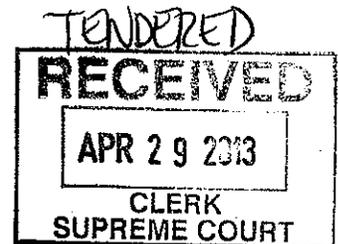
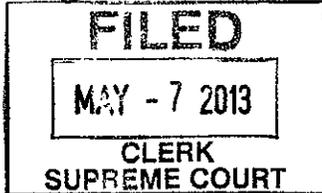


Pursuant to
Court order



**Commonwealth of Kentucky
Supreme Court of Kentucky**

No. 2012-SC-000164-D
(2010-CA-1371)

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. James Ishmael, Judge
Indictment No. 09-CR-516-2

JOSEPH WILLIAM PARKER

APPELLEE

Reply Brief for the Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal was not removed from the court and a copy of the Reply Brief for Commonwealth has been served April 29th, 2013 as follows: first class mail, postage prepaid, to Hon. James Ishmael, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Ky. 40507; via state messenger mail to Hon. Linda Roberts Horsman, Asst. Public Defender, Dept. of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601; and electronically mailed to Hon. Ray Larson, Commonwealth Attorney.



W. Bryan Jones
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PURPOSE OF THE REPLY BRIEF

The purpose of this reply brief is to address matters in the Appellee's brief that the Appellant believes deserve further comment beyond what was presented in the Appellant's original brief. That a particular aspect of an issue in this case is not addressed in this reply brief should not be taken as an indication that the matter has less merit than any other issue addressed in this reply brief, but is a reflection of that the topic has already been sufficiently addressed, or cannot be elaborated on further due to page limitations.

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COUNTER-COUNTERSTATEMENT OF THE CASE

While there is general agreement between the parties regarding the facts of this matter, the Appellee states in his "Counterstatement of the Case" that police gave permission to Target store personnel to show photographs of the two robbery suspects to Ms. Martin before she identified Masengale in the show-up. The record indicates that no such permission was given.

The Appellee states that Target store manager Rodney Branham testified that he showed Ms. Martin still pictures from the store surveillance tape that contained the two robbery suspects, and that he had permission from one of two officers he spoke with to show the victim those pictures. The citations to the suppression hearing provided by the Appellee do not support that claim of permission from law enforcement to show the pictures. Appellee's cite VR 4/22/10; 4:16:20 refers to a passage wherein Mr. Branham says he showed the pictures to the victim. This portion of the record reveals that Mr. Branham testified that he took the photos to an officer and then showed them to the victim, but does not indicate that an officer gave him permission to do so. At VR 4/22/10; 4:16:42, Mr. Branham actually testified that he did not remember if a police officer told him to show them or not.

The Appellee cites to VR 4/22/10; 4:25:05, which is a part of the suppression hearing where Mr. Branham testified that he did not remember anybody stopping him from showing the pictures to the victim. Mr. Branham stated that no detective stopped him from showing the photos at VR 4/22/10; 4:28:28. This is different from testifying that he was given permission to show the pictures to the victim. The Appellee also cites to VR 4/22/10; 4:30:18, which is a passage wherein Mr. Branham testified that he

believed he showed the pictures to an officer, and nobody stopped him from showing them to the victim. This again is different from testifying that an officer gave permission to display the photos. Mr. Branham's testimony actually concludes with him testifying that he believed he showed the pictures to police, and that he showed them on his own accord, and the officers could not have known what he was going to do. (VR 4/22/10; 4:33:00-4:34:00). The record contradicts the Appellee's version that some law enforcement official gave the store manager permission to show the victim pictures of the two suspects.

