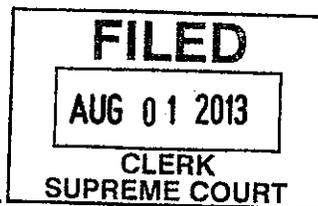


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-591-D  
(2011-CA-452)



(ON APPEAL FROM MADISON CIRCUIT COURT,  
CASE NO. 09-CR-258)

SAMUEL CRABTREE

APPELLANT

v.

BRIEF FOR THE APPELLANT  
SAMUEL CRABTREE

COMMONWEALTH OF KENTUCKY

APPELLEE

\*\*\*\*\*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Appellant's brief has been served on all parties by mailing or hand-delivering same this the 31<sup>st</sup> day of July, 2013 to Hon. William G. Clouse, Jr., Judge, Madison Circuit Court, Division I, 101 W. Main St., Richmond, KY 40475, and Hon. Jennifer Smith, Madison Commonwealth Attorney's Office, 101 W. Main St., #201, and Hon. J. Hays Lawson, Assistant Attorney General, Capitol Suite #118, 700 Capitol Avenue, Frankfort, Kentucky 40601, while the original and 10 copies have been filed with the Clerk of the Supreme Court. I further certify that the record has not been checked out from the office of the Clerk of the Court of Appeals.

BY:

  
Fred E. Peters

## PURPOSE

The Appellant's Reply Brief is being filed to address the issues raised by the Response Brief of the Appellee.

## ARGUMENT

*I. Viewing, Deletion, and Unintentional Storage in Hidden Caches is not Sufficient to Support a Conviction of Knowing Possession.*

To convict a defendant of a violation of KRS 531.335, the Commonwealth must show that the accused knowingly possessed the prohibited material. The material for which the Appellant was convicted was located in two places. The videos were in an Incomplete file, where the computer automatically placed them when a download was terminated. The images were in a thumbcache file, where the computer automatically put them. Absolutely no evidence was presented that the Appellant knew of the existence of these directories, or that he had the technical knowledge to access them. One cannot knowingly possess that which he does not know he has.

The Appellee asserts that the existence of videos in the "Incomplete" file of the Liiimewire program is sufficient to sustain a conviction. However, the Commonwealth's expert testified that the program automatically saves these videos to the Incomplete file prior to the files being downloaded to completion. This process is done with or without the user's knowledge, depending on the user's level of tech savvy. In the present case, the downloads for all the files for which the Defendant was convicted were terminated prior to completion. Had these downloads been completed, they would have appeared in the Saved folder, where even novice users could find and play them.

In the 4<sup>th</sup> paragraph of its opinion, the Court of Appeals made a grievous error on this issue, stating that all 5 of the video counts appeared in the "Saved" folder, when in

fact the only video included in the "Saved" folder was the one for which Mr. Crabtree was found not guilty, Count 1. The Commonwealth's expert testified that the remaining four videos were in the folder labeled "Incomplete."<sup>1</sup> Likewise, on p. 5 of its brief the Appellee acknowledges that the videos for which the Appellant was convicted were in the "Incomplete" file, and that he was acquitted of the lone video in the "Saved" folder, Count 1. The Court of Appeals based its Opinion on an improper understanding of an *uncontested* material fact. The Opinion also erroneously stated in the same paragraph that the Appellant had been convicted of all charges, when the jury acquitted him of Count 1 and multiple images were dismissed as either duplicates or as not pornographic.

Though the evidence shows that Incomplete files may be playable in some fashion for people who know how to locate them and get them to play, no evidence was presented at trial that the Appellant ever accessed or viewed any of these Incomplete videos, or that he was aware of Limewire's automatic save function for downloads that were terminated. The Commonwealth's expert testified that there was no evidence that the Appellant had ever viewed any of the four Incomplete videos for which he was convicted.<sup>2</sup> The only video in this case that was downloaded to completion and knowingly retained by the Appellant on his computer in the Saved folder was Count 1, the video the jury deemed not to be child pornography.

However, once again the Commonwealth is attempting to shoehorn the viewing of child pornography into a conviction of knowing possession. The key issue in this case has always been and still is whether viewing temporarily and discarding with no intent to retain possession is sufficient to sustain a conviction for knowing possession. The

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<sup>1</sup> Trial Transcript, Day 1, Disc 2, 14:26:30

<sup>2</sup> Trial Transcript, Day 1, 16:00:40

Legislature has already weighed in on this issue by amending the statute to criminalize viewing, creating the presumption under long-standing Kentucky precedent that the act of viewing was not illegal prior to the amendment. Nevertheless, the Commonwealth continues to assert that this is an open-and-shut possession case.

