

**Commonwealth of Kentucky
Supreme Court**

Case No. 2012-SC-00431

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SUPREME COURT

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Campbell Circuit Court
Hon. Fred A. Stine, V., Judge
Indictment No. 08-CR-706

BRIAN LEMONS

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

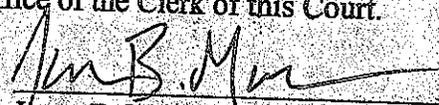
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, the foregoing Brief for the Commonwealth was served, first class, postage pre-paid, U.S. mail to Hon. Fred A. Stine, V., Chief Circuit Judge, Campbell Circuit Court, 330 York Street, Newport, Ky. 41071; and to Hon. Susan Jackson Balliet, Asst. Public Advocate, Dept. of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, and via electronic mail to Hon. Michelle Snodgrass, Commonwealth's Attorney. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.



Jason B. Moore
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INTRODUCTION

Appellee, Brian Lemons, entered a conditional guilty plea in Campbell Circuit Court to one count each of second-degree manslaughter and assault under extreme emotional distress and was sentenced to fourteen years in prison. He reserved the right to appeal the trial court's denial of his motion to dismiss the indictment pursuant to the immunity provisions of KRS 503.085(1). The Court of Appeals reversed, in a 2-1 decision, and remanded the matter to the trial court for entry of an order dismissing the indictment. This Court granted the Commonwealth's motion for discretionary review.

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The Commonwealth requests oral argument as the issues presented herein will greatly affect the handling of motions claiming immunity in the trial courts and appellate courts of the Commonwealth.

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STATEMENT OF THE CASE

Appellee was indicted by a Campbell County grand jury on December 4, 2008, and charged with one count of first-degree manslaughter (TR 1). The charge arose from an incident that occurred on October 11, 2008, wherein appellee stabbed Cory Kessnick resulting in Cory's death (Id.).¹ Appellee entered a plea of not guilty to the charge (TR 25-26). A second indictment was returned against appellee on April 8, 2010, charging appellee with one count of second-degree assault arising out of the same altercation wherein Cory was killed (TR 67).

On April 15, 2010, three weeks prior to the start of the fourth scheduled trial date in this matter, appellee filed a motion to dismiss the indictment on the basis of immunity from prosecution under KRS 503.085(1) (TR 69-74). The Commonwealth filed a response to the motion to dismiss on April 23, 2010, asserting that appellee's motion to dismiss was untimely and lacked merit because the evidence of record showed there was probable cause to conclude appellee's use of force was unlawful (TR 78-83).²

¹ In the documents in the record of this matter, Cory's name is spelled both Cory and Corey. The Commonwealth will use the spelling Cory in this motion because that is how the name is spelled in the indictment, the autopsy report, and medical records.

² In addition to its written response, the Commonwealth also filed materials from the police investigation with the trial court. These materials are included in the record on appeal in a separate envelope, and consist of transcripts of witness statements, police investigative letters, and the autopsy report.

The evidence of record filed by the Commonwealth in response to appellee's motion to dismiss presents a wildly inconsistent picture of the events leading to Cory's death with most of this inconsistency arising from the statements of appellee himself. On October 11, 2008, appellee gave a recorded statement to Newport police regarding the events that lead to Cory Kessnick's death after being stabbed by appellee (TR Envelope, Statement, Brian Lemons, 10/11/08, 1-8). In this statement, appellee asserted that he and his friend, Patrick Link, came to the "Brass Ass" to pick up the girlfriends from work. (Id. at 2). Appellee stated "We pull in the parking lot and there's a crowd of people sitting out there. My girlfriend's one of them, Yvonne. She was sitting out there with three other women and there was a couple guys standing out by the truck." (Id.). Appellee stated that he walked up to his girlfriend who said she did not make any money that night, and "one of the guys said well I give you five dollars or something like that." (Id.). Appellee stated his girlfriend then started arguing with the guy because of his remark and "tried to get up in his face and push him." (Id.).

Appellee then stated that he tried to pull his girlfriend back and calm her down. (Id. at 2-3). Then, according to appellee, "the two guys and my friend Pat started exchanging words. The two guys got real hyped up." (Id. at 3). At that point, appellee stated a guy pulled up to the scene in a black truck, got out of the truck, and punched Link in the face, knocking him down. (Id.). Appellee stated that Link got back up and "one of the two guys,

it's the guy in the truck's brother, he started punching on Pat, too. And the guy in the white stripped shirt hits my girlfriend, knocks her down on the ground." (Id.). Appellee stated that he then started fighting with the guy in the white stripped shirt. (Id.).

Appellee stated this guy came at him, punching him in the ribs, and appellee was punching the guy in the face. (Id.). The guy then backed off and said he was going to kill appellee. (Id.). At that point, appellee said he pulled out a knife and told the guys to leave him alone or he would use the knife. (Id.). Appellee then stated:

the dude come at me again and when he came at me I stabbed him in the left shoulder blade or shoulder area and I pulled it out. And he's still coming at me like he's trying, you know tackle me to the ground so I stabbed him again. And at that point his brother noticed what was going on and he started coming at me, so I took off running around the side of the building. And the guy I stabbed come running around the side of the building after me. I run all the way across the street. They stopped running after me. They turn around and start walking back towards the parking lot area.

