Commonwealth of Kentucky
Supreme Court
No. 2007-SC-128-DG

LACY BEDINGFIELD **APPELLANT**

On Discretionary Review from the Kentucky Court of Appeals
05-CA-971-MR
v. Appeal from Fayette Circuit Court
Hon. Gary D. Payne, Judge
Indictment No. 95-CR-866

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

Submitted by,

GREGORY D. STUMBO
Attorney General of Kentucky

JAMES HAVEY
TRACI C. CANEER
Special Assistant Attorneys General
Office of the Commonwealth's Attorney
116 N. Upper Street, Suite 300
Lexington, Kentucky 40507
(502) 246-2060

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 12th day of December, 2007, to the Hon. Gary D. Payne, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, Kentucky 40507; hand delivered to the office of Hon. Gregory D. Stumbo, Attorney General, 1024 Capital Center Drive, Suite 200, Frankfort, KY 40601-8204; and sent by messenger mail to the Hon. Melanie L. Lowe, Assistant Public Advocate, Office of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601.

James Havey
Special Assistant Attorney General

INTRODUCTION

Appellant appeals the denial of a motion for a new trial that was based upon post-conviction DNA testing in a rape case in which identity was not at issue. The Court of Appeals affirmed that denial.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 6

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A NEW TRIAL, GIVEN THAT APPELLANT FAILED TO MEET HIS BURDEN OF ESTABLISHING THAT THE DNA EVIDENCE WOULD HAVE CHANGED THE OUTCOME. 6

CR 60.02 6

RCr 10.02 6

RCr 10.06 6

a. Standard of Review 6

CR 60.02 ..... 6 – 7

RCr 10.02 ..... 6 – 7

RCr 10.06 ..... 6 – 7

Wine v. Commonwealth,
699 S.W.2d 752 (Ky. App. 1985) ..... 6 – 7

Wilson v. Commonwealth,
403 S.W.2d 710 (Ky. 1966) 7

Gross v. Commonwealth,
648 S.W.2d 853 (Ky. 1983) 7

Bethlehem Mineral Co. v. Church and Mullins Corp.,
887 S.W.2d 327 (Ky. 1994) 7

Brown v. Commonwealth,
932 S.W.2d 359 (Ky. 1996) 7

Kuprion v. Fitzgerald,
888 S.W.2d 679 (Ky. 1994) 7

Commonwealth v. Tamme,
83 S.W.3d 465 (Ky. 2002) 7

Collins v. Commonwealth,
951 S.W.2d 569 (Ky. 1997) ..... 7 – 8

Coots v. Commonwealth,
418 S.W.2d 752 (Ky. 1967) 7

Foley v. Commonwealth,
55 S.W.3d 809 (Ky. 2000) 8

b. The Trial Judge Did Not Abuse His Discretion in Denying Appellant's Motion for a New Trial. 8

c. No "Erroneous Scientific Evidence" Was Presented. 12

Chumbler v. Commonwealth,
905 S.W.2d 488 (Ky. 1995) ..... 12 – 13

Thompson v. Commonwealth,
177 S.W.3d 782 (Ky. 2005) ..... 12 – 13

RCr 11.42 12

d. Newly Discovered Impeachment Evidence Is Not an Adequate Ground for a New Trial. 14

Collins v. Commonwealth,
951 S.W.2d 569 (Ky. 1997) 14

Epperson v. Commonwealth,
809 S.W.2d 835 (Ky. 1990) 14

Mullins v. Commonwealth,
375 S.W.2d 832 (Ky. 1964) 14

Foley v. Commonwealth,
55 S.W.3d 809 (Ky. 2000) 14

e. **Appellant Has Failed to Meet His Burden of Establishing the Reasonable Certainty of a Different Verdict.** 14

Foley v. Commonwealth,
55 S.W.3d 809 (Ky. 2000) 17

Collins v. Commonwealth,
951 S.W.2d 569 (Ky. 1997) 18

State v. Luckett,
761 N.E.2d 105 (Ohio App. 2001) ..... 18 – 19

People v. Smith,
665 N.Y.S.2d 648 (N.Y. App. Div. 1997) 19

Thompson v. Commonwealth,
177 S.W.3d 782 (Ky. 2005) ..... 20 – 21

RCr 11.42 20

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... 20 – 21

Norton v. Commonwealth,
63 S.W.3d 175 (Ky.2002) 21

Commonwealth v. Bustamonte,
140 S.W.3d 581 (Ky. App. 2004) 21

CR 60.02 21

RCr 10.02 21

RCr 10.06 21

CONCLUSION 22

COUNTERSTATEMENT OF THE CASE

On June 2, 1995, the last day of the school year, T.B.—who was thirteen years old—and her friend K.P.—who was eleven—swam at a clubhouse pool near their homes. (TAPE A-1, 4/1/96, 16:09:49 – 10:48). While they were at the pool, Appellant—K.P.'s thirty-nine-year-old ex-stepfather who still lived in the home—came to the pool and swam with them. (TAPE A-1, 4/1/96, 10:00:00 – 16:14:01).

