

Supreme Court of Kentucky
Nos. 2010-SC-326-DG & 2011-SC-508-DG

COMMONWEALTH OF KENTUCKY APPELLANT/CROSS-APPELLEE

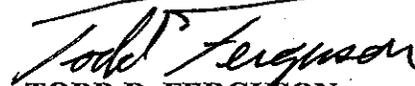
v. On Review from the Kentucky Court of Appeals
Nos. 2007-CA-1264 & 2008-CA-2376
Appeal from Logan Circuit Court
Hon. Tyler L. Gill, Judge
Indictment No. 00-CR-126

JAMES W. STEADMAN APPELLEE/CROSS-APPELLANT

Reply/Responsive Brief for the Commonwealth

Submitted by,

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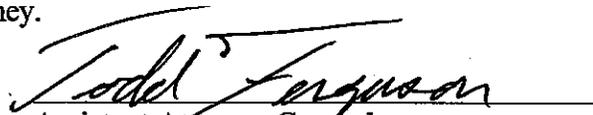


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CERTIFICATE OF SERVICE

I certify, this 3rd day of July, 2012, that the record on appeal was not removed from this Court and that a copy of the Reply/Responsive Brief for the Commonwealth has been served: by mailing to Hon. Tyler L. Gill, Judge, Logan Circuit Court, Courthouse, 200 West Fourth Street, P. O. Box 667, Russellville, Ky. 42276-0667; and Hon. Kyle Anthony Burden, 436 South Seventh Street, Suite 100, First Floor, Louisville, Ky. 40203-1981, Counsel for Appellee/Cross-Appellant; and *via* e-mail to Hon. Gail Guiling, Logan County Commonwealth's Attorney.



Assistant Attorney General

INTRODUCTION

James Steadman was convicted, in 2007, of Theft by Deception Over \$300 and Persistent Felony Offender in the Second Degree and was sentenced to eight years imprisonment. This brief is a reply concerning the original issue (whether the trial court retained jurisdiction to order restitution) and is responsive concerning the cross-motion issue (the timeliness of the CR 60.02 motion).

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this case, but is happy to present oral argument to this Court, if the Court feels it would help with the resolution of the issue.

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COUNTERSTATEMENT OF THE CASE

In the Kentucky Court of Appeals, the Commonwealth presented the following as a statement of the facts¹:

On August 4, 2000, appellant was indicted for theft by deception over \$300. A subsequent indictment was entered on July 7, 2005, for theft by deception over \$300 and persistent felony offender in the first degree.

Robert Blackford, has been an auctioneer for over 33 years. He was asked to conduct an auction on April 8, 2000, at Shaker Equipment Company for equipment which was coming mostly from the Shelton Equipment Company bankruptcy, plus some consignments. The conditions of the sale were that all accounts had to be settled on the day of the sale.

Appellant bought 14 items for \$29,175.00 and paid by check. Appellant bought a GMC truck for \$1,100.00, John Deere push mower for \$100.00, John Deere parts, a weed-eater, a parts washer, mower blades, four used tires, a Volvo truck and trailer for \$19,800.00, a wagon, and a Ford 6600 tractor for \$6,250.00. Appellant's check was returned from Pioneer Bank for insufficient funds, and after it was put in a second time it came back again for insufficient funds. Mr. Blackford talked with appellant several times and contacted appellant by letter.

Mr. Blackford had a meeting on July 5, 2000, to settle the bankruptcy matter of the Shelton Equipment Company, which was the purpose of the auction, and appellant was present, so Mr. Blackford again requested payment from appellant.

Mr. Blackford learned of the location of the Ford tractor, it was at a John Deere dealership in Bowling Green, and he later recovered the tractor upon payment of a repair bill for \$3,397.02. Also, Mr. Blackford later located the truck and trailer, the truck was at a repair shop and the trailer was at Lonnie Matthews's farm, and he was able to recover them after paying a \$1,400.00 repair bill. When the

¹The Commonwealth believes, due to the cross-motion issue, that it is necessary to expound on the facts of the case to a greater extent than was done in its original brief.

Volvo truck was recovered from the repair shop the paperwork was in Lonnie Matthews's name.

