COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2007-SC-000382-MR

KENNETH R. CAMPBELL — **APPELLANT**

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HON. SAM H. MONARCH, JUDGE
INDICTMENT NO. 2006-CR-00131

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, KENNETH R. CAMPBELL

SUBMITTED BY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for appellant has been mailed, postage prepaid, to Hon. Sam H. Monarch, Judge, Breckinridge Circuit Courthouse, 208 West Main Street, Hardinsburg, Kentucky 40143; Hon. Jessica L. Brown, Assistant Commonwealth's Attorney, 512 Fairway Drive, Brandenburg, Kentucky 40108; Hon. Shelly Lemons-Alvey, trial attorney for the defendant, 517 West Ormsby Avenue, Louisville, Kentucky 40203; and by state messenger mail to the Hon. Jack Conway, Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601, this 17th day of March, 2008. I hereby further certify that the record on appeal has been returned to the Clerk of this Court.

Karen Shuff Maurer
KAREN SHUFF MAURER

INTRODUCTION

Kenneth Campbell appeals his 50 year sentence based on convictions for Manufacturing Methamphetamine, firearm enhanced; Wanton Endangerment, First-Degree, firearm enhanced; Possession of Marijuana, firearm enhanced; and Possession of Drug Paraphernalia, firearm enhanced. (TR 2, 234). At trial, a number of errors occurred which denied Campbell due process of law, to wit: failure of the trial court to prevent the firearm enhanced penalty where the gun was inoperable and no ammunition found in the home, the trial court erred by failing to excuse a juror who knew a defense witness, the trial court failed to randomly select the jury, and the Commonwealth abridged Campbell's right to waive a jury trial by offering a "package" plea deal that required all four defendants plead guilty.

STATEMENT OF ORAL ARGUMENT

This case presents substantial errors in the jury selection process. It also presents an issue of first impression regarding the propriety of "package plea" deals by the Commonwealth. Accordingly, Campbell requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Kenneth Campbell, Appellant herein, admitted to manufacturing methamphetamine. However, he denied manufacturing meth on the day arrested, October 6, 2006. In fact, the Commonwealth's own experts testified that no actual meth product was discovered that day.

On October 6, 2006, Grayson County Sheriff's Deputy Matt Darst called Breckinridge Sheriff Deputy Rick Knight regarding what Darst viewed as suspicious purchases of Sudafed in Grayson County. Darst told Knight Kenneth Campbell and Joseph Metten made the purchases. Darst also said he had an active bench warrant out of Jefferson County for Metten. (VR No. 5, 2/28/07, 11:14:00-11:16:00). Actually, the psuedoephedrine logs revealed Joseph Metten made one Sudafed purchase in August 2006. (VR No. 5, 2/28/07, 10:52:00). Campbell made two purchases, one on August 25, 2006, and another on October 6, 2006. (VR No. 5: 2/28/07; 10:31:00-10:34). The bench warrant out of Jefferson County for Metten was for expired registration plates and no insurance, traffic offenses. (VR No. 5, 2/28/07, 2:21:00-2:23:00).

Knight and Darst agreed to go to Campbell's residence in Breckinridge County to investigate. Deputy Terry Blanton accompanied Darst. Deputies Whitworth and Beecham accompanied Knight. (VR No. 5, 2/28/07, 11:16:00-11:17:00). In all, five officers descended on the Campbell residence. (VR No. 5, 2/28/07, 11:17:00-11:19:00).

Initially, the officers went to 327 Mercer Bend Road. There, they learned Campbell had moved. A neighbor took one of the deputies to Campbell's new residence, 350 Mercer Bend Road. (VR No. 5, 2/28/07, 11:16:00-11:18:00).

The deputies re-grouped and drove their cruisers, lights off, to Campbell's trailer. Deputies Beecham and Whitworth went to the back of the trailer. They guarded the back door. Shortly after they arrived, a man the officers later identified as Thomas Hall, opened the back door twice. Each time the officers ordered him to remain in the trailer. (VR No. 5, 2/28/07, 11:18:00-11:19:34).

Deputies Knight, Darst, and Blanton went to the front door. The front door stood open; however, the screen door remained closed. Knight knocked on the front door. A man the deputies later identified as Joseph Metten, came to the door. Knight asked the man if he was Joseph Metten. Metten said no. Knight asked if Joseph Metten was there. Metten said I don't think so. At this point, a young male child, one of five children in the trailer, came to the door. Knight asked if Kenneth Campbell was there. The child said Campbell was in the back. The child opened the door for the deputies. The deputies entered. At trial, the deputies testified they smelled the odor of ether when they entered the trailer. (VR No. 5, 2/28/07, 11:19:34-11:20)

At this time, three men, later identified as Kenneth Campbell, Thomas Hall, and David Allen appeared in the dining room/living room area from behind a hanging quilt. The quilt served as a partition from the living room area and the master bedroom area. (VR No. 5, 2/28/07, 11:20:00-11:21:00).

