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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 18, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000034-MR

RONNIE LEE BOWLING — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., SPECIAL JUDGE
NO. 89-CR-000024

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Ronnie Lee Bowling appeals from the Laurel Circuit Court's denial of his motion for a new trial. The motion, made pursuant to CR 60.02, alleges that expert testimony concerning comparative bullet lead analysis was so unreliable as to warrant a new trial. For the reasons stated herein, we affirm.

The offenses underlying this appeal occurred at two different gas stations. The first occurred on January 20, 1989, at Jones Chevron station, where Bowling killed Ronald L. Smith. Ronald Smith was shot six times in the head, chest, and back. Bowling was convicted of murder, burglary in the first degree, and robbery in the first degree for the crimes committed on January 20th.

The second set of crimes occurred on February 22, 1989, at a gas station owned by Marvin Hensley. A customer found Marvin Hensley lying in a pool of blood; he had suffered two gunshot wounds to the head and one to his hand. Bowling was convicted of the murder of Mr. Hensley, as well as first-degree burglary and first-degree robbery.

Bowling was arrested for these two sets of crimes after attempting to rob a third service station, Quality Sunoco, on February 25th. Bowling entered the station and had a brief conversation with the owner, Ricky Smith. As he began to leave, Bowling pulled out a revolver and started shooting at Mr. Smith. Fortunately, Mr. Smith was able to dive behind a wall and metal desk to avoid the gunfire. Bowling fled and Mr. Smith notified the Kentucky State Police, who followed Bowling for some thirty miles before he finally stopped and was arrested. During the chase, police observed Bowling throw two brown objects from his vehicle near the nine-mile marker of Kentucky Highway 472. Troopers later returned to this location and found a pair of brown gloves. Troopers also searched the area along the entire route of the chase. Near the area where the chase began, they recovered a handgun. This handgun was identified by Mr. Smith as the one Bowling had brandished.

Bowling was found guilty of the above stated crimes and sentenced to death for each of the murder convictions. He was also sentenced to twenty years' imprisonment for each of the burglary and robbery convictions, to be run consecutively. On direct appeal, this Court affirmed Bowling's convictions and sentences. See Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997).

In 1998, Bowling filed a collateral attack motion pursuant to RCr 11.42 in Laurel Circuit Court. The primary subject of the motion was a claim of ineffective assistance of counsel. The Laurel Circuit Court denied the motion, and this Court affirmed the judgment. See Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002).

In 2002, Bowling then filed a motion for a new trial pursuant to RCr 10.02 and CR 60.02, primarily alleging juror misconduct. The Laurel Circuit Court denied the motion. Again, this Court affirmed the judgment of the lower court. See Bowling v.

Commonwealth, 168 S.W.3d 2 (Ky. 2004). Bowling petitioned this Court for rehearing, which was denied.

On January 28, 2005, while that petition for rehearing was pending, Bowling filed another pro se motion for a new trial pursuant to CR 60.02 in Laurel Circuit Court. Counsel was appointed for purposes of the motion and counsel later submitted a motion for a new trial pursuant to RCr 10.02 and RCr 10.06. Bowling's primary allegation challenged the reliability of the expert testimony given by Donald Havekost. Havekost, an FBI employee, compared the chemical composition of bullets found at all three gas stations with bullets found at Bowling's residence, a process known as CBLA (comparative bullet lead analysis). The crux of Havekost's testimony was that some bullets at each location had identical chemical composition of bullets found at Bowling's home.

Since the time of Bowling's trial, the reliability of CBLA has been seriously undermined. See Ragland v. Commonwealth, 191 S.W.3d 569, 578 (Ky. 2006) (referencing a report issued by the National Research Council of the National Academies of Science, which "determined that the conclusions drawn from CBLA do not meet the scientific reliability requirements" established by Daubert). In fact, the FBI discontinued CBLA testing in September of 2005. In his motion for a new trial, Bowling made three arguments relating to the CBLA testimony: (1) that the recent discrediting of CBLA testing constitutes newly discovered evidence within the meaning of CR 60.02(b); (2) that Havekost's testimony, resulting from such unreliable chemical analysis, rendered the entire proceedings unfair; and (3) that the Commonwealth violated Brady v. Maryland by failing to elicit from Havekost that there could possibly be an "innocent explanation" for the compositional matching of the bullets.

The Laurel Circuit Court denied the motion and Bowling now appeals that judgment as a matter of right. From the record, it appears that the trial court rejected all of Bowling's claims on the basis that, notwithstanding the recent discrediting of CBLA testing, Havekost's testimony was merely cumulative of other, properly admitted testimony. The trial court reasoned that, even absent Havekost's testimony, there was little possibility that the verdict would have been different.

