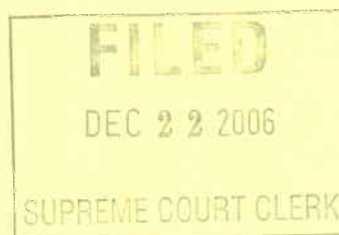


**COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2005-SC-0690-DG**



TERRY RANKINS

APPELLANT

On Review from the Court of Appeals  
No. 2004-CA-1445

v.

Jefferson Circuit Court No. 03-XX-00044  
Hon. Ann O'Malley Shake, Judge

COMMONWEALTH OF KENTUCKY

APPELLEE

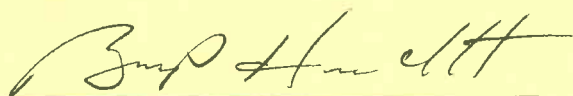
**REPLY BRIEF FOR APPELLANT, TERRY RANKINS**

Submitted by:

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**Certificate of Service**

This is to certify that a copy of the foregoing was mailed, first class postage prepaid to Hon. Ann O'Malley Shake, Judge, Jefferson Circuit Court, Division 13, Jefferson County Judicial Center, Louisville, KY 40202; Hon. David Stengel, Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202; and to Hon. David A. Sexton, Special Assistant Attorney General, Assistant County Attorney, Fiscal Court Building, 531 Court Place, Suite 1001, Louisville KY 40202, on December 21, 2006. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.

  
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BRUCE P. HACKETT

## **PURPOSE OF THE BRIEF**

This brief is filed to point out that the Commonwealth has ignored or overlooked the proper standard of review that applies when a trial court admits or excludes evidence (abuse of discretion and deference to the trial court).<sup>1</sup> Also, the Commonwealth cites "facts" to support its argument that are contrary to the evidence and the trial court's findings of fact.

### **THE TRIAL COURT'S EXCLUSION OF HEARSAY EVIDENCE WAS NOT AN ABUSE OF DISCRETION**

The appellee cites Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488 (Ky. 1998), for the proposition that the review of the trial court's pretrial ruling is de novo by this Court. (Brief for Appellee, p. 6). Bob Hook was a case in which "[t]he facts and issues...[were] not in question" and "[t]he construction and application of statutes is a matter of law and may be reviewed de novo." 983 S.W.2d at 490. The review of the Jefferson District Court's evidentiary ruling is by the abuse of discretion standard.

Many of the "facts" in the Commonwealth's brief are taken from the Uniform Citation (KSP 206 (Rev. 1/1/88)) prepared by Officer William Brown after the arrest of Mr. Rankins. (Brief for Appellee, p. 1; TR 7; See Appendix 1, Brief for Appellee). The statements contained within the document, particularly in the "Post-arrest complaint" section, are classic testimonial hearsay statements that are excluded from evidence by the Sixth Amendment in the absence of

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<sup>1</sup> Woodard v. Commonwealth, 147 S.W.3d 63 (Ky. 2004); R.C. v. Commonwealth, 101 S.W.3d 897, 902 (Ky.App. 2002).

unavailability of the declarant and a prior opportunity for cross-examination.

Crawford v. Washington, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177

(2004) (“Statements taken by police officers in the course of interrogation are also testimonial under even a narrow standard.”).

One of the Commonwealth’s main factual points in support of its position is that Officer Brown spoke to Ms. Weaver within minutes of the alleged beating. (Brief for Appellee, pp. 8, 10, 11, 13). That simply is not true. Officer Brown actually testified that he arrived at the scene within one to two minutes of receiving the radio call from dispatch. (Evidentiary Appendix [EA] (Brief for Appellant), p. 4). Although Officer Brown said that the time of the “incident” was 2155 hours and his time of arrival at the scene was 2157 hours, he later explained (in response to the judge’s question) that the time of 2155 was the time that the “911 hang up or the domestic call” had been made, as reported to him by the police dispatcher. (EA 9). According to Fire Paramedic (EMT) Hildy Scott, Nicole Weaver told her that the alleged assault occurred at 2130 hours, or 9:30 p.m. (EA 28 –29).<sup>2</sup> Thus, the alleged assault actually occurred 25 minutes before the 911 call and 27 minutes prior to Officer Brown’s arrival at the scene.