(Id. at 3-4).

Two claims in appellee's statement at this point are contradicted by the autopsy report. First, appellee claimed the person he was fighting with, and stabbed, was wearing a white stripped shirt (Id. at 3). However, the victim, Cory Kessnick, was wearing a black t-shirt according to the autopsy report which stated "accompanying the decedent is a plastic bag containing a previously cut open black shirt with no sleeves. There is a 1 1/4

inch cut wound in what appears to be the back of the shirt and a 3/16th of an inch cut wound near it.” (TR Envelope, Autopsy Report – Final Report –, Gregory P. Wagner, M.D., 10/21/08, p. 1). Second, appellee claimed that, during the melee, he punched Cory in the face. According to the autopsy report, however, an external examination of Cory’s head showed no injuries (Id. at 2). Likewise, the Emergency Room Physician Report detailing efforts to revive Cory after he had been stabbed reflects that “there [was] no obvious injury to the face” or neck (TR Envelope, St. Luke Hospital East Emergency Room Physician Report, 10/11/2008, p. 1).

After running, appellee stated that his girlfriend walked around the corner and the two of them returned to the parking lot to look for Patrick Link. (TR Envelope, Statement, Brian Lemons, 10/11/08, p. 4). Appellee said they saw “the guy laying on the ground” but did not see “that much blood on the ground.” (Id.). Appellee said he then saw Link on the ground, walked over to see if he was okay, and the police then arrived at the scene. (Id.). However, while he was away from the scene, appellee threw the knife into a garbage can. (Id.).

One of the police officers that arrived at the scene, Officer R. Gross, filed a confidential report dated October 11, 2008 that was also tendered to the trial court in response to appellee’s motion to dismiss (TR Envelope, Newport Police Department Confidential Report, Police Officer R. Gross to Lieutenant L. Long, 10/11/08, p. 1-4 (unnumbered)). In that report,

Officer Gross stated that he spoke with appellee at the scene and appellee said he, Patrick Link, Yvonne Weaver, and Weaver's daughter had gotten into a fight with Cory Kessnick and others. (Id. at 3). According to Officer Gross:

[Appellee] made several statements about the events. He stated he had observed a male subject thrown (sic) Ms. Weaver to the ground. He stated a male white had approached him, and he fled the area on foot. He stated he was unsure of what had happened, and could not give details to the police. Officers advised Mr. Leomns (sic) he needed to tell the truth, and about the events. Mr. Leomns (sic) continued to state (sic) that he had nothing to do with the events that happened during the incident. Officer Vance and I spoke with Mr. Leomns (sic) for a period of time. He would only state he had not stabbed anyone, had (sic) could not provide any additional information.

I transported Mr. Leomns (sic) to the Newport police H.Q. I and Officer Vance continued to interview Mr. Leomns (sic) while in the parking area of the police department. Mr. Leomns (sic) continued to change the story of the events. He was unable to tell the details of the events the same way (sic) twice. He changed the story from running away, to running around the crime scene. He was or would not tell officers the details about the events. Officer Vance and I continued to speak with Mr. Leomns (sic) at the police department. He would not tell the same details twice about the event. He continued to state he did not stab anyone.

(Id. at 3-4).

Appellee's version of what occurred when Cory Kessnick was stabbed is not supported by the statements of any other witness. Although no other witness stated they actually witnessed appellee stab Cory, no other witness stated they saw Cory corner appellee against a vehicle in the manner

appellee claims. Further, although Patrick Link and Jaemichael Goodwin stated Cory got out of the truck and struck Patrick Link, other witnesses said Cory did not strike anyone.

On October 15, 2008, Patrick Link gave a statement to the police. (TR Envelope, Statement, Patrick Link, 10/15/08, p. 1-14). In his statement, Link stated that he and appellee went to pick up their girlfriends at the "Brass Ass" and pulled up next to the building in the parking lot. (Id. at 2). He stated that he and appellee both got out of the car and Jaemichael Goodwin, Yvonne Weaver and two guys "were talking, smoking a joint." (Id.). Link stated that one of the guys made a comment that Weaver took offense to, at which point Weaver got irrate and appellee started pushing her away and holding her back. (Id.).

Link stated that he then went up to the guy that made the comment that made Weaver irate and "was telling him, look she's been drinking, don't pay any attention to it. He's like, oh, I know, man, don't worry about it, it's cool." (Id. at 4)³ Link stated that after he got finished speaking to the guy, a "guy pulls up in a black Avalanche, really fast into the parking lot." (Id.). According to Link, the driver of the truck "hit me twice, once in the face, right, I guess, in this area, and then when I backed up he got

³ Link's description of the events at this time contradicts vastly with appellee's statement that "the two guys and my friend Pat started exchanging words. The two guys got real hyped up." (TR Envelope, Statement, Brian Lemons, 10/11/08, p. 3).

me in the neck and that's the one that put me down for a minute." (Id.). Link stated that he was dazed for a minute and then saw the guy that hit him lying on the ground. (Id. at 7). According to Link, when he got hit, appellee was still trying to hold his girlfriend back. (Id. at 10).

