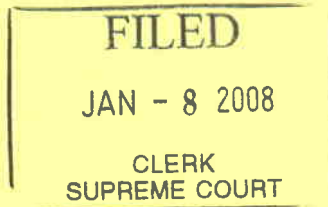


**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2006-SC-0863-MR**



TIMOTHY TAYLOR

APPELLANT

v.

Appeal from Jefferson Circuit Court
Action No. 04-CR-0755
Hon. Kathleen Voor Montano, Judge

COMMONWEALTH OF KENTUCKY

APPELLEE

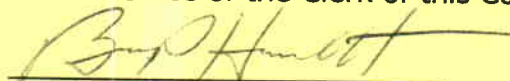
REPLY BRIEF FOR APPELLANT, TIMOTHY TAYLOR

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Certificate of Service

This is to certify that a copy of this brief was mailed, first class postage prepaid, to Hon. Kathleen Voor Montano, Judge, Jefferson Circuit Court, Division Ten, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Paul W. Richwalsky, Jr., Assistant County Attorney, 600 West Jefferson Street, Louisville, KY 40202; and Hon. Gregory D. Stumbo, Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on January 7, 2008. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.



BRUCE P. HACKETT

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Purpose of the Brief

This brief is filed in order to respond to the Commonwealth's claims concerning Argument I, having to do with Timothy Taylor's custodial statement to the police and Argument II, addressing the prosecutor's cross-examination of Timothy at trial about why he never spoke up at any court proceedings to tell Judge Montano or the police detectives that Raymond, not he, had actually killed Christopher Buckner. Regarding Argument III, the denial of a fair opportunity to present a defense, the appellant will continue to rely upon the arguments made and authority cited in his initial brief.

ARGUMENT

I. The trial court erred when it refused to suppress Timothy Taylor's statements to the police.

In this brief, the appellant will address the Commonwealth's assertion that the police complied with the requirements of KRS 610.200 and 610.220, designed to protect juveniles who are taken into police custody. The Commonwealth says that the police followed the mandates of parental notification and timely complied with the requirement to obtain permission from a court, trial commissioner or court designated worker for the extended custodial interrogation of Timothy at the police station after his arrest. (Brief for Appellee, pp. 7-13).

As to parental notification (KRS 610.200), the appellee says that Timothy's mother was notified of Timothy's custodial status by the police on three separate occasions. (Brief for Appellee, pp. 7-8). The problem is that KRS 610.200

requires immediate notification "[w]hen a peace officer has taken or received a child into custody on a charge of committing an offense." What the appellee labels the first notice was contact with Mrs. Taylor at her home when the police were still looking for Timothy. (Brief for Appellee, p. 7). The second notice, according to the appellee, was at 4th District substation when the police asked Mrs. Taylor for permission to search her house. (Brief for Appellee, p. 8). The problem is that both of these contacts with Mrs. Taylor occurred prior to the arrest of Timothy. Neither can qualify as the custodial notification mandated by KRS 610.200. The third notification cited by the appellee, when Mrs. Taylor was told that Timothy was in custody, did not come until after the "arrest slips" on Timothy and Raymond were filled out. (Brief for Appellee, p. 8). This notification came after the conclusion of interrogation, some six to seven hours after Timothy had been taken into custody (See Brief for Appellee, Appendix, I-1). It could hardly qualify as the immediate notification required by KRS 610.200.

Regarding KRS 610.220, which requires the police to obtain permission from a court, a commissioner or a court designated worker to hold a juvenile in police custody beyond two hours, the appellee asserts that the police fully complied with the statute by getting permission from a court designated worker. (Brief for Appellee, pp. 8-10). What the appellee cites in support of this claim are various police documents attached as pages G1-G11 in the Appendix to the Brief for Appellee. The problem is that these documents were not offered as exhibits at the suppression hearing, nor did any witness testify about the information