The sole case relied upon by the Appellee, US v. Kain, 589 F3d, 945 (8<sup>th</sup> Cir 2009), is distinguishable on its face. Compare Aguilar-Turcios v. Holder, 691 F.3d 1025 (9th Cir. 2012). In Kain, the Defendant knowingly and voluntarily saved and kept images of child pornography in a folder labeled “Y” on the desktop of his computer. From the time he started his computer every day, fully downloaded, intentionally saved images of child pornography were quite literally two clicks away from being viewed. He could open the “Y” folder and click on the image. Kain confessed to intentionally downloading and storing first 40-50 images, then agreed that there were 405 images of child pornography on his computer. He was charged with 27 counts, 21 in the “Y” folder and 6 in his temporary internet files. The Court found that Kain’s admissions and the testimony of the detective provided “ample support” for a conviction on all counts.

The distinguishing facts of Kain are glaringly obvious. Kain never said the images made him sick. Kain never said that he tried to get rid of them because he knew looking at them was wrong. Kain wasn’t surprised that the images were still saved on his computer, because he actively and knowingly sought to keep them in his possession on his computer. With those clear, unambiguous statements of knowing, intentional possession on the record, it’s no wonder that his conviction was affirmed. Sam Crabtree, on the other hand, viewed the material, was sickened by it, and tried his best to remove it.

These two cases present a very stark picture of the difference between viewing and knowing possession.

The Commonwealth's reliance on Kain is unsurprising given its misinterpretation of the Appellant's confession. In Section II of this brief, in other briefs, and at trial, the Commonwealth has distorted the statement of the Appellant and the testimony on that statement to say that the Appellant was not sickened by viewing the material, but only because he "got caught." Det. Collins testified unequivocally that Mr. Crabtree said that he felt sick upon viewing the images.<sup>3</sup> He did not feel sick only because he "got caught." The Commonwealth has repeated this falsehood again and again throughout the entirety of these proceedings, and there is absolutely no evidence to support it. As it has with this entire case, the Commonwealth is using the offensive nature of child pornography and the deep emotional response that it elicits as a smokescreen to hide a case bereft of actual evidence to support it. They toss out his actual confession and substitute it with one that fits their narrative. The Appellant asks this Court today to look at the actual confession and the real evidence, not the Commonwealth's baseless speculation.

Moreover, in its brief the Appellee has neglected to address the 9<sup>th</sup> Circuit cases of United States v. Flyer, 633 F.3d 911 (9th Cir. Ariz. 2011), US v. Romm, 455 F3d 990 (9<sup>th</sup> Cir. 2006), and United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006), which were relied upon by the Court of Appeals, in light of the express rejection of the Commonwealth's theory of the case by the Legislature. The Response Brief also fails to address the remaining 11 cases cited by the Appellant that stand for the well-recognized principle that accessing/viewing is a different offense than knowing possession. Courts confronted with the facts of viewing, deletion, and hidden caches have overwhelmingly

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<sup>3</sup> Trial Transcript, Day 1, Disc 1, at 13:40:05.

held that such conduct does not constitute knowing possession, especially when the act of viewing is recognized by the Legislature as a separate offense.

At best, the evidence shows that the Appellant viewed the material, was sickened by it, and deleted it. The images and videos for which he was convicted were automatically saved on his computer without his knowledge, and thus he could not have knowingly possessed this material. The Legislature has since amended the statute to criminalize the viewing of child pornography, evincing a clear statement of legislative intent that viewing was not criminalized prior to the amendment.

*II. Evidence of the Appellant's Character for Truthfulness is Admissible when his Confession is a Key Piece of Evidence, Especially in Light of the Fact that the Commonwealth Represented to the Jury that he Lied.*

The Appellant's character for truthfulness was admissible under 404(1)(a) as evidence of a pertinent trait or of general moral character and was also admissible to rebut the attacks on his character by the Commonwealth. The Commonwealth argues that the latter should be considered under KRE 608 rather than KRE 404(1)(a), but ultimately that is a distinction without a difference, because both rules say that an accused has the right to defend his character when it is attacked.

The treatise cited by the Commonwealth, C.J.S. Criminal Law s. 112 (updated January 2013), states that character evidence is admissible "if it tends to make the existence of any material fact more or less probable than it would be without evidence of that trait." The Appellant's computer was in a dorm room that was accessible by many other students. The key piece of evidence tying the material in the cache on the computer to the Appellant was his statement. That statement was the single most important piece of evidence in the entire trial, and Sam's character for truthfulness was being judged by

the jury when they considered that statement. On p. 14 of the Response Brief, the Appellee itself says that the actual words of the confession that the Appellant viewed the material, was sickened by it, and deleted is “not the only interpretation” of the statement. How the jury interpreted that statement and thus the key material facts of this case depended greatly on its assessment of the character for truthfulness of the Appellant.

The C.J.S. goes on to say that character for truthfulness is admissible when an accused’s truthfulness has “been attacked.” KRE 404(a)(1), KRE 608, and common sense dictate that when a citizen is accused of a crime and his character is attacked by the government, that citizen has a right to present evidence to defend his character. The Commonwealth elicited testimony<sup>4</sup> and argued<sup>5</sup> that the Appellant lied in that statement. The Court of Appeals has tried to characterize lying about what you did to the police as a “behavior” rather than a trait, but to accuse the Appellant of the behavior of lying is to attack his character for truthfulness, no matter what technical term you use.

