



**Supreme Court of Kentucky  
No. 2006 – SC – 000096 - MR**

**Timothy Carl Shane**

**Appellant**

v.

Appeal from Jefferson Circuit Court  
Division 12  
Hon. F. Kenneth Conliffe, Judge  
No. 04-CR-977

**Commonwealth of Kentucky**

**Appellee**

**Reply Brief for Appellant, Timothy Carl Shane**

Submitted by:

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**Certificate of Service**

I hereby certify that a copy of this brief was mailed with first class postage pre-paid to Hon. F. Kenneth Conliffe, Judge, Jefferson Circuit Court, Division 12, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202; Hon. Mac Shannon, Assistant Commonwealth's Attorney, 514 W. Liberty St., Louisville, KY 40202; and Hon. David W. Barr, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601-8204 on December 22, 2006. I further certify that the appellant has not withdrawn the record on appeal.

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Frank W. Heft, Jr.

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### **Purpose of the Brief**

The primary purpose of this brief is to respond to appellee's argument that the evidence was sufficient to support a first-degree burglary conviction.

### **Issues to which Brief is addressed**

#### **I. The indictment should have been dismissed because of pre-indictment delay of 11 years.**

In *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 464, 30 L.Ed.2d 468, 479 (1971) and *United States v. Lovasco*, 431 U.S. 783, 788-789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752, 758 (1977), the Supreme Court noted that statutes of limitations provide an important safeguard against pre-indictment delay. Obviously, that protection is absent in a jurisdiction, like Kentucky, that does not have a statute of limitations. See KRS 500.050(1). Thus, rigid adherence to *Marion* and *Lovasco* undermines the protection against pre-indictment delay that those cases offer. Consequently, appellant has proposed that a test similar to the one articulated in *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 647 (1992) as the proper standard for pre-indictment delay analysis in Kentucky. Adoption of a *Doggett* type analysis does not, as appellee suggests on p. 5 of its brief, violate the Supremacy Clause of the United States Constitution because the States are entitled to interpret the provisions of their own Constitutions (like Section 11) more broadly than the Supreme Court interprets the Federal Constitution.<sup>1</sup>

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<sup>1</sup> A State has the authority "to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040-2041, 64 L.Ed.2d 741, 752 (1980). See also *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967) and *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575-576 (1975).

Under the analytical method proposed by appellant, the Commonwealth should be required to explain the delay in submitting the items for DNA comparison. As the supervisor of the DNA database at the State Police Forensic Laboratory testified, Kentucky was doing DNA testing in 1990 and it started producing DNA profiles that could be put in the CODIS database in the early 1990's and that the CODIS software was available to Kentucky about 1995. (VT 24-2, 10-27-05, 10:49:43-50:16, 10:57:02-58:22). Since appellant was convicted of felonies in Kentucky in 1993, in Georgia in 1995, in Indiana in 1991, 1992 and 1999, and in Colorado in 2003,<sup>2</sup> it seems reasonable that DNA testing could have occurred at a much earlier time. Prejudice can therefore be presumed from the delay and even if the delay could be attributed to mere negligence relief cannot be denied "simply because the accused cannot demonstrate exactly how it has prejudiced him." *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693, 120 L.Ed.2d at 531.

Accordingly, appellant respectfully urges the Court to adopt his proposed test for determining whether pre-indictment delay entitles the defendant to relief.

## **II. Juror 138 should have been struck for cause.**

The record reflects that Juror 138 would believe the testimony of a police officer simply because it was the testimony of a police officer.

Defense Counsel: So would you then say and don't want to put words in your mouth ...

Juror: No, that's okay.

Defense Counsel: taking from that that it's more likely that a police officer who has taken the oath is telling the truth than that a lay witness who has taken the oath is telling the truth.

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<sup>2</sup> VT 24-3, 10-31-05, 09:59:40-10:25, TR I, 108-109.

Juror: I would say yes.

Defense Counsel: So you would say that you would tend to believe the testimony of a police officer ...

Juror: Sure (nodding head affirmatively).

Defense Counsel: simply because it's the testimony of a police officer.

Juror: Sure.

(VT 24-1, 10-25-05, 14:13:05-34). That view alone is enough to disqualify Juror 138.

When it is considered with the fact that the juror was a police officer and knew and worked in the same district as the lead investigator (Detective Shifflett) 2-2½ years earlier (VT 24-1, 10-25-05, 11:09:50-10:38) and also worked with Detective Felty who was involved in this case (but did not testify) (*Id.* 11:15:36-16:11), the totality of the circumstances establishes grounds to excuse him for cause.