Jaemichael Goodwin was interviewed by the police on October 11, 2008. (TR Envelope, Statement, Jaemichael Goodwin, 10/11/08, p. 1-16). In her statement, Goodwin said that she was sitting at the side of the building when Link and appellee pulled up and came over. (Id. at 4). Goodwin then said that the other three guys came up and two of them left to get the truck. (Id.). At that point, Goodwin said Yvonne Weaver and the guy still there got into an argument. (Id. at 5) Appellee and Link tried to calm down Weaver and the other guy who were arguing, and the other two guys pulled up in the truck and got out. (Id.). Goodwin said the guy that got out of the driver's side of the car hit Link. (Id.).

Goodwin stated that she then began to tend to Link and was "yelling why'd you do that, why'd you do that, he didn't do anything. And then I turned around to look and to see if he was, you know, at least paying attention or whatever, he was laying on the ground and bleeding. And I got up and I'm like oh, my god, what happened? And Yonnie's boyfriend was still holding her, from what I saw when I looked around. And the guy in the gray started to go after Yonnie and her boyfriend, chasing a little bit around the parking lot." (Id. at 7).

According to what Goodwin recounted, appellee's version of the events could not have happened. Goodwin said that when she saw Cory on the ground bleeding, appellee was still holding back Weaver. According to appellee, Weaver had been knocked to the ground after Link and appellee began to fight with the guy in the white stripped shirt. According to Goodwin, when Cory's brother saw Cory on the ground he started to chase after appellee. Appellee claimed that Cory and his brother both chased after him after the stabbing. According to Goodwin, the brother chasing appellee and Weaver stopped chasing them and went to where Goodwin was with Cory. According to appellee, Cory and his brother chased him and then both walked back to the scene where Cory then apparently went down on the ground bleeding.

Finally, Cory's brothers, Dustin Kessnick and Gary Damon, Jr., were interviewed on two occasions by the police. Dustin was first interviewed on October 11, 2008. (TR Envelope, Statement, Dustin Kessnick, 10/11/08, p. 1-8). In that interview, Dustin admitted that he had little knowledge of the events that occurred because he had blacked out after being hit. (Id. at 3,4,6,7 and 8). However, Dustin stated that he and his two brothers, Cory and Gary, had been at the bar that evening until closing time. (Id. at 4). As they left, Cory went to get the truck which was parked down the street (Id. at 5), and Dustin and Gary stood outside in the parking lot with two girls. (Id. at 4). At that point, Dustin said two guys walked up and

“shit kind of blew up. I don’t know. That’s what I’m saying. After that I don’t remember. I got hit.” (Id.). Dustin continued, “It started an argument is all I remember, and argument started. I blacked out. When I come to though I seen my brother pull in the parking lot but I guess we was fighting already so he jumped out, yeah, I don’t know, and he was on the ground. I’m over there trying to wake him up.” (Id. at 6).

Dustin was then re-interviewed by the police on October 14, 2008. (TR Envelope, Statement, Dustin Kessnick, 10/14/08, p. 1-6). In the second interview, Dustin stated that he and his brothers went out of the bar at closing time, and Cory went to get the truck. (Id. at 1-2). Dustin and his brother, Gary, then went around the corner with some girls while they were waiting for the truck. (Id. at 2). Dustin said an argument started and Cory pulled up in the truck and got out asking what was going on. (Id. at 3). Dustin turned away from Cory because he was being crowded and, when he turned back around, Cory was on the ground bleeding. (Id.) Dustin said he went over to his brother and was trying to stop the blood when he was hit in the back of the head and knocked face first into the ground. (Id.). According to Dustin, Cory did not hit anybody at the scene. (Id.).

Gary Damon, Jr., was also interviewed twice by the police (TR Envelope, Statement, Gary Damon, Jr., 10/11/08, p. 1-6 and 10/14/08, p. 1-6). In a statement taken October 11, 2008, Damon stated that he and his brothers left the “Brass Ass” at closing time, walked outside and began

talking to some girls that were out there. (TR Envelope, Statement, Gary Damon, Jr., 10/11/08, p. 1). Damon stated "Me and Dustin said Cory go get the truck cause he was driving. So he went to get the truck. We're talking to these few girls, two or three or whatever, and there's a couple guys there. And Cory pulls up in the parking lot and he pulls up and gets out of the truck and one of the guys says something. And then next thing I know I turn around and there's a big fight going on and, my brother, Cory's laying on the ground in a puddle of blood." (Id. at 2).

