Commonwealth of Kentucky
Supreme Court
2007-SC-000081-MR

Phillip Leroy Wines — Appellant

V.

Appeal from the Jefferson Circuit Court
Action Nos. 05-CR-1921 and 06-CR-1838

Commonwealth of Kentucky — Appellee

Reply Brief for Appellant, Phillip Leroy Wines

Submitted By:

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Certificate of Service

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to: Hon. Mary M. Shaw, Judge, Jefferson Circuit Court, Division Five, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Mac Shannon, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202; and Hon. Samuel J. Floyd, Jr., Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204, on March 4, 2008. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.

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STATEMENT OF POINTS AND AUTHORITIES

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PURPOSE OF THIS BRIEF

The purpose of this brief is to demonstrate the deficiencies in the arguments made by the appellee in its brief. With regard to Issue V, the appellant will continue to rely upon the arguments and authorities cited in his previous brief.

ISSUES TO WHICH THIS BRIEF IS ADDRESSED

I. The trial court committed reversible error by denying the appellant's motion to sever the counts of the indictment for separate trials.

In its brief, the appellee asserts that "evidence as to each offense certainly would not have been inadmissible at separate trials...." (Appellee's Brief, p. 17). However, the appellee not only mischaracterizes these offenses as "drug-related attacks" but also erroneously contends that one offense "tended to prove motive, opportunity, intent, preparation and plan on appellant's part as to the other offense." (Appellee's Brief, p. 17). The offenses involved different purported victims and occurred approximately two months apart. Although Phillip Wines claimed that he acted in self-defense on both occasions, the offenses were not of similar character. Phillip used nunchaku karate sticks to defend himself against Micah Brashear while he used a knife to defend himself and Angela Nelson against James Hamilton. The circumstances surrounding these incidents were also drastically different. Phillip and Micah had been friends for over thirty years but had become embroiled in a dispute that day because Phillip did not want Micah and Brian Langan coming over to his house. (VR No. 3; 11/1/06; 16:23:18-16:30:38, VR No. 6; 11/6/06; 12:48:58-13:00:18). In contrast, Phillip had only known James Hamilton for a few months. (VR No. 3; 11/1/06; 14:32:48-14:33:01, VR No. 6; 11/6/06; 12:43:0612:44:45). James became angry after Angela began a sexual relationship with

Phillip, and he entered Phillip's house without permission twice in the month of May 2005. (VR No. 6; 11/6/06; 13:23:25-13:24:16, 14:10:12-14:13:56, 14:15:35-14:19:50). James had also shown up outside his house earlier in the morning on June 12. (VR No. 4; 11/2/06; 11:07:49-11:10:20, VR No. 6; 11/6/06; 14:26:32-14:29:42).

Contrary to the appellee's assertion that Phillip Wines somehow used self-defense as a "defense ploy in initially avoiding indictment for the Micah Brashear assault" (Appellee's Brief, p. 18), the May 2005 grand jury returned no true bill on the assault charge based upon the evidence presented by Detective Chris Horn. (VR No. 4; 11/2/06; 15:06:28-15:08:11). The fact that the June 2005 grand jury subsequently indicted Phillip for assault along with murder and tampering physical evidence demonstrates the prejudice in presenting these cases together. Once the trial jury found Phillip Wines guilty as to one incident, the likelihood that the jury would find guilt as to the other incident was greatly enhanced due to the collective proof and the prejudice of being charged with multiple violent offenses. There was "a substantial likelihood that the inadmissible 'other crimes' evidence tainted the jury's belief as to each of the crimes charged and that each additional unrelated charge took on weight by virtue of being joined with the others whereby the whole exceeded the sum of its parts." Rearick v. Commonwealth, 858 S.W.2d 185, 188 (Ky. 1993). Because the trial court clearly abused its discretion by denying the motion to sever the charges for trial and because the joint trial prejudiced Phillip Wines' rights to a fair trial and due process of law, as guaranteed by the 6th and 14th Amendments to the United States Constitution and Sections 2 and 11 of the Kentucky Constitution, Phillip's convictions must be reversed and the offenses remanded for separate trials.

II. The trial court failed to properly apply the law under KRS Chapter 503, as amended by the General Assembly in 2006, resulting in erroneous self-protection instructions and an inadequate immunity hearing.

Contrary to the appellee's argument that "KRS Chapter 503 is not addressed to any 'mitigating penalties'" (Appellee's Brief, p. 22), the amendments to KRS Chapter 503 mitigate punishment by increasing the scope of when a defendant is justified in acting in self-defense and in protection of others. It is a complete defense that exonerates a defendant when the belief to use self-defense is properly held, or it can reduce the offense, and therefore the penalty, when the belief to use self-defense is reckless or wanton. The amendments create presumptions, expand the circumstances when deadly force may be used, and emphasize the "no duty to retreat" principle. In sum, nothing mitigates punishment more than a mandate that no punishment be imposed at all.

