

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-SC-000018

FILED

JAN 03 2007

SUPREME COURT CLERK

DAVID KAPLAN

APPELLANT

vs.

GARY WADE PUCKETT

APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 96-CI-06279
Hon. F. Kenneth Conliffe, Judge, Presiding

REPLY BRIEF FOR APPELLANT

Submitted by:

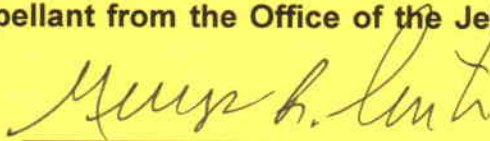
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CERTIFICATE

It is hereby certified that a copy of the foregoing Reply Brief for Appellant was served via U.S. Mail this 28th day of December 2006 upon Hon. Bill V. Seiller, Counsel for Plaintiff, Meidinger Tower, 22nd Floor, 462 South Fourth Avenue, Louisville, Kentucky 40202, Hon. F. Kenneth Conliffe, Judge, Jefferson Circuit Court, Division 12, 9th Floor, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202 and Clerk, KY Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601.

It is further certified that the record on appeal was not withdrawn or checked out by Counsel for the Appellant from the Office of the Jefferson Circuit Court Clerk.



George R. Carter

DO NOT REMOVE THIS CAPTION.

The Appellee did not discuss the constitutional mandated exculpatory disclosure required by Brady v. Maryland, 373 U.S. 83; 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963) and Banks v. Dretke, 540 U.S. 668, 157 L.Ed.2d 1166, 124 S.Ct. 1256 (2004) Instead, Appellee spent considerable time discussing evidence outside the limits set by the trial court in its ruling on Appellant's motion in limine. 30-15-04-VCR 027 (B1) 09:58:30 - 9:59:30. In that ruling the trial court limited the evidence to Appellant's failure to give an opening statement and evidence dealing with " the petroleum issues." Id.

Moreover, Appellee made extensive reference to the initial 1996 trial to factually support its position that Appellant failed to meet the standard of care for an attorney representing a defendant in a criminal action. He claimed that Appellant comitted "literally dozens of omissions and commissions" in his representation. And several of the omissions or commissions referenced by Appellee were the subject of an earlier appeal to this Court, and this Court found no error in the denial by the Trial Court of a motion for mistrial based upon alleged acts of misconduct. Puckett v. Commonwealth of Kentucky, 94-SC-730-MR June 8, 1995. In fact, Appellee even recognized this fact when he said that the jury was not allowed to hear about this inappropriate behavior because of an earlier trial court ruling, which is not being questioned by Appellee in this appeal.

But with this acknowledgement of the limitations imposed by the trial court, Appellee proceeded to make misleading references at the very start of his brief to a plastic bottle of Gulf Lite that Appellee claims was on "a counter in the kitchen" at

the time of the fire. Appellee's brief page 2. Other references to Gulf Lite are on pages 15.

The implication from these references to Gulf Lite bottle is the inference that Appellant should have been aware of this alternative source of accelerant. But that is not the case. Appellee never told Appellant anything except that the fire was in the refrigerator. Appellee knew nothing about how the fire started, and he never mentioned to Appellant about the presence of Gulf Lite. That fact was not revealed by the Pucketts until after the initial trial, despite extensive interrogation by the police and questioning by Appellant as to the fire's cause. In fact, the presence of this Gulf Lite was made known to Mr. Heavrin by Appellee's father, after Appellant had been relieved as Appellee's Counsel. Trial Tape 30-6-96-VCR-040 (B-4): 10:50: - 10:52 and Trial Tape 30-15-04-VCR-027 (B-2): 16:27:36- 16:29.

Similarly, Appellant submits that the reference to the fire being caused by a short in the refrigerator should be excluded. That reference has nothing to do with employing a chemist and the references do not have any cite to the record. These references are on pages 17 and 18 of Appellee's brief.

Another improper reference in Appellee's brief is on pages 5 and 6, where Appellee discussed the ATF's testimony and his prepared computer model explaining the fire's progression. That discussion should also be excluded from consideration because it is in violation of the trial court's ruling and because Appellee's brief does not contain any reference to the underlying record. Rule 76.12(4)(c)(v) of the Kentucky Rules of Civil Procedure.

As to Appellee's discussion of Appellant's cross-examination of Rider, Appellee conveniently omitted portions of Rider's testimony. And Appellee failed to acknowledge that Mr. Nick King, Mr. Lloyd Vest, and an earlier Court of Appeals had reviewed the same testimony and reached the opposite conclusion. Trial Tape 30-15-04-VCR-027 (B-2): 10:19:33 - 10:19:48.

