COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000214-DG

GEORGE LaPRADD, Jr. APPELLANT

Court of Appeals
No. 2007-CA-1205-MR
Appeal from Jefferson Circuit Court
v. Action No. 06-CR-1356
Hon. Geoffrey P. Morris, Judge

COMMONWEALTH OF KENTUCKY APPELLEE

REPLY BRIEF FOR APPELLANT, GEORGE LaPRADD, JR.

Submitted by:

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Geoffrey P. Morris, Judge, Jefferson Circuit Court, Division 11, or his successor in office, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and to Hon. Joshua D. Farley, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and sent to Hon. Samuel Floyd, Jr., Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on October 8, 2010. I further certify that the record on appeal was not removed from the office of the Clerk.

BRUCE P. HACKETT

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PURPOSE OF THE BRIEF

This brief is filed in order to answer the appellee's argument that Beasley v. Commonwealth, 618 S.W.2d 179 (Ky. App. 1981), and Peak v. Commonwealth, 34 S.W.3d 80 (Ky. App. 2000), state that it is the defendant and not the Commonwealth that bears the ultimate burden of proof at trial to convince the fact finder of the existence or absence of the "choice of evils" defense. (Brief for Appellee, Subsection A of Argument I, pp. 5-6). The brief is also filed to point out that in arguing that Mr. LaPradd was not entitled to a choice of evils instruction, the Commonwealth actually makes the case that "choice of evils" was an issue to be resolved by a properly-instructed jury. (Brief for Appellee, Subsection B of Argument I, pp. 6-9). Finally, this brief will address the Commonwealth's claim that the instruction defining "choice of evils" did place the burden on the Commonwealth to prove beyond a reasonable doubt that Mr. LaPradd was not justified in taking possession of the gun. (Brief for Appellee, Subsection C of Argument I, pp. 11-12).

ARGUMENT

Because "choice of evils" is a "defense" under the Penal Code (and not an "exculpation"), the Commonwealth had the ultimate burden to prove that Mr. LaPradd was not acting to avoid an imminent public or private injury.

In Subsection A of Argument I, the Commonwealth says that both Beasley and Peak stand for the proposition that a defendant has the burden at trial to prove to the jury that he or she was entitled to the choice of evils defense. (Brief

for Appellee, pp. 5-6). But a close look at both Beasley and Peak reveals that the issue presented in both of those cases is not the issue that is presented in Mr. LaPradd's case. In both Beasley and Peak, the issue on appeal was whether the trial court erred by refusing to instruct the jury on choice of evils. Beasley, 618 S.W.2d at 180; Peak, 34 S.W.3d at 180. In Mr. LaPradd's case, the trial judge ruled that the evidence was sufficient to justify a jury instruction on choice of evils, and the judge gave a jury instruction on choice of evils. (TR 90; App. B 2, Brief for Appellant). The issue raised in the trial court and on appeal in Mr. LaPradd's case is whether the instructions properly allocated the burden of proof on choice of evils.

On page 6 of its brief, the Commonwealth says, "Case law in Kentucky is clear the Commonwealth does not carry the burden of disproving a choice of evils defense beyond a reasonable doubt." By "case law," the Commonwealth means Beasley and Peak. This is what the latest edition of Justice Cooper's treatise on jury instructions says about Beasley:

> There is dicta in this case at page 180 to the effect that the defendant has the burden of proof of this defense. That is incorrect. KRS 503.030; KRS 503.020; KRS 500.070(3).

Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal, Section 11.28, Choice of Evils, Comment, Case Notes, p. 11-34 (5th ed., Lexis Nexis 2008). In Beasley, the court was actually talking about the burden of going forward with evidence of the defense of choice of evils. The court was not talking about the

ultimate burden of proof. See Robert G. Lawson, The Kentucky Evidence Law Handbook, Section 9.05[3][6], p. 758 (4th ed. 2003).

Because neither Beasley nor Peak actually reached the issue presented in this case, this Court need not necessarily overrule either of those cases. But in 2006, this Court, citing Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), overruled Hicks v. Commonwealth, 550 S.W.2d 480 (Ky. 1977), and said that a jury must be instructed on "deadly weapon," and the jury must find beyond a reasonable doubt that an object is a deadly weapon. Thacker v. Commonwealth, 194 S.W.3d. 287 (Ky. 2006). The principle that applied in Thacker, that the Commonwealth must prove to the jury each and every element of the offense beyond a reasonable doubt, applies equally to Mr. LaPradd's case. Because the evidence raised the issue about whether Mr. LaPradd acted to avoid a greater evil, the Commonwealth was required to prove beyond a reasonable doubt that Mr. LaPradd was not justified, under the choice of evils doctrine, in possessing the gun.

In Subsection B of Argument I, the Commonwealth says that Mr. LaPradd was not entitled to a choice of evils instruction, pointing out that while Mr. LaPradd testified that he picked up the gun so that teenagers would not shoot him or shoot the police officers or anybody else, the police officers on the scene never saw Mr. LaPradd pick up the gun, and Mr. LaPradd's testimony was, therefore, not supported by other evidence. (Brief for Appellee, pp. 6-9). Both

the trial court and the Court of Appeals concluded that Mr. LaPradd was entitled to have the jury instructed on the choice of evils defense.