As the deputies focused their attention on the men from behind the quilt, Joseph Metten worked his way behind the quilt to the back door. When he reached the back door, he ran. Deputies Beecham and Whitworth gave chase. Joseph Metten fled into a wooded area behind the trailer. The deputies barely gave chase due to a pit bull being chained at the back door. (VR No. 5, 2/28/07, 11:23:00-11:24:00). However, they found

Mr. Metten approximately an hour and a half later at his uncle's house down the road. They took Metten into custody and returned him to Campbell's trailer. (VR No. 6, 3/1/07, 9:27:25)

On the way back through the trailer, after pursuing Metten, the deputies saw items that led them to believe someone at the trailer was or recently had manufactured methamphetamine. (VR No. 5, 2/28/07, 11:23:00-11:24:00)

While Deputies Whitworth and Beecham pursued Metten, Knight placed Campbell, Hall, and Allen in handcuffs seated in the living room. Knight also realized that Marissa Metten and five children between 8 to 10 years-old were in the house. (VR No. 5, 2/28/07, 11:21:00-11:25:00)

Marissa Metten is Joseph Metten's mother and Kenneth Campbell's girlfriend. (VR No. 5, 2/28/07, 11:22:15). Knight took Marissa Metten outside. He asked if she lived in the trailer. Marissa said she did. Knight told her if she would sign a consent to search, he would let her and the children leave. Marissa Metten signed the form. (VR No. 5, 2/28/07, 1:16:42). Additionally, upon Knight's request, she took a consent to search form to Kenneth Campbell. She told Campbell to sign the consent. He did so. Marissa Metten and the children left. (VR No. pre-trial hearing, 2/27/07, 9:41-9:47:17).

Deputy Knight contacted Danny Payne with the Greater Hardin County Task Force to dismantle the lab. (VR No. 6, 3/1/07, 12:50:00-12:51:00)

The deputies searched the trailer. They found the following:

- A hot plate, liquid fire, a liquid filled jar, and a in the window in the master bathroom (it was not turned on); (VR No. 5, 2/28/07, 11:44:00-11:45:00)

- A fruit cake tin with marijuana, scales, rolling papers, and baggies in the living room; (VR No. 5, 2/28/07, 11:44:00-11:45:00)
- A mason jar with a coffee filter on top containing a white powdery substance, a plastic soda bottle with tubing running out the top, 2 dried marijuana plants, plant-like material suspected marijuana, and a rusted and corroded sawed off shotgun without ammunition in the master bedroom; (VR No. 5, 2/28/07, 11:57:00, 1:02:00, 1:12:00, 1:13:00, 1:14:00)
- Used lithium batteries, used ether cans, discarded hcl generators in the burn barrel behind the trailer(VR No. 5, 2/28/07, 11:52-11:53:00)
- Draino, lye, starting fluid in the kitchen, a small amount of marijuana, and a light bulb allegedly modified to ingest methamphetamine (VR No. 5, 2/28/07, 11:53:00)
- "pill soak," a blender containing white powder residue, a regular, undoctored, 2 liter Pepsi bottle, salt, and a bag of ammonium nitrate in the laundry room (VR No. 5, 2/28/07, 11:54:00-11:56:00, 1:03:00)
- 2 bags of marijuana under the mattress and light bulbs modified to ingest methamphetamine in the guest bedroom (VR No. 5, 2/28/07, 1:06:00-1:08:00, 1:10:00)

Based on the evidence collected, deputies arrested Metten, Campbell, Allen, and Hall. (VR No. 5, 2/28/07, 2:20:00)

Deputy Knight sent samples of the plant like substance and samples from the jars to the Kentucky State Police laboratory. (VR No. 5, 2/28/07, 1:17:00-1:18:00). The plant

like substance was marijuana. However, none of the remaining samples tested positive for methamphetamine. (VR No. 5, 2/28/07, 4:02:00-4:07:00)

The Breckinridge County Grand Jury indicted all four men for Manufacturing Methamphetamine, firearm enhanced; Wanton Endangerment, First-Degree; Possession of Marijuana, Firearm enhanced; Possession of Drug Paraphernalia, Firearm Enhanced, and Trafficking in a Controlled Substance. Ultimately, the trial court directed a verdict in all defendants' favor on the Trafficking charge and for Hall and Allen on the firearm enhancement of the other charges. All four defendants were tried jointly in a multi-day trial.

Pre-trial, the Commonwealth offered all four defendants a deal. In exchange for their guilty plea, each would receive a total 10 year sentence on amended charges. The Commonwealth's only condition was all four men must take the deal. Joseph Metten and Kenneth Campbell expressed interested in taking the deal. However, Mr. Allen and Mr. Hall flat out refused. Because the jury acquitted them, their refusals were appropriate.