After the girls spent four hours at the pool, they and Appellant walked to K.P. and Appellant's home. (TAPE A-1, 4/1/96, 16:14:11). After arriving there Appellant went to a liquor store and returned with a bottle of MD 20/20—Mogan David fortified wine. (TAPE A-1, 4/1/96, 16:15:44; TAPE A-2, 4/2/96, 11:31:06). He drank while the girls ate, talked on the telephone, and watched television. (TAPE A-1, 4/1/96, 16:14:54). T.B. wore her bathing suit under other clothes. (TAPE A-1, 4/1/96, 16:14:54).

As T.B. and K.P. watched television in the den, Appellant entered and sat next to T.B. Appellant began to rub her calf and thigh. Surprised, she told Appellant to stop. (TAPE A-1, 4/1/96, 16:18:50). Appellant did stop briefly, but then began rubbing her leg again. (TAPE A-1, 4/1/96, 16:l8:50). T.B. then got up and joined K.P. in her bedroom to get away from Appellant. (TAPE A-1, 4/1/96, 16:20:46). Appellant removed his clothing in the den and went to K.P.'s bedroom door. (TAPE A-1, 4/1/96,16:20:46, 13:19:00-25:10). Although the girls had locked the door and were standing against it in an effort to keep Appellant from getting in, Appellant shoved his way through the door and entered the room. (TAPE A-1, 4/1/96, 16:20:46). His penis was erect. (TAPE A-1, 4/1/96, 16:22:25).

Once inside the room, Appellant told T.B. to lay down on the bed. (TAPE A-1, 4/1/96, 16:22:25). When she refused, Appellant grabbed her by the hair, threw her down on K.P.'s bed, and told her to roll over. (TAPE A-1, 4/1/96, 16:23:23). T.B. would not turn over, so Appellant grabbed her torso and rolled her over, ripping her swimsuit in the process. (TAPE A-1, 4/l/96, 16:23:41). He also struck T.B. in the head with his fists and called her a "bitch" and a "motherfucker". (TAPE, 4/1/96, 16:25:32). T.B. cried and screamed at K.P., asking "why are you letting him do this to me?" (TAPE A-1, 16:25:04). K.P. stood crying in the corner of the room, unable to move or help. (TAPE A-1, 4/1/96, 16:22:25).

Appellant then lubricated his penis with hair conditioner he had brought into the room with him and tried to put his penis in T.B.'s anus. (TAPE A-1, 4/1/96, 16:26:39). Appellant told T.B. to hold still so that he could insert his penis, and then he said "bitch, if you don't let me in I'll beat your ass." (TAPE A-1 4/1/96, 16:27:26). Appellant then flipped T.B. over onto her back, forced her legs open, and thrust his penis into her vagina twice. (TAPE A-1, 4/1/96, 16:27:46). Afterward, Appellant told T.B. to get her things and get out. He turned to K.P. and told her she was next. (TAPE A-1, 4/1/96, 11:43:36).

T.B. gathered her things, left the room, and attempted to leave the house. Appellant told K.P. to stay in the room and to remove her clothes. (TAPE A-2, 4/2/96, 11:43:59). Appellant then left K.P.'s bedroom, allowing K.P. to escape through her bedroom window and run to a neighbor's house for help. (TAPE A-2, 4/2/96, 11:45:13). After Appellant left K.P.'s room, he again grabbed T.B., took her to another bedroom and

told her that he "want[ed] it again." (TAPE A-2, 4/1/96, 16:30:42). Appellant threw T.B. on the bed and again forced his penis into her vagina. (TAPE A-2, 4/1/96, 16:31:30).

T.B. got away from Appellant and ran. He chased her through the house saying "I'm gonna find you." (TAPE A-2, 4/1/96, 16:31:36). As T.B. ran through the house trying to escape she knocked over a lamp and other items. (TAPE A-2, 4/l/96, 16:33:10). When Appellant caught up with T.B. and she picked up an object and hit him in the face with it. (TAPE A-2, 4/1/96, 16:33:16) Appellant responded, "I don't care none, just get the fuck out." (TAPE A-2, 4/1/96, 16:33:35). T.B. left through the back door, headed toward her home, and was met by three police officers on foot patrol—to whom she reported the crime. (TAPE A-1, 4/1/96, 13:19:44, 13:29:57).