contained in the documents. The court had none of this information before it when deciding the suppression issue. Moreover, in its brief filed after the suppression hearing, the Commonwealth never mentioned or tendered the documents, nor did the Commonwealth make an argument based upon the information in the documents. (See "Commonwealth's Response to Defendant's Brief in Support of his Motion to Suppress," p. 19; TR II, 169). In the circuit court, the Commonwealth confined its argument to one of no error because the detention lasted less than twelve hours. The Commonwealth said that because a court, trial commissioner, or court-designated worker may extend by up to ten hours the time during which the police may detain a particular child, there was no violation in Timothy's case because the police held him for less than twelve hours while they got his confession. ("Commonwealth's Response to Defendant's Brief in Support of his Motion to Suppress," p. 19; TR II, 169).

The information contained in the documents attached as pages G1 through G11 in the Brief for Appellee is hearsay that was never tested in court and subject to cross examination. The Commonwealth had the burden to prove by a preponderance of the evidence that the confession was properly obtained. Colorado v. Connelly, 479 U.S. 157, 168-170, 107 S.Ct. 515, 522-523, 93 L.Ed.2d 473 (1986); Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627, 30 L.Ed.2d 618 (1972); Tabor v. Commonwealth, 613 S.W.2d 133, 134 (Ky. 1981); RCr 9.78. In Tabor, this Court reversed the conviction, finding that the trial court should have suppressed a confession when the Commonwealth failed to produce

evidence at the suppression hearing in order to sustain its burden. In Timothy Taylor's case, the Commonwealth cannot prevail on appeal by now saying that it could have met its burden in the trial court with untested hearsay contained in documents that were never considered by the trial court.

II. The prosecutor's cross-examination of Timothy Taylor about why he failed to speak up to the judge or detectives during pretrial court proceedings violated Timothy's right to due process of law, his right to remain silent and his right to the assistance of counsel.

What is most telling about the Commonwealth's argument relating to this issue is that the Commonwealth never once mentions the questions that were asked of Timothy concerning his failure to speak up at pretrial court hearings. Furthermore, the Commonwealth never explains how the following questions were relevant or how those questions were not designed to have the jury consider Timothy's silence as an admission of guilt:

Mr. Richwalsky: So I guess I want to know, Tim, if prior to saying, just, that to the jury on Friday, I mean, we've been in court a lot haven't we, in the past couple years, correct?

Timothy: Yes, sir.

Mr. Richwalsky: Judge Montano's been sitting there all along. Did you ever ask to approach the bench and tell her, "Hey you've got the wrong guy on trial"?

Timothy: No, sir.

Mr. Richwalsky: Did you ever reach out to Detective Huffman or Detective Lawson and say, "You know, I told you a bunch of stuff in the 3 hours, but it's not really true, but I made it all up, it's, Raymond's the guy you really want"? You didn't do that either, did you?

Timothy: No, sir. I never tried to talk to them.

Mr. Richwalsky: You just waited until Friday for the first time to say, "I made it up"?

Timothy: No, sir.

Mr. Richwalsky: Oh, there was another time?

Timothy: Yeah, when I talked to my family.

Mr. Richwalsky: But other than that?

Timothy: I never asked nobody nothing.

(VR No. 4, 8/21/06, 10:48:24-10:49:20). Each question implied that Timothy's failure to speak out to the judge, to Detective Huffman or to Detective Lawson during court sessions was evidence of his guilt. "The prejudice from informing a jury of a defendant's assertion of his right to remain silent arises from the implication that the defendant refused to talk to the police because of a consciousness of his own guilt, *i.e.*, an innocent person would profess innocence." Price v. Commonwealth, 31 S.W.3d 885, 891 (Ky. 2000).

In Timothy's case, the prosecutor informed the jury about Timothy's failure to speak to Judge Montano or the detectives because, according to the

prosecutor, Timothy would certainly have told the judge and the detectives in court that he was innocent if he were truly innocent. In the prosecutor's view, Timothy's failure to do so meant that he was guilty. In Price, this Court noted that if a jury learns that a defendant had invoked his right to counsel that fact is less prejudicial than a jury learning that a defendant had invoked his right to remain silent. Id. Timothy Taylor was certainly prejudiced when his fate was decided by a jury that was free to conclude that Timothy's failure to speak up in court and to proclaim his innocence was evidence that he was guilty.