Metten and Campbell's counsels wanted the Commonwealth reconsider the "package plea" condition. And, the Commonwealth agreed she would reconsider. The record is unclear as to which party approached the other about waiving the "package" requirement. But ultimately, the Commonwealth determined the plea must be all or none. Thus, compelling Metten and Campbell to go to trial along with Hall and Allen. (VR No. Pre-trial hearing, 2/7/07, 2:25:36-2:38:16)

Jury selection began at 1 PM. The trial court struggled to seat a jury. Due to the late hour, the court did not call up the district court jury. The court excused for cause many jurors who knew the parties and those for whom drug addiction had seriously

impacted their family. The court became so desperate for jurors it called in four potential jurors he had previously given excused absences for the day. (VR No. 3, 2/27/07, 1:23:37-VR No. 4, 7:04:30)

When the last potential juror number was pulled from the box, the trial court realized Mr. Skeeters remained seated in the court room. In chambers, Mr. Skeeters told the court he had been there all day, taken the oath, and heard the questions the court asked. However, he didn't hear his name called when the clerk called the roll so he didn't respond. (VR No. 1, 2/27/07, 6:50:30). The trial court did not see "how in the world [seating] him would prejudice anybody." The court overruled counsel's objection. (VR No. 1, 2/27/07, 6:38:50-6:57:30)

On the second day of trial, Defendant Allen's counsel realized that one juror, Charlene Mattingly, was the girlfriend of a man who had litigation pending against Defendant Allen. The court dismissed her as the alternate. (VR No. 2, 2/28/079:11:09-9:19:40, 9:22:52-9:30:54). The court was down to 12 jurors before the first witness testified.

During defendant Hall's case in chief, counsel called Alicia Hall as a witness. Alicia is Thomas Hall's wife. (VR No. 6, 3/1/07, 2;44:07, 3:13:00).

Prior to Mrs. Hall being sworn, the court, counsels, defendants, and Mrs. Hall met in chambers. The trial court expressed frustration because Mrs. Hall's name was not given to him for voir dire purposes. The court was concerned that one of the jurors would know Mrs. Hall. According to the court, Mrs. Hall's father, Barry Lucas, was known throughout the community. (VR No. 2, 3/1/07, 2:49:00-2:53:51)

After the court swore Mrs. Hall as a witness, a juror asked to speak with the judge in chambers. The juror, the court, the counsels, and the defendants convened in chambers. (VR No. 6, 3/1/07, 2:49:00). There the juror, Mr. Matthews, explained that he knew Mrs. Hall "when she was a Lucas." The juror knew Mrs. Hall's father. He was aware of the problems the family had. He said he knew her when she was a child. (VR No. 2, 3/1/07, 2:53:51-2:54:31)

The court sent the juror back to the courtroom. Then, the court stated:

> I knew yesterday when I found out who Alicia Hall was, I knew we had this problem. The last time I saw Alicia Hall, her father was under indictment for trying to kill somebody that he caught screwing around with her. It has been a never ending chronicle. Barry Lucas is the penn right now for having had intercourse with a 15 year old girl. He has been indicted for everything in the world at one time or another. As soon as I heard her name, I knew that one or more people on the jury was going to know her. And one or more people was going to be influenced by either her reputation or her father's reputation and you can't disguise it or hide it because that family has a disease or genetic problem that cause the great big acts everybody in the county knows. Everybody in the county talks about it. I don't know how this thing is going to cut. But at this point in time, it ain't going to be a fair trial. I don't know which way it is going to cut. It could be somebody that Barry has tried to kill for fooling around with her. Or that Barry has tried to shoot or sell drugs to. Earheart I understand why you didn't want to disclose your witnesses but under these circumstances by keeping her name secret, it has made it

almost impossible for us to go forwards with an untainted jury.

...

When I realized yesterday Alicia Hall was Alicia Lucas, I knew we had a mess.

...

Barry Lucas is probably 40+ years old. He has been in one series of problems after another. There is no one in Breckridge County that across the board has a worse reputation than Barry Lucas. He is in jail right now, having been prosecuted within the last 2 years for having had intercourse with a 15 year old girl. And, he has been associated with every bad thing you can be associated with. Not too long ago, I lose track of time, he was under indictment for having attempted to shoot someone for fooling around with her. And there was, how long have you all been married?

Defendant Hall: 4 years.

Trial Court: did he try to shoot you? Are you the one he tried to shoot?

Defendant Hall: No.

Trial Court: He ran somebody off the road up here at Hardin and tried to shoot them for screwing around with her.

Defendant Hall: No that was for screwing around with his wife.

Trial Court: well, same thing, same problem. I will do whatever you all want to do. I don't care. A jury may well say she is a Lucas. They are every damn one guilty. If she's a Lucas, they are guilty. That may well be. Or they may say, I ain't going to believe nothing they have to say from

now on out. But that is the reputation that we are putting on the line here." (VR 2, 3/1/07, 2:54:47-2:59:30)

Counsel moved for a mistrial. However, Allen and Hall's attorneys wanted to proceed. The court brought Mr. Matthews back into chambers.