The Commonwealth’s assertions about “uncontroverted” facts are likewise inaccurate, and more importantly, contrary to the trial court’s factual findings.

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<sup>2</sup> Both the circuit court and the Commonwealth on appeal mistakenly said that the only evidentiary source for the 9:30 p.m. time is a sworn affidavit of Nicole Weaver that was not admitted as evidence at the hearing. (Brief for Appellant, Appendix, p. 4; Brief for Appellee, pp. 10-11). Both the circuit court and the Commonwealth overlook Ms. Scott’s testimony on that precise issue. (EA 28-29).

The Commonwealth says that "it was uncontroverted that the victim in this case was 'excited' due to her obvious emotional distress and physical pain arising from the beating," and that "it was uncontroverted that the victim spoke 'at the first opportunity following the alleged offense.' [Citation omitted]." (Brief for Appellee, pp. 8, 9). The trial judge found, as a matter of fact, that Ms. Weaver's statements were not "offered in the excitement of the moment." (EA 30). Her statements were in response to Officer Brown's question. Id. Ms. Weaver's statement "was more the result of an interview than an excited utterance." (EA 31). Furthermore, the trial judge was concerned about whether there was time for Ms. Weaver to fabricate before making the statement. Id.

The alleged incident was at 9:30 p.m., the 911 call at 9:55 p.m. and the first contact between Officer Brown and Ms. Weaver was at 9:57 p.m. Upon arriving, Officer Brown asked Ms. Weaver what happened and then decided to take her to his police vehicle "where she finished her, her statement to me." (EA 6). Since there was substantial evidence to support the trial court's factual findings regarding Ms. Weaver's state of mind and Officer Brown's interview of her, these findings must be accepted on appeal. See Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001). The Jefferson Circuit Court, sitting as an appellate court, made two serious errors. The court engaged in its own fact finding, and substituted its own judgment for that of the trial court.

Application of the Confrontation Clause and of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and Davis v. Washington,

126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), to Mr. Rankins's case does not alter the outcome. In Davis, the Supreme Court distinguished between statements made to a 911 dispatcher that described ongoing events with statements to a police officer in which the declarant described past events. Davis v. Washington, 126 S.Ct. at 2278. In Mr. Rankins's case, Ms. Weaver was telling Officer Brown what had happened; she was describing past events. Her statements were testimonial and excluded by the Confrontation Clause.

On page 12 of its brief, the Commonwealth characterizes the Hammon v. Indiana case, decided under the name Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), as being about "written statements set out in an affidavit given to a police officer during a formal post-incident, investigative interrogation." Hammon actually involved statements in an affidavit and statements made to police officers who had responded to a domestic call. On remand from the United States Supreme Court, the Supreme Court of Indiana ruled that both the affidavit and the oral statements to the police were inadmissible. "We believe that Davis compels exclusion of an officer's testimony as well to the extent the officer testified to statements made to the officer at the Hammon home by Amy or any other person who did not testify at trial." Hammon v. State, 853 N.E.2d 477, 478 (Ind. 2006).

District Court Judge Delahanty patiently and carefully considered the evidence and the law before he concluded that the Commonwealth had failed to meet its burden to convince him that statements attributed to Ms. Weaver fell

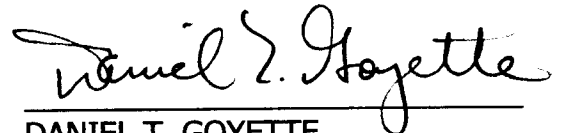
within an exception to the hearsay rule. His ruling was not an abuse of discretion. The circuit court erred by improperly engaging in fact finding on appeal and by substituting its judgment for that of the trial court.

**CONCLUSION**

For the foregoing reasons, the appellant, Terry Rankins, respectfully requests that he be granted the relief requested in his original brief.



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