Mr. Blackford stated that, concerning the terms of the sale, the titles would be released upon the checks clearing or the payment of cash. The truck and trailer had liens on them when they were sold and the lien on the trailer was released on May 2, 2000. The Ford tractor did not have a title, tractors do not transfer by use of a title, and it was conveyed by the sales receipt. The same was true for the parts that appellant bought. Appellant had a receipt for everything he bought at the auction, Mr. Blackford handed it to him. Mr. Blackford said the titles would have been mailed for the vehicles once the check had cleared and that the bankruptcy court would have furnished a title for the pick-up truck. Appellant received the goods for which he paid with the bad check. When appellant's check did not clear, Mr. Blackford had to go to the bank to get a loan in order to pay the sellers of the items.

Sam Lawson owns the John Deere dealership in Bowling Green, and in June of 2000, he did some business with appellant. Mr. Lawson sold appellant a John Deere tractor, and as part of the deal he took a used Ford 6600 tractor from appellant in trade. Mr. Lawson stated that he believed the value of the Ford tractor was around \$5,500.00. After learning of the problems with the sale of the Ford tractor, Mr. Lawson let the auction company have the Ford tractor for the amount of the repairs they had made on it.

At some point during their business, Mr. Lawson was taken to a farm by appellant, where Mr. Lawson delivered the John Deere tractor that appellant had bought, and the farm was owned by Lonnie Matthews.

Edie Lock of the Pioneer Bank stated that they received the check written on appellant's account to Blackford Auction Company for the first time on April 13, 2000, and it did not clear because of insufficient funds. Ms. Lock stated that the check was submitted a second time on April 20, 2000, and was again returned for insufficient funds. After the check was returned the second time, appellant never had sufficient funds in his account in order to cover the check. Appellant had a pattern of checks returned for insufficient funds around the time that the Blackford Auction Company was attempting to get

payment for its check: there were three NSF checks returned in March 2000; there were four NSF checks returned in April 2000; there were six NSF checks returned in May 2000; there were three NSF checks returned in June 2000; and there were eight NSF checks returned in July 2000.

Danny Smith, of Shaker Equipment Sales, handled a bankruptcy sale for Shelton Equipment; First Star Bank was the first lien holder and they had contacted Mr. Smith and gave him a contract to conduct the sale. Following the auction Mr. Smith saw appellant leave with a Ford tractor and some parts. On the day of the auction, Lonnie Matthews and another guy took the tractor trailer and the pick-up truck that appellant bought at the auction. Mr. Smith never received any complaints from sellers or from the bankruptcy court that they were not properly paid for their sold items. Mr. Smith stated that the property that appellant left with on the day of the auction certainly had a value of over \$300.

In 2000, Herman England, Jr., owned a 1990 Volvo road tractor and a trailer and they were sold at a consignment auction conducted by Blackford Auction Company. Mr. England received payment from Mr. Blackford, the lien that was on the tractor and trailer was paid and released, and there was no problem with the title. Later, a forged title was created for the Volvo tractor and trailer which was notarized by Charles Jones.

Joe Thomas sold a Ford tractor at the Blackford Auction for over \$6,000.00. Mr. Thomas was paid by Mr. Blackford for the purchase price and there was no lien against the tractor.

Randall Epley, a former Commonwealth's Attorney for Logan County, never heard from appellant about the case after Mr. Epley wrote appellant a letter requesting information about the situation.

Lonnie Matthews went to the auction on April 8, 2000 and appellant was there as well. The trailer that appellant bought at the auction was later located on Mr. Matthews's farm and the Volvo road tractor was located at a repair shop at the same time, and Mr. Matthews had possession of both. Mr. Matthews stated that Charles Jones had called him in 2001 and offered Mr. Matthews the truck and trailer; Mr. Jones said that they belonged to appellant.

Mr. Matthews denied driving the tractor-trailer from the auction.

Charles Jones testified that his son owned a car dealership in Somerset, and that he worked there most of the time. Mr. Jones stated there was a Volvo tractor-trailer on the lot; it had showed up one morning and appellant called later, saying it was his and he wanted to sell it. Mr. Jones sold it to Lonnie Matthews. Mr. Jones stated that a man named England came to the dealership and requested a new title for the tractor-trailer - for appellant's tractor-trailer - and that title then passed to Mr. Matthews.