During this session, Mr. Matthews told the court he had dated Mrs. Hall's aunt, years ago. He and the aunt did not "go around that side of the family" because of Mrs. Hall's dad. Mr. Matthews stated he knew about and had feelings about Mrs. Hall's dad. However, he stated the feelings did not carry over to Mrs. Hall. Mr. Matthews said he could separate her from her father. The court admonished him not to tell the other jurors that Mrs. Hall was Barry Lucas's daughter. (VR 2, 3/1/07, 3:05:57-3:11:00)

The court overruled Metten's motion for mistrial. (VR 2, 3/1/07, 3:14:23). Mrs. Hall testified in a way exonerating co-defendants Hall and Allen.

In their defense, Hall and Allen argued they were only at the Campbell residence to deliver a sewing machine. They claimed no awareness of the meth lab in the trailer. (VR No. 6, 3/1/07, 3:43:00-3:54:00)

For his defense, Campbell admitted he manufactured methamphetamine. (VR No. 5, 2/28/07, 9:38:13). However, he contested the firearm enhancement and wanton endangerment and that he was manufacturing meth that day.

Metten also admitted he purchased Sudafed tablets in August 2006. However, he testified he bought those pills at Campbell's behest. Although he suspected Campbell used methamphetamine and might be manufacturing methamphetamine, Joseph was not involved and had no interest in helping Campbell make meth. (VR No. 6, 3/1/07,4:05-4:29:00)

The jury acquitted Thomas Hall and David Allen. The jury convicted Joseph Metten and Kenneth Campbell. As to Campbell, the jury recommended 50 years on the manufacturing methamphetamine charge, firearm enhanced; 12 months on the possession of marijuana charge, firearm enhanced; five years on the possession of drug paraphernalia charge, firearm enhanced; five years on the wanton endangerment charge, firearm enhanced. The jury recommended all sentences to run concurrently for a total of 50 years. The trial court imposed a 50 year sentence.

Appellant shall state further facts as needed in Argument portion of the brief.

ARGUMENT

I.

THE TRIAL COURT ERRED IN NOT GRANTING A DIRECTED VERDICT ON THE FIREARM ENHANCEMENT AS THE GUN FOUND WAS NOT OPERATIONAL AND WAS NOT USED IN FURTHERANCE OF THE COMMISSION OF THE OFFENSE.

Preservation

This issue is preserved. (VR No. 2: 3/1/07; 2:12:00; 10:05:31 p.m.).

Facts

While searching the home of Campbell, the police uncovered a rusted corroded shotgun behind the headboard of the bed. (VR No. 5: 2/28/07; 1:43:00). It was found under some sheets and a comforter. (Id.). It was open when they found it and there was no ammunition in the gun, nor any ammunition found in the home. (Id.; 1:52:00; VR No. 6; 3/1/07; 10:29:00). There was never any testing done to determine if the gun was even operational. (VR No. 5: 2/28/07; 1:52:00). Counsel's motions for directed verdict on the firearm enhancement were denied.

Law

An examination of the plain language of the enhancement statute indicates that an inoperable weapon would not suffice to meet the statutory requirements for possession of a firearm. Under KRS 218A.992(1) "Enhancement of penalty when in possession of a firearm at the time of commission of offense," it states that the defendant who "at the time of the commission of the offense and *in furtherance of the offense*, was in possession of a firearm" will be subject to an enhanced penalty.(emphasis added). The definition for "firearm" is found under KRS 237.060(2), "'Firearm' means any weapon which will expel a projectile by the action of an explosive." Clearly, if the police found a weapon that would not expel a projectile, then the definition of firearm would not be met and by extension the requirements of the enhancement penalty would not be satisfied.

In addition to the statutory language, the courts have also provided clear guidance regarding the application of enhancement penalties. The Kentucky Supreme Court has determined that the Sixth and Fourteenth Amendments of the United States Constitution and Section 11 of the Kentucky Constitution require that a defendant "be found guilty by a jury of every element of the crime with which he was charged 'beyond a reasonable doubt.'" Johnson v. Commonwealth, 105 S.W.3d 430, 434 (Ky. 2003). The United States Supreme Court has applied this requirement "to every fact, with the exception of a prior conviction, that increases the penalty for a crime beyond the statutory maximum." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Kentucky Supreme Court has consequently determined that KRS 218A.992 fits this requirement, meaning that the jury must find beyond a reasonable doubt on the firearm charge. Johnson, 105 S.W.3d at 434-35. Furthermore, KRS 218A.992 "requires a nexus between the crime committed and the

possession of a firearm." Commonwealth v. Montaque, 23 S.W.3d 629, 632 (Ky. 2000). Therefore, "A proper instruction would have required the jury to find beyond a reasonable doubt the existence of some nexus between Appellant's possession of the pistol and each of the individual drug and paraphernalia possession charges; i.e., that Appellant possessed the firearm 'in furtherance of' the underlying offenses." Johnson, 105 S.W.3d at 435. Nevertheless, Montaque explains that there are certain times when the Commonwealth need not prove an essential nexus:

> [W]henever it is established that a defendant was in actual possession of a firearm when arrested, or that a defendant had constructive possession of a firearm within his or her "immediate control" when arrested, then ... the Commonwealth should not have to prove any connection between the offense and the possession for the sentence enhancement to be applicable.... [W]hen it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime.