Shortly thereafter, Appellant—wearing only jeans and shoes, and sweating profusely—was apprehended by officers as he attempted to leave the home where the rape occurred. (TAPE A-1, 4/1/96, 13:33:01, 16:07:20). He was read his *Miranda* rights and arrested. (TAPE A-1, 4/1/96, 13:34:04). Appellant refused to voluntarily give the evidence required for a Rape Kit, so the officers obtained a warrant compelling Appellant to submit evidence. (TAPE A-2, 4/2/96, 9:09:34 – 9:10:26). Appellant was taken to the hospital. As Nurse Brian Howard explained the procedures he would use to collect evidence, Appellant was fairly cooperative. (TAPE A-1, 4/1/96, 13:50:52 – 13:51:16). However, when the nurse explained that he would have to insert a swab into Appellant's penis to collect sperm, Appellant told the nurse and a police officer that he did have sex with T.B., but he claimed it was consensual and he did not know she was underage. (TAPE A-1, 4/1/96, 13:51:38, TAPE A-2, 4/2/96, 9:19:03).

The defense theory of the case—first introduced during the opening statements—was that K.P. dared T.B. to have sex with Appellant. (TAPE A-1, 4/1/96, 11:57:00 – 12:00:00). The defense claimed that T.B. had walked into the den where Appellant was watching television and rubbed her hands on his chest, that Appellant got upset and told T.B. to leave, and that instead of leaving, T.B. went into K.P.'s bedroom. The defense further claimed that Appellant then walked towards K.P.'s bedroom door and heard K.P. say "[d]id you do it?" T.B. purportedly replied "[n]o, he wasn't down for that." Appellant claimed he became angry over the conversation he overhead and again told T.B. to leave. She refused, so he grabbed her, chased her, and—after a struggle—removed her from the house.

Appellant admitted that he confessed during the exam to having had intercourse with T.B. He claimed he made the statement only to keep from having the swab inserted into his penis. (TAPE A-2 4/2/96, 16:03:00, 16:05:49).

After hearing all of the evidence, the jury disbelieved Appellant and found him guilty of Rape in the First Degree. (TR I, 151 – 153). A verdict of not guilty was entered on the charge of Sodomy in the First Degree. (TR I, 151 – 153). The jury recommended that Appellant serve a term of twenty (20) years to serve, enhanced to twenty five (25) years because of his status as a Persistent Felony Offender in the First Degree. (TR I, 115 – 119). The trial judge imposed that sentence.

This Court affirmed Appellant's conviction. (TR III, 299). Appellant then filed a motion pursuant to RCr 11.42, raising, among other claims, an allegation that his trial attorney was ineffective for not pursuing additional DNA testing. (TR II, 266). The trial

judge overruled his motion, and the Court of Appeals affirmed that denial. (TR II, 287; TR III, 308). Later, Appellant initiated the present action, which the Court of Appeals accurately summarized:

> [o]n July 6, 2004, Bedingfield filed a motion for release of evidence consisting of the victim's rape kit. He sought forensic testing of the semen which was not available at the time of trial in 1996. The Commonwealth did not oppose the release of the evidence for testing. The trial court granted the motion on September 7, 2004, and the forensic evidence was sent for testing to Reliagene Technologies in New Orleans, Louisiana.
>
> On January 26, 2005, Bedingfield filed a motion to vacate judgment and to grant new trial pursuant to CR 60.02(e) and (f), RCr 10.02 and RCr 10.06. Bedingfield claimed that the results of the DNA testing performed by Reliagene excluded him as the source of the semen recovered from the victim and requested a new trial based upon the newly discovered evidence. The Commonwealth responded that Bedingfield was not entitled to a new trial because "there was a wealth of evidence pointing to [Bedingfield's] guilt at trial aside from the presence of unknown semen on the vaginal smear."
>
> The trial court entered its opinion and order on April 6, 2005, denying the motion[.]

(Court of Appeals Opinion, 4 – 5).

In an opinion dated January 12, 2007, the Court of Appeals affirmed the trial judge's decision. This Court granted discretionary review.

Any additional facts may be mentioned in the argument section below, as necessary.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A NEW TRIAL, GIVEN THAT APPELLANT FAILED TO MEET HIS BURDEN OF ESTABLISHING THAT THE DNA EVIDENCE WOULD HAVE CHANGED THE OUTCOME.

Appellant requested relief pursuant to CR 60.02(e) and (f), RCr 10.02(1) and RCr 10.06(1). He appeals from the denial of that request.

a. Standard of Review

According to Kentucky Rule of Civil Procedure 60.02:

> 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.

