).

Taylor also gave detailed testimony about the significance of blood type secretions. He stated that a secretor is a person that secretes their blood type in other body fluids. Eighty percent (80%) of the population are secretors (T2; 4/2/96; 10:22:05). Testing performed by Taylor found that the Appellant is a group O secretor and Boulder is a group B secretor (T2; 4/2/96; 10:26:00). Taylor also testified that he found constituents of semen and group B factors on the purple pants (T2; 4/2/96; 10:55:00). The blood grouping tests performed on the other items were inconclusive.

Taylor testified under cross-examination that there was nothing conclusive in the tests that proved the Appellant was the source of the semen found (T2; 4/2/96; 11:11:10). However, Taylor gave a very detailed explanation as to why it would be possible for O

factors to be present but not be discoverable (T2; 4/2/96; 11:06:58). According to Taylor, if there is a mixed sample, any A, B, or AB factors would mask O factors. Due to this "masking effect," testing would only detect the A, B, or AB factors (T2; 4/2/96; 11:06:30). The reason for this masking effect, Taylor explained, is that everyone who is a secretor has some O factors in their blood; so the testing detects only the A, B or AB factors (T2; 4/2/96; 11:07:53). On re-direct examination, Taylor again stressed that that he found group B factors on the purple pants, that Boulder was a group B secretor, and that if there was a mixture of vaginal fluid from a group B secretor and seminal fluid from a group O secretor (Appellant), the group O factors would be masked by the group B factors. The Commonwealth then pointed out that Boulder's group B secretions would mask the Appellant's group O factors. Based on this, Taylor testified that there is nothing conclusively from the results that shows that the Appellant was not the source of the semen (T2; 4/2/96; 11:12:58-11:14:15).

The Commonwealth therefore argued to the jury that the semen in this case belonged to the Appellant. While the State's expert testified that he could not positively say that the Appellant was the source of the semen, there was a reason that he could not give this opinion – the masking effect that the B factors have on the O factors in mixed samples.

The Commonwealth was further able to buttress their claim that the semen was from the Appellant and not a third party by presenting evidence that Boulder had been in and out of the pool several times prior to the alleged rape, and by her testimony that she had not had sexual intercourse with a third party. Given Boulder's age (13) at the time of the alleged rape, it is easy to understand how a jury would conclude that she was not sexually active. The only logical inference that the jury could draw from the testimony was that the Appellant was the only possible source of the semen found on the vaginal swabs, smear, the purple pants,

and the complaining witness's tee-shirt. It would therefore follow that Lacy Bedingfield had raped the complaining witness. In fact, in closing argument the Commonwealth argued that the semen was evidence of rape by the Appellant and further called the defense argument that Boulder had sex with someone else that day as a "bizarre theory" for which there was no evidence.

THE PROBLEM OF ERRONEOUS SCIENTIFIC EVIDENCE.

The problem with this evidence was addressed by this Court in two cases, Chumbler v. Commonwealth 905 S.W.2d 488 (Ky. 1995) and Thompson v. Commonwealth, 177 S.W.3d 782 (Ky. 2005).

In the Chumbler case, the prosecution produced erroneous statistical calculations to argue the significance of secretor evidence found on a cigarette butt at the scene. This Court found that the calculations were "completely unfounded and in error." Chumbler v. Commonwealth 905 S.W.2d 488, 495 (Ky. 1995). The Court compared statistical calculations to a polygraph in their "propensity to mislead" and said that they "may have convinced jurors of modest analytical ability" that no one but the defendant could have committed the crime. Chumbler at 495. As such, the calculations coupled with the arguments by the Commonwealth constituted "palpable error" affecting the defendant's "'substantial rights' resulting in 'manifest injustice.'" Id. quoting in part RCr 10.26. The problem with the statistical errors from Chumbler is the same as the problem with erroneous information presented in Mr. Bedingfield's trial. Statistical calculations like erroneous biological evidence carry an air of scientific certainty and therefore are much more likely to persuade jurors. In this same way, the biological evidence presented at the Appellant's trial

coupled with the Commonwealth's arguments constituted "palpable error" affecting Lacy Bedingfield's "substantial rights" resulting in "manifest injustice." RCr 10.26.

In the second analogous case, Thompson v. Commonwealth, 177 S.W.3d 782 (Ky. 2005), the Commonwealth introduced an accident reconstruction expert who utilized erroneous mathematical calculations. In the context of this reckless homicide case, the calculations were designed to assist the Commonwealth in demonstrating that the defendant had ample opportunity to stop his motorcycle prior to striking the child victim. The Court noted "[h]ad the error been corrected at trial, the Commonwealth witness would have had to admit on the stand, Appellant could not have stopped in any event." Thompson at 787. Similarly, if the DNA evidence would have been available at Bedingfield's trial, the Commonwealth's chemist would have been forced to admit that the semen located on the victim's purple pants and shirt could not have belonged to Appellant. Further, the Thompson Court noted that the officer "was innocent in his mistake" and stated, "we are not such men as can turn our heads from the grossly inaccurate scientific opinions testified to in this case..." Id. Regardless of the fault, the scientific testimony provided to the jury in the Bedingfield case has been proven to be false. This Court must recognize this egregious error and grant Appellant a new trial.

CONCLUSION

The bottom line is that this new evidence would have completely gutted the Commonwealth's theory that the semen belonged to the Appellant and thus corroborated Boulder's story that a rape occurred. Considering Bedingfield's explanations of other evidence and the problems with the two girls' testimony, the Commonwealth went to great lengths to tie the semen to Appellant because they knew it was key to conviction. The jury

heard testimony that blood group testing on the semen made Appellant a possible source of the semen. The jury also heard testimony that Boulder had been in and out of the pool all day. Lastly, the jury heard testimony from Boulder insisting that she did not have sex with anybody else that day. Given Boulder's age of 13 at the time of the incident, and given the fact that the jury was not given evidence of a third party source, the jury clearly believed that the semen belonged to Appellant and considered it as evidence of rape. We now know that this conclusion was false. Had the jury heard the truth about this powerful biological scientific evidence, they would not have found guilt beyond a reasonable doubt. Appellant is entitled to a new trial.

WHEREFORE, Appellant respectfully requests that this Court reverse the courts below, vacate the judgment of conviction herein, and grant Appellant all other relief that the Court deems appropriate

Respectfully submitted,

MELANIE L. LOWE
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 301
FRANKFORT, KENTUCKY 40601
(502) 564-3948; FAX (502) 564-3949