Johnson, 105 S.W.3d at 436 (citing Montaque, 23 S.W.3d at 632-33). Clearly, the Commonwealth needs to prove that Campbell was in possession of an actual firearm and that the firearm was used in furtherance of the crime.

Applying the above legal standards to this case indicates that Commonwealth failed to prove the essential nexus. First, the plain language of the statute requires that the gun be operable, because otherwise it does not meet the statutory definition. The

corrosion on the shotgun should have raised a significant factual question about the operability. The fact that no ammunition was found also furthers the argument that the gun was not used in furtherance of the commission of the offense.

Second, if the gun was found outside Campbell's "immediate control" under the Chimel standard, meaning it was outside the room the defendant was in when the police arrived and arrested him, then the Commonwealth needed to show an essential nexus between the shotgun and the drugs. It is unlikely that a corroded shotgun would actually be useful in the furtherance of a crime because the would-be victims would simply not be threatened. Even if Campbell was arrested in the master bedroom, the Commonwealth would probably still need to show that the shotgun actually worked, because a gun that does not work cannot be used in furtherance of a crime, which is an element of the statute and both federal and state constitutions require that each element be proved.

Although the enhancement language alone would indicate that the Commonwealth must prove the operability of the weapon, at least when it is reasonably in question, when dealing with the concealed weapons law, the court has determined that the defendant must raise the issue as an affirmative defense. The Kentucky Court of Appeals recently stated in Arnold v. Commonwealth, 109 S.W.3d 161 (Ky. Ct. App. 2003), that, "the operability of a firearm is not an element of the offense of carrying a concealed deadly weapon. However, its inoperability is an affirmative defense." Id. at 163. It also noted, "if the weapon was in such a defective condition that it could not be fired, the burden was upon the accused to prove such a fact in the way of an affirmative defense." *Id.* (citing *Mosely v. Commonwealth*, 374 S.W.2d 492, 493 (Ky. 1964)). Under KRS 527.020(1) "Carrying concealed deadly weapon," a defendant is guilty

"when he or she carries concealed a firearm or other deadly weapon on or about his or her person." The definition of firearm is the same as for the enhancement penalty. So, for concealed weapons laws, the defendant must show as part of an affirmative defense that the firearm in question did not function.

Applying this to the case at hand, the subtle difference in the language of each statute and the intent of each statute could be enough to forego the affirmative defense requirement when dealing with the enhancement penalty. KRS 218A.992 requires the defendant to have the firearm at the time and in furtherance of the offense, whereas KRS 527.020 says nothing regarding the furtherance of an offense. So, KRS 218A.992 would seem to add an extra element, requiring the Commonwealth to prove that the firearm could have been used in furtherance of the offense. There is also the constitutional argument following *Apprendi*, because 218A.992 is a penalty enhancement and 527.020 is not. After *Apprendi*, penalty enhancements place a greater burden on the Commonwealth to prove each element of the crime, so it would not fall to the defendant to raise an issue as an affirmative defense. Although the law is clear regarding concealed weapons, there is an argument that 218A.992 should not require the defendant to raise an affirmative defense, but instead that the Commonwealth must prove the gun is operable.

II.

DUE TO THE FACT THAT MR. SKEETER'S NAME WAS NOT IN THE JURY BOX TO BE RANDOMLY DRAWN, THE JURY SELECTION PROCESS DENIED CAMPBELL DUE PROCESS OF LAW.

Preservation

This issue is preserved. (VR No. 1, 2/27/07, 6:50:30).

Facts

Mr. Skeeter did not hear his name called by the court clerk. Therefore, he did not answer the roll call. As a result, the clerk did not place his number in the box to be randomly selected to come forward and actively participate in voir dire.

The trial court, upon learning the error and being desperate for jurors, so as to avoid mistrial, considered Mr. Skeeter the last number called forward. Over defense objection, the court place Mr. Skeeters on the panel. (VR No. 1, 2/27/07, 6:38:50-6:57:30)

Law

By including Mr. Skeeters as the "last number called," the trial court compromised jury selection. As such, the court violated Campbell's right to a randomly selected jury. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and § One, Two, Seven, and Eleven of the Kentucky Constitution. This Court must reverse Campbell's convictions and remand the case for a new trial.

RCr 9.30 states:

> (1) (a) In a jury trial in circuit court the clerk, in open court, shall draw from the jury box sufficient names of the persons selected and summoned for jury service to compose a jury as required by law. If one or more of them is challenged, the clerk shall draw from the box as many more as are necessary to complete the jury.
>
> (b) If there is an irregularity in drawing from the jury box, the names of the jurors so drawn shall be returned to the box.