Avery Matney, of Pioneer Bank, testified that he learned of the check written by appellant to Mr. Blackford, and that it was returned twice. Mr. Matney recalls appellant promising a wire transfer to cover the Blackford check, but that transfer was never received.

On cross-examination, appellant brought out that, at some point, Mr. Matney lost track of appellant and thought that appellant had probably taken off with the trailers which Mr. Matney had loaned him money to buy. Mr. Matney never recovered the trailers.

Diana Hinton, Deputy Logan County Clerk, testified that the lien on the Volvo road tractor and the lien on the trailer were both released on May 2, 2000.

Robert Blackford was recalled to the witness stand and testified that he was involved in the release of the liens of the tractor-trailer; Mr. Blackford paid off the liens. Mr. Blackford stated that appellant never asked Mr. Blackford about obtaining releases of the liens.

Ultimately, after a jury trial, appellant was convicted, on May 29, 2007, of theft by deception over \$300 and persistent felony offender in the second degree and sentenced to eight years imprisonment.

(Brief for the Commonwealth in Case No. 2007-CA-1264, pp. 1-6. (Citations to the record omitted.))

On April 16, 2008, Steadman filed a CR 60.02 motion to vacate the restitution order. (Transcript of Record in Appeal No. 2008-CA-2376, hereinafter TR2376, 4.) Steadman followed that up, on June 23, 2008, with a motion pursuant to CR 60.02(d)

asking that the judgment be vacated, because a box of documents, some possibly exculpatory, had been found in Steadman's Barren County case. (TR2376 43.) On July 22, 2008, the trial court entered an order denying both CR 60.02 motions. (TR2376 63.) On that same day, Steadman filed a supplement to his previous CR 60.02 motion. (TR2376 68.) Steadman asked for reconsideration on August 4, 2008. (TR2376 78.) The trial court denied reconsideration of its order on October 6, 2008. (TR2376 100.) Steadman then filed a motion for *in forma pauperis* status and a notice of appeal on the same date, October 14, 2008. (TR2376 108, 115.) Steadman's request for pauper status was denied on December 11, 2008. (TR2376 127.) Steadman filed a second notice of appeal on December 18, 2008. (TR2376 135.)

On appeal, the Court of Appeals held that Steadman's Notice of Appeal was untimely filed and so his appeal concerning the denial of his CR 60.02 motion was not properly before the Court. (Opinion pp. 17-18.)

Additional facts shall be developed, as needed, in the Argument section of this brief.

ARGUMENT

I.²

**THE TRIAL COURT HAD GENERAL SUBJECT
MATTER JURISDICTION OVER STEADMAN'S
CASE, AND SO STEADMAN'S CONSENT TO A
DELAY IN THE RESTITUTION HEARING BEYOND
FINAL SENTENCING WAS A VALID WAIVER OF
HIS RIGHT TO COMPLAIN ABOUT THE
TIMELINESS OF THE HEARING AND
SUBSEQUENT ORDER OF RESTITUTION.**

The Commonwealth continues to rely upon all arguments made in its initial brief and simply addresses points raised by Steadman in his brief.

Steadman argues initially that his Notice of Appeal from his conviction was tendered on May 29, 2007, and so the trial court immediately lost all jurisdiction to make any further rulings in the case. The first problem with this argument is that the Notice of Appeal was not filed of record until June 20, 2007. (Transcript of Record in Appeal No. 2007-CA-1264, hereinafter TR1264, 662.) The appellate rules all contemplate that the Notice of Appeal is not effective until filed by the clerk of the court - CR 73.02, 73.03, 75.01(1).

Beyond that, Steadman's argument is a smokescreen because the whole question is whether the trial court could retain jurisdiction for a few days after Final Judgment/Sentence of Imprisonment was entered, with Steadman's consent, to conduct a hearing on the question of the amount of restitution. This Court should hold that the trial

²This is the original issue upon which discretionary review was granted and so is a reply to Steadman's arguments.

court retained jurisdiction to hold a restitution hearing and enter a restitution order under KRS 532.033. Here, Steadman agreed to a hearing date outside of the final sentencing hearing - it was for Steadman's benefit, the Commonwealth was ready to proceed - and that should be considered a waiver of the jurisdiction argument. The trial court specifically retained jurisdiction to consider the question of restitution, which it began to examine at the sentencing hearing, but needed a separate hearing where testimony could be obtained. Steadman should not be allowed to cut off jurisdiction to consider the question of restitution when he agreed that a hearing was necessary and consented to a short delay. The restitution order in this case should be affirmed.

