COMMONWEALTH OF KENTUCKY
SUPREME COURT
2007-SC-000128

LACY BEDINGFIELD **APPELLANT**

V.

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

COMMONWEALTH OF KENTUCKY **APPELLEE**

Reply 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 reply brief was served upon the following individuals by mail on December 21, 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.

Melanie L. Lowe
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PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to arguments set forth by the Commonwealth in the Brief for the Appellee.

TABLE OF POINTS AND AUTHORITIES

ARGUMENT I

THE COMMONWEALTH IS ATTEMPTING TO ALTER THE STRATEGY USED AT TRIAL IN ORDER TO MINIMIZE THE NEW EVIDENCE.

In its brief, the Commonwealth does an outstanding job of revising the theory used to convict Mr. Beddingfield. However, such revisions are neither consistent with the record nor appropriate under Kentucky Law. Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976).

First, the Commonwealth says, "Appellant was determined to be a Type-O Secretor so the tested secretions could not have come from him." (Appellee's Brief, 8 & 13). The Commonwealth offers this information as if it were an uncontested fact at trial. Instead, at trial, the Commonwealth explained the test results as supporting their theory of the case. The prosecution expert testified that the secretions on the pants, like those on the shirt and the vaginal swab, tested positive for constituents of semen. Taylor testified that the only sample substantial enough for testing was the one from the pants. Further, the secretions contained B-factors and that the girl's B-factors were able to mask O-factors such as those provided by an O-secretor like Bedingfield. (T2, 4/2/96, 9:18:25; 10:56:40). The Commonwealth argued that the only reasonable conclusion that could be drawn from this evidence and testimony was that the semen stains were the result of the attack claimed by T.B. The Commonwealth called the possibility that the girl had sex with someone else "another one of their bizarre theories" (T2 4/2/96; 18:00:32). The only way that the semen could have been deposited on the clothing of T.B. was because she had "recently been violated" by Bedingfield (T2 4/2/96; 18:01:13). The testimony of Taylor was so conclusory on the issue that Bedingfield's counsel did not argue the conclusion that the Commonwealth seems to indicate was so very obvious.

The Commonwealth emphasizes this new interpretation of the physical evidence by going as far as to call it a "discrepancy" (Appellee Brief, 9). The record indicates absolutely no agreement as to any discrepancy between the physical evidence and Bedingfield's status as an O-secretor. The Commonwealth's theory of the case at trial was clear; the seminal fluid was evidence confirming the victim's story of a sexual attack by Bedingfield.

In its brief, the Commonwealth alters the case presented to the jury by saying, "The absence of Appellant's semen on the vaginal smear merely indicates the possibilities that he did not ejaculate or that his secretions were diluted or washed away by the victim urinating" (Appellee Brief, 21). Neither of these possibilities was incorporated in the prosecution case against Bedingfield. In fact, the Commonwealth argued that even if the "bizarre" theory of another sexual partner were true, being sure to emphasize that the child denied other sexual partners, any semen from a prior partner would have been washed away when T.B. went swimming for several hours prior to the supposed attack (T2 4/2/96; 18:00:52). The Commonwealth now engages in truly bizarre theorization by claiming that T.B. could have had sex with another days before the rape kit with this individual's sperm remaining while Bedingfield's would have been washed away by urination (Appellee Brief, 11). The Commonwealth concludes this interesting line of logic by saying, "Thus the exclusion of Appellant's semen on the vaginal smear does not create an inference that he did not rape T.B." (Appellee Brief, 12). Unfortunately for the Commonwealth, that is *exactly* the inference that a jury would have been likely to conclude given the new evidence and all of the testimonial inconsistencies. Therefore, a new trial is warranted.