The Appellee also states that Detective Todd Iddings made a police report which included the statement, "Also at that time the Target store personnel came out with surveillance photos and were attempting to show them to the victim so I requested that they not do that which would taint the identification." This is accurate. However, the Appellee refers to counsel for Masengale filing a motion that characterized this as a statement by police that "an officer expressly prevented the victim from being shown the photos." First, the portion of Detective Iddings' report quoted says that he requested that the pictures not be shown, and does not say that officers prevented them from being shown. Further, Detective Iddings' testimony at the suppression hearing was that he made an error in his report, and that he had asked to see the pictures, but did not ask not to show them and did not prevent anyone from showing the photos. (VR 4/22/10; 4:54:40-5:01:40). Again, the point is that Detective Iddings' testimony does not support the claim that law enforcement gave permission to show the pictures or that law enforcement claimed to have prevented them from being shown.

ARGUMENT

I.

THE COMMONWEALTH DID NOT WAIVE THE ISSUE OF THE APPELLEE'S LACK OF STANDING TO CONTEST THE IDENTIFICATION OF HIS CO- DEFENDANT MASENGALE

The prosecution objected to the participation of the Appellee's trial counsel in the motion to suppress the identification of his co-defendant Masengale. The prosecutor objected to the Appellee's attorney asking questions on the basis that, "This is about the show-up and his client was not identified in the show-up." (VR 4/22/10; 5:03:17-5:03:36). The trial judge overruled the motion. (VR 4/22/10; 5:04:04-5:04:15). This clearly established that the Commonwealth objected on the basis of a lack of standing by the Appellee to object to the identification of a co-defendant. The matter was brought to the attention of the trial court, ruled upon, and therefore preserved for appellate review. RCr 9.22; Elery v. Commonwealth, 368 S.W.3d 78, 89 (Ky. 2012).

The Appellee argues in his brief that the Commonwealth also waived the issue of standing when it did not file a cross-appeal on that matter. The Appellee cites Stevens v. Commonwealth, 354 S.W.3d 586, 589 (Ky. App. 2011) for the proposition the Commonwealth was required to file a cross-appeal to preserve its argument that the Appellant lacked standing. Stevens is distinguishable from the Appellee's case. In Stevens, the reason that a cross-appeal was required was that the Commonwealth was maintaining on appeal the validity of a search that the trial court had invalidated by granting a motion to suppress. In the Appellee's case, the Commonwealth argued on

direct appeal in the Court of Appeals to uphold the trial court ruling denying the motion to suppress. The Commonwealth was in the role of the Appellee when this case was in the Court of Appeals, and did not have to cross-appeal to preserve the standing issue, as is clear from Carrico v. City of Owensboro, 511 S.W.2d 677 (Ky. 1974).

In Carrico, the appellee/city was fighting an action by a citizen/appellant challenging an urban renewal project. The citizen lost by summary judgment in the trial court, on a basis other than lack of standing, although lack of standing had been asserted by the city at the trial court level. On appeal, the citizen argued that the city could not raise lack of standing in the Court of Appeals, because it had not cross-appealed on that issue. In rejecting that argument, the appellate court wrote, "The appellees seek only to have the judgment affirmed, therefore, without filing a cross-appeal, they are entitled to argue that the trial court reached the correct result for reasons it expressed and for any other reasons appropriately brought to its attention." Id. at 679. (Citations omitted). The Court of Appeals then proceeded to affirm the trial court on the basis of a lack of standing on the part of the citizen. Id. at 679-80.

The Commonwealth, as the Appellee in the Court of Appeals, was entitled to argue a lack of standing for the then-Appellant Parker, even if no cross-appeal was taken, since the issue was raised in the trial court and the Appellee may argue to uphold the trial court for the reasons given by the trial judge or "any other reasons appropriately brought to its attention," such as lack of standing.

II.

