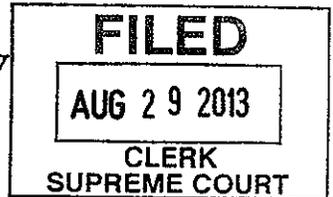


Commonwealth of Kentucky
Supreme Court

Case No. 2012-SC-00431



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

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

BRIAN LEMONS

APPELLEE

Reply Brief for Commonwealth

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 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 via state messenger mail 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, Campbell Co. Commonwealth Attorney. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.


Assistant Attorney General

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PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's brief. Any failure to respond to any particular argument should not be taken as a waiver of an issue or argument.

ARGUMENT

I.

THIS COURT HAS ALREADY DETERMINED THE IMMUNITY PROVISION IN KRS 503.085 IS PROCEDURAL

In his brief, appellee first argues that this Court erred when it held the immunity provision of KRS 503.085 was procedural rather than substantive law in *Rodgers v. Commonwealth*, 285 S.W.3d 740, 753 (Ky. 2009). Contrary to appellee's argument, this Court properly concluded the immunity provision did not constitute substantive law.

First, appellee argues the Court's determination in *Rodgers* that the immunity provision was procedural was dicta. In support of his assertion, appellee relies upon language in Justice Noble's opinion concurring in part, concurring in result in part, and dissenting in part. Appellee Br., p. 24 relying upon *Rodgers*, 285 S.W.3d at 761 (Noble, J., *concurring in part, concurring in result in part, and dissenting in part*). Appellee is simply incorrect in asserting that the question of whether the immunity provision of KRS 503.085 constituted substantive or procedural law was not properly

before the Court in *Rodgers*. Nothing in Justice Noble's opinion supports that assertion.

In *Rodgers*, the appellant was charged with a murder that occurred on August 22, 2004, prior to the enactment of the immunity provision at issue herein. 285 S.W.3d at 743. He did not go to trial on that charge until after the immunity provision was enacted, however. *Id.* at 749. Prior to the start of his trial, Rodgers moved the trial court to dismiss the charges against him on the basis of the newly enacted immunity provision and to conduct a pre-trial evidentiary hearing on whether he was entitled to immunity. *Id.* at 750. The trial court then determined "that the new immunity statute did not apply retroactively to Rodgers's case but that even if it did a review of the discovery record was sufficient to determine that Rodgers's assertion of self-defense was significantly controverted, precluding immunity." *Id.*

On appeal, Rodgers argued the trial court erred by determining the immunity provision did not apply retroactively. *Id.* He argued the determination was erroneous because the immunity provision was procedural law. Thus, the question of whether the immunity provision was procedural or substantive was squarely before the Court in *Rodgers*. If the Court determined the provision was substantive, it could not be applied retroactively to Rodgers charges and the Court would have had no reason to

then consider whether the trial court properly adjudicated the immunity claim. If, however, the Court determined the immunity provision was procedural (as it did), the Court then had to determine whether the trial court properly adjudicated the immunity claim. If the trial court did not properly adjudicate the immunity claim (which the Court found it did not), this Court then had to determine the proper manner for adjudicating the claim (which it did), and whether the trial court's error was harmless (the Court found it was). Contrary to appellee's argument, nothing in this Court's decision in *Rodgers* regarding the immunity provision was dicta or advisory.

Further, nothing in Justice Noble's opinion in *Rodgers* indicates the question of whether the immunity provision was procedural or substantive was not before the Court in the case. To the contrary, Justice Noble's opinion confirms the question was squarely before the Court, Justice Noble simply disagreed with the majority's holding that the immunity provision was procedural, and believed it was "a substantive change in the law." 285 S.W.3d at 761 (Noble, J., *concurring in part, concurring in result in part, and dissenting in part*). Because Justice Noble believed the immunity provision was substantive, she, therefore, believed it was not appropriate to reach the issue "on how the immunity issue is to be determined." *Id.* This is because, as substantive law, the immunity provision could not be retroactively applied to *Rodgers*.

Finally, whether the immunity provision of KRS 503.085 was

procedural or substantive has no effect on the proper appellate standard of review applicable to trial court decisions under that provision. Appellee argues that, because the immunity provision is substantive law, this Court “cannot allow trial court denials of immunity to be judged on appeal under a lenient” *Illinois v. Gates*, 462 U.S. 213, 232 (1983) “ ‘substantial basis’ standard of review.” Appellee Br., p. 27. Appellee’s assertion is illogical. In *Gates*, the United States Supreme Court determined the “substantial basis” test was the appropriate standard of review for the issuance of a search warrant under the Fourth Amendment of the United States Constitution. Clearly, the provisions of the United States Constitution are substantive law, yet a trial court’s denial of a defendant’s motion to suppress evidence obtained via a search warrant is reviewed on appeal under the “lenient” *Gates* substantial basis test.

The *Gates* substantial basis test is also the appropriate standard of review for a trial court’s decision on a claim of immunity under KRS 503.085. The trial court’s standard for considering such a claim is the low threshold of probable cause, and a denial of immunity in no way compromises a defendant’s constitutional right to a jury trial or to raise a defense of justification at trial.

II.

UNDER *GATES*, THE CREDIBILITY OF WITNESSES AND RELIABILITY OF EVIDENCE IS NOT CONSIDERED EXCEPT WHEN CONSIDERING PERSONS SUPPLYING HEARSAY INFORMATION.

Appellee argues that the Court of Appeals properly did what the trial court stated it could not do in considering appellee's immunity claim when the Court of Appeals weighed the credibility of evidence and witnesses which appellee argues is required when reviewing the "totality of the circumstances" under *Gates*. Appellee, again, is simply incorrect.