ARGUMENT II

THE COMMONWEALTH'S CLAIM THAT "NO ERRONEOUS OR FALSE SCIENTIFIC EVIDENCE WAS PRESENTED TO THE JURY" IS SIMPLY WRONG

The Commonwealth argues "No erroneous or false scientific evidence was presented to the jury" and "the fact that more precise data is now available does not invalidate the evidence presented." (Appellee Brief, 13). Black's Law Dictionary, 8th Edition defines "erroneous" as "incorrect; inconsistent with the law or the facts." The word "false" is defined by Black's as "1. Untrue 2. Deceitful 3. Nongenuine; inauthentic." The purpose of the original testing run by the Kentucky State Police Lab was to exclude or include Mr. Bedingfield as the source of the semen. The tests run prior to trial indicated that Mr. Bedingfield could not be excluded as the contributor. However, the DNA testing excludes Appellant. The DNA evidence demonstrates that the secretor evidence and the conclusions drawn by the Commonwealth are "incorrect" and "untrue". To say that this newer "more precise" data does "not invalidate" the prior results is simply not genuine. That is exactly the effect of the DNA results on the prior testing and its progeny of conclusions. Black's Law Dictionary notes that "What is false can be so by intent, by accident or by mistake" (Black's Law Dictionary, 8th Edition, 2004). There is no allegation that the Commonwealth acted with intent in using this incorrect evidence against Mr. Bedingfield. Relief has been requested and is appropriate under CR 60.02(e) and (f), RCr 10.02(1), and 10.06(1).

was entirely consumed in the testing process. These problems are not a part of the case at hand. More importantly though, the Luckett court determined that since identity was the central question of the case, the presence of the sperm was not "sufficiently central to the state's case." Id. at 658. That court said, "Although, the prosecutor did refer to the presence of sperm during his closing arguments, the jury was never told that the sperm originated from the appellee..." Id. at 659. By contrast, in Mr. Bedingfield's trial, identity was a secondary issue but the question of whether a crime occurred was the primary fact question for the jury. In this way, the semen stains became central to the prosecution's case. The mere presence of semen on a girl who was too young for consensual sex supported the prosecution's case for the occurrence of the crime. The fact that testing on one of the samples did not exclude Appellant underscored the theory that the crime occurred and allowed the prosecutor to call the defense theory contributing the semen to a secondary source "bizarre." (T2 4/2/96; 18:00:32).

The Commonwealth cites a second case from a foreign jurisdiction, People v. Smith, 665 N.Y.S.2d 648 (N.Y. App. Div. 1997). In that case, the New York court rejected that defendant's motion for a new trial based upon DNA results from the rape kit which excluded the defendant. In that case, the victim, unlike T.B. admitted to having consensual intercourse with her boyfriend shortly before the claimed rape. Id. at 649. Because of this testimony by the victim, the prosecution would not have been able to argue that the semen found by the rape kit either confirmed the rape or that the semen was that of defendant. The use of the semen evidence would have been limited in the Smith case in ways that it clearly was not in Mr. Bedingfield's case.

ARGUMENT IV.

THE COMMONWEALTH'S CLAIM TO KNOW WHAT FACTS THE JURY USED TO CONVICT THE APPELLANT IS MERE SPECULATION.

The Commonwealth appears to have the miraculous ability to have read the minds of the jurors in this case. In its brief, the Commonwealth claims to know that Bedingfield's jury simply discarded all of the inconsistencies in the Commonwealth's case and chose to believe every element of the prosecution theory without regard to reason or common sense. (Appellee Brief, 19-20). At the same time, the Commonwealth spends the majority of the rest of its brief attempting to convince this Court that the physical evidence used against Mr. Bedingfield had relatively no impact upon the jury. Without having conducted interviews with individual members of the jury in this case, Appellant is confounded as to how the Commonwealth could know the impact or the weight of all of this evidence. In fact, with such strong scientific evidence being determined to be erroneous the only fair result is for Bedingfield to be given a new trial as provided for under CR 60.02(e) and (f), RCr 10.02(1), and 10.06(1).

CONCLUSION

This new evidence completely guts the Commonwealth's theory. Throughout its brief the Appellee attempts to alter the theory used to convict Bedingfield. Given Boulder's age 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. Nothing argued by the Commonwealth in its brief changes this.

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
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

COUNSEL FOR APPELLANT