"[T]he reasons behind CR 60.02...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) (quoting Wilson v. Commonwealth, 403 S.W.2d 710, 712 (Ky. 1966)).

Relief under CR 60.02 is discretionary. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). Consequently, a trial court's denial of such relief should not be overturned on appeal, absent a showing that there was an abuse of that discretion. Id.; Bethlehem Mineral Co. v. Church and Mullins Corp.,887 S.W.2d 327 (Ky. 1994); Brown v. Commonwealth, 932 S.W.2d 359 (Ky. 1996). In describing this standard of review, the Kentucky Supreme Court stated that,

> [a]buse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.

Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

As for the Kentucky Rules of Criminal Procedure, "[u]pon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice." RCr 10.02(1). Such a motion based upon a claim of newly discovered evidence must be filed within a year of the judgment, or later upon a showing of good cause. RCr 10.06(1).

"Newly discovered evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." Commonwealth v. Tamme, 83 S.W.3d 465, 468 (Ky. 2002) (citing Collins v. Commonwealth, 951 S.W.2d 569, 576 (Ky. 1997); Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967)). Whether to grant a new trial is within

the discretion of the trial judge. Collins, *supra*, at 576. The decision will not be overturned absent an abuse of that discretion. Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky. 2000).

b. The Trial Judge Did Not Abuse His Discretion in Denying Appellant's Motion for a New Trial.

Appellant fails to establish that the decision of the trial court was arbitrary, capricious, unreasonable or unfair.

Physical samples were taken from T.B. and—pursuant to court order—from Appellant. (TAPE A-1, 4/1/96, 13:48:34, 15:38:48; TAPE A-2, 4/2/96, 9:10:26). Forensic serologist Edward Taylor from the Kentucky State Police Central Forensic Laboratory found traces of semen on the t-shirt that T.B. wore, on the purple pants someone had given her to put on after the rape, and on a vaginal swab. (TR I, 92 – 93; TAPE A-2, 4/2/96, 9:18:25, *et seq.*). It was not possible to do DNA tests on those small samples at the time, but Taylor—who testified that eighty percent of people secrete their blood type through bodily fluids—was able to determine that group B factors were present in the semen sample taken from the pants. (TR I, 93; TAPE A-2, 4/2/96, 10:55:00, 10:56:40). Appellant was determined to be a type-O secretor, so the tested secretion could not have come from him. (TR I, 93; TAPE A-2, 4/2/96, 10:26:00). At the time, no results could be obtained from the other semen samples.

Appellant was aware of the discrepancy prior to trial, and pursuant to the test results he filed a pretrial motion to offer evidence that someone else was the source of the semen. (TR I, 89 – 90).

T.B. is a type-B secretor, and Taylor testified at trial that the B secretion on the pants could have come from her vaginal secretions, particularly given that B secretions can mask O secretions. (TAPE A-2, 4/2/96, 10:56:40, 11:14:00). However, on cross-examination Taylor said that he could not rule out the possibility that T.B. had sexual intercourse with a B secretor. (TAPE A-2, 4/2/96, 11:08:50, 11:10:10). T.B. had testified at trial that she had not had sex with anyone else that day. (TAPE A-2, 4/1/96, 17:07:51).

The jury convicted Appellant based upon the overwhelming evidence of his guilt, despite the discrepancy between his blood type and the type found on the secretion from the pants T.B. had put on.

On July 6, 2004, Appellant moved to have the vaginal smear taken from T.B. tested using advanced techniques that were not available at the time of trial. (TR III, 326). The Commonwealth agreed, and the trial court ordered that the smear be tested. (TR III, 329, 342). Reliagene Technologies, Inc. performed DNA tests on the vaginal smear —which contained a minimal number of sperm cells—and on a sample obtained from Appellant. They were not consistent. (TR III, 353 – 354). Citing CR 60.02, RCr 10.02, and RCr 10.06, Appellant moved for vacation of his judgment and for a new trial based upon newly discovered evidence. (TR III, 345 – 350). After both sides had briefed the issue and the court conducted a hearing wherein Appellant produced no additional evidence, the circuit judge issued an Order and Opinion that stated, in part:

> The central inquiry, as stated above, is would the exclusion of the Defendant as the source of the semen be significant enough to change the outcome of the trial within a

> reasonable certainty. This Court is of the opinion that the DNA evidence in this case was limited from the beginning and recognizes the possible confusion surrounding the testimony dealing with said evidence.
>
> Given the entirety of the proof, the Court is not convinced the newly discovered evidence would change the outcome of the jury's decision. The testimony from those finding the two girls after the incident in question supports the determination that a rape occurred. The condition of the home where the events occurred as well as the torn bathing suit affords credence to the conclusion of guilt. The statement made by the Defendant at the hospital in addition to the clump of hair found in the home further support the jury's conclusion. The testimony of the minor witness and the victim designated the Defendant as the attacker. The account of events as given by the two girls was relatively consistent. Both were subjected to zealous cross-examination by the competent trial counsel and upon review of the trial tape, flaws in the testimonies were exposed.
>
> The exclusion of the Defendant as the source of semen does not negate any of the foregoing evidence nor does it tend to prove, considering the entire case, that the Defendant did not commit rape. The evidence of the exclusion, in this Court's opinion, is not of such significance that the verdict would change or be likely to change. Following Kentucky law and applying it to this case, the Court DENIES the Defendant's motion.