We agree with the trial court's characterization of Havekost's testimony as "merely a stone in a foundation strong enough to stand without it." While Havekost's testimony linked bullets from all three crime scenes to bullets found at Bowling's residence, such testimony was corroborative of other evidence. Ballistics testing performed by the Kentucky State Police crime lab established that the bullets taken from Ronald Smith's body were fired from the gun recovered along Highway 472. Ballistics testing likewise established that a bullet taken from Marvin Hensley's body was fired from that same handgun.[1] Ricky Smith, who survived, not only identified Bowling as the assailant, but also identified this handgun as the one Bowling used during the attack. Lead residue particles were found on the brown gloves Bowling threw from his vehicle during the chase. Bowling's ex-wife, Ora Lee Isaacs, also identified the recovered handgun as one Bowling had earlier purchased from his uncle. Thus, while Havekost's testimony linked the crime scene bullets to ammunition in Bowling's possession, ballistics testing and other testimony linked the bullets from the crime scenes to the handgun Bowling threw from his vehicle. In short, the practical effect of the CBLA testimony and the ballistics testimony was the same.

[1] The remaining bullets found in Mr. Hensley's body were too mutilated to undergo ballistics testing.

The trial court's ruling as to whether to grant a new trial based on newly discovered evidence pursuant to CR 60.02(b) is reviewed for an abuse of discretion. Foley v. Commonwealth, 55 S.W.3d 809, 814 (Ky. 2000). In order to warrant a new trial, the newly discovered evidence "must be of such decisive value or force that it would, with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted." Coots v. Commonwealth, 418 S.W.2d 752, 754 (Ky. 1967). See also Foley, 55 S.W.3d at 814-15 (to warrant a new trial, newly discovered evidence must be "sufficiently compelling as to create a reasonable certainty that the verdict would have been different had the evidence been available at the former trial[.]"). Here, Bowling essentially claims that the recent discrediting of CBLA testing constitutes newly discovered evidence. We have considered whether the verdict in this case would have been different had the jury been made aware of the limitations of CBLA testing, and we conclude that it would not. Substantial evidence was presented linking Bowling to the recovered handgun, and likewise linking the recovered handgun to all three crime scenes. As such, the trial court did not abuse its discretion in denying Bowling a new trial pursuant to CR 60.02(b).

Alternatively, Bowling asserts that the admission of Havekost's testimony, the strength of which has been seriously undermined, denied him due process of law and a fundamentally fair trial. This claim was brought pursuant to subsection (f) of CR 60.02, which permits relief for "any other reason of an extraordinary nature." Furthermore, for purposes of our analysis of whether Bowling was denied due process of law by the admission of Havekost's testimony, we turn to our jurisprudence regarding perjured testimony. While we certainly do not find that Havekost perjured his testimony, the

subsequent discrediting of CBLA testing creates an analogous circumstance – that is, the revelation that false testimony was presented to the jury.

The introduction of perjured testimony can result in a violation of the right to due process of law, where the defendant can establish "that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known." Commonwealth v. Spaulding, 991 S.W.2d 651, 657 (Ky. 1999). The latter portion of that test is satisfied when there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury under the evidence as a whole." Spaulding, 991 S.W.2d at n.1, quoting Williams v. Commonwealth, 569 S.W.2d 139, 144 (Ky. 1978). Again, the decision to grant a motion pursuant to CR 60.02(f) lies within the sound discretion of the trial court. Brown v. Commonwealth, 932 S.W.2d 359, 362 (Ky. 1996).

Bowling has failed to present a sufficiently compelling argument that Havekost's testimony affected the judgment of the jury under the evidence as a whole. The CBLA testimony was important evidence linking Bowling to the bullets. However, we are convinced that the jury's verdict would have been the same even if the testimony had been excluded, as the Commonwealth's evidence linking Bowling to the weapon and the weapon to the murders was compelling. We also cannot discount the force of Rick Smith's identification of both Bowling and his handgun. For this reason, we find no abuse of discretion in the trial court's denial of Bowling's motion pursuant to CR 60.02(f).

Bowling's final claim is that the Commonwealth violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to ask Havekost whether there could be an "innocent explanation" for the match between the crime scene bullets and

Bowling's ammunition. In support of this claim, Bowling attached to his motion for a new trial an affidavit executed by an attorney with the Department of Public Advocacy. According to the affidavit, Havekost stated in a 2005 phone interview that he "could have testified" in 1992 that "local retail distribution of a certain type of bullet could provide an innocent reason for a match between bullets in [Bowling's] possession and bullets at a crime scene."