It should also be noted that appellee's reliance on *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) is misplaced because that case involved a right *bestowed* on the accused by the decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Since the defendant's case in *Griffith* was still on direct review, he would get the *benefit* of the *Batson* rule. The case at bar, however, results in appellant losing what had previously been recognized as a "substantial right."<sup>3</sup> The right existed when the case at bar was tried, yet, because of the intervening decision in *Morgan v. Commonwealth*, 189 S.W.3d 99, 106 (Ky. 2006) appellant is being stripped of

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<sup>3</sup> See *Thomas v. Commonwealth*, 864 S.W.2d 252, 259 (Ky.1993). "The rules specifying the number of peremptory challenges are not mere technicalities, they are *substantial rights* and are to be fully enforced." *Id.* Emphasis added. Other citation omitted.

that right. *Griffith v. Kentucky* is not authority for retroactive application of a rule that deprives a defendant of a "substantial right."

### III. Insufficiency of evidence for first-degree burglary conviction.

The jury was instructed that it could convict appellant of first-degree burglary if it found:

that when effecting entry or while in the building or in immediate flight therefrom, he was armed with a deadly weapon; and/or he caused physical injury to Sarah Sheroan; and/or he used or threatened the use of a dangerous instrument against Sarah Sheroan who was not a participant in the crime.

(TR III, 328). Appellee, however, ignores those essential elements in its recitation of evidence and at least tacitly concedes that a first-degree burglary conviction cannot be sustained under KRS 511.020(1)(b) because it offers no evidence that Ms. Sheroan sustained a physical injury.

Moreover, the rationale underlying *Williams v. Commonwealth*, 721 S.W.710 (Ky. 1987) is applicable to the case at bar because the defendant in *Williams* engaged in conduct that was intended to convince the victim that he was armed. That conduct, however, was insufficient as a matter of law to sustain a first-degree robbery conviction.

A response of perceiving danger is quite real under threat; however, such cannot serve to convert something merely speculated upon (a weapon or instrument) into established existence.

To do otherwise places defendant virtually without defense at the caprice of a victim's subjective evaluation without regard to the actual course of events and could lead to convictions for crimes neither intended nor enacted. Our heritage of justice applies the law to facts. Herein the fact is that although force was threatened, the presence of a weapon or instrument was illusory at best. Without an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction.

*Id.* at 712. The Court further explained:

The indictment specified that Mr. Williams committed the robbery while armed. Nothing was heard at trial to establish this other than the reference to Appellant's gesturing to his pocket. This cannot be said to have met the Commonwealth's burden. Without something tangible backing up the threat, words do not reach beyond the status of threats and as such are insufficient to sustain submission under first-degree robbery.

*Id.* at 713. The Court's reasoning is applied with equal force to the a first-degree burglary that is charged under KRS 511.020(1)(a) - "Is armed with ... a deadly weapon[.]" The evidence showed that when Ms. Sheroan said she did not want to engage in oral sex, her assailant said he would go and get his gun. (VT 24-1, 10-26-05, 10:21:44-23:15, 11:02:07-20) The obvious implication is that the perpetrator was not in fact armed at the time he made the statement. Thus, the evidence was not sufficient to support a first-degree burglary conviction because KRS 511.020(1)(a) requires that the defendant in fact be armed with a deadly weapon. (See Appellant's brief, pp. 24-25).

Finally, Ms Sheroan did not tell Lt. Sherrard that the perpetrator used or threatened the use of a hammer,<sup>4</sup> and even if the jury believed her testimony that her assailant said he had a hammer, the fact remains that he did not use or threaten its use against her.<sup>5</sup> Indeed, when defense counsel asked Ms. Sheroan if she told the police that the perpetrator threatened her with a hammer, she responded, "Making remarks that he had a hammer. Not that he was going to hit me upside the head with a hammer, no, just making remarks that he had a hammer." (VT 24-1, 10-26-05, 11:23:55- 24:12). Thus, the evidence was insufficient to support a first-degree burglary conviction under KRS 511.020(1)(c) - "Uses or threatens the use of a dangerous instrument ...".

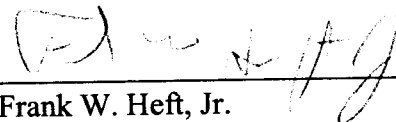
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<sup>4</sup> VT 24-2, 10-26-05, 16:24:19-38.

<sup>5</sup> VT 24-1, 10-26-05, 10:40:27-41:25, 11:23:08-25:24, 11:27:27-28:20

**Conclusion**

For the foregoing reasons, the appellant, Timothy Carl Shane, respectfully submits that he is entitled to the relief requested in his original brief.



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