

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
FILE NO. 2011-SC-000325-D  
(COURT OF APPEALS CASE NUMBER 2010-CA-000670)

DARBY ASHLEY BARNES

MOVANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HON. KIMBERLY BUNNELL, JUDGE  
INDICTMENT NO. 09-CR-01031

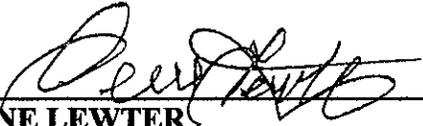
COMMONWEALTH OF KENTUCKY

RESPONDENT

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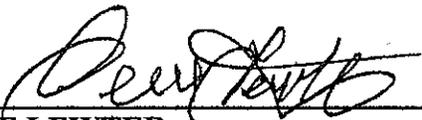
REPLY BRIEF FOR MOVANT, DARBY ASHLEY BARNES

Submitted by:

  
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The undersigned does certify that copies of this Reply Brief for Movant were mailed, first class postage prepaid, to the Hon. Kimberly Bunnell, Judge, Fayette Circuit Court, 521 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Kentucky 40507; the Hon. Kimberly H. Baird, Assistant Commonwealth's Attorney, Suite 300, 116 N. Upper Street, Lexington, Kentucky 40507; the Hon. Herb West, Assistant Public Advocate, 111 Church Street, Lexington, Kentucky 40507; and to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on September 5, 2012.

  
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## REPLY BRIEF

It is the purpose of this reply brief only to point out areas in the Commonwealth's brief which could mislead or confuse the issues, and not to reargue the matters already adequately covered.

Essentially the Commonwealth in its brief merely quoted from the Opinion of the Court of Appeals. With respect to Argument One, involving the use of the color photograph by the officer to bolster the confidence of the eyewitness in her pretrial identification, this Court should consider the fact that the reason the best argument was not made by trial counsel was the fault of the Commonwealth and not Movant's trial counsel. Had the Commonwealth properly divulged this information prior to the suppression hearing involving the admissibility of the identification by Manning, or any time prior to trial, counsel would have been in a much better position to have made the appropriate argument.

The entire problem was thus brought about because the information concerning the 8 x 10 color photograph never came to light until the day of the trial. The Commonwealth here simply ignores the fact that the entire problem was created by the Commonwealth's failure to divulge the information at a time when Movant's counsel would have been able to use the information in an appropriate manner. It thus became palpable error only because when the Commonwealth threw the curveball at Movant's counsel in the middle of the trial counsel did not make the best argument available, which is much easier to find in hindsight. All trials would involve only palpable error if the Commonwealth waited until the day of trial to turn over all of its evidence to the defense, because many arguments that could have been envisioned over time and thorough analysis would be missed by counsel when provided only during the trial.

With respect to Argument Two, the Commonwealth again merely quoted from the Court of Appeals, calling it a well-reasoned analysis, before stating that no prejudice "could have accrued" even if the testimony was erroneously admitted. This is tantamount to conceding on this issue. Neither the Court of Appeals nor the Commonwealth properly dealt with the issue of harmless error. The final paragraph from the Opinion of the Court of Appeals as quoted by the Commonwealth, page 11 of its brief, merely concluded, "assuming arguendo that even if we determined the trial court abused its discretion, the error would have been harmless because the testimony was that the print could not be considered a match."

To simply ignore, as the Court of Appeals did, the additional part of the testimony, the very essence of Movant's argument, does not answer the legal issue involved herein. It is true that the officer testified that the partial print was not a match to Movant, and had he stopped at that point the Court of Appeals would be correct and there would be no issue on the subject. However, the Commonwealth at the trial successfully convinced the trial court that it was relevant and important to tell the jury that there were four matching points in the search for a complete match. It is very disingenuous for the appellate Commonwealth to ignore the evidence of the matching four points and simply quote the Court of Appeals in saying that it was "harmless because the testimony was that the print could not be considered a match."

