IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-000197-MR

BECKHAM B. BARNES — APPELLANT

V.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
01-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

2004-SC-000258-TG

BECKHAM B. BARNES — APPELLANT

V.

ON TRANSFER FROM THE COURT OF APPEALS
NO. 2004CA000547
WAYNE CIRCUIT COURT NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Beckham B. Barnes, was indicted for the murder of Troy Miller by a Russell County Grand Jury. A change of venue was granted to Wayne County due to difficulty in empanelling a jury in Russell County. In May of 2001, Barnes was convicted of intentional murder and sentenced to twenty-two (22) years in accordance

with the jury verdict. This Court reversed and remanded for a new trial.[1] In the second trial ("Barnes II"), also held in Wayne County, Barnes was convicted of murder and was sentenced, as recommended by the jury, to twenty-five (25) years imprisonment. Appellant appeals to this Court from his conviction in Barnes II as a matter of right[2] and from the trial court's denial of his motion for a new trial under CR 60.02.

Appellant is a civil engineer and land surveyor with his office located, at the time of the shooting, in a barn across from his house. Appellant hired Troy Miller, the victim, shortly after Miller graduated from high school. Appellant trained Miller as a land surveyor. Miller eventually became qualified as a land surveyor in his own right, but continued to periodically use Appellant's expertise, tools, and equipment. When Miller sought Appellant's help on jobs, Miller would pay Appellant twenty percent (20%) of the fees generated.

On April 1, 1999, Appellant assisted Miller on such a project, but the project was interrupted so that Appellant could attend a pie supper at his daughter's elementary school. Shortly after Appellant returned to his office, Miller did likewise, and they finished the project around 10:00 p.m. Internal computer logs indicate the project restarted at 9:45 p.m. and concluded at 10:07 p.m.[3] Appellant alleges that Miller was behind on the payment of fees and that he refused to print the project until Miller satisfied the account. Their usual arrangement was to settle the account quarterly. Miller left the office and Appellant went back across the street to his house.

Sometime later Appellant was awakened by his barking dog and went to investigate. Appellant's dog led him to his office where he saw movement in front of a

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[1] Barnes v. Commonwealth, 91 S.W.3d 564 (Ky. 2002) ("Barnes I").
[2] Ky. Const. §110(2)(b).
[3] Barnes, 91 S.W.3d at 565.

lit computer screen. Barnes obtained a rifle he kept adjacent to his office and ordered the person to "freeze." Barnes alleges that he heard "gunshots" and fired back with his own rifle and then ran back to his home. He informed his wife that he thought he had shot the intruder. The internal computer logged additional activity on the pending project from 12:40 a.m. until 1:52 a.m. and Paula Barnes, Appellant's wife, called the "911" emergency operator at 2:13 a.m.[4] Appellant admitted to shooting Miller, but argues that the shooting was in self-defense.

On this appeal, Appellant claims that the trial court erred by denying his request to transfer the case back to Russell County for the retrial. Appellant argues that denying the retransfer violates his rights under both the United States and Kentucky Constitutions. Specifically, Appellant claims a violation of the Due Process Clause of the Fourteenth Amendment as applied to the states by the Sixth Amendment of our Federal Constitution and Section Eleven of the Kentucky Constitution.

The trial court relied on Bennett v. Commonwealth[5] and Hodge v. Commonwealth[6] for interpretations of KRS Chapter 452. This Court held that the defendants in Bennett and Hodge were not entitled to a change in venue due to the pre-trial publicity of their respective cases. Bennett was a recent holding by this Court that trial courts have broad discretion over change of venue questions and their decision will be overturned only on a showing of an abuse of discretion.[7] In Hodge the defendant was retried after an initial conviction was reversed and remanded by this Court. We held there was not a statutory entitlement to a second change of venue

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[4] Id. at 566.
[5] 978 S.W.2d 322 (Ky. 1998).
[6] 17 S.W.3d 824 (Ky. 2000).
[7] Bennett at 325.

relying on KRS 452.240.[8] The trial judge in the instant case correctly stated that KRS Chapter 452 applies here.

