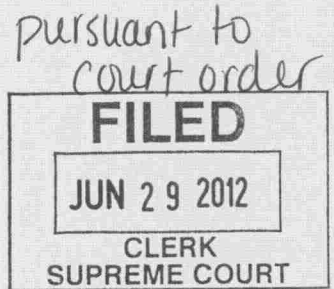


**Commonwealth of Kentucky
Supreme Court of Kentucky**

No. 2011-SC-000630-D
(2009-CA-2109-MR)



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Jefferson Circuit Court
Hon. Barry Willett, Judge
Indictment No. 08-CR-2323

ERIC RAE BELL

APPELLEE

Reply Brief for the Commonwealth/Appellant

Submitted by,

JACK CONWAY

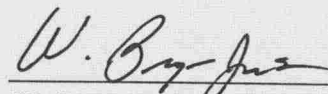
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CERTIFICATE OF SERVICE

I certify that the record on appeal was not removed from the court and a copy of the Reply Brief for Commonwealth/Appellant has been served June 28th, 2012 as follows: first class mail, postage prepaid, to Hon. Barry Willett, Circuit Judge, Jefferson Circuit Court, Jefferson Co. Judicial Center, 700 W Jefferson St., Louisville, Ky. 40202-4733; via state messenger mail to Hon. Thomas Ransdell, Asst. Public Defender, Dept. of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601; and electronically mailed to Hon. David Stengel, Commonwealth Attorney.



W. Bryan Jones
Assistant Attorney General

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to address issues in the Brief for the Appellee that the Appellant considers to be in need further comment, clarification or correction.

This Court should not infer that failure by the Appellant in this reply brief to address a particular issue means that the Appellant believes unaddressed issues have less merit than those issues discussed in this reply brief.

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ARGUMENT

The Appellee's conviction for sodomy in the first degree was reversed by the Kentucky Court of Appeals, while his convictions for tampering with physical evidence and assault in the fourth degree were affirmed. This Court granted discretionary review pursuant to the Commonwealth's motion. The Appellant respectfully requests that this Court reverse the overturning of the sodomy in the first degree conviction. The issue before this Court is whether the trial judge committed error in a forcible sodomy trial by excluding evidence that the victim stated to medical personnel that she had used cocaine for twenty years, and whether this denied the Appellee the opportunity to present his defense that the complaining witness (identified by her initials, "P.W.") had motive to consent to sex with the Appellee in exchange for cocaine. This excluded statement is evidenced by Defendant's Avowal Exhibit 1. (Brief for Appellee, Appendix, p. A-1).

In the introductory portion of the Appellee's "Argument" section, he refers to three defense avowal exhibits, which he has attached to his brief. (Brief for Appellee, Defendant's Avowal Exhibits 2, 3, and 4; Appendix, pp. A-2 through A-7). These avowal exhibits were placed in the trial record. (VR No. 3: 6/26/09; 2:18:00-2:22:40).

Avowal Exhibit 2 refers to dismissed charges against the complaining witness, P.W., of prostitution and drug paraphernalia.

Avowal Exhibit 3 refers to a misdemeanor plea, by P.W. to a drug paraphernalia charge and to five other dismissed charges. Among those dismissed was a filing a false report charge. The Appellee unsuccessfully raised the exclusion of evidence about that charge at trial and on appeal. (Bell v. Commonwealth, No. 2009-CA-2109-MR,

“Opinion Reversing in Part, Affirming in Part, and Remanding,” September 16, 2011, pp. 10-13).

Exhibit 4 refers to a misdemeanor possession of a controlled substance plea by P.W.

The admissibility of none of these avowal exhibits 2 through 4 is before this Court on discretionary review.

This reply brief will address each of the Appellee’s arguments in the sequence in which the Appellant presented them in its brief, with an additional argument regarding “prejudice” in response to the Appellant’s brief.

I.

THE EVIDENCE IS NOT RELEVANT

The Appellant stated in its brief that to find evidence of drug use for the past twenty years is relevant and admissible calls for a conclusion that all or most long term drug users would perform sexual acts to get drugs. The Appellant contended that this was more of a stereotype than a valid rationale for an evidentiary ruling. The Appellee characterizes this as “ridiculous.” The Appellant’s line of argument tracked the statements of the trial judge, who asked trial defense counsel if going from evidence of past drug use to the conclusion that the drug user would prostitute herself for drugs was a “quantum leap.” (VR No. 2: 6/24/09; 9:20:15-9:20:40). The Court of Appeals did not specifically state this conclusion, but to arrive at the conclusion that such evidence is admissible would require that one to believe that all or most long term drug users would trade sex for drugs, or there would be no connection between the evidence and its alleged

purpose by the Appellee of showing motive to engage in sex. In the section of his brief discussing KRE 412, the rape shield law, the Appellee stated, "Evidence of cocaine addiction is not related to sexual predisposition...." (Brief for Appellee, p. 30). That's what the trial judge thoughtfully determined. The ruling of the trial judge in this matter reflects an appropriate concern about concluding that long term drug users would have a motive or be predisposed to have sex to obtain drugs. The trial judge thoughtfully not being willing to make the "leap" from past drug use to prostituting for drugs, correctly excluded the irrelevant evidence.