THE APPELLEE LACKED STANDING TO CHALLENGE THE IDENTIFICATION OF HIS CO- DEFENDANT MASENGALE

The Appellee cites to cases referenced in the Appellant's own brief, in which other jurisdictions have allowed a defendant to challenge the identification of a co-defendant. The Appellee tries to distinguish these identification cases from other cases which hold that a defendant may not assert the rights of others. The Appellee argues that he has a "substantial personal stake" when the identification of a co-defendant leads to him and undercuts his defense. A defendant has a substantial personal stake when evidence incriminating him is discovered in a search of a premises or area to which he has no claim of ownership or privacy, but Fourth Amendment law as cited in the Appellant's brief clearly denies him standing to contest the search in that circumstance. The Appellee's personal stake in the identification of Masengale is no greater here than the personal stake of the defendant in these Fourth Amendment cases.

The Appellee argues that he should be granted standing to challenge the identification of a co-defendant because the Appellee is not an "interloper" to the proceedings. This argument does not distinguish the Appellee's situation from that of the defendant who wants to challenge the search of his co-defendant's premises or area, but is unable to assert his co-defendant's rights. It is difficult to imagine when a defendant would be an "interloper" in his own prosecution.

The Appellee argues that his position reflects good public policy, and cites to an argument from People v. Bisogni, 4 Cal.3d 582, 586, 483 P.2d 780, 783 (1971) (internal

citations omitted). That case states that the reason to exclude improper show-up identification is because if it is unreliable as a matter of law and can result in the conviction of an innocent person, and it is therefore equally unreliable when directed toward the identity of a co-participant in the crime as when it relates to the identity of the defendant on trial. Whether the identification of Masengale by Ms. Martin was reliable has nothing to do with whether the identification of the Appellee by Masengale was reliable. Surely a partner in crime is disadvantaged by his cohort giving him up to the police, but that has nothing to do with whether his identification by his co-participant was reliable, which is the reliability that should be of concern in these types of cases.

Kentucky should align itself with those jurisdictions referenced in the Appellant's brief (Texas and Kansas) which do not permit challenges to a co-defendant's identification. It is better public policy that society weigh the possible benefits of an exclusionary rule against the substantial societal costs exacted by that rule. Herring v. United States, 555 U.S. 135, 145, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (Citation and quotation marks omitted). The effects of exclusion are proper considerations for this Court, as allowing those who are down the criminal chain from an allegedly questionably identified defendant to challenge that defendant's identification can have a broad and negative impact on law enforcement.

III.

THE IDENTIFICATION OF MASENGALE BY THE VICTIM WAS NOT UNDULY SUGGESTIVE AND WAS RELIABLE

The Court of Appeals agreed with the trial court that the show-up identification of Masengale by Ms. Martin to be unduly suggestive. The Appellee argues that since the

Appellant did not take a cross-appeal on this issue, that it is “arguably waived.” Just as has been previously discussed in Argument I with regard to the standing issue, a cross-appeal was not required. Carrico v. City of Owensboro, 511 S.W.2d 677 (Ky. 1974) makes it clear that an appellee seeking to have the trial court ruling affirmed is entitled to argue that the trial court reached the correct result for the reasons expressed by the trial court, or for any reason appropriately brought to the trial court’s attention. Since the issue of suggestiveness was raised at the trial court level during the suppression hearing, it is certainly a matter that the then-appellee Commonwealth could raise on appeal to the Court of Appeals, without having to file a cross-appeal. The issue of suggestiveness was not waived and the Appellant is free to argue that the show-up was not unduly suggestive.

The Court of Appeals incorrectly held that the show-up identification by Ms. Martin was unduly suggestive. Show-ups are not per se violative of due process. Brown v. Commonwealth, 564 S.W.2d 24, 29 (Ky. App. 1978). Ms. Martin having viewed photographs of two men who matched the description she recently gave was not unduly suggestive. Further, before she was asked to see if she could identify Masengale, the officers told her that they had a person in custody who matched the description she had given, and that he might or might not be one of the robbers. This is important, as it demonstrates that the police cautioned Ms. Martin that the man might not be one of the perpetrators, not that he was one of the assailants. Masengale was standing by a police car, but was not handcuffed, was smoking, and was accompanied by only one officer, showing that the police took steps to minimize a suggestive atmosphere.