In *Gates*, the United States Supreme Court stated "the task of the issuing magistrate is simply to make a practical, commonsense 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." 462 U.S. at 238. It can not be more plain that consideration of the "veracity" and "basis of knowledge" only comes into play under *Gates* when addressing persons giving hearsay information. In this matter, the trial court was not presented with any hearsay information to consider in determining appellee's claim of immunity under KRS 503.085. All of the witness statements were first-party accounts of what they observed during the altercation when appellee stabbed Cory

Kessnick to death. There was no hearsay. Likewise, the statements of the police officers recounted information appellee had told them, and do not constitute hearsay under the Kentucky Rules of Evidence. *See* KRE 801A(b)(1).

Given that the trial court was not considering any hearsay information, the trial court properly determined that it could not, in considering a pre-trial motion to dismiss on the basis of immunity, wade into the waters of whose statements were more credible. The trial court's determination was proper given that credibility determinations are the province of the jury under our criminal justice system after the evidence has been subjected to cross-examination. The Court of Appeals erred when it relied upon credibility determinations in reversing the trial court's decision and ignored the blatant credibility issue in the case, the fact appellee directly contradicted his claim of self-defense by initially denying he had any involvement in Cory's death during his first two statements to the police.

III.

**GIVEN APPELLEE'S EVER EVOLVING
STATEMENTS AS TO WHAT HAPPENED
WHEN HE STABBED CORY, IT IS CLEAR
THE COURT OF APPEALS ERRED IN
FINDING HE WAS ENTITLED TO
IMMUNITY**

As noted above, and in the Commonwealth's opening brief, after

stabbing Cory, appellee fled from the scene, attempted to dispose of the murder weapon, and then returned to the scene. Appellee then made several statements to Newport Police Officer R. Gross indicating that he fled the scene after his girlfriend was thrown to the ground and a man had approached him (TR Envelope, Newport Police Department Confidential Report, Police Officer R. Gross to Lieutenant L. Long, 10/11/08, p. 1-4 (unnumbered)). He further maintained he did not know what had happened and had not stabbed anyone (Id.).

Appellee then changed his story and admitted that he had stabbed Cory, but had done so in self-defense after Cory struck Patrick Link and came at appellee (TR Envelope, Statement, Brian Lemons, 10/11/08, p. 3-4). Now, appellee has modified his story after the Commonwealth pointed out inconsistencies between his version of the events and the autopsy report. Specifically, in its opening brief, the Commonwealth noted appellee claimed in his statement the person he was fighting with and stabbed was wearing a white striped shirt, but the autopsy report indicated Cory was wearing a black shirt when his body was brought to the medical examiner's office. The Commonwealth also pointed out the autopsy revealed Cory had no signs of injury to his face or body other than the stab wounds despite appellee's statement that he fought with Cory and "was punching him in his face." (Id.).

In response, appellee now asserts in his brief that he was really

fighting with Cory's brother Dustin, and that was who appellee punched in the face, not Cory. Appellee's statement to the police, however, simply does not support that alteration. In his statement, appellee stated as follows:

The guy, the two guys and my friend Pat started exchanging words. The two guys got real hyped up. Next thing you know this guy in this truck's pulling up, in this black truck. He gets out, punches my friend in the face, knocks him down on the ground. He gets, my friend gets back up and the one of the two guys, it's the guys 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, she busted her head on the ground. And at that point I start fighting with the guy in the white stripped shirt because he hit my girlfriend and I was basically trying to defend her and myself because, you know, there were three guys and me and my friend and another woman and my girlfriend. So basically I was trying to defend myself as well because I didn't know what was gonna happen at that point. And he's a very big guy. So he start coming at me, punching me in the ribs. I was punching him in the face. He backed off for a second. Talking about he was gonna kill me, this and that. And his brother was talking, they just seemed like they were out of their minds, crazy. And I said well, okay, well, this is how it's gonna be. I pulled out the knife, basically, and said you know I mean, get the fuck away, leave me alone, I don't want to use this but if I have to I will, basically. Not those exact words, but something similar to that. I said get away, you know. And 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.

(Id. at 3).

In his brief, appellee argues he started fighting with Cory's brother Dustin after Dustin knocked appellee's girlfriend to the ground, and

that it was Dustin he was referring to having punched in the face, and then Cory came at him and he stabbed Cory. That does not fit what he told the police in his statement. In his statement, appellee claims to have started fighting with the guy in the white stripped shirt, after that guy knocked his girlfriend down. He then says "he start coming at me, punching me in my ribs. I was punching him in his face." The guy backed off at that point, said he was going to kill appellee and the guy's brother was also talking. Appellee claimed he then pulled out his knife and told them he would use it. He then says "[a]nd the dude come at me again and when he came at me I stabbed him"

In his statement, as opposed to his brief, appellee does not claim a person different than the one he had been fighting with came at him after he pulled out the knife. He claims the same person that came at him before, that punched him in the ribs, and that he punched in the face came at him "again," and that was the person he then stabbed - Cory. The only time appellee involved a person other than the person he was fighting with and ultimately stabbed to death in his statement was to say another "brother was talking." He never asserts he engaged with more than one person during the fight as he now claims to have happened.

The Commonwealth has pointed out the remainder of the inconsistencies with appellee's claim of self-defense contained in the other witness statements in its opening brief (and they are many), and will not set

those forth here. Given the contradictions in appellee's own statements to the police which evolved from a claim of not knowing anything, to a denial of stabbing anyone, to an admission to stabbing Cory but claiming it was in self-defense. The trial court properly denied appellee motion to dismiss the indictment by declining to weigh the credibility of the various statements regarding what happened. The Court of Appeals erred by reversing that decision.

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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