The Commonwealth at the trial certainly felt that the four point match was important enough to tell the jury, especially after emphasizing that it was only a partial print. The implication was clear that a partial print which produced four matching points is as good as a full print that produces ten matching points. That was the intent of the

Commonwealth in getting the evidence in, and it was made perfectly clear to the jury.

Both the Commonwealth and the Court of Appeals totally ignored the essence of Movant's second argument, merely quoting from a case that was not even in point, **Fields v. Commonwealth**, 274 S.W.3d 375 (Ky.2008). As pointed out by Movant in its original brief to this Court, the evidence of which Fields complained was simply that the prints were not a match, and had nothing whatsoever to do with the issue in this case where the Commonwealth purposefully added that while it was not a complete match, it was indeed a match at four points of comparison. Apparently neither the Court of Appeals nor the Commonwealth understood Movant's argument that it was that additional evidence that created the problem, not the simple evidence that there was no match. By bringing in the "matching four points on a partial print," the officer and the Commonwealth were able to completely nullify what should have been the true import of the evidence, that there simply was no match. That would have satisfied the Commonwealth's claimed basis for introducing the fingerprint evidence, including the matching four points, that the police did their job by attempting to find matching fingerprints. However, not being content to acknowledge the failure to obtain matching fingerprints, the Commonwealth improperly added, essentially, "But we came close to a full match even on a partial print. We got four out of ten."

It is the "coming close" evidence of which Movant complains, not the answer given by the Court of Appeals and the appellate Commonwealth that it is admissible to tell the jury that prints found at a scene were not a match to the suspect. This is known in logic circles as the argument of the "straw man." The Court of Appeals and the Commonwealth created a straw man, then tore it down without dealing with the real issue.

In addition, both the Court of Appeals and the Commonwealth ignored any test for harmless error. The Court of Appeals merely stated that the error would have been harmless because there was testimony that the print could not be considered a match, and the Commonwealth simply quoted the Court and added that no prejudice could have accrued to Movant even if the testimony was erroneously admitted. In the first place, it is impossible to dispute the fact that the testimony was erroneously admitted.

On the issue of whether the matter was harmless, this Court stated in Elery v. Commonwealth, 368 S.W.3d 78, 85 (Ky. 2012):

Criminal Rule 9.24 states that “no error in either the admission or the exclusion of evidence” will warrant reversal unless the “denial of such relief would be inconsistent with substantial justice.” The harmless error inquiry “is not simply ‘whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.’ ” Winstead v. Commonwealth, 283 S.W.3d 678, 689 (Ky.2009) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

Perhaps the best argument that the four matching points had a substantial influence on the jury is the incontrovertible fact that the Commonwealth fought so hard to get the evidence before the jury in the first place. The Commonwealth knew, as does everyone, that fingerprint evidence is very powerful for a jury. The Commonwealth knew that its evidence that the police checked for fingerprints and could not find a match was essentially worthless testimony, and it needed more. The Commonwealth reached into its bag of tricks and pulled out evidence of a partial match for a partial print, and came up a winner.

To tell the jury that the police obtained four matching points out of what was, after

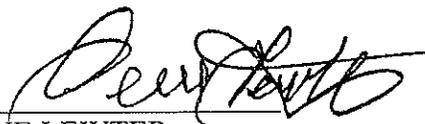
all, only a partial print (totally ignoring the point that all prints found at crime scenes are partial prints since suspects rarely ink their fingers and roll their prints on suitable crime scene locations for the police to find), was of tremendous significance to the Commonwealth in bolstering the questionable eyewitness testimony.

That such fingerprint evidence would have had substantial influence on the jury can hardly be disputed. The Commonwealth knew that, and played it to the hilt. Under the test for harmless error set forth in Winstead, *supra*, as quoted in Elery, *supra*, this Court must find that the unquestionable error was not harmless.

### CONCLUSION

The Commonwealth has failed to respond to any of Movant's argument concerning the four point match of the fingerprints other than to say "no prejudice could have" occurred. This speaks volumes concerning the merit of Movant's argument, and, accordingly, this Court should vacate the judgment.

Respectfully submitted,



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