Gary further elaborated as follows:

There was a girl there, an older blonde haired girl, I can't remember her name, and she was hollering about she worked her butt off and only made five dollars. I guess one of my brother's gave her. And her old man was there. He said, he said something to her and then something to us and then his friend who was there was dressed in gray, gray tank top, he said my buddy, he's actually the one that left in the ambulance cause (inaudible) or whatever he did, I don't know. He said that, he said hey it's alright, it's cool, she's alright. Cause she was trying to run her mouth. And I said hey, I said, you know, I've got to work tomorrow, everything's fine, whatever, we're cool, we're leaving. And she's running her mouth, I'm watching her, and then all of a sudden I turn around and my brother's laying in a puddle of blood. The guy in the gray tank top's gone. And the dude in all black takes off running. I chase him across the block. And he's running faster than me. So I turn around, come back, check on my brother, I can't catch him, turn around come back. I'm checking on my brother, he's going in shock, whatever it is. His eyes are rolling back in his head. It was freaking me out. There's another guy there, he's in a cast. The police question him I guess. He come up to me while I was freaking out and he said hey that's the guys who did it. . . . Pointing to the guy in all black.

(Id. at 2-3).

On October 14, 2008, Gary Damon, Jr., gave a second statement to the police. (TR Envelope, Statement, Gary Damon, Jr., 10/14/08, p. 1-6). In the second statement, Damon again stated that he and his brothers left the bar at closing time and Cory walked down the street to get the truck. (Id. at 2). While Cory was gone, Damon and Dustin Kessnick begin talking with people outside the bar and an argument ensues between Dustin and a stripper over five dollars. (Id.). Damon said Dustin started to walk over to where the stripper was and two guys got up. (Id.). Damon tried to get between Dustin and the others at which point Cory pulled up in the truck and Damon said "let's go" to Dustin. (Id. at 2-3). According to Damon, "Next thing I know all hell broke loose and I turn around and my brother's laying on the ground." (Id. at 3).

In its order denying the motion to dismiss, the trial court stated "There are numerous witness statements recounting the evening in question, however, many give conflicting accounts of the events. In addition to the statements of the witnesses, the Defendant also gave statements to the police during the investigation at the scene, in the police cruiser and at the police station, some of which are in direct contradiction to prior statements made by the Defendant." (TR 85-86). The trial court then reviewed the procedures for considering a motion to dismiss based on an invocation of immunity under

KRS 503.085(1) as set forth by this Court in *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009). (TR 86-88).

In its analysis of the evidence of record, the trial court went through the various statements from witnesses and appellee in great detail setting forth the inconsistencies among the versions of the events of October 11, 2008 (TR 91-94). The trial court summed up the evidence of record in this matter in concluding his order denying appellee's motion to dismiss:

There are numerous discrepancies in the witness' and Defendant's recollection of the events that transpired that night. No one saw the Defendant stab the victim although the Defendant admitted to it after initially denying any involvement. There is conflicting testimony as to who was the initial aggressor. The testimony is also unclear as to what transpired before the altercation began and even after the stabbing occurred. Some witnesses remember Cory pulling up alone in the vehicle while others say two men were in the vehicle. Some witnesses have Cory attacking Patrick Link while others do not. The Defendant says that Cory chased him after the stabbing while his brothers say that he was down almost immediately after he exited the vehicle. These contradictions cannot support a determination that the force used by the Defendant was lawful or that he was acting in self-defense.

(TR 94).

On August 27, 2010, appellee accepted the Commonwealth's offer on a plea of guilty whereby appellee would enter a plea of guilty to one count each of second-degree manslaughter and assault under extreme emotional disturbance (TR 99). In exchange for the guilty plea, the Commonwealth would recommend that appellee be sentenced to ten years in

prison for the second-degree manslaughter conviction and four years in prison for the assault EED conviction with the sentences to run consecutive for a total sentence of fourteen years in prison.⁴

Appellee filed a motion to enter a guilty plea on August 27, 2010, and reserved the right to appeal the trial court's denial of his motion to dismiss pursuant to RCr 8.09 (TR 100). On August 23, 2010, the trial court conducted a hearing on appellee's motion and entered its judgment on guilty plea on August 27, 2010 (TR 102-104). On October 14, 2010, the trial court entered its judgment and sentence on plea of guilty and sentenced appellee to fourteen years in prison (TR 105-107).

Thereafter, Appellee filed an appeal with the Court of Appeals asserting the claim of error reserved by the guilty plea, i.e. the trial court erred by denying his motion to dismiss on the basis of immunity under KRS 503.085(1). On June 22, 2002, the Court of Appeals rendered a 2-1 opinion reversing appellee's convictions and remanding this matter to the trial court with directions to dismiss the indictment pursuant to KRS 503.085. Slip Opinion, p. 16.

In so holding, the majority, in an opinion authored by Senior Judge Joseph Lambert, recognized this Court's holding in *Rodgers* that immunity under KRS 503.085(1) attaches " 'unless there is probable cause to

⁴ The fourteen year sentence was also to run consecutive to a one year sentence appellee received in an unrelated case for a total sentence of fifteen years in prison.

conclude that the force used was not legally justified[]” and that the Commonwealth bears the burden of proving there is probable cause to so conclude. Slip Opinion, p. 6 quoting *Rodgers, supra*, at 755. The majority also recognized that this Court in *Rodgers* referred to the “totality of the circumstances” test for determining probable cause that was set forth by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 232 (1983). *Id.* at 7-8.