In Williams v. Commonwealth, 734 S.W.2d 810, 812 (Ky. App 1987), the court held "that the central principle in any jury selection is preservation of randomness all through voir dire and peremptory challenges." "No prejudice needs to be shown when the deviation from randomness is substantial." Robertson v. Commonwealth, 597 S.W.2d 864 (Ky. 1980). "Randomness means that, at no time in the jury selection process will anyone involved in the action be able to know in advance, or manipulate, the list of names who will eventually compose the empanelled jury." Williams at 812-813.

The violation of the "randomness" requirement is a structural error that does not require a showing of prejudice. In this case, there was nothing random about Mr. Skeeter's place in the jury selection process. His name was not included in the numbers of jurors the court called forward to answer voir dire questions. By including him as the final juror "drawn" on the voir dire panel, the court manipulated the list of names who will eventually compose the empanelled jury. By being the last selected, the trial court increased the probability that Mr. Skeeters would serve on the jury or that defense counsel would use a peremptory strike to excuse him.

Because the court deviated from the random selection process, this Court must reverse Campbell's conviction and remand the case for a new trial.

III.

WHERE A CO-DEFENDANT'S WIFE'S FATHER WAS "THE MOST NOTORIOUS CRIMINAL IN BRECKINRIDGE COUNT" AND SAID WIFE TESTIFIED EXONERATING THE CO-DEFENDANT AT TRIAL, THE TRIAL COURT'S UNWILLINGNESS TO STRIKE A JUROR WHO HAD INTIMATE KNOWLEDGE OF THE WIFE'S FAMILY IS NOT JUSTIFIED BY THE COURT'S DESIRE TO AVOID A MISTRIAL.

Preservation

This issue is preserved. (VR No. 2, 3/1/07, 3:02:23, 3:04:27, 3:05:03, TR vol. 2, 256)

Facts

In this case, the trial court struggled to seat 13 jurors. According to the court, a last minute motion heard on the day of trial caused jury selection to begin in the late hours; therefore, the court could not call up the district court jury because it had already been excused. (VR No. Pre-trial: 2/27/07; 9:07:07; 10:53:33). Because there were four defendants and the case involved manufacturing methamphetamine, the court excused many potential jurors for cause.

On the second day of trial, Defendant Allen's counsel realized that one juror, Charlene Mattingly, was the girlfriend of a man who had litigation pending against Defendant Allen. (VR No. 2: 2/28/07; 9:15:10). The court dismissed her as the alternate, leaving only 12 jurors. (Id.; 9:25:18).

During defendant Hall's case in chief, counsel called Alicia Hall as a witness. Alicia is Thomas Hall's wife. (VR No. 6, 3/1/07, 2;44:07, 3:13:00).

Prior to Mrs. Hall being sworn, the court, counsels, defendants, and Mrs. Hall met in chambers. The trial court expressed frustration because Mrs. Hall's name was not

given to him for voir dire purposes. The court was concerned that one of the jurors would know Mrs. Hall. According to the court, Mrs. Hall's father, Barry Lucas, was known throughout the community. (VR No. 2, 3/1/07, 2:49:00-2:53:51)

After the court swore Mrs. Hall as a witness, a juror asked to speak with the judge in chambers. The juror, the court, the counsels, and the defendants convened in chambers. (VR No. 6, 3/1/07, 2:49:00). There the juror, Mr. Matthews, explained that he knew Mrs. Hall "when she was a Lucas." The juror knew Mrs. Hall's father. He was aware of the problems the family had. He said he knew her when she was a child. (VR No. 2, 3/1/07, 2:53:51-2:54:31).

The court sent the juror back to the courtroom. Then, the court stated:

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tried to shoot or sell drugs to. Earheart I understand why you didn't want to disclose your witnesses but under these circumstances by keeping her name secret, it has made it almost impossible for us to go forwards with an untainted jury.

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When I realized yesterday Alicia Hall was Alicia Lucas, I knew we had a mess.

...

Barry Lucas is probably 40+ years old. He has been in one series of problems after another. There is no one in Breckridge County that across the board has a worse reputation than Barry Lucas. He is in jail right now, having been prosecuted within the last 2 years for having had intercourse with a 15 year old girl. And, he has been associated with every bad thing you can be associated with. Not too long ago, I lose track of time, he was under indictment for having attempted to shoot someone for fooling around with her. And there was, how long have you all been married?

Defendant Hall: 4 years.

Trial Court: did he try to shoot you? Are you the one he tried to shoot?

Defendant Hall: No.

Trial Court: He ran somebody off the road up here at Hardin and tried to shoot them for screwing around with her.

Defendant Hall: No that was for screwing around with his wife.

Trial Court: well, same thing, same problem. I will do whatever you all want to do. I don't care. A jury may well

> say she is a Lucas. They are every damn one guilty. If she's a Lucas, they are guilty. That may well be. Or they may say, I ain't going to believe nothing they have to say from now on out. But that is the reputation that we are putting on the line here." (VR 2, 3/1/07, 2:54:47-2:59:30)

Campbell's counsel moved for a mistrial. However, Allen and Hall's attorneys wanted to proceed. The court brought Mr. Matthews back into chambers.