(Order and Opinion, Hon. Judge Gary D. Payne, TR III, 377 – 378).

Of course, the presence of sperm that did not belong to Appellant did not exonerate him. The perpetrator's identity was never at issue. The new evidence merely indicated that someone else had engaged in sexual intercourse with T.B. some time prior to the rape.

The new evidence is not of such a decisive value or force, in light of all the other evidence presented at trial, to provide reasonable certainty of a different verdict. It is not even clear that the results would impeach T.B.'s testimony. T.B. testified that she did not have sex with anyone else on the day she was raped. She was not asked whether she had sexual intercourse in the days preceding.

Appellant, who carried the burden of proof, failed to introduce evidence about how long sperm cells survive in a vagina. At the hearing on Appellant's motion for a new trial, both sides argued from the Commonwealth's position that the cells could remain for three days. Appellant's counsel initially argued that T.B. had either perjured herself or, at a minimum, sat there while the jury was mislead. (HEARING TAPE, 3/1/05, 12:31:52). Shortly afterward, counsel admitted that T.B. was not required to volunteer an answer to a question she was not asked. (HEARING TAPE, 3/1/05, 12:32:20).

So the new test results would not necessarily even qualify as impeachment evidence. T.B. was never asked and never denied having sexual intercourse with someone in the days prior to the day she was raped. Moreover, the fact that she apparently did have sex with someone other than Appellant prior to the rape does not mean Appellant did not rape her.

Also, T.B. testified that she did not know if Appellant ejaculated. (TAPE A-2, 4/1/96, 17:06:40). T.B. also told Dr. Stapczynski that she did not witness Appellant ejaculate. (TAPE A-1, 4/1/96, 15:51:32). Furthermore, the doctor testified that T.B. had urinated while at the emergency room, before a sample could be taken by swab. Urination

can dilute or wash away secretions. (TAPE A-1, 4/1/96, 15:54:05; TAPE A-2, 4/2/96, 9:10:53).

Thus the exclusion of Appellant's semen on the vaginal smear does not create an inference that he did not rape T.B.

c. No "Erroneous Scientific Evidence" Was Presented.

Appellant props his claim upon the misidentification of this issue as one of "erroneous scientific evidence," and he cites two Kentucky decisions that reversed convictions because false scientific evidence was presented. (Appellant's brief, 19).

Appellant correctly states that in Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995), the defendants' murder convictions were reversed on appeal, in part because the prosecutor produced statistical calculations relating to the probability that the principal defendant was present at the crime scene—calculations that were "completely unfounded and in error" to the extent that the error was palpable. Id. at 495. In that case, the court held that "[t]he statistical calculations rival a polygraph in their unreliability and propensity to mislead and may have convinced jurors of modest analytical ability that no one but [the principal defendant] could have committed the crime." Id.

Similarly, in Thompson v. Commonwealth, 177 S.W.3d 782 (Ky. 2005), the defendant's reckless homicide conviction was reversed pursuant to RCr 11.42 because his attorney failed to detect a glaring calculation error committed by the Commonwealth's accident reconstruction expert. Misplacing a decimal, the expert determined that the defendant had adequate time to stop his motorcycle after seeing the child victim enter his lane of traffic. In fact, had the data he applied been correctly calculated, he would have

had to testify that the defendant would have been unable to stop his motorcycle until well after the point of impact. Id. at 784. This Court ruled that not only was counsel ineffective for failing to notice the error, but that absent the oversight there was a reasonable probability that the result of the proceeding would have been different.

Appellant's reliance on Chumbler and Thompson is misplaced. In both of those cases the jury was provided with scientific and mathematical evidence that was false and baseless. Though the DNA evidence in this case was certainly incomplete, given the limitations of the technology at the time of trial, it was not erroneously or falsely presented. Edward Taylor determined that group B factors were present in the semen taken from the pants—a different sample than the vaginal smear more recently tested—that Appellant secretes type O, and that T.B. secretes type B. (TAPE A-2, 4/2/96, 9:18:25, *et seq.*, 10:55:00, 10:56:40). Because Appellant was determined to be a type O secretor the tested secretion could not have come from him. (TR I, 93; TAPE A-2, 4/2/96, 10:26:00). He testified that type B secretions can mask those of type O, so that it was possible that T.B.'s secretions masked Appellant's, and that it was also possible that T.B. had sexual intercourse with a B secretor. (TAPE A-2, 4/2/96, 10:56:40, 11:08:50, 11:10:10, 11:14:00).