Despite its recognition of this Court’s holdings in *Rodgers*, the majority held that, in considering an immunity claim under KRS 503.085(1), “the trial court must only consider the totality of the circumstances to determine whether there is an objectively reasonable basis to conclude that the defendant’s use of force was unlawful.” Slip Opinion, p. 9. As the dissent pointed out, the test under *Gates* does not turn on an “objectively reasonable basis,” but, rather, the test is whether “there is a fair probability” that the use of force was unlawful. Slip Opinion, pp. 19-20. The “objectively reasonable basis” standard adopted by the majority comes not from *Gates* but from *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Slip Opinion, p. 8.

After setting forth its new test for probable cause, the majority concluded that its review of the trial court’s decision should be *de novo* because “the trial court’s factual findings are not at issue.” Slip Opinion, p. 9 citing *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001) citing *Ornelas*,

517 U.S. at 691. The dissent again departed with the majority's conclusion as to the standard of appellate review. Slip Opinion, p. 18-19. The dissent, citing to this Court's decision in *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010), noted that under *Gates* the standard of review on appeal was simply whether there was a "substantial basis for ... conclud[ing]" that probable cause existed, and also noted that this Court in *Banks* "stressed that the *de novo* review standard applied only to warrantless searches." *Id.* at 19.

After recasting the test for probable cause and establishing a *de novo* standard of review, the majority reviewed the witness statements and evidence. In doing so, the majority essentially ignored that fact that appellee had given contradictory and inconsistent statements to the police regarding the events by first denying any involvement in the fight until finally confessing to stabbing Cory, but claiming it was done in self-defense. In the majority's words, "[Appellee's] behavior and statements after the fight are suspicious," but not sufficient to establish probable cause. Slip Opinion, p. 15. The majority, therefore, reversed appellee's conviction and remanded this matter to the trial court for entry of an order dismissing the indictment.

This Court granted the Commonwealth's motion for discretionary review.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT'S DENIAL OF APPELLEE'S MOTION TO DISMISS THE INDICTMENT ON THE BASIS OF IMMUNITY UNDER KRS 503.085

The sole issue in this matter concerns the Court of Appeals reversal of the trial court's denial of appellee's motion to dismiss the indictment against him on the basis of KRS 503.085(1) which grants immunity to a criminal defendant "who uses force as permitted in KRS 503.050, KRS 503.055, KRS 503.070, and KRS 503.080" In reaching its decision, the Court of Appeals majority applied the wrong probable cause standard and standard of review leading it to erroneously concluded the Commonwealth had failed to meet its burden for proceeding to trial.

A. KRS 503.085(1) and *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009).

During the 2006 regular session, the General Assembly passed Senate Bill 38 which amended KRS 503.010, 503.050, 503.070, and 503.080, and created two new sections of KRS 503. 2006 Ky. Acts Ch. 192. One of the new sections of KRS 503 created by Senate Bill 38 became codified as KRS 503.085. That statute, which is at issue in this matter, provides as follows:

(1) A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1) of this section, but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.

(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff, if the court finds that the defendant is immune from prosecution as provided in subsection (1) of this section.

In *Rodgers v. Commonwealth*, 285 S.W.3d 740, 749-57 (Ky. 2009), this Court analyzed KRS 503.085 and set forth how the immunity provision should be applied when raised in trial courts. Initially, the Court noted that KRS 503.085 was "purely procedural, and by prohibiting prosecution of one who has justifiably defended himself, his property or other, it in effect creates a new exception to the general rule that trial courts may not dismiss indictments prior to trial." *Id.* at 753 (footnote omitted).

According to the Court, “the new law is meant to provide . . . protection against the burdens of prosecution and trial as well.” *Id.*

Turning then to the issue of how trial courts should go about determining if the immunity statute is applicable to a given defendant, the Court first determined that pre-trial evidentiary hearings where the defendant must show by a preponderance of the evidence that the use of force - a procedure employed by other jurisdictions with similar immunity statutes, *See People v. Guenther*, 740 P.2d 971 (Colo. 1987); *Dennis v. State*, 51 So.3d 456 (Fla. 2010); *State v. Duncan*, 709 S.E.2d 662 (S.C. 2011) - was not required or warranted under KRS 503.085. *Id.* at 754. In rejecting this procedure, the Court inferred from the language of KRS 503.085(2) that the “controlling standard of proof” in considering an immunity claim was “probable cause” not “preponderance of the evidence.” *Id.*

The Court then stated as follows:

Probable cause is a standard with which prosecutors, defense counsel, and judges in the Commonwealth are very familiar although it often eludes definition. Recently, in *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006), this Court noted the United State Supreme Court’s definition in *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983): “[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.” Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that

a defendant's use of force was unlawful. If such cause does not exist, immunity must be granted, and conversely, if it does exist, the matter must proceed.

Id. at 754-55.