During this session, Mr. Matthews told the court he had dated Mrs. Hall's aunt, years ago. He and the aunt did not "go around that side of the family" because of Mrs. Hall's dad. Mr. Matthews stated he knew about and had feelings about Mrs. Hall's dad. However, he stated the feelings did not carry over to Mrs. Hall. Mr. Matthews said he could separate her from her father. The court admonished him not to tell the other jurors that Mrs. Hall was Barry Lucas's daughter. (VR 2, 3/1/07, 3:05:57-3:11:00)

The court overruled Campbell's motion for mistrial. (VR 2, 3/1/07, 3:14:23).

Law

Because of his relationship with defense witness Alicia Hall and Alicia Hall's father's reputation in the community, Mr. Matthews' continued participation as a juror in this case unduly prejudiced Campbell's right to a fair and impartial jury. This Court must reverse Campbell's convictions and remand his case for a new trial. The trial court's failure to excuse Mr. Matthews and declare a mistrial denied Campbell's right to an impartial jury under the 6th and 14th Amendments of the United States Constitution, § 11 of the Kentucky Constitution, and RCr 9.36(1).

Standard of Review. A trial court's decision whether to remove a juror from a panel that has already been seated is reviewed for abuse of discretion. Lester v. Commonwealth,

132 S.W.3d 858, 863 (Ky.2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id. Case law demonstrates the trial court's decision was unsupported by sound legal principles.

Constitutional provisions. The 6th Amendment "right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). § 2, 7, 11and 17 Kentucky Constitution and RCr 9.36(1) also guarantee a defendant a "trial by an impartial jury."

Kentucky Authority. In Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985), this Court expressed its concern over the impropriety of persons serving as jurors who are closely associated with witnesses in a case. This Court stated "[t]he Court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational with any of the parties, counsel, victims or witnesses." Ward *citing* Commonwealth v. Stamm, 429 A.2d 4 (Pa. 1981). See also Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 716-18 (1991).

In this case, Mr. Matthews had, at one time, a close familial relationship with defense witness Alicia Hall. Mr. Matthews dated Mrs. Hall's aunt. As a result of that relationship, he came to know Mrs. Hall's father, Barry Lucas. According to the trial court, Mr. Lucas is one of the most notorious criminals in Breckinridge County. In describing Mr. Lucas, the Court stated:

"There is no one in Breckridge County that across the board has a worse reputation than Barry Lucas."

"He has been indicted for everything in the world at one time or another."

"And one or more people was going to be influenced by either her reputation or her father's reputation and you can't disguise it or hide it because that family has a disease or genetic problem that cause the great big acts everybody in the county knows. Everybody in the county talks about it."

"He has been associated with every bad thing you can be associated with." (VR 2, 3/1/07, 2:54:47-2:59:30)

Mr. Matthews told the court he was aware of Mr. Lucas' reputation. Moreover, he stated he and Mrs. Hall's aunt, "had little to do with" that side of the family because of Alicia Hall's dad. Clearly, Mr. Matthews had a close situational, emotional, and familial relationship with Alicia Hall that caused him to think poorly of Alicia Hall's father. Based on this Court's rulings in Ward and Montgomery, the court should have excused Mr. Matthews.

Admittedly, Mr. Matthews told the trial court he would not hold Alicia Hall's father's reputation against her or the defendants. He agreed not to tell the other jurors that Mrs. Hall was Mr. Lucas' daughter. However, these disclaimers do not mitigate the prejudice of Mr. Matthews sitting as a juror in this case.

In Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255 (1986), this Court recognized "[e]ven where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their decision in the case."

In Marsch v. Commonwealth,, 743 S.W.2d 830, 833-834 (Ky. 1987), this Court stated that jurors' statements, "given in response to leading questions, that they would disregard all previous information, opinions and relationships should not be taken at face value," and that "[i]t is always ***vital to the defendant*** in a criminal prosecution that ***doubt of unfairness be resolved in his favor***." (Emphasis added). In Montgomery v. Commonwealth, 819 S.W.2d 713, 716 (Ky. 1991), this Court reiterated that "[m]ere agreement to a leading question asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court's obligation to provide a neutral jury." Moreover, the United States Supreme Court recognized "a prospective juror's own assurances that [s]he is equal to the task cannot be dispositive of the accused's rights'...[A]n individual juror may have an interest in concealing h[er] own bias...[or] may be unaware of it.'" Mu'min v. Virginia, 500 U.S. 415, 440, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (Justice Marshall dissenting).

Because the trial court had already dismissed one juror as an alternate, the trial court correctly feared a mistrial would result. Indeed, §7 Kentucky Constitution and KRS 29A.280 requires a jury for circuit court felony trials consist of 12 jurors. However, the inconvenience of a mistrial to the court and the Commonwealth must yield to Defendant Campbell's constitutional right to an impartial jury. It is appropriate this Court reverse Campbell's convictions and remand the case for a new trial.

IV.