No erroneous or false scientific evidence was presented to the jury. Both the prosecutor and defense counsel argued the reasonable inferences from the valid evidence presented. The fact that more precise data is now available does not invalidate the evidence presented.

d. Newly Discovered Impeachment Evidence Is Not an Adequate Ground for a New Trial.

Even if the new evidence would have impeached T.B.'s testimony, a new trial "is disfavored when the grounds are newly discovered evidence which is merely cumulative or impeaching in nature." Collins, *supra*, at 576 (quoting Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1990)). Impeaching evidence warrants a new trial only when it "seriously affects the testimony of *the sole or all the principal witnesses* upon whose testimony it is manifest the conviction was had, and it is reasonably certain that had the evidence been heard, it would probably have induced a different conclusion by the jury[.]" Mullins v. Commonwealth, 375 S.W.2d 832, 834 (Ky. 1964) (emphasis added); *see also* Foley, 55 S.W.3d at 814. The new evidence, at most, could impeach only T.B. It does not impeach K.P., and it does not diminish the corroborating evidence and testimony. And again, the evidence does not necessarily even impeach T.B. because, as Appellant's counsel conceded at the hearing on his motion for a new trial, she had no duty to volunteer information about her sexual activities during the days preceding the rape given that she was not asked.

e. Appellant Has Failed to Meet His Burden of Establishing the Reasonable Certainty of a Different Verdict.

The evidence against Appellant was overwhelming. Beyond T.B.'s testimony, evidence presented at trial included the testimony of K.P., who witnessed the rape that occurred at her and Appellant's home. K.P.'s testimony was largely consistent with and

corroborated T.B.'s testimony. (TAPE A-2, 4/2/96, 11:23:00 *et seq.*). Furthermore, T.B.'s and K.P.'s descriptions of events were corroborated by officers' descriptions of the scene and by other evidence. In finding that the trial judge did not abuse his discretion in denying Appellant's motion for a new trial, the Court of Appeals stated:

> [W]hile the DNA evidence excluded Bedingfield as a source of the semen, the testimony at trial was that Bedingfield may or may not have been the source of the semen because of the difference in the typing of blood secretions in the semen. The fact that further DNA testing proved that Bedingfield was not the source of the semen found on the victim's vaginal swab does not mean that he did not rape the victim. It merely established that she had had sex with another man in the recent past.
>
> At trial, the jury was made aware of the discrepancies in the witnesses' testimonies. In its brief the Commonwealth summarizes the other evidence in support of Bedingfield's guilt as follows:
>
> 1. Physical evidence corroborated [the victim's] and [her friend's] testimony that Appellant assaulted [the victim] by striking her with his fists. Nurse LeAnn Wright and Dr. Joseph Stapczynski described contusions and swelling to [the victim's] face and a scrape on her arm [citation to record omitted].[1]
>
> 2. [The victim] and [her friend] both testified that Appellant grabbed [the victim] by the hair and threw her onto [her friend's] bed. A clump of hair was photographed and collected from the bed [citations to record omitted].[2]
>
> 3. Both [the victim] and [her friend] testified that Appellant ripped [the victim's] bathing suit off of her. The torn bathing suit was collected by police from the floor beside [her friend's] bed and introduced at trial [citations to record omitted].[3]

---

[1](TAPE A-1, 4/1/96, 15:35:00, 15:52:08).

[2](TAPE A-1, 4/1/96, 14:09:00, 16:23:23; TAPE A-2, 4/2/96, 11:39:19).

[3](TAPE A-1, 4/1/96, 14:06:00, 16:24:08; TAPE A-2, 4/2/96, 11:39:19).