The Commonwealth does not dispute that in accordance with RCr 3.05(1), at Timothy's initial court appearance on December 30, 2003, he was advised of "his ... right to have counsel" and was advised that "he ... is not required to make a statement and that any statement made by him ... may be used against him." In Miranda, the Supreme Court said, "All these policies point to one overriding thought: the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government-state or federal-must accord to the dignity and integrity of its citizens." Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966). "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964)." Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

While it is true that Timothy Taylor spoke to the police on December 29, 2004, after being informed of his right to remain silent, it is also true that after being advised in court on December 30, 2004, of his right to remain silent and after being told by his attorney to speak to nobody about his case, he remained silent, as was his constitutional right. The prosecutor's cross-examination of Timothy at trial was designed to trample all over the exercise of that constitutional right by having the jury use Timothy's courtroom silence as evidence of his guilt.

In Green v. Commonwealth, 815 S.W.2d 398 (Ky. 1991), a drug case, this Court found constitutional error where a prosecutor improperly argued to the jury that the defendant's post-arrest silence was evidence of guilt. But the Court also found the error to be harmless beyond a reasonable doubt because a police eyewitness testified that he saw the defendant in possession of the drugs and the defendant "made two post-Miranda statements which clearly suggested he was guilty." Green v. Commonwealth, *supra*, 815 S.W.2d at 400. In Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993), a similar error was found by this Court to be reversible error. This Court took into consideration the weight of the evidence against the defendant and the degree of punishment imposed by the jury, finding that the Commonwealth failed to show harmless error beyond a reasonable doubt. Hall v. Commonwealth, *supra*, 862 S.W.2d at 323-324.

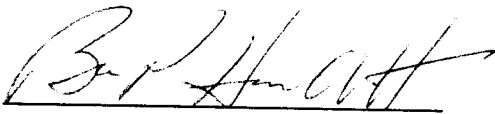
The evidence against Timothy Taylor included his confession to the police in which he said he shot Buckner, along with his assistance in recovering the

gun. But Timothy testified at trial that he took the blame for Raymond because he was a juvenile. He also said that Raymond had given him the gun after shooting Buckner so that Timothy could dispose of it. Timothy Taylor, who has an IQ of 75, which is "border line," had been enrolled in special education classes since he was diagnosed with learning disabilities in the 3rd grade. When Timothy was tested in 1997 and again in 2001, his scores indicated that in reading and math skills, he ranged from the 16th percentile down to the 00.10 percentile when compared with other special education students who had also been tested. (VR No. 3, 8/18/06, 15:38:40, 15:43:11, 15:39:29, 15:40:43). These facts cast doubt on the reliability of his confession to the police.

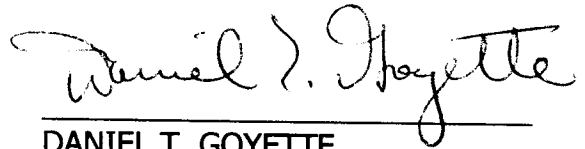
In Hall, the lack of an eyewitness to the offense and the severity of the punishment (life imprisonment) were significant factors in the harmless error analysis. Hall v. Commonwealth, *supra*, 862 S.W.2d at 323-324. In Timothy's case, there were no eyewitnesses to the actual shooting and the jury imposed a sentence of thirty years imprisonment. The judge reduced that sentence to twenty-five years, obviously finding the jury sentence to be too severe. (TR IV, 454-455; VR No. 5, 10/12/06, 08:56:28; TR IV, 549-551). The error in Timothy's case, which was neither inadvertent nor beyond the control of the prosecutor, is an error that cannot be deemed harmless beyond a reasonable doubt. Timothy Taylor's conviction for murder must therefore be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, the appellant, Timothy Taylor, respectfully requests that he be granted the relief requested in his original brief.



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