THE COMMONWEALTH ABRIDGED CAMPBELL'S PERSONAL RIGHT TO WAIVE A TRIAL BY JURY BY REFUSING TO PERMIT HIM TO ACCEPT THE PLEA OFFER UNLESS HIS CO-DEFENDANTS, WHO THE JURY SUBSEQUENTLY ACQUITTED, ALSO PLEAD.

Preservation

This issue is preserved. (VR No. Pre-trial hearing: 2/7/07, 2:25:36-2:38:16; 4/4/07; 10:15:47).

Facts

Prior to trial, the Commonwealth offered the defendants 10 years on amended charges if they pled guilty. (VR No. Pretrial hearing: 2/7/07; 2:25:36). However, the Commonwealth hinged the deal on all defendants pleading guilty. (Id.). Defendant Hall and Defendant Allen stated, in no uncertain terms, they would not plead guilty. This decision inured to their benefit as the jury acquitted them on all charges.

Campbell and Metten sought to accept the plea. (Id.; 2:30:49). Counsels for Campbell and Metten asked the Commonwealth to waive the "package plea" requirement. The Commonwealth agreed to consider a waiver. However, she ultimately concluded the pleas must be "all or nothing." This decision compelled Campbell and Metten to trial and inured to their detriment as they received 50 and 25 year sentences respectively. (VR No. Pre-trial hearing, 2/7/07, 2:25:36-2:38:16)

Law

At issue in this case are two competing legal principles:

a. Only a defendant can waive his constitutional right to plead not guilty and have a trial. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987

(1983); Brookhart v. Janis, 384 U.S. 1, 7-8, 86 S.Ct. 1245, 1248-1249, 16 L.Ed.2d 314 (1966) and

b. There is no constitutional right to plea bargain. Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977)

Admittedly, a plea bargain is merely a contract; only the guilty plea and subsequent deprivation of liberty implicate the Constitution. Mabry v. Johnson, 467 U.S. 504, 507-508 (1984). However, a prosecutor's decision to offer a plea bargain must comport with notions of equal protection. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). The Commonwealth's offer must not be arbitrary. In this case, the offer was arbitrary because the Commonwealth required all four men to plead guilty. The sum effect of this requirement is to leave the decision of whether Campbell would go to trial, in the hands of his co-defendants. His ability to take a reduced sentence on amended charges was foreclosed not by any action attributable to himself. Rather, the decision lay with co-defendants who were ultimately acquitted. The decision as to whether Campbell would serve 10 years or 50 years was made by men who received no consequence as a result of the facts of this case.

This is an issue of first impression in Kentucky. However, there is case law from other jurisdictions against Appellant's position. See U.S. v. Gonzalez-Vazquez, 219 F.3d 37, 43 (1st Cir. 2001); U.S. v. Wheat, 813 F.2d 1399 (9th Cir. 1987); U.S. v. Crain, 33 F.3d 480 487 (5th Cir. 1994). The cases find the right of the prosecutor to withhold plea negotiations superior to the right of a defendant to waive his right to trial. This Court should not follow this precedent. It is patently wrong.

While the above courts have held that a prosecutor can condition a guilty plea as a package deal, these same courts recognize that package plea deals are inherently coercive. U.S. v. Gonzalez-Vazquez, supra. In fact, these same courts have found package plea deals so coercive as to require prosecutors disclose the fact the plea is a package deal. (It is reversible error if the prosecutor fails to inform the court about the package deal. U.S. v. Daniels, 821 F.2d 76, 78-79 (1st Cir. 1987)). The also require courts to "carefully ascertain the voluntariness of each defendant's plea." In re Ibarra, 666 P.2d 980 (Cal. 1983)

Case law from other jurisdictions is not in the interest of judicial economy. The Commonwealth's decision not to accept a plea by Campbell and Metten in this case clearly demonstrates thus. Campbell admitted guilt of manufacturing meth at trial. The trial was a complete waste of energy and resources. The jury was going to convict him. The only question was of what and how long he would have to serve.

Moreover, this Court should reject case law from other jurisdictions because it allows a defendant to reap the benefit of the Commonwealth's offer by intimidating or coercing his co-defendants to plead guilty. One defendant receives the benefit of reduced sentence, while another defendant gets his guilty plea overturned because they were coerced. Everyone wins by manipulating the system.

Campbell would have been better off by 40 years if he had successfully intimidated Allen and Hall to plead guilty. This is not justice.

Justice dictates allowing each defendant to control his own destiny with regard to exercising his right to a jury trial.

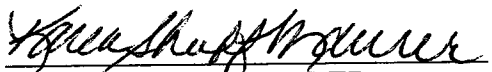
Justice dictates each defendant be allowed to accept responsibility for his criminal actions if that is his desire. This Court has already accepted this principle in the death penalty context.

This Court should reverse Kenneth Campbell's convictions and remand the case to the trial court with instructions to sentence him to 10 years on amended charges.

CONCLUSION

For the foregoing reasons, Kenneth R. Campbell, Appellant herein, respectfully requests that the judgment of the Breckinridge Circuit Court be reversed.

Respectfully submitted,



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