After setting forth the proper standard under which to consider an immunity claim, the Court turned to the issue of "how the trial courts should proceed in determining probable cause." *Id.* at 755. The Court held that "[t]he burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Id.* The Court specifically rejected the argument that the trial court conduct an evidentiary hearing on the issue because such "would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse" and "would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial." *Id.*

Based upon this Court's decision in *Rodgers*, the following guidelines for considering a claim of immunity are established: (1), the burden of proof is on the Commonwealth to establish probable cause that the defendant's use of force was unlawful; (2) trial courts are to apply the same standard in considering probable cause under the immunity provision that they employ in considering whether probable cause exists for issuing a search

warrant; (3) evidentiary hearings are not to be conducted, and the trial court must make its decision based upon the evidence of record; and, (4) there is a strong preference for jury trials on all elements of a criminal case. RCr 9.26; *See also* Ky. Const. §§ 7 and 11, KRS 29A.270(1) (expanding constitutional right to a jury trial to “all criminal prosecutions.”).

B. The Court of Appeals applied an incorrect standard of review in considering this matter.

As noted above, in *Rodgers*, this Court stated “[j]ust as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant’s use of force was unlawful.” Thereby, this Court, at least implicitly, held that trial courts should apply the same standards applicable to the determination of whether probable cause exists for issuing a search warrant when faced with a motion to dismiss an indictment on the basis of KRS 503.085 immunity. Those standards were plainly set forth by this Court in *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010).

Therein, this Court, quoting the United States Supreme Court, stated:

The task of the [warrant] issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be

found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a “substantial basis for ... conclud[ing]” that probable cause existed.

302 S.W.3d at 48 quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983). In this matter, the dissenting opinion neatly modified this standard for application to motions to dismiss on the basis of immunity, as follows:

The task of the trial court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the record, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that the defendant’s use of force was unlawful. The duty of the reviewing Court is simply to ensure that the trial court had a substantial basis for concluding that probable cause existed.

Slip Opinion, p. 20.

Despite this Court’s analogy in *Rodgers* comparing the standard for issuing a warrant to considering an immunity claim under KRS 503.085, the Court of Appeals majority, despite noting that this Court referenced the “test laid out in *Gates, supra*” in *Rodgers*, Slip Opinion, p. 7, rejected application of that standard. Rather, the majority, relying on cases involving warrantless searches and arrests, cast the standard for considering a motion to dismiss on the basis of immunity as follows:

In making a determination of probable cause under KRS 503.085(1), the trial court’s role is not to consider the objective merits of the evidence for the prosecution and the defense. *Instead*, the trial court must only consider the totality of the circumstances to determine whether there is an objectively reasonable basis to conclude that

the defendant's use of force was unlawful. Since the trial court's factual findings are not at issue, this Court conducts a *de novo* review of the trial court's conclusions regarding the existence of probable cause.

Slip Opinion, p. 8 citing *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001), citing *Ornelas v. United States*, 517 U.S. 690, 691 (1996) (emphasis original).

Although the majority appears to have adopted the standard for considering whether probable cause existed for a warrantless search or arrest, in fact, it did not do so. In those situations, the trial court does not review the facts and consider whether there was an objectively reasonable basis to conclude probable cause existed for the search or arrest. The "objectively reasonable" element of those tests simply directs the trial court to view the evidence "from the standpoint of an objectively reasonable police officer." See *Commonwealth v. Jones*, 217 S.W.3d 190, 196 (Ky. 2006) ("In order to determine if probable cause has been shown, the 'principal components' a reviewing court must examine are 'the events leading up to the stop or search, and then the decision whether these historical facts, **viewed from the standpoint of an objectively reasonable police officer,** amount to reasonable suspicion or to probable cause.'") quoting *Ornelas*, 517 U.S. at 696 (emphasis added); *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006) ("[T]o determine whether an officer had probable cause to arrest, examination is made of the events leading to the arrest and the decision of

the officer as to whether these facts, **viewed from the standpoint of an objectively reasonable police officer** amount to probable cause.”)

(emphasis added).

The majority opinion herein took these tests and twisted them into a new test asking whether, based on the totality of the circumstances, there was an “objectively reasonable basis” to conclude the use of force was unlawful. The majority’s new test does not even mention probable cause, the standard this Court clearly stated was applicable to immunity questions. If the majority intended to apply the standard from warrantless search and arrest cases in this matter, the standard would be articulated as “[i]n order to determine if probable cause has been shown, the ‘principal components’ a reviewing court must examine are ‘the events leading up to the [use of force], and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable [person], amount to probable cause’ ” that the use of force was unlawful.

The use of such a standard in considering a claim of immunity, however, is inconsistent with this Court’s declaration that trial courts are not to hold evidentiary hearings on such claims. It would be quite difficult for trial courts to consider the evidence from the standpoint of an objectively reasonable person without hearing from the actual person involved. Under the *Gates* standard, however, the trial court can review the “paper” record - consistent with this Court’s directive in *Rodgers* that these claims be

determined based on the “evidence of record” - and “make a practical, common-sense decision whether, given all the circumstances set forth in the record, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability” that the defendant’s use of force was unlawful. The Court of Appeals erred in this matter by creating its own standard of review rather than applying the standard from *Gates* that was recognized by this Court in *Rodgers*.

