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**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2008-SC-129 & 2008-SC-876-DG**

DAVID LAKE

APPELLANT

V.

Appeal from Knox Circuit Court
Hon. Roderick Messer, Judge
Case No. 93-CR-00177

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR CROSS APPELLANT

Respectfully submitted,
Gail Robinson
Gail Robinson
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601
(502) 564-8006

CERTIFICATE OF SERVICE

I hereby certify that on August 3rd, 2009, a true and accurate copy of this Reply Brief for Cross Appellant was served by first class mail, postage prepaid to Hon. Roderick Messer, Judge, Courthouse, 101 South Main Street, P.O. Box 5189, London, Kentucky 40745; Hon. Danny Evans, Commonwealth Attorney, 105 East 4th Street, London, Kentucky 40741 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was not withdrawn from the Supreme Court of Kentucky.

Gail Robinson

PURPOSE OF THE REPLY BRIEF FOR CROSS APPELLANT

The purpose of this Reply Brief for Cross Appellant is to respond to the arguments in the Brief for Cross Appellee to the extent a response is necessary.

PREFACE

The Commonwealth invites this Court to elevate the importance of the circuit court's opinion on remand and has referred throughout the appellate proceedings to that court "mistakenly" denying the RCr 11.42 motion as successive in 2004. Lake urges that the lower court's very belated opinion should be given little credit by this Court. That court improperly denied his RCr 11.42/CR 60.02 motion without a hearing **nearly eleven years ago** (TR 194-200). After being ordered to conduct a hearing the court issued a clearly erroneous opinion that the motion was successive in October 2004 (TR I of 138-9). The court only finally issued its opinion on the merits of the case on remand on October 19, 2006. That court's errors have delayed review on appeal of the merits of Lake's claims for many years.

Throughout its Brief for Cross-Appellee the Commonwealth harps on lack of prejudice, claiming substantial evidence of guilt. That view of this case is simply disingenuous. The evidence that Jack Lake was guilty of the murder of Chris Golden is as strong as the evidence of David Lake's guilt. And former attorney Abner's representation of David Lake was truly abysmal. The lower court questioned the credibility of the witnesses who testified for David Lake at the evidentiary hearing but was willing to accept the incredible testimony of Mr. Abner without question (Appendix to Brief for Appellant, Tab 2, 1-28). For example, Abner moved for a continuance which was denied but claimed at the hearing he was actually ready to proceed and to present

David Lake's testimony but claimed surprise when David allegedly offered a new version of the events. And, while he contended his theory of defense was "involuntary manslaughter" (which does not exist in Kentucky), he objected to the court's first degree manslaughter instruction. David Lake essentially had no defense with Abner as his lawyer. The circuit court disregarded both the facts and the law in its findings.

ARGUMENTS

II.

LAKE'S CONVICTION MUST BE VACATED BECAUSE OF THE ADMITTED PERJURY OF WITNESS GLORIA GOLDEN CONCERNING CRITICAL FACTS.

The Commonwealth's position on this issue is really quite troubling. The Commonwealth does not disagree that Gloria Golden committed perjury at David Lake's trial (Brief for Cross Appellee, hereinafter BCA'ee 6-8). Instead, the Commonwealth argues that her perjury was not prejudicial and that this Court should defer to the trial court's conclusions (BCA'ee 3-5). The Commonwealth even boldly contends that the strength of David's conviction "was not violated in the least bit by Ms. Golden's failure to truthfully testify" because "the Commonwealth's case was premised on Jack Lake's testimony and other unimpeached evidence of guilt including appellee/cross-appellant's prior inconsistent statements" (BCA'ee 5). The Commonwealth is operating in a fantasy world.

The jury in this case had three choices as far as who killed Chris Golden: David Lake, Jack Lake or David and Jack acting in concert. Both David, age seventeen, and Jack, age fifteen, initially lied to the police and claimed to have no involvement in Chris's death. Jack said he was not there and David said someone else was responsible.

Then Jack changed his story to admit some involvement, implicate David as the principal actor and supply a possible motive of anger over an alleged theft of pot (TE I 93-103). David testified that Jack beat Chris severely after Chris confronted Jack over “fooling around” with Gloria and denied being involved himself (TE II 177-185, 191-2). David also testified he and Chris had been friends for many years (TE II 80).

The physical evidence linked both Jack and David to Chris. The suspension bar had Chris’s and Jack’s blood but not David’s (TE I 150). David’s T-shirt had Chris’s blood but David testified he had tried to help Chris after Jack beat him so there was an innocent explanation for the presence of the blood (TE II 159-160). Thus, motive was very critical in this case. And a jury which believed Gloria was involved with Chris and rebuffed Jack, resulting in a jealous confrontation between Chris and Jack, would surely have been far more likely to believe that Jack rather than David killed Chris. However, Gloria lied at trial, denying any relationship with either Chris or Jack and lying about seeing a pipe in Jack’s hand (TE I 8-26). Only David testified about the “love triangle” and the prosecutor emphasized the lack of any corroborating testimony in his closing argument (TE I 204-5).

