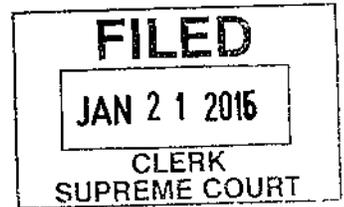


SUPREME COURT OF KENTUCKY
FILE NO. 2014-SC-000472
(COURT OF APPEALS FILE NO. 2011-CA-972)



DEVLIN BURKE

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HON. PATRICIA M. SUMME, JUDGE
INDICTMENT NO. 2010-CR-00563

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, DEVLIN BURKE

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Patricia M. Summe, Chief Circuit Judge, Kenton County Justice Center, 230 Madison Avenue, Suite 601, Covington, Kentucky 41011-1539; the Hon. Stefanie L. Kastner, Commonwealth Attorney's Office, 303 Court Street, Suite 605, Covington, Kentucky 41011-1639; the Hon. Ameer Mabjish, Department of Public Advocacy, 333 Scott Street Boulevard, Suite 400, Covington, Kentucky 41011-1534, and to Hon. Jeffrey A. Cross, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on January 21, 2016. The record on appeal was not checked out.


KATHLEEN K. SCHMIDT

Purpose of Reply Brief

The purpose of this Reply Brief is to respond to any arguments made by the Appellee that require additional explanation.

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Response to Counterstatement of the Case

The Appellant would simply point out that the facts of the incident were more complicated than the Appellee acknowledges. The Appellant presented his own version in his defense that disputes some of the testimony of the prosecution witnesses and explains why he feared for his own safety that night. One such fact is that Preston Akemon, after initially saying he did not have a knife on him, testified he had a knife with a three inch blade in his hand at the time Burke allegedly cut him. VR 3/16/11, 10:05:00, 10:11:05, 10:22:35.

I.

The Appellee acknowledges that the Kentucky hate crime law has not been interpreted in a published decision yet appears to reject turning to similar statutes from other jurisdictions for illustration of how to accomplish this. The fact the federal and Iowa statutes are stand-alone criminal laws do not mean that the interpretation of similar language defining a hate crime is not persuasive.

The Appellee wants to reject that “because of” means “but for.” But the Appellee’s interpretation then renders the first clause of the statute superfluous rather than harmonizing all sections of the statute. He also does not explain how “because of” can be interpreted any way other than their plain meaning. He also ignores a Sixth Circuit case cited by the Appellant interpreting that phrase to mean “but for.”

The central challenge of interpreting the statute is giving rationale effect to both Section 1 (“because of”) and Section 2 (“primary factor”). But the General Assembly set out the definition of what offenses can be committed as a result of a hate crime in Section 1, the very first clause. Furthermore, when dealing with conflicts in criminal statutes, “the

‘rule of lenity’ is applicable.” *Commonwealth v. Lundergan*, 847 S.W.2d 729, 731 (Ky. 1993). This rule requires a conflict in a statutory scheme “to be resolved in favor of a criminal defendant.” *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005). A defendant should not be found to have committed an assault as a result of a hate crime unless he intentionally did so **but for** the sexual orientation of the victim. This clear language must be interpreted this way to avoid a constitutional defect.

The “primary factor” question is different from the question in Section 1. The victim’s characteristic must be the but for cause of the defendant’s actions but it also must be the primary factor in the result. A person could intend to assault a victim because of their sexual orientation but that was not the primary factor in the commission of the assault.

The Appellee accuses the Appellant of making an argument- that the victim actually be a member of the protected class the statute refers to- that is absurd and vile. Brief for Commonwealth, p. 11. First, neither the Appellee nor the Court of Appeals cited any authority to the contrary. Second, the Appellant cited the plain language of the statute which the legislature voluntarily chose to use. See Brief for Appellant, p. 12-13. Also, because this is not a separate crime, a defendant can be prosecuted for an assault for an attack on a person who is not in the protected class if this requirement cannot be met.

The Appellant stands on his Brief for Appellant regarding the lack of factual support for the trial court’s findings. The Appellant points out that the Appellee’s argument that the judge was correct to find that hate was the primary factor of felony assaults on the three men starkly highlights why his interpretation of the plain language of the statute completely ignores the “intentionally because of” language in Section 1. No

one could dispute that the sexual orientation of the three men had nothing to do with Burke's alleged acts. The Appellee and both lower courts are openly reading some kind of continuation theory into the statute that does not exist, or at the very least of which no reasonable citizen would have fair notice.

The Appellee says the Appellant were on constructive notice since allegations that homophobic slurs were stated at one or more of the women that the judge could find he committed a hate crime. But the Appellee already noted that the hate crime statute is very rarely used. How can a defendant be aware a judge will consider KRS 532.031 when so few have? It is not burdensome to require the prosecutor to give simple notice that she will attempt to prove a hate crime at sentencing. In this particular case, defense counsel filed a motion in limine asking to excluding those slurs, stating the case had not been charged as a hate crime, and the prosecutor stood moot, effectively sandbagging the defense. The defense tried to get some pretrial notice of what the prosecution planned.

All the evidence the Appellee states should have led the defense to know this could be a hate crime applies equally to the prosecution and it is simply not credible to think the prosecutor was somehow surprised at trial by the evidence it then used to ask for a hate crime designation. The idea that just because the Appellant could have introduced evidence in sentencing about the effects of the hate crime statute, he would have affirmatively done so before the Commonwealth gave notice it would seek hate crime status, is ludicrous. Again, the Appellee admits this statute is hardly ever used. Why would you require every defendant to affirmatively present evidence that it could be used before he is told it will be used even though it is almost never used?