II.³

**THE COURT OF APPEALS CORRECTLY HELD
THAT STEADMAN'S NOTICE OF APPEAL WAS
UNTIMELY FILED, AND SO THE APPEAL OF THE
DENIAL OF STEADMAN'S CR 60.02 MOTION WAS
NOT PROPERLY BEFORE THE COURT.**

Steadman first argues that he served his CR 59.05 motion on the tenth day and so it was timely. There are two problems with Steadman's argument. First, the CR 59.05 motion, which is Exhibit 3 in Steadman's Appendix, is undated. Secondly, Steadman's argument that he could not have mailed the motion on the weekend, and thus must have mailed it timely, is not supported by the Corrections policy he attaches to his Appendix as Exhibit 6. The policy merely states that correspondence to be delivered to an inmate will not be delivered on a weekend, it does not address whether there is out-going mail service

³This is the issue raised in Steadman's cross-motion for discretionary review and in his initial brief.

on a weekend. (Section II, first paragraph, of Exhibit 6.)

Steadman next argues that CR 6.05 should apply to a motion filed under CR 59.05 (to expand the time for properly filing said motion). The problem with this argument is that this Court clearly answered this proposition in the negative in Arnett v. Kennard, 580 S.W.2d 495 (Ky., 1979). This has been settled law for at least 32 years and Steadman makes no persuasive argument for a change. This Court should uphold the Court of Appeals on this issue.

Steadman specifically claims that he is seeking remand to the Court of Appeals for review of the substantive argument concerning the denial of his CR 60.02 motion, but if this Court should choose to address the merits of the denial of his CR 60.02 motion the Commonwealth strongly argues for the affirmance of the trial court's ruling.

The standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky, 1996); Gross v. Commonwealth, 648 S.W.2d 853, 858 (Ky, 1983). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky, 1999); Johnson v. Commonwealth, 184 S.W.3d 544, 551 (Ky, 2005).

Steadman first raised his argument about the box of documents found in his Barren County case by way of his CR 60.02(d) motion. (TR2376 43.) In that motion, Steadman referenced a letter from a Special Commonwealth's Attorney in the Barren County case, but did not attach the letter. The trial court denied the CR 60.02 motion,

specifically noting that the letter from the Commonwealth's Attorney was not attached and there was no evidence about a large box of documents. (TR2376 66.) Steadman then filed a motion for reconsideration, to which he did attach the letter concerning the box of documents from the Special Commonwealth's Attorney. (TR2376 78, 82-83.) The trial court denied the motion to reconsider:

This letter acknowledges the existence of a "large box". The defendant made reference to this "large box" in a previous motion, but provided no proof of its existence. The letter also acknowledges the possibility that the "large box" contains exculpatory evidence. This in and of itself is merely evidence of the possibility of evidence. It is unclear how this revelation in the defendant's Barren Circuit case, which has now been dismissed, has any bearing upon his conviction from Logan Circuit. Further, the defendant has failed to show how the contents this "large box" could have or would have changed the outcome of his jury trial in Logan Circuit.

(TR2376 101-02.) The trial court even addressed this box of documents in denying Steadman pauper status: "As of the date of this Order, the Court has yet to receive any specific allegation as to how the contents of the 'large box' would have any exculpatory impact." (TR2376 128.)

The trial court absolutely did not abuse its discretion in denying Steadman's CR 60.02 motion. Steadman failed to carry his burden of proof and burden of persuasion. Steadman makes broad allegations that the box contained exculpatory evidence but goes no further. The box was from a criminal case in a separate court and, although there may have been overlap in the two criminal cases, Steadman does not allege how these documents may have affected the results in this case. Steadman has made no attempt to

offer any substantive proof of any of his allegations and the trial court properly denied his CR 60.02 motion without an evidentiary hearing.

CONCLUSION

Based upon the foregoing, the Commonwealth respectfully urges this Court to reverse the Court of Appeals concerning restitution and affirm the judgment of the Logan Circuit Court.

Respectfully submitted,

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