Of course, even if the show-up is considered unduly suggestive, Ms. Martin’s identification of Masengale is admissible if reliable under the five-factor test of Neil v.

Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The Appellee argues that the Commonwealth did not provide proof on many of those factors. Specifically, the Court of Appeals referenced three of the five factors in its Opinion, and held that the show-up was unreliable because the Commonwealth did not introduce "...any testimony or evidence from Ms. Martin herself, or from anyone else, addressing these three factors...." (Opinion, p. 9). Both the Court of Appeals and the Appellee are incorrect.

The first factor cited by the Court of Appeals was the opportunity to view the criminal at the time of the crime. Lexington Police Department Lieutenant Chris Van Brackel testified at the suppression hearing that after arriving at the store within a minute of receiving notification of the robbery, Ms. Martin described two men approaching her. One man hit her, and her purse was taken. She described both men as wearing jeans, zip-up "hoodies" with "skateboarder" style writing or design, described the colors of some clothing, and said that she saw them flee the scene by running away toward the interstate. (VR 4/22/10; 4:38:05-4:40:40). The trial judge focused on her ability to describe the men while being victimized. (VR 4/23/10; 5:28:20-5:30:46). Certainly, this is evidence related to the first factor of opportunity to view the assailants, who were obviously in close proximity to her at the time. It is therefore incorrect to say that no evidence was presented on this factor of opportunity to view the criminal at the time of the crime.

The second factor cited by the Court of Appeals was the degree of attention paid to the robbers by Ms. Martin. The previously cited description of the men by the victim, including their gender and clothing speaks to the level of attention she paid to the attackers. This same evidence also suggests that she was paying attention to what

happened to her and who was robbing her. It is therefore again incorrect to say that no evidence was presented regarding the amount of attention she paid to the robbers.

The third factor mentioned by the Court of Appeals, (which is the fifth factor discussed in Neil v. Biggers) was the passage of time between the crime and the identification. The Court of Appeals stated that there was a lack of proof regarding the passage of time between the crime and the identification. The record does contain evidence for the time line. Defense investigator James Devasher testified at the suppression hearing that Ms. Martin entered the store at 7:51 p.m., and that by 8:07 p.m., store personnel, medical personnel, police and the victim's family members were at the store. (VR 4/22/10; 5:20:57-5:21:35; 5:22:57-5:23:49). The hearing evidence established that Masengale was identified by Ms. Martin, Masengale had told the police about the Appellee, and the Appellee was taken into custody. The record shows that Masengale was in custody by 11:46 p.m. (TR I, "Uniform Citation," p. 4). Therefore, the entire incident from robbery to arrest of both Masengale and the Appellee, during which time Ms. Martin's identification of Masengale would have had to occur, was approximately from 7:51 a.m to 11:46 p.m., or about four hours. This means that the record showed that a great amount of time did not pass from the purse-snatch to identification of Masengale, and there was evidence presented to establish a time line.

Using the "totality of the circumstances" test to determine reliability through the five factors, Neil v. Biggers, 409 U.S.at 199; 34 L.Ed.2d at 411, no one factor would control. Substantial and credible evidence to support the trial court's ruling was presented, and there was no abuse of judicial discretion.

CONCLUSION

The Appellant respectfully requests that this Court reverse the Court of Appeals, and that this Court find that the Appellee lacked standing to contest the identification of his co-defendant Masengale, that the identification of Masengale by the victim was reliable and admissible, that evidence from that identification is admissible, and reinstate the conviction of the Appellee. In the alternative, the Appellant respectfully requests that should this Court find that a Commonwealth objection to standing was waived, that this Court still reverse the Court of Appeals and hold that the identification of Masengale by the victim was reliable, that all evidence from that identification is admissible, and reinstate the conviction of the Appellee.

Respectfully submitted,

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