At the evidentiary hearing Gloria admitted her sexual relationship with Chris, acknowledged Jack pursued her and she rejected him and stated Jack’s actions caused problems between Jack and Chris (Tape No. 2; 3/11/04; 15:04:02). She also admitted seeing Jack with a pole or stick when she drove off from the scene which further links Jack to the beating of Chris since there was a mix of Jack and Chris’s blood on the bar (Tape No. 2; 3/11/04; 15:17:59)¹.

¹ The Commonwealth notes that on cross-examination she testified that the only thing untrue in her trial testimony was denial of a relationship with Chris Golden (BCA’ee 4). That is misleading since she had

Gloria's perjured testimony was central to David's conviction because she denied the relationship she had with Chris and her rebuff of Jack which gutted David's explanation for why Jack would want to confront and hurt Chris. Moreover, Jack's testimony was self-serving and highly suspect, hardly "unimpeached", as the Commonwealth claims. And the testimony of other witnesses, cited by the trial court, did not establish who killed Chris, only that Chris died from his injuries. Minimizing the importance of Gloria's testimony is disingenuous. Perjury strikes at the heart of our justice system, and the admitted perjury of a critical witness on important topics should not be tolerated.

The Commonwealth, citing *Brown v. Commonwealth*,² urges that review of a CR 60.02 motion "is for abuse of discretion" (BCA'ee 4)³. The Commonwealth states that the conclusion of the trial court was not unreasonable, biased or capricious and notes that this Court must defer to the trial judge's superior ability to judge credibility of witnesses (BCA'ee 5). David Lake asserts that the trial court clearly abused its discretion by denying his CR 60.02 motion based on perjury by Gloria Partin. The court issued that ruling in 1998 prior to the evidentiary hearing and thus had not heard any testimony from Ms. Partin about the lies she had told (See Appendix, Tab 3, to Brief for Appellant/Cross Appellee). The court reviewed only her affidavit filed with the post-conviction action and addressed the issue cursorily (August 1998 Order at 5-7). The court listed the names of other witnesses who testified and stated their testimony would have justified Lake's

already admitted her various lies and then simply agreed with a prosecutor who (erroneously) summed up her testimony as admitting only one lie.

² 932 S.W.2d 359 (Ky. 1996).

³ The Commonwealth erroneously claims that Lake is pursuing this issue based solely on CR 60.02 (BCA'ee 3-4). That is incorrect. Lake included this issue in his original RCr 11.42 motion (TR 74-9) and re-affirmed it in the amended RCr 11.42/CR 60.02 motion (TR 145-9).

conviction. The court then stated without further analysis that “it cannot be shown that but for Gloria Golden’s supposed perjured testimony that the outcome of [Lake’s] trial would have been different “(August 18, 1998 Order at 5-6).

The court chose to ignore the love triangle to which David Lake testified at trial and Gloria’s lies about her relationships with Chris and Jack. A critical issue at trial was whether Jack was more likely to have killed Chris than David was, and Gloria lied about the underpinnings of that issue. Her truthful testimony could have been the difference between conviction and acquittal. David Lake has presented a ground for relief under RCr 11.42 and a “reason of an extraordinary nature justifying relief” under CR 60.02(f). A new trial should be granted.

III.

LAKE’S CONVICTION MUST BE VACATED BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Commonwealth’s argument focuses on particular aspects of Mr. Abner’s performance which Lake has challenged, but the Commonwealth does not analyze Abner’s overall performance which is required⁴. Anyone examining the overall performance of defense counsel at David Lake’s trial would be struck by the lack of minimal preparation and advocacy from beginning to end. The bottom line is that this was a winnable case, but counsel failed to present the jury with the information they needed to vote “not guilty”. He did not call available witnesses who would have supported David Lake’s claim that there was a love triangle and that Jack was the one who had the motive to kill Chris Golden. The Commonwealth’s only response to this claim is that “there was no prejudice as Gloria denied any relationship with Jack Lake

⁴ See *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), cert. denied, 531 U.S. 1035 (2000).

and Gloria's testimony was not otherwise central to the Commonwealth's case" (BCA'ee 8). While Gloria denied that she agreed to have a relationship with Jack, she did not deny that he pursued her, she rebuffed him and this caused problems between Chris and Jack (Tape No. 2; 3/11/04; 15:04:42, 15:14:08). Her testimony about her relationship with the victim and one of the possible suspects certainly was central to the case, and Abner had no choice but to contradict her with other witnesses when she denied the love triangle existed.

The Commonwealth even goes as far as to claim "Lake's shifting of blame to his younger cousin undermined the defense" (BCA'ee 9). That makes no sense since "Jack did it" was the defense. Absent Abner's deficient performance at Lake's trial there certainly was a reasonable probability he would have been found not guilty, or, at least, not guilty of murder. David Lake's conviction should be vacated based on ineffective assistance of trial counsel.

CONCLUSION

For the reasons set forth in this Reply Brief for Cross Appellant and the Brief for Appellee/Cross Appellant, David Lake requests that his conviction be vacated and his case remanded to juvenile court or, at a minimum, to circuit court for a new trial.

Respectfully submitted,

Gail Robinson

Gail Robinson
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601