4. [The victim] testified that Appellant was wearing blue shorts when they were in the den watching television. [The victim] testified that while they were there Appellant took her black shorts off of her. Police found the black shorts in the family room floor in front of the television. Both [the victim] and [her friend] testified that they went to [the friend's] room and locked the door. They further stated that Appellant forced his way through the door and was completely naked. Appellant's blue shorts and boxer shorts were also found in the den [citations to record omitted].[4]

5. [The victim] testified that when Appellant's penis touched her anus, it felt slimy. [The friend] testified that Appellant brought a bottle of hair conditioner in the room and [rubbed] it on his penis before raping [the victim]. Police located and collected a bottle of hair conditioner from the dresser in [the friend's] bedroom [citations to record omitted].[5]

6. [The victim] testified when Appellant was finished raping her, he told her to "[g]et up and get out." She fled the room, but then Appellant changed his mind and told her, "I'm not through. I want it again." He dragged her into another bedroom and raped her again. [Her friend] testified that at this opportunity, she jumped out the window and ran to a friend's house. Caroline Hufstedler testified that [the friend] ran to her house, upset and crying that "[h]e raped my friend and tried to rape me[ ]" [citations to record omitted].[6]

7. [The victim] testified that after Appellant raped her again in the second bedroom he went to get something and she fled with nothing but her t-shirt on her. She further stated that Appellant chased her through the house, knocking over a lamp along the way. Police located and photographed a turned-over lamp [citation to record omitted].[7]

---

[4](TAPE A-1, 4/1/96, 14:20:00, 14:23:00).

[5](TAPE A-1, 4/1/96, 14:16:00; TAPE A-2, 4/2/96, 11:38:32).

[6](TAPE A-1, 4/1/96, 13:11:07; TAPE A-2, 4/2/96, 11:45:20).

[7](TAPE A-1, 4/1/96, 13:30:24).

8. Lexington police officers were on foot patrol when they encountered [the victim] semi-hysterical, crying that she had been raped, clothed in only a t-shirt [citation to record omitted].[8]

9. Police took [the victim] back to the house where she was raped and the officers saw Appellant coming out of the kitchen door wearing only blue jeans and shoes, and "perspiring profusely [citation to record omitted].[9]

10. The girls testified that Appellant was drinking MD 20/20 before raping [the victim], and Officer Phil Taylor, who participated in Appellant's arrest, confirmed that Appellant smelled of alcoholic beverages [citations to record omitted].[10]

11. While Appellant was at the hospital to submit physical samples for forensic purposes, Nurse Brian Howard cleaned and bandaged a laceration on Appellant's left big toe. Appellant told Howard several different stories about how he had cut it. At trial Appellant claimed that he had cut it earlier that day while replacing the blade of a meat-cutting band saw at the restaurant where he was employed. However, he could not produce the shoes that the blade had purportedly cut through [citations to record omitted].[11]

12. Finally, Appellant confessed at the hospital on the night of the crime. He said that he had sex with the girl but didn't know she was underage. Appellant recanted this confession at trial, claming that he only admitted to the serious crime because he didn't want his penis swabbed.[12]

Given the magnitude of the evidence against Appellant, it is not possible to find that if the jury had learned the victim had sex with someone other than Appellant at some time prior to the rape, there is a reasonably certainty that the verdict would have been different.

---

[8](TAPE A-1, 4/1/96, 13:19:44, 13:29:57, 16:03:10).

[9](TAPE A-1, 4/1/96, 13:33:37, 16:04:36).

[10](TAPE A-1, 4/1/96, 16:15:44; TAPE A-2, 4/2/96, 9:08:20, 11:31:06).

[11](TAPE A-1, 4/1/96, 13:53:41; TAPE A-2, 4/2/96, 15:42:13, 16:08:50).

[12](TAPE A-1, 4/1/96, 13:51:41; TAPE A-2 4/2/96, 16:03:00, 16:05:49).

> We agree with the Commonwealth that the trial court did not abuse its discretion in denying Bedingfield a new trial. As stated in Foley: "While [this] result may at first blush seem harsh, [it] is based on the principle that a defendant is entitled to one fair trial and not to a series of trials based on newly discovered evidence unless that evidence is sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial[.]" We cannot conclude that there is a reasonable certainty that the newly discovered evidence would bring about a different result at a new trial.

(Court of Appeals Opinion, 8 – 12).

This Court was faced with a similar—though not identical—issue to this one in Collins, *supra*. In that case a physician who treated the teenage victim of rape, sodomy, and incest testified as to physical indications she had been sexually abused. Id. at 573. The victim had testified at trial that she never had sexual intercourse with anyone other than the defendant. Id. at 576. Among other reasons for upholding the denial of a new-trial motion following the defendant's conviction, the Court stated that the allegations of two young men—presented to the trial court in a motion for new trial—that they had sexual intercourse with the victim were not "of such at decisive quality as to change the outcome of the case. The testimony of either would do nothing other than denigrate [the victim's] reputation. Even if the allegations [were] taken as true, they [did] not change the fact that [the defendant] sexually abused [the victim]." Id. at 576.