II.

THE PREJUDICIAL EFFECT OF THIS EVIDENCE SUBSTANTIALLY OUTWEIGHS ITS PROBATIVE VALUE

The Appellant did not concede that the disputed evidence was relevant. The Appellant's first argument was that the evidence was not relevant. The Appellant then addressed the issue of the prejudicial effect of this evidence if it was found to be relevant. The Appellant maintained that even if found relevant, the excluded evidence was inadmissible as prejudicial character and propensity evidence under KRE 403 and KRE 404.

The Appellee raises the topic of preservation and waiver with regard to the issue of the admissibility of the disputed evidence. (Brief for Appellee, p. 15). Both sides argued the issue at trial. (VR No. 1: 6/23/09; 10:08:42-10:20:50; VR No. 2: 6/24/09; 9:06:30-9:25:08). The Appellant argued in its brief to the Court of Appeals and also in its motion for discretionary review to this Court that the evidence was properly excluded as

irrelevant, being propensity evidence or being prejudicial. (Brief for Commonwealth/Appellee, Bell v. Commonwealth, No. 2009-CA-2109, pp. 9-12; Motion for Discretionary Review, Commonwealth v. Bell, No. 2011-SC-630-D, pp. 10-14). The Appellee argued the issue of admissibility in his brief to the Court of Appeals. (Brief for Appellant, Bell v. Commonwealth, No. 2009-CA-2109, pp. 9-13). The issue of admissibility being forefront in this case, there is no lack of preservation and no waiver.

The Appellee argues that without the victim's statement at the hospital he could not adequately present the defense of her consent to sex to the jury. This is belied by the proof admitted at trial that she had used cocaine the day before, had it in her system at the time, and that the Appellee introduced evidence that she had sold herself for sex to him on a prior occasion. This provided the Appellee with plenty of proof with which to make his motive/consent argument. That the jury did not accept that argument does not render the excluded and inadmissible evidence any more acceptable.

The Appellee cites a passage from Johnson v. State, 632 A.2d 152 (Md. 1993), for the proposition that a court held that evidence of an alleged rape victim's addiction was relevant to the issue of her consent. (Brief for Appellant, p. 18). It is important to note that the quote provided by the Appellee makes it clear that the alleged victim in that case admitted that she had prostituted for sex over a six month period and as recently as one week before the alleged rape, and that she would engage in sex for cocaine at any time of the day or night. The alleged victim in Johnson admitted to trading sex for drugs. That factor was not present in the Appellee's case, and distinguishes Johnson from this case.

III.

VERMONT V. MEMOLI IS NOT DIRECTLY ON POINT

The Kentucky Court of Appeals cited to the case of Vermont v. Memoli, 18 A.3d 567 (VT. 2011), which permitted evidence of the complainant's drug use thirty days before and after the alleged sexual assault as relevant to whether she consented to engage in sex for cocaine. This is different from admitting evidence of twenty years of drug use. The Appellee states that the Appellant concedes that unrelated drug use within thirty days of the incident would be relevant and admissible in this case. A reading of the Appellant's brief reveals no such concession. As Memoli specifically relies on a thirty day time frame before and after the incident in that case, it might have been decided differently had the defendant in that case sought to introduce twenty year old evidence. The trial judge in the Appellee's case properly exercised discretion to exclude the remote and prejudicial evidence sought to be introduced by the Appellee.

IV.

KENTUCKY CASE LAW REQUIRES A SHOWING OF FINANCIAL NEED TO INTRODUCE EVIDENCE OF A DRUG HABIT

The Appellee contends that the Appellant's argument on this topic was "ado about nothing" and a misinterpretation of the case law. (Brief for Appellee, p. 22). Adkins v. Commonwealth, 96 S.W.3d 779, 793 (Ky. 2003) states that evidence of a drug habit along with evidence of insufficient funds to support that habit, is relevant to show motive to commit a crime in order to get money to buy drugs. In that case, evidence was admitted that the defendant lived in "abject poverty," but following the murder/robbery of

the victim, had cocaine and had rented a hotel room. Id. Neither the Memoli court or the Kentucky Court of Appeals addressed the financial status of the victim. With there being insufficient evidence of the victim's financial state, the admissibility of a drug habit would not be supported by the case law.