Given Mr. Crabtree’s cognitive difficulties related to head injuries sustained playing football, a decision was made by the Appellant with the advice of counsel not to take the stand, where he would be subjected to extremely aggressive cross examination and might get confused and tripped up. To take the stand to defend his character for truthfulness was too great a risk. Therefore, to rebut this attack, a witness with excellent standing in the community, Burt May, who had known Mr. Crabtree all his life was presented to testify to his character. The Court did not allow this testimony to be heard by the jury and let the attacks on Mr. Crabtree’s character for truthfulness go unanswered.

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<sup>4</sup> Trial Transcript Day 1, 13:57:25

<sup>5</sup> Trial Transcript Day 2, 9:12:45

Without the ability to defend his character, the only character argument the jury heard was a baseless accusation that he lied in his statement about being sick when he viewed the material, and that he lied about not liking it or feeling bad about looking at it. No actual evidence exists to support this accusation, but it was all the jury got to hear in regards to the character of the accused. That ruling was an error, a grievous error and a prejudicial one. The Appellant now asks this Court to make it right.

*III. The Jury Should have been Instructed on the Temporary Innocent Possession Defense.*

The Appellant requested and was denied an instruction on the defense of temporary innocent possession. Temporary innocent possession is a defense to knowing possession, and the facts support it.

In its Brief, the Commonwealth has mirrored the Court's conclusion that "clicking" on the file was the entirety of the offense, and thus temporary innocent possession cannot be considered. Once again, this interpretation is a misstatement of the law. Clicking on a file is only the first step in what could become an offense of either viewing/accessing or knowing possession. While the time will certainly come for this Court to determine what conduct constitutes viewing under the new statute, that issue is not being litigated in this case.

The Appellant did not request an instruction of temporary innocent possession for the offense of viewing the material, but for that of knowing possession, a distinct and separate offense. The only evidence presented in this case was the presence of material in the computer that was unknown to the Defendant and his statement of viewing, being sickened, and deleting. Even if the Court were to interpret viewing the material as possessing it, contrary to the acts of the Legislature, any viewing/possession of the

material was followed by being sickened and deleting it. While the Commonwealth is correct that an exact timeline for the deletion was not presented, the evidence of this sequence of events is “deducible or supported to any extent by the testimony,” and thus sufficient to allow a defense of temporary innocent possession to the jury to be considered by the jury. Taylor v. Commonwealth, 995 S.W.2d 355, 360 (Ky. 1999), citing Kelly v. Commonwealth, 267 S.W.2d 536, 539 (Ky. 1954).

As such, the Appellant respectfully requests that the Court rule that the Appellant should have been allowed to present this defense to the jury, and the ruling to keep the jury from being instructed on this defense was reversible error.

*IV. The Jury was Required to Decide a Question of Law.*

The Appellee and the Court of Appeals both take the position that the Circuit Court’s ruling that the parties should present their legal interpretation of the statute to the jury and let the jury decide<sup>6</sup> is not in error, because an instruction on the definition of the word, “knowingly” was sufficient to inform the jury on the law of the case. However, as this extensive litigation has shown, the distinction between viewing and knowingly possessing material on one’s computer is a very complex legal problem. A jury needs adequate guidance on this issue in the instructions in order to make a fair assessment of the facts.

The Appellee has cited Caretenders, Inc. v. Commonwealth, 821 S.W.2d 83 (Ky. 1991) as precedent that the definition of the word “knowingly” is adequate instruction to the jury. In Caretenders, the defendant was charged with knowing and willful neglect of its patients. The case is distinguishable by the nature of the offense charged. When the conduct charged is as straightforward as neglect, terms like “knowingly” and “willfully”

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<sup>6</sup> Trial Transcript, Day 2, 10:40

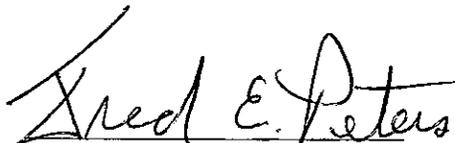
can be applied to the facts as knowledge and intent. Possession, especially in the context of computers, is a much more complicated issue, and the application of the mens rea of knowingly more complicated still. The jury was already being required to learn highly technical aspects of a computer's automated storage system. Applying a difficult issue of statutory interpretation in this context is fundamentally different from applying a mens rea of knowingly to an act of neglect or to simple drug possession. The jury needed guidance from the Court's instructions beyond a definition of the word, "knowingly."

The complexity of the legal and technical issues in this case become even more perilous when one considers the inflammatory nature of the material at issue in this case. Powerful emotions can sway both juries and courts into disregarding facts and making findings based on the outrage they feel that such material even exists. Complicated issues of law and the workings of technology make such rash decisions even more likely in the absence of guidance from the Court.

### CONCLUSION

For the reasons stated above, the Appellant respectfully requests that his conviction be reversed, and that the case be remanded back for a new trial.

Respectfully submitted,



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