Although not specifically referred to by the trial court we interpret his reference as to KRS 452.240 which allows just one change of venue. The Court of Appeals previously permitted more than one change of venue,[9] but Appellant instead relies on Commonwealth v. Kelly[10] and argues that the trial court is duty bound to transfer the case back to the original county when there is no longer a "state of lawlessness."

The record does not indicate that there was ever a finding of a state of lawlessness or that the original change of venue was based on that premise. KRS 452.290 requires transfer back to the original county only when the original transfer has been made on the basis of a state of lawlessness. In the absence of an express finding of lawlessness to trigger KRS 452.230, we will not presume the original transfer to have been on that basis. Instead, the original transfer will be deemed to have been made on the basis of KRS 452.210 when, in such circumstances, venue remains in the transferee county until a complete determination of the case.

Appellant admits to shooting Miller but contends that it was in self-defense, and as justification claims that Miller, an intruder, fired on Appellant first. However, the prosecution contends that someone other than Miller, specifically the Appellant, fired first and then planted the weapon beside Miller's body. To prove this theory the prosecution produced the testimony of Ms. Zenobia Skinner of the Kentucky State Police. She compared the gunshot residue from the victim's hands to that from a

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[8] Hodge at 835.
[9] Smith v. Commonwealth, 67 S.W. 32 (Ky. 1902).
[10] 18 S.W.2d 953 (Ky. 1929).

test firing by Mr. Ronnie Freels, a retired Kentucky State Police Ballistics expert. Particularly she tested for the presence, or lack thereof, of three specific chemical substances: antimony, barium, and lead. The test firing results indicated significant levels of antimony and lead, indicating the gun was an emitter of those two substances. Appellant objected to Skinner's testimony at trial, preserving the issue for appeal.

Appellant argues that Skinner's analysis is not scientifically reliable, and that if the trial court had held a Daubert[11] hearing then Skinner's testimony would not have been permitted. Daubert requires the trial judge to determine whether an expert's testimony is relevant and reliable in a preliminary hearing. In Daubert the United States Supreme Court suggested factors that may aid in that review: (1) can it be tested; (2) has it been peer-reviewed; (3) its rate of error; and (4) acceptance and support within the relevant community.[12] In City of Owensboro v. Adams[13] this Court stated that even though a trial court has broad latitude in its discretion regarding the Daubert examination, it must state at a minimum on the record its Daubert conclusion.[14] The trial court here stated on the record that it was "applying Daubert" and that it had not heard enough to disqualify the testimony. The trial court did not, therefore, abuse its discretion.

If an expert's testimony is admitted over the objection of a party, the opposing party may either refute the testimony with another expert or lessen its effect through vigorous cross-examination. Appellant chose only to cross-examine Skinner and Freels, but did not introduce his own expert. Skinner prepared a report and

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[11] 509 U.S. 579, 592-94, 116 S.Ct. 189, 125 L.Ed.2d 469 (1993).
[12] Id.
[13] 136 S.W.3d 446 (Ky. 2004).
[14] Id. at 451.

testified to the presence of antimony and lead on Freels' hand after he test-fired the weapon. Skinner then compared her results to those from the victim Miller. While the test subject Freels had significant amounts of lead and antimony on his hands, Miller had only lead on his hands. Therefore, Skinner concluded that she couldn't state with certainty whether Miller had fired the weapon.

Appellant's defense counsel cross-examined Skinner on her methodology and results, causing Skinner to concede that the conditions of the crime scene could be much different from the test fire range. The cross-examination of Freels led him to admit that test firing weapons to determine whether a gun was an emitter (causing significant presence of one of the three chemical substances) is no longer performed by the Kentucky State Police. The jury heard the evidence, its conflicts and attacks upon it. It was for the jury to determine the weight of such evidence.

Appellant further argues that the Commonwealth failed to provide "exculpatory" material in violation of Brady v. Maryland[15] entitling him to a new trial. This claim arises because Skinner's report on the victim, Miller, did not indicate a presence of barium or lead, yet she testified at trial that there were significant amounts of lead and the presence of barium on the swabs of Miller's hand, allowing the inference that he had fired a gun. This was to Appellant's advantage. The live testimony was more favorable than the report. It also revealed an inconsistency that Appellant's counsel used to attack Skinner's testimony.