The Appellee cites to several other cases regarding the introduction of drug-related evidence as proof of a motive to commit a crime. Notably, two of them concern financial status as part of motive to commit a crime. In the Kentucky case of Hayes v. Commonwealth, 175 S.W.3d 574, 592 (Ky. 2005), this Court stated that possession of cash could be relevant to a drug trafficking prosecution. The court also stated that if the defendant were unemployed, possession of a large amount of cash is relevant to criminal conduct. In United States v. Kadouh, 768 F.2d 20, 21 (1st Cir. 1985), evidence of an unemployed defendant's cocaine use was admissible to show motive to engage in drug trafficking to afford his habit. In this case, sufficient evidence of P.W.'s financial status was not developed to support introduction of her statement to medical personnel. The other cases cited by the Appellee are also distinguishable from the present case because they do not concern proof of motive to consent to sex for cocaine.

V.

KRE 412 BARS THE ADMISSION OF EVIDENCE SHOWING A PROPENSITY TO ENGAGE IN SEX

KRE 412(a)(2) prohibits the use of evidence to show a victim's sexual predisposition. Although arguing that he wanted to show motive, the theory for admissibility of Appellee's proposed evidence is tied to the proposition that someone who is a heavy drug user would have sex with another person as part of a trade for drugs. The

Appellee states that, "The evidence in the present case had nothing to do with sex." (Brief for Appellee, p. 29). The Appellee maintains this while arguing that the rationale for admissibility was motive to consent to sex to get cocaine. This disputed evidence shows a predisposition to engage in sexual behavior, and is what Court of Appeals Judge Combs was concerned about in her dissent in this case. Judge Combs did not cite to KRE 412, but the exclusion of such evidence is consistent with KRE 412.

**VI.
THE APPELLEE WAS NOT PREJUDICED AND
REVERSAL OF THE TAMPERING WITH
PHYSICAL EVIDENCE AND ASSAULT FOURTH
DEGREE CONVICTIONS IS NOT WARRANTED**

The Appellee argues that he was prejudiced by the exclusion of P.W.'s statement. For purposes of criminal law, "prejudiced" means "unduly prejudiced" or whether the prejudice was "unnecessarily or unreasonably hurtful." Johnson v. Commonwealth, 105 S.W.3d 430, 439 (Ky. 2003). (Citations omitted). Just because a criminal defendant does not prevail on an argument does not mean that he was legally prejudiced. The trial court ruling to exclude P.W.'s statement was an appropriate exercise of judicial discretion. The Appellee had other evidence available to him to argue motive to consent. He was not prejudiced by the exclusion of P.W.'s statement.

The Court of Appeals decision reversed the sodomy in the first degree conviction, but left standing the tampering with physical evidence and assault in the fourth degree convictions. The Appellee not only asks this Court to affirm the Court of Appeals reversal of his sodomy conviction, but also asks this Court to reverse his conviction for tampering with physical evidence and assault in the fourth degree.

The Appellant stated in his motion for discretionary review that the issue of law to be considered was the exclusion of evidence in a forcible sodomy trial. The Court of Appeals did not apply the result of the decision regarding the exclusion of P.W.'s statement to the tampering and assault convictions, and allowed those convictions to stand. The Appellee did not seek discretionary review of the tampering and assault convictions. If the losing party in the Court of Appeals has a motion for discretionary review granted, a prevailing party in the Court of Appeals must file a cross motion for discretionary review in order to have the issues on which he lost in the Court of Appeals considered in the Supreme Court. Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 926-27 (Ky. 2007). (Citations omitted). The tampering and assault convictions are final and not before this Court in this matter, and should not be reversed.

Should this Court consider the tampering with physical evidence and assault in the fourth degree convictions, it should conclude that the issue of excluding evidence related to the sodomy count and whether P.W. consented to sex had no bearing on the tampering and assault charges. The convictions for tampering with physical evidence and assault in the fourth degree should not be disturbed.

CONCLUSION

The Appellant respectfully requests that this Court reverse the decision of the Kentucky Court of Appeals which overturned the Appellee's sodomy in the first degree conviction, and thereby reinstate that conviction. This Court should take no action toward the tampering with physical evidence and assault in the fourth degree convictions and allow those convictions to stand, as they are not before the Court on this appeal or were unaffected by the exclusion of the complaining witness's statements.

Respectfully submitted,

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Attorney General of Kentucky

A handwritten signature in black ink, appearing to read "W. Bryan Jones", written in a cursive style.

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