The Court of Appeals likewise erred by determining that its review of the trial court’s determination that probable cause did exist to find appellee’s use of force was unlawful should be *de novo* rather than deferential. While appellate courts review the probable cause determination in warrantless search cases *de novo*, this Court and the United States Supreme Court has made clear that the rationale for employing a stricter test in that area is to provide an incentive for police to conduct searches pursuant to a warrant. *See Gates*, 462 U.S. at 236; *Pride*, 302 S.W.3d at 48-49. When a search has been conducted pursuant to a warrant, the appellate court does not review the warrant issuing judge’s probable cause determination *de novo*. Rather, “the duty of the reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Pride*, 302 S.W.3d at 48 quoting *Gates*, 462 U.S. at 238-39 (ellipsis and alteration original). Further, the reviewing court gives “great deference”

to the warrant issuing judge's probable cause determination because of the preference for searches conducted pursuant to a warrant. *Id. quoting Gates*, 462 U.S. at 236.

As the dissent in this matter noted, “[j]ust as there is a preference for searches pursuant to warrant, there is a ‘strong preference for jury trials on all elements of a criminal case[.]’ ” Slip Opinion, p. 20 quoting *Rodgers*, 285 S.W.3d at 755; *see also* Ky. Const. §§ 7 and 11; KRS 29A.270(1) (expanding constitutional right to a jury trial to “all criminal prosecutions.”). Given the strong preference for jury trials on all elements of a criminal case, there is no incentive for applying the strict *de novo* standard of appellate review adopted by the majority in this matter. As such, an appellate court considering a trial court’s ruling on an immunity claim should review simply to ensure there was a substantial basis for the decision giving deference to the trial court’s determination.

C. The Court of Appeals majority erroneously concluded the Commonwealth had failed to establish probable cause in this matter regardless of the standard applied.

The majority of the Court of Appeals panel in this matter reversed the trial court’s determination that the Commonwealth had sufficiently established probable cause that appellee’s use of force was unlawful. As noted, the majority opinion held the trial court’s determination was subject to a *de novo* review which, as set forth above, the Commonwealth believes was erroneous. However, the majority erred in reversing the trial

court's determination regardless of whether the claim is reviewed *de novo* or under the *Gates* substantial basis standard.

In its opinion, the Court of Appeals majority stated the following in regard to the quantum of proof the Commonwealth must present in order to establish probable cause that a defendant's use of force was unlawful:

By its enactment of KRS 503.085, the General Assembly firmly required the Commonwealth to bear the initial burden of going forward with evidence establishing probable cause that the defendant's use of force was unlawful. As we interpret the statute, the Commonwealth cannot meet this burden simply by asserting that a jury could reject the defendant's version of the facts. Otherwise, KRS 503.085 would not result in any meaningful change in the law in circumstances where a change was clearly intended. Rather, the Commonwealth must now present affirmative evidence to establish probable cause on the issue. The Commonwealth may meet its burden either by presenting direct evidence contradicting the defendant's account or through circumstantial evidence which casts doubt on the defendant's credibility. *See Commonwealth v. Bushart*, 337 S.W.3d 666, 669 (Ky. App. 2011) (Commonwealth relied on circumstantial evidence to rebut the defendant's claim of self-defense).

Slip Opinion, pp. 10-11. After setting forth this standard, the majority found the Commonwealth had failed to meet its burden despite recognizing that the record contained direct and circumstantial evidence contradicting appellee's account and casting substantial doubt on his credibility.

As set forth above, appellee told police that he stabbed Cory in self-defense after Cory got out of a truck, struck Patrick Link and Yvonne Weaver, and started an altercation with appellee. Appellee claimed Cory

pinned him against a vehicle and appellee then stabbed Cory twice in the shoulder area. Appellee told police that during the altercation he punched Cory in the face, and that, after stabbing Cory, Cory and one of his bothers chased appellee down the street.

The evidence of record, however, contained substantial direct and circumstantial evidence contradicting this account. First, appellee claimed he punched Cory in the face during the altercation, but, as noted above, neither the autopsy report or ER record indicate that Cory had any injury to his head, neck or face. Second, appellee claimed Cory got out of the truck, struck Link and Weaver, and then started an altercation with appellee. Other witnesses, specifically Cory's brothers, gave statements contradicting this claim. According to both Dustin Kessnick and Gary Damon, Cory pulled up to the scene in a truck, a fight was going on between many people, including appellee, Cory got out of the truck, asked what was going on, and then was down on the ground bleeding.

Jaemichael Goodwin also gave a statement that directly contradicted appellee's version of the events. According to Goodwin, Weaver and another guy got into an argument, appellee and Link tried to calm Weaver down, and then a truck pulled up and two guys got out. The guy that got out of the driver's side of the truck then hit Link who fell to the ground. Goodwin began to tend to Link, yelled at the person that hit him, and then saw that he was on the ground bleeding. Although she did not see Cory get

stabbed, Goodwin stated that appellee was still holding Weaver back when she looked around, and then one of Cory's brothers began to chase appellee. Thus, Goodwin placed appellee holding Weaver back after Cory had been stabbed in contradiction to appellee's claim that Weaver had been knocked down by Cory before the stabbing.