Appellee's persistent reference throughout his brief that Appellant's failure to hire an arson expert was malpractice is a continuing misstatement of the issue before this Court. Besides being beyond the scope of the underlying trial court's ruling, this argument is nothing more than Appellee's second-guessing of Appellant's representation and performance after the conviction. And to support this conclusion, Appellee refers to highly selected unreferenced portions of the initial 1996 trial and to exhibits B, C, and D that Mr. Heavrin filed with his motion for a new trial that were not part of the record submitted to the jury in this trial.

Appellee's arguments attempt to shift the focus from who set the fire, which was the primary focus of the initial trial, to one of how and where the fire started. This shift in emphasis ignores the Commonwealth's theory of the underlying initial trial:

1. The fire started in the kitchen;
2. Based upon the burn pattern and the presence of accelerant, the fire was intentionally set;
3. Appellee must be the person who set the fire because the accelerant found on the kitchen floor was also found on Appellee's and the victim's clothing;

4. Appellee and his mother were the only occupants in the house at the time of the fire; and
5. Appellee's behavior during and after the fire supported the conclusion that he started the fire.

The Commonwealth had a strong theory for its case, and Appellee's statement to Appellant that the fire was in the refrigerator and that he could not explain the presence of the medium petroleum distillate that was on the kitchen floor was of little help for his defense that he did not start this intentionally set fire.

In addition, the whole tenor of Appellee's argument is no more than a narrative of how the events came about based upon Mr. Heavrin's perception that he enjoyed with the benefit of hindsight. And despite Mr. Heavrin's protestations, Appellee's argument fails to show that Appellant's representation was outside the range of a professionally competent attorney. But even here Appellee does not stop. He continues with a long litany of items which he claims an expert would have explained to Appellant. However, even a cursory reading of this list shows that it is a list of issues that were not to be decided at this trial. Instead, it again is a recitation of Mr. Heavrin's own perception with the benefit of hindsight.

Even assuming that Appellee explained the source of the medium petroleum distillate on the kitchen floor by the bottle of Gulf Lite, presumably left in the kitchen, a fact never revealed by Appellee or his family to Appellant, he never adequately explained how the fire started. And how does this correlate with the events related by Appellee to Appellant that he first saw the fire in the refrigerator?

What we do know is that the Commonwealth's central theory in the initial trial was that the fire was arson in origin caused by medium petroleum distillate on the kitchen floor and that Appellee got this medium petroleum on his clothing when he sprayed the accelerant on the kitchen floor. Trial Tape 30-15-04-VCR-027 (B-2): 10:20:35 - 10:21:05. That theory was false, and if Mr. Rider had truthfully, completely, and accurately acknowledged that fact during his cross-examination, the Commonwealth's case would have suffered major damage to its theory of the case.

When Appellee discusses Rider's testimony, he understates its misstatement and its impact during the initial trial. Rider's testimony under cross-examination was, at the very least, rank equivocation designed to mask his true findings with the intent to mislead. His actions resulted in a perversion of our judicial system. This fact was recognized by Mr. Lloyd Vest in his memorandum to Nick King dated November 14, 1995, when he wrote:

While Mr. Rider's answers are each technically true, he skirted the line in his responses to cross-examination. Even though Mr. Rider knew for a fact that the accelerant on the floor came from a source different than the accelerant on the clothing, he created the impression they were the same by repeatedly testifying that the accelerant on all 7 exhibits was "medium petroleum distillate."

* * *

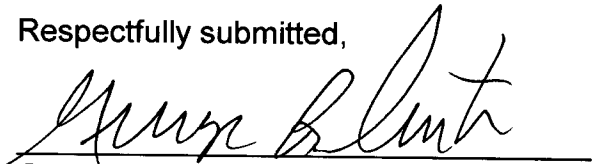
I do not believe Mr. Kaplan was ineffective in his questioning of Mr. Rider. To the contrary, I thought he was quite effective. If Mr. Rider had been fully candid, Mr. Kaplan would have likely uncovered this information during cross-exam. It may be that his questioning led Mr. Heavrin to his independent investigation, which would simply reflect a different degree of intensity rather than quality. Defendant's Proposed Exhibit 4, 30-15-04-VCR-027 (B-2): 10:24:45 - 10:25:10.

Rider's perversity and the effectiveness of Appellant's cross-examination of Ryder was never better expressed than by Lloyd Vest.

CONCLUSION

WHEREFORE, based upon the foregoing, the Appellant, David Kaplan, respectfully submits that the decision of the Jefferson Circuit Court should be reversed and that this case should be remanded to the trial court for entry of a Judgment Notwithstanding the Verdict.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "George R. Carter", is written over a horizontal line.

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