In State v. Luckett, 761 N.E.2d 105 (Ohio App. 2001), the Ohio Court of Appeals reversed a trial judge's grant of a new trial following a determination seventeen years after his conviction that the defendant was not the source of semen obtained from the vaginal swab performed on one of his rape victims. Although the prosecutor had referred during his closing argument to that specimen as evidence that the victim was raped, there

was no evidence that her assailant had ejaculated during the commission of the offense and there was no testimony as to "whether she had engaged in consensual sexual intercourse during the twenty-four-to-forty-eight-hour time period immediately preceding the time she was raped." Id. at 108. The appellate court based its decision in part on the strong eyewitness testimony and ultimately on the trial judge's application of an improper standard in granting the new trial—one requiring less than establishment of a strong probability of a different result on retrial.

Similarly, in People v. Smith, 665 N.Y.S.2d 648 (N.Y. App. Div. 1997), post-conviction DNA tests that excluded the defendant as the source of semen was consistent with the victim's testimony that she had intercourse with her boyfriend before the rape and that she did not know whether the defendant ejaculated. The appellate court held that the evidence of guilt was overwhelming, that there was no claim of mistaken identity, and that the trial court correctly applied the high standard applicable to newly discovered evidence. Id. at 649.

After addressing the new evidence, Appellant devotes significant portions of his discussion to repeating arguments to this Court that the jury did not accept. (Appellant's brief, 11 – 14). Appellant claims that T.B.'s testimony differed from what she told Detective Basehart. He lifted his claims wholesale from what his trial attorney told the jury during closing argument. (TAPE A-3, 4/2/96, 17:17:50 – 17:23:24, 17:30:35 – 17:31:40). Appellant's claims about inconsistencies between T.B.'s testimony and her statements to Dr. Stapczynski were brought out in the direct and cross examinations of the doctor. (TAPE A-1, 4/1/96, 15:51:38, 15:55:15). Appellant's claim that T.B. and

K.P.'s stories about what happened in the living room were inconsistent was also raised during closing argument. (TAPE A-3, 4/2/96, 17:23:20 *et seq.*) Appellant's argument that K.P. lacked credibility was similarly presented to the jury by the testimony of her mother—who stood by Appellant—and in closing argument. (TAPE A-2, 4/2/96, 15:27:30; TAPE A-3, 4/2/96, 17:31:57). Finally, Appellant's claim that T.B.'s testimony was inconsistent with the manner in which her bathing suit was torn was emphasized during his counsel's closing argument. (TAPE A-3, 4/2/96, 17:26:10).

Nearly every purported inconsistency claimed by Appellant was argued during Appellant's summation. What few were not had been brought out in cross-examination of the Commonwealth's witnesses. The jury heard these claims and, in convicting Appellant, rejected them. Furthermore, what few inconsistencies appeared in the Commonwealth's case were of the type and magnitude that frequently occur in trials that lead to conviction, and they certainly do not bolster Appellant's claim that he is entitled to a new trial.

In his reliance on Thompson, *supra*, Appellant fails to appreciate that in that case this Court applied the lower standard of proof applicable to RCr 11.42. Correcting the lower court's application of a more stringent standard, and citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Court held:

> We find it important that the Strickland Court made clear that "reasonable probability" does not mean that counsel's deficient conduct more likely than not altered the verdict. In specific, the Court stated "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself

> unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. This Court has also previously clarified a RCr 11.42 movant need not show that counsel's allegedly deficient performance would have compelled acquittal in order to meet the prejudice prong of Strickland. Norton v. Commonwealth, 63 S.W.3d 175, 177 (Ky.2002).

Thompson at 786-87.

The evidence overwhelmingly established that Appellant forcibly raped T.B. 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 prior to the collection of evidence during the sexual assault exam. Considered in light of all the other evidence presented at trial—the eyewitness, extensive corroborating evidence, Appellant's own confession—the newly discovered evidence cannot be considered to be of such decisive value or force that it would with reasonable certainty, change the jury's verdict. That is the standard Appellant failed to reach. The standard is high because a request for a new trial is a request for extraordinary relief that "must be invoked only with extreme caution, and only under the most unusual circumstances." Commonwealth v. Bustamonte, 140 S.W.3d 581 (Ky. App. 2004).

When considering all of the foregoing Response, it is clear that these facts do not rise to the high standard required for the extraordinary relief under RCr 10.02, RCr 10.06, or CR 60.02.

CONCLUSION

For the foregoing reasons, the trial judge's denial of Appellant's motion for a new trial should be upheld.

Respectfully submitted,

GREGORY D. STUMBO
Attorney General of Kentucky

JAMES HAVEY
TRACI C. CANEER
Special Assistant Attorneys General
Office of the Commonwealth's Attorney
116 N. Upper Street, Suite 300
Lexington, Kentucky 40507
(502) 246-2060

Counsel for Appellee