The Commonwealth bases its argument on the fact that Mr. LaPradd's testimony was either not corroborated by or was contradicted in part by the testimony of Officer Sheehan and of Officer Fisher. (Brief for Appellee, pp. 8-9). The Commonwealth acknowledges that Mr. LaPradd testified that he picked up the gun to prevent the teenagers in the immediate vicinity from getting it and shooting Mr. LaPradd, the police officers or anyone else. (Brief for Appellee, p. 7-8). The crux of the Commonwealth's argument is that Mr. LaPradd provided no evidence to corroborate his testimony and that the testimony of Officer Sheehan and Officer Fisher contradicted Mr. LaPradd's testimony. (Brief for Appellee, pp. 4, 7). Thus, in the Commonwealth's view, Mr. LaPradd simply lacked credibility. The Commonwealth's argument is, "The weight of the evidence, concerning Appellant's guilt, when weighed against the Appellant's weak evidence presented for a choice of evils defense, is so great that no reasonable jury could have found Appellant's allegations to be true." (Brief for Appellee, p. 9). But see Taylor v. Commonwealth, 995 S.W.2d 355 (Ky. 1999), a case in which the issue was whether the jury should have been instructed on the justifications of duress or choice of evils. This Court said:

> However, no matter how preposterous, any defense which is supported by the evidence must be submitted to the jury. "It is the privilege of the jury to believe the unbelievable if the jury so wishes." Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 680 (1977).

Taylor, supra, 995 S.W.2d at 361. Furthermore, the Court stated that the burden would be on the Commonwealth to show that the justification did not apply: "[a]n instruction on duress would have required the jury to acquit Appellant unless they believed beyond a reasonable doubt Cotton's claim that she did not coerce him into committing these crimes." Id.

What the Commonwealth actually reveals is a classic jury question involving the evaluation of witness credibility, the weighing of evidence and the application of the law to the facts. Contrary to the Commonwealth's argument, the failure of the trial court to properly instruct the jury about the Commonwealth's burden to prove beyond a reasonable doubt every element of the offense, including the absence of the choice of evils justification, cannot be deemed harmless error because erroneous instructions are presumed prejudicial. McKinney v. Heisel, 947 S.W.2d 32, 35 (Ky. 1997); Commonwealth v. Hager, 35 S.W.3d 337 (Ky. 2000). In Mr. LaPradd's case, the failure of the trial court to give jury instructions that required proof beyond a reasonable doubt of every element necessary for conviction violated KRS 500.070 and also denied due process of law to Mr. LaPradd. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Commonwealth v. Collins, 821 S.W.2d 488, 490 (Ky. 1991).

In Subsection C of Argument I, the Commonwealth says that the instruction given was correct and that it did require the Commonwealth to prove beyond a reasonable doubt that Mr. LaPradd was not entitled to act out of fear

for his safety or the safety of others. But according to the jury instructions, there were only two elements to the charged offense that had to be proven beyond a reasonable doubt: 1) that Mr. LaPradd "knowingly had in his possession a handgun" and 2) that "he had been previously convicted of a felony." (TR 90; App. C2, Brief for Appellant). The definition of "choice of evils" (Instruction No. 2) allowed the jury to find Mr. LaPradd not guilty if the jury found that "at the time he possessed the firearm, he believed: (a) that his action in picking the gun up from the ground was necessary to avoid being shot, or to prevent someone else, including the police officers, from being shot" and "(b) that he had no reasonable, viable alternative then he was privileged to take such action as he believed necessary to protect himself and others, including the police officers from being shot." (TR 91; App. C3, Brief for Appellant). With regard to the choice of evils defense, the jurors only had to apply a beyond a reasonable doubt standard if Mr. LaPradd had, in their view, "by his own conduct, brought about the situation requiring him to choose the course which he took," in which case, the choice of evils defense would not be available to him. Id. As pointed out on pages 11-12 of the Brief for Appellant, in closing arguments, the prosecutor took full advantage of the failure of the instructions to place the burden of proof beyond a reasonable doubt on the Commonwealth.

On page 5 of its brief, the Commonwealth points out the jury instruction defining "choice of evils" -- Instruction No. 2: choice of Evils -- was the same instruction that was tendered by the defense except that the court had added

subsection (c). It is true that subsections (a) and (b) of Instruction No. 2 reflected the language in the defense-proposed instruction, which in turn, utilized the language of the model instruction from the then-current edition of Cooper and Cetrulo, Kentucky Instructions to Juries, Criminal, Section 11.28, p. 11-33 (5th ed., LexisNexis 2008). But in addition to asking that choice of evils be defined in the instructions, defense counsel also specifically requested that the choice of evils justification be included as an element of the possession of a handgun charge, with the burden of proof beyond a reasonable doubt being placed upon the Commonwealth. (VR 1, 4/5/07, 09:47:23-09:50:05). Mr. LaPradd's conviction of possession of a handgun by a convicted felon cannot stand.

CONCLUSION

For the foregoing reasons, the appellant, George LaPradd, Jr., respectfully requests that he be granted the relief requested in his original brief.

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