

FILED

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SUPREME COURT CLERK

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

KENNETH R. CAMPBELL

APPELLANT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, KENNETH R. CAMPBELL

SUBMITTED BY:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 27th day of May, 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

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to those arguments in the Brief for Appellee which call for a response.

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.

The appellee states in its brief that the gun was not buried in bedding. (Brief for Appellee, page 11). This is simply not true. The gun was found under some sheets and a comforter. (VR No. 5: 2/28/07; 1:43:00).

Furthermore, it was not the burden of the defense to establish that the gun was inoperable or used in furtherance of the commission of an offense. The Kentucky Supreme Court has determined that KRS 218A.992 fits this requirement, meaning that the jury must find beyond a reasonable doubt on the firearm charge. Johnson v. Commonwealth, 105 S.W.3d 430, 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.

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.

Conclusion

The trial court erred in not granting a motion for directed verdict on the firearm enhancement. Sections 2, 3, 7, and 11, Kentucky Constitution; 6th and 14th Amendments, United States Constitution. The case should be remanded for the entry of a directed verdict on the enhancement and order a new sentencing phase.

CONCLUSION

For the foregoing reasons, and for those presented in his Brief for Appellant, Kenneth R. Campbell, respectfully requests that the judgment of the Breckinridge Circuit Court be reversed and a new trial ordered.

Respectfully submitted,



KAREN SHUFF MAURER
COUNSEL FOR APPELLANT