While the Commonwealth's failure to furnish appellant with a report that accurately disclosed investigatory findings of probable gunshot residue on the victim's hands was likely a Brady violation, Skinner's testimony at trial cured the violation by

[15] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

presenting the jury directly with the exculpatory evidence. Accordingly, we find that any error with respect to the Brady violation was harmless beyond a reasonable doubt.[16]

In his next claim of error, Appellant asserts that the trial court erred by admitting the testimony of Detective Ken Hill regarding tire tracks. Appellant preserved this issue for appeal by filing a Motion in Limine before trial and objecting during trial. Furthermore, the testimony was excluded in Barnes I and Appellant asserts that it must also be excluded in Barnes II under the "law of the case" doctrine.

Appellant first questions the relevancy and probative value of Hill's testimony. Kentucky defines "relevant evidence" under KRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We have given trial courts broad discretion to determine whether evidence is relevant and a "slight" showing is sufficient.[17] Hill testified from photos of the scene where the decedent's truck was found that there were two sets of tire tracks. Hill attributed one set to a turkey hunter and the second to a rear wheel drive vehicle that lost traction and made a "fish tail" mark on the gravel road. The "fish tail" was caused by an accelerated start with the driver over-applying power and losing traction.

The Commonwealth introduced the testimony of Detective Hill to support its theory that someone had moved the victim's truck in an attempt to place it in such a position as to support the Appellant's story and then sped off in another vehicle. KRE 403 states: "Although relevant, evidence may be excluded if its probative

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[16] Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[17] "A 'fact that is of consequence to the determination of the action' includes not only a fact tending to prove an element of the offense, but also a fact tending to disprove a defense. Relevancy is established by any showing of probativeness, however slight." Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1996) (quoting KRE 401).

value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Appellant took the opportunity to cross-examine Hill on his testimony. Since the probative value of Hill's testimony is not substantially outweighed by any undue prejudicial effect it was not inadmissible. With respect to Appellant's claim regarding "law of the case," the evidence at issue was excluded by the trial court in Barnes I. As this ruling favored Appellant, it was not presented to this Court and we did not address it. Thus, "law of the case" does not apply.

Appellant next argues that the Commonwealth improperly impeached his parents, Wilbur and Margie Barnes, on collateral facts. Appellant claims this issue was properly preserved by a citation at trial and by a motion in limine; however, the Commonwealth contends the asserted error was unpreserved. We have recently made clear that while we have not repealed the contemporaneous objection rule, we follow the plain language of KRE 103(d) over case law to the contrary, and, therefore a proper motion in limine preserves an issue for appeal.[18] The impeachment arose from two inconsistent lines of testimony by Appellant's parents as to the time they arrived at the scene and whether they arrived together.

Appellant's mother, Margie, testified before the grand jury that she and her husband arrived together at the crime scene. To illustrate the position of their car she sketched the location where they parked their vehicle. However, various police and ambulance personnel testified that they watched Wilbur drive in alone, and that Margie must have arrived earlier for her to already be on the scene. Further, the witnesses

[18] Lanham v. Commonwealth, 171 S.W.3d 14, 21 (Ky. 2005).

stated that Wilbur could not have parked in the location described by Margie because an ambulance was already parked there.

Margie explained that Wilbur drove slowly into the driveway and she got out and ran into the house. After reviewing her husband's testimony she admitted she was wrong and ultimately testified that she was unsure about where they parked. A neighbor, Ms. Lisa Brumley, also testified that she saw Wilbur pull out in front of her around midnight as she was coming home from work. The inconsistency between Wilbur and Margie and between the other uninterested parties, the police, ambulance personnel, and neighbor reflects a proper basis for the trial court to rule as it did and allow such impeachment.

The Appellant characterizes Margie's testimony as collateral, but the Commonwealth says it is material because it fits within its general theory that the Appellant did not shoot in self-defense, but staged the evidence to appear that he did. If Wilbur and Margie actually arrived earlier than they said, such as before midnight as the neighbor Brumley testified, then their testimony is inconsistent with the 911 dispatch call at 2:13 a.m.