Citing the case of Hilbert v. Commonwealth, 162 S.W.3d 921, 926 (Ky. 2005), the appellee further asserts that "[t]his Court's determination that there is 'no error in the failure to give an instruction on retreat' where the jury is 'otherwise fully instructed on self-defense,' is still the proper perspective with regard to jury instructions." (Appellee's Brief, p. 25). However, the General Assembly codified the "no duty to retreat" principle in several statutes within KRS Chapter 503 one year after the opinion in Hilbert was rendered, seemingly in response to that decision. See KRS 503.055(3), KRS 503.050(4), and KRS 503.070(3). The appellant submits that Hilbert should be reconsidered in light of these statutory provisions, as they express the legislature's intent that the "right [of a person] to stand his or her ground and meet force with force" is an integral element of the law of self-defense. Therefore, the appellant submits that a trial court cannot adequately instruct on self-defense without including a "no duty to retreat" instruction.

The appellee also contends that "Appellant's argument...based on case law from other states...does not establish his entitlement to a pretrial hearing because any such entitlement would have to be found, not in the language of statutes from Georgia or Colorado, but in the language of KRS 503.085 and Kentucky case law, statutory law and constitutional law." (Appellee's Brief, p. 28). As the appellant acknowledged in his prior brief (Appellant's Brief, p. 23), KRS 503.085 does not specifically designate what procedure should be used in determining the issue of immunity. However, both Colorado's immunity statute and Georgia's immunity statute contain similar language (i.e., "shall be immune from criminal prosecution") to the language found in KRS 503.085 (i.e., "is immune from prosecution"). As with the language of the Colorado and Georgia statutes, the plain meaning of "is immune from prosecution" can only be construed as intending to bar criminal proceedings against a person who uses force under the circumstances set forth in the statute. See People v. Guenther, 740 P.2d 971, 975 (Colo. 1987) ("In accordance with the plain meaning of these terms, the phrase 'shall be immune from criminal prosecution' can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in [the statute]."); see also Boggs v. State, 581 S.E.2d 722, 723 (Ga.App. 2003) ("[A]s the statute provides that such person "shall be immune from criminal prosecution," the decision as to whether a person is immune under OCGA § 16-3-24.2 must be determined by the trial court before the trial of that person commences."). Therefore, the trial court correctly determined that KRS 503.085(1) permits the issue of immunity to be addressed at the pretrial stage.

However, the trial court departed from the guidance of other jurisdictions and incorrectly decided that an evidentiary hearing was not required to determine immunity at the pretrial stage. For example, although the Colorado Supreme Court did not fully explain what it meant by a "pretrial hearing" in Guenther, the lower courts in Colorado have considered witness testimony in ruling on motions to dismiss under the immunity statute. See People v. McNeese, 892 P.2d 304, 306-307 (Colo. 1995) (considered testimony from several witnesses), and People v. Malczewski, 744 P.2d 62, 64 (Colo. 1987) (reviewed evidence presented at preliminary hearing, including testimony of police officer who was alleged victim). Moreover, in Kentucky, a criminal defendant is entitled to pretrial evidentiary hearings on suppression issues[1] and a determination of whether he or she is competent to stand trial.[2] Like immunity, these are threshold issues that must be decided by the trial court before a defendant can be made to stand trial.

The appellee further claims that "KRS 503.085, while later–enacted than KRS 503.020, is not more specific, insofar as it announces...nothing more than an existing defense, justification and privilege recognized under established provisions of KRS Chapter 503." (Appellee's Brief, p. 31). However, KRS 503.085 is certainly more specific in that it grants immunity from prosecution, not just a defense to be presented at trial. Even the trial court interpreted the language of KRS 503.085 as preventing the continued prosecution of a case if certain circumstances applied. (VR No. 1; 10/30/06; 15:07:45-15:17:15). Moreover, the appellee's restrictive interpretation begs the question as to why the General Assembly would go to such great lengths to amend KRS Chapter

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[1] RCr 9.78
[2] Gabbard v. Commonwealth, 887 S.W.2d 547, 551 (Ky. 1994).

503 and specify immunity, designate presumptions, expand the circumstances under which deadly force may be used, and codify the pre-existing "no duty to retreat" principle" if the legislature were merely "announc[ing]...nothing more than an existing defense, justification and privilege recognized under established provisions of KRS Chapter 503." (Appellee's Brief, p. 31). Therefore, it is the appellee's interpretation of KRS 503.085(1), not the appellant's, that would bring about an absurd and unreasonable result[3] and that would render the 2006 amendments to KRS Chapter 503 meaningless or ineffectual[4].

III. The trial court committed reversible error by failing to give a presumption of innocence instruction that admonished the jury to find guilt as to the lesser offense of manslaughter in the first degree if it had a reasonable doubt as to whether Phillip Wines was acting under extreme emotional disturbance, where the evidence reasonably supported the conclusion that extreme emotional disturbance was a mitigating factor.