The Appellant relies on the arguments made in his Brief for Appellant for any arguments not specifically addressed.

II.

The Appellee says admission of the swastika tattoo was proper because the trial court had witnesses admonished not to mention the swastika. That “concession” was undone by allowing the jury to see photos shown during the witnesses’ testimony of Appellant’s tattoos, including the swastika. The Appellee does not assert that the prosecution made clear before trial which witnesses remembered the swastika tattoo. So the fact that the defense challenged Meyer and Kohlman about their description of the tank top worn by the person who assaulted Meyer does not mean they could have distinguished Searp from the Appellant because of this swastika. In fact, the Appellee argues in essence the jury could hardly see the swastika since it “is small and nearly lost in the maze of dark-colored skin art.” Brief for Commonwealth, p. 23. The Appellee goes on to convince this Court how unlikely it was that the jury’s eye would be drawn to the tattoo rather than to Appellant’s face and black eye. *Id.*

So how likely was it any of the witnesses saw the swastika during the chaos of the event which occurred at night and involved another heavily tattooed man? The color of the men’s shirts was far more relevant during the event itself.

The Appellee’s assertion that the swastika did not constitute an attack on his character because the prosecutor did not specifically argue that puts blinders on reality. No inference of good or even benign character exists from the display of a swastika- it just doesn’t. It is offensive- the only open question is the depth of revulsion an individual feels.

The two unpublished cases cited by the Appellant are properly cited under CR 76.28 (c) - they were both rendered after January 1, 2003, and no published opinions that would adequately address the issue before the court. There are very few published Kentucky opinions related to the display of swastika tattoos in a criminal prosecution. The Appellee himself says the one published case cited by the Appellant is inapposite, although the Appellant disagrees. But this Court called the issue in *Colyer v. Commonwealth*, 2009 WL 736001, at *5 (Ky. Mar. 19, 2009), one of first impression, holding that tattoos which a witness said were gang tattoos, violated KRE 404(b). While the jury came by the evidence of Appellant's swastika tattoo through a picture and not testimony, the result was the same. And this Court commented on what the display of a swastika tattoo could mean to the person displaying it in *Hicks v. Commonwealth*, 2009 WL 3526699, at 8 (Ky. Oct. 29, 2009).

The Appellant stands on his argument in his Brief for Appellant that this error was prejudicial and requires reversal. The same is true regarding the improper admission of the Stacy Crail pill bottle and the drug dog alert which the Court of Appeals found to be error but harmless, as well as the introduction of the other irrelevant physical evidence introduced and the statements by several female witnesses refusing to tell the jury where they lived. The best the Appellee can do is argue the Appellant's argument about prejudice is "nonsense." However, the prosecutor at trial did not think it was nonsense. The prosecutor believed there was an inference of wrongdoing by Clark- that is why she wanted the information before the jury. She argued it was relevant to his credibility. VR 3/17/11; 10:41:30. And it is for certain she was not trying to bolster his credibility. Clark's credibility was important because he contradicted the Commonwealth's case

about Appellant's motives for getting out of the car. His version was the Appellant was trying to get an enraged Erica Abney back in the car, rather than he was seeking to attack women he thought were gay.

III.

The Commonwealth conceded the imperfect self-perfect portion of the assault fourth degree instruction was erroneously drafted. He argues that it did not constitute palpable error. As the Appellant argued in his Brief for Appellant, the Court of Appeals and the Appellee look at the case only through the proof offered by the Commonwealth. But the prosecutor offered no evidence to dispute that the Appellant was medically fragile which was the source of his fear of being hit. The prosecution offered no evidence to dispute that his black eye came from the injuries from his accident, not from any fight. Oddly, the Appellee wants this Court to assume the jury could not have believed the Appellant and his version of events because of his appearance. In short, the Appellee wants the Court to believe his photo shows he was an aggressive fighter by character that no one would approach.

But the evidence is uncontroverted that Patton was armed with a homemade hammer named Thor and Akemon was armed with a knife at the time he says he was cut. Additionally, some of the men's testimony was consistent with the Appellant's. Pfeiffer said he took off his shirt; Appellant said the man took his shirt off while approaching him; Sizemore saw Patton swing at Searp. The incident had changed in nature by the time the men encountered the Appellant- the crowd had grown and new people, including the three men, had entered the fray from different directions.

The “road map” instruction, as the Appellee calls it, in no way makes it clear that if the jury rejects perfect self-defense, it may consider a lesser assault. Those two concepts are not tied together. Plus, as stated above, the imperfect self-defense portion of the assault fourth degree instructions were defective.

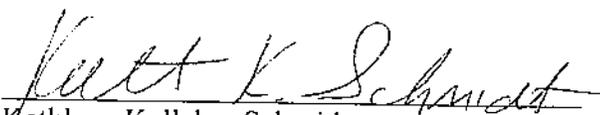
IV.

The Appellee does not get to decide how much evidence the Appellant can choose to introduce to prove his defense. Clark’s testimony went to the Appellant’s motive in getting out of the car. The Appellant should have been allowed to clear this matter up through questioning Clark. The Appellant stands on his Brief for Appellant regarding the other points made on this issue.

Conclusion

The Appellant requests that this Court reverse his convictions and sentence.

Respectfully Submitted,



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