It should have been expected that the Commonwealth would impeach Margie and Wilbur with their testimony that was inconsistent with each other and with the testimony of others. We have recognized the approach suggested by Professor Lawson,[19] to look at this as a KRE 403 balancing test measuring the probative value against the prejudicial effect of the evidence and not whether the matter is merely collateral. Under either analysis, however, there was no abuse of discretion by allowing

[19] Metcalf v. Commonwealth, 158 S.W.3d 740, 745 (Ky. 2005) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook, § 4.05(3), at 276).

the jury to consider the credibility of each witness to determine the weight it should have.

Appellant's next claim of error is that the verdict form improperly shifted the burden to the Appellant. Appellant objected to the verdict form at trial and thereby preserved the issue for appellate review. The instructions are properly described as a "form" with standard language beginning with the Presumption of Innocence:

> A. The law presumes a defendant to be innocent of a crime and the Indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.
> B. If you believe from the evidence beyond a reasonable doubt that the Defendant would be guilty of Intentional Murder under Instruction No. 3B(1), except that you would have a reasonable doubt as to whether at the time he killed Troy Miller he was or was not acting under the influence of extreme emotional disturbance, you shall not find the Defendant guilty of Intentional Murder under Instruction No. 3B(1), but shall find him guilty of First Degree Manslaughter under Instruction No. 4B(1).

While the form provided for alternative findings by the jury, such as first-degree manslaughter instead of intentional murder, in no way does it "shift the burden" to Appellant. The instructions properly described the presumption of Appellant's innocence and the burden of proof of the Commonwealth.

Finally, Appellant argues that statements made by the prosecutor during opening statement, and by police witnesses about whether the weapon found beside the victim was "clean" of fingerprints entitle Appellant to a new trial under CR 60.02 based on newly discovered evidence. Appellant timely filed a motion for a new trial as required by CR 60.02 and upon denial of the motion appealed to the Court of Appeals.

That appeal was transferred to this Court and consolidated with the matter of right appeal.

During the Commonwealth's opening statement the prosecutor stated that Detective Hill had inspected the gun with a magnifying glass, that he could not find any blood or fingerprints, and "[i]t was a totally clean gun planted at the scene." Hill and Freels both testified at trial that they checked for fingerprints and found none. Hill also testified that the victim, Miller, had blood on both hands and his upper body, but none was detected on the gun by naked eye examination or by use of a magnifying glass. Hill did not check further for prints but sent it to the lab for latent prints, blood, body fluids, and test firing for gun residue. Freels stated that the gun was dusted and no prints were found. However, Appellant discovered through an open records request to the Kentucky State Police that the pistol and bullets were not examined for fingerprints.

The difference between the trial testimony of finding no fingerprints and the post-trial revelation that no laboratory examination was actually made is Appellant's basis for claiming a new trial under CR 60.02. This inconsistency between the testimony of the two officers and what actually occurred is, perhaps, the most troubling aspect of this appeal.

The trial court, however, addressed those concerns and found them as unworthy and even characterized them as speculative.

> The Court does not find that the information the Defendant recently obtained from the Kentucky State Police is contrary to representations made by the Commonwealth Attorney or the evidence presented by the Commonwealth. Furthermore, the Defendant does not claim that the Commonwealth deliberately withheld information from the Defendant, and the Defendant had more than three years to review the discovery provided by the Commonwealth, [sic] Both Sgt. Ken Hill and Ronnie Frees [sic] testified at an earlier trial of the case and the Defendant does not claim

> their testimony changed substantially from the first trial. If the Defendant had questions about the exact type of analysis conducted on the pistol, based on the discovery provided by the Commonwealth and the earlier testimony of Sgt. Ken Hill and Mr. Ronnie Freels, the Defendant could have raised those concerns long before now. It is speculation at best to suggest that if further tests had been conducted on the pistol the victim's fingerprints would have been found on the pistol.

We agree that failure of the laboratory to test for fingerprints provides no basis for CR 60.02 relief. Our decision in Foley v. Commonwealth[20] requires discovery of evidence of such a character that "it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted."[21] This standard has not been met.

For the foregoing reasons this Court affirms the conviction of the Appellant.

Lambert, C. J., and Cooper, Graves, Johnstone, Roach, and Wintersheimer, JJ., concur. Scott, J., dissents.

[20] 55 S.W.3d 809, 814 (Ky. 2001).
[21] Id. at 814.

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