The appellee argues that this issue is not properly preserved for review. (Appellee's Brief, p. 35). However, Phillip Wines submits that this issue was properly preserved by his tendering of a presumption of innocence instruction, his request that all of his tendered instructions be submitted to the jury, and his objection to any instructions being given that varied from his own. (TR Exhibits Envelope; VR No. 6; 11/6/06; 16:17:59-16:23:59). RCr 9.54(2).

The appellee also contends that "the tendered instruction was not correct as tendered" because it "contains a third paragraph C *not included* in the specimen instruction for presumption of innocence at § 2.03 of Cooper's treatise." (Appellee's

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[3] Estes v. Commonwealth, 952 S.W.2d 701, 703 (Ky. 1997).
[4] Stevenson v. Anthem Cas. Ins. Group, 15 S.W.3d 720, 724 (Ky. 1999).

Brief, p. 36). Paragraph C of the appellant's tendered presumption instruction states as follows:

> If you find Phillip Wines guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree. Murder is the highest degree, Manslaughter in the First Degree is the next highest degree, Manslaughter in the Second Degree is the next to the lowest degree, and Reckless Homicide is the lowest degree.

(TR Exhibits Envelope; Defendant's Proposed Instruction No. III – Presumption of Innocence). Although the appellee is correct that the specimen instruction in § 2.03 of Kentucky Instructions to Juries, Criminal does not contain this paragraph, it is consistent with the language found in paragraph B of the specimen instruction in § 2.03B of that treatise. Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal §§ 2.03 and 2.03B. (5th ed. 2007). This language was previously required by RCr 9.56, but "[i]t was subsequently held in Carwile v. Commonwealth, 656 S.W.2d 722 (Ky. 1983) that the 1978 Amendment to Ky. RCr 9.56 eliminated the requirement to instruct on reasonable doubt as to the degree of the offense." Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal §§ 2.03B, cmt. (5th ed. 2007). In Butts v. Commonwealth, 953 S.W.2d 943, 946 (Ky. 1997), this Court clarified that the trial judge is not required to give an instruction on reasonable doubt as to the degree of the offense, but that if such an instruction is given, it must be given correctly. Therefore, contrary to the appellee's assertion, the fact that the defense proposed instruction contained this language did render the instruction erroneous or "nonconforming." (Appellee's Brief, p. 37).

This Court has held that a presumption of innocence instruction that includes an admonition regarding reasonable doubt as to extreme emotional disturbance "is required if requested and if warranted by the evidence." Sherroan v. Commonwealth, 142 S.W.3d

7, 23 (Ky. 2004), citing Commonwealth v. Hager, 41 S.W.3d 828, 831-32 (Ky. 2001), Holbrook v. Commonwealth, 813 S.W.2d 811, 815 (Ky. 1991), Edmonds v. Commonwealth, 586 S.W.2d 24, 27 (Ky. 1919), and 1 William S. Cooper, Kentucky Instructions to Juries § 2.03, cmt. (4th ed. 1999). See also Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal § 2.03, cmt. (5th ed. 2007). In this case, defense counsel tendered a presumption of evidence instruction that contained language instructing the jury on reasonable doubt with respect to the issue of emotional disturbance, and the evidence warranted such an instruction. The trial court obviously believed that an instruction on EED was supported by the evidence, making it an element of the intentional murder instruction, giving an instruction as to first-degree manslaughter, and providing a definition of EED. But the trial court failed to give an instruction explaining how to apply the definition of EED in order get to the lesser offense of first-degree manslaughter. Under these circumstances, there should have been an instruction so that the jury could understand how to apply EED to differentiate the two intentional homicide crimes: murder and manslaughter in the first degree. The failure of the trial court to properly instruct the jury as to the mitigating effects of EED deprived Phillip Wines of his defense to the higher charge of murder. Therefore, he is entitled to a new trial.

IV. The trial court committed reversible error by permitting the Commonwealth to introduce Angela Nelson's taped statement.

The appellee argues that Angela Nelson's statement was admissible under KRE 801A because "[t]he prior statement at issue here was made in June, 2005; the implied motive to fabricate, i.e., to avoid going to jail, arose - as defense counsel told the judge – in September, 2005." (Appellee's Brief, p. 47). However, the appellee ignores the fact that defense counsel only actually questioned Angela Nelson regarding her pending

felony charge. Although defense counsel initially asked Ms. Nelson whether she should be in jail, the trial court prevented Ms. Nelson from answering the question at that point. (VR No. 3; 11/1/06; 15:31:57-15:32:10). Thereafter, defense counsel avoided the bench warrant issue and only asked Ms. Nelson about her pending felony charge. Angela Nelson was charged with possession of cocaine on April 19, 2005, well before she made the statement to detectives on June 12, 2005. (VR No. 3; 11/1/06; 15:59:45-16:05:08, VR No. 5; 11/3/06; 10:42:00-10:45:03). Therefore, the motive to curry favor with the police and prosecution to gain favorable treatment on her felony charge existed at the time she gave her taped statement.

CONCLUSION

For the reasons stated in this brief and in his original brief, the appellant, Phillip Leroy Wines, by counsel, respectfully submits that his convictions must be reversed and his case remanded for a new trial.

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