The Court of Appeals majority acknowledged that the versions of events from other witnesses differed from appellee's, but discounted these differences as being "within the normal range of variation expected when different people with different vantage points describe chaotic events." Slip Opinion, p. 13. The Court of Appeals majority also discounted the reliability of Cory's brother's statements because Gary stated he had consumed alcohol that night and Dustin was knocked out at some point during the fight. Slip Opinion, p. 14. In doing so, the majority ignored Gary's statement that he was not intoxicated when giving his statement and the detective's statement that Gary did not appear to be intoxicated. Of course, the majority made these weight and credibility determinations without the benefit of any cross-examined testimony because the trial court properly did not conduct an evidentiary hearing on the motion to dismiss. The trial court on the other hand candidly acknowledged that it could not make such credibility determinations on the evidence it was required to consider in deciding the immunity issue. The trial court properly reserved any questions of weight and/or credibility for a jury.

Despite making credibility determinations as to other witnesses, however, the Court of Appeals majority did not properly consider the substantial evidence undermining appellee's credibility. The majority conceded that appellee gave "several contradictory accounts" of the events on October 11, 2008 "to the police." Slip Opinion, p. 11. The majority further conceded that appellee's "behavior and statements after the fight are suspicious" and "significant grounds for questioning his credibility." Slip Opinion, p. 15. Simply put, no one gave more inconsistent accounts of the fight than appellee, but the Court of Appeals majority accepted his (final) version of the events as gospel despite its clear statement that the Commonwealth could meet its burden of proof "through circumstantial evidence which casts doubt on the defendant's credibility."

Herein, the Commonwealth did not present just circumstantial evidence casting doubt on appellee's credibility, it also presented direct evidence casting doubt on appellee's credibility - his own words. Appellee's own inconsistent statements regarding his involvement in the stabbing would be sufficient to withstand a motion for a directed verdict as to a claim of self-defense at trial. Evidence that is sufficient to support the denial of a directed verdict must be sufficient to support a finding of probable cause that the use of force herein was unlawful. To hold otherwise would mean that the Commonwealth's burden of establishing probable cause to withstand an immunity assertion is higher than its burden to get to a jury at trial.

In *Townsend v. Commonwealth*, 474 S.W.2d 352, 353-354 (Ky. 1971), this Court's predecessor stated "[i]f the testimony relied on to establish self-defense is contradicted ... a directed verdict should not be given." This holding has been recognized consistently by this Court. See *Stepp v. Commonwealth*, 608 S.W.2d 371, 373 (Ky. 1980); *West v. Commonwealth*, 780 S.W.2d 600, 601 (Ky. 1989); *Brock v. Commonwealth*, 947 S.W.2d 24, 26 (Ky. 1997). In this matter, appellee's claim of self-defense in stabbing Cory Kessnick is directly contradicted by his own prior inconsistent statements to Officer Gross that "he fled the area on foot" when approached by a white male, "was unsure of what had happened, and could not give details to the police," "had noting to do with the events," and "he had not stabbed anyone."

The Commonwealth also presented circumstantial evidence of casting doubt on appellee's credibility. The evidence of record in this matter also showed that appellee attempted to conceal or dispose of the knife used to stab Cory. After arriving at the scene of the incident, Officers Gross and Vance discovered a knife in a garbage can in front of 601 Monmouth Street (Confidential Report, *supra*, page 2). The knife appeared to have blood on it (Id.). Appellee later identified the knife as his and as the knife used to stab Cory. Appellee's act of attempting to conceal or dispose of the knife is relevant to a criminal case, *Tamme v. Commonwealth*, 973 S.W.2d 13, 36 (Ky. 1998). His attempt to conceal or dispose of the weapon shows a consciousness

of guilt which contradicts his claim of self-defense and casts doubt on his credibility.

After setting forth the standard for how the Commonwealth could meet its burden (“circumstantial evidence casting doubt on the defendant’s credibility”), the majority moved the ball by finding that direct and circumstantial evidence in the record casting doubt on the appellee’s credibility was not sufficient without “other circumstantial and physical evidence.” Slip Opinion, p. 18. This was error, and, under the standard set forth by the Court of Appeals majority, the Commonwealth clearly presented sufficient evidence to support a finding of probable cause that appellee’s use of force was unlawful.

Whether the evidence of record in this matter is reviewed to determine if the trial court had a substantial basis for its finding of probable cause (which the Commonwealth believes is the appropriate standard) or is reviewed *de novo*, there is no question that probable cause existed to find appellee’s use of force against Cory Kessnick was unlawful. In reversing the trial court’s denial of appellee’s motion to dismiss on the basis of immunity under KRS 503.085, the Court of Appeals erred by creating a new standard for considering probable cause, applied the wrong standard of appellate review, and then erred by finding insufficient proof of probable cause under its own standard. The decision must be reversed.

CONCLUSION

Based upon the foregoing, the opinion of the Kentucky Court of Appeals should be reversed and the judgment of conviction and sentence imposed upon appellee by the Campbell Circuit Court re-instated.

Respectfully submitted,

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APPENDIX

- 1) Lemons v. Commonwealth, Case No. 2010-CA-001942-MR
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- 2) Campbell Circuit Court, Judgment and Sentencing Order
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