Brady concerns the disclosure of exculpatory evidence favorable to the defense and is clearly inapplicable to this circumstance. Nothing was withheld from defense counsel in violation of Brady, and nothing prevented defense counsel from asking Havekost this very question at trial. Brady does not impose upon the Commonwealth the duty to cross-examine its own witnesses in an effort to glean testimony favorable to the defense. There was no error.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

Minton, C.J.; Abramson, J.; Cunningham, J.; and Thomas D. Emberton, Special Justice; concur. Schroder, J., dissents by separate opinion in which Noble, J., joins. Sara W. Combs, Special Justice, also dissents by separate opinion in which Noble, J., also joins. Scott and Venters, JJ., not sitting.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY SPECIAL JUSTICE COMBS

After serious deliberation and careful review of the file, I am compelled to dissent from the well-crafted memorandum opinion affirming in this case. I cannot fathom how we can avoid the precedent of Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006), which reversed a conviction and remanded for a new trial when the reliability of CBLA (Comparative Bullet Lead Analysis) testing was not only questioned but wholly discredited. The Court observed in Ragland that the FBI had abandoned any continued use of or reliance upon CBLA, correctly characterized by the Appellant in the case before us as "junk science."

I wholly agree with the majority opinion that there was no perjury committed by Havekost in presenting his expert testimony. Nor was there a Brady violation. I also agree that there was much substantial evidence. It is significant that the majority opinion reiterates the metaphor fashioned by the trial judge with regard to Havekost's testimony: "merely a stone in a foundation strong enough to stand without it."

I am not convinced that that compelling metaphor as to the substantiality of the remaining evidence overcomes the deliberate language utilized by the prosecutor in his opening statement at the Laurel County double murder trial in 1992. He referred to the now-discredited bullet testing as "the string that ties all the evidence together, and goes back to this man on the murders." (Emphasis added.) The prosecutor placed all-encompassing emphasis on the CBLA testing, affording it in metallurgical terms the same deference that DNA correctly enjoys today in biological terms.

In his pro se reply brief at pp.3-4, the Appellant cogently summarized the taint on the verdict as a result of the CBLA evidence:

> Fahy v. State of Connecticut, 375 U.S. 85-("The question is whether there is a reasonable possibility that the evidence complained of might of contributed to the conviction.") An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant, cannot, under Fahy, be conceived as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. Bowling states under Chapman v. State of California, 386 U.S. 18 (1967) which held that an error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict." The judge employs a deficient standard of review under Fahy and Chapman. The judge does not satisfy Chapman's concerns because it fails to dtermine [sic] whether the jury's verdict did rest on that evidence as well as on the CBLA evidenc [sic] and FBI expert testimony, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the CBLA evidence and FBI expert testimony must have made no difference in reaching the verdict.

Appellant's attorneys correctly noted in their appellate brief that the unreliable scientific testimony of the expert witness Havekost "infected" the verdict so as to rise to the level of a deprivation of a fair trial of constitutional proportions:

> To a jury an "aura of special reliability and trustworthiness" surrounds the testimony of an expert. Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987); see also Thompson v. Commonwealth, 177 S.W.3d 782, 786 (Ky. 2005) (Jurors are "undoubtedly greatly influenced" by expert witness testimony). Here, "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967).

There is no doubt that the CBLA evidence was dramatized, emphasized, and touted as the coup de grace, again in the prosecutor's words, "the string that ties all the evidence together ...." Such was the state of the law at the time of trial in 1992 and in 1997 when this Court affirmed Bowling's conviction. However, Ragland held that the debunked CBLA evidence deprived the defendant of a fair trial and ordered a new trial, ever mindful of the heightened scrutiny required in a death-penalty case. I cannot escape its binding, precedential relevance to the case before us.

Accordingly, I would vacate this conviction and remand for a new trial or "at the least a new sentencing" as Appellant's attorneys request.

Noble, J., joins this dissenting opinion.

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DISSENTING OPINION BY JUSTICE SCHRODER

I have some of the same concerns that Special Justice Combs expressed in her dissent. A major piece of evidence in Bowling's trial was the CBLA. In recent time, CBLA was exposed as junk science, unreliable and inadmissible. Bowling's motion for a new trial was denied by the trial court for a number of reasons, and is being affirmed by the majority of this Court. While I agree with the majority on a number of grounds, Bowling's motion for a new trial under CR 60.02(f), which permits relief for "any other reason of an extraordinary nature[,]" has caught my eye. Bowling contends the discredited CBLA evidence denied him due process of law and a fundamentally fair trial.[1] The majority, for purposes of analysis, compares the admission of the discredited

[1] U.S.Const. amend. V, XIV.

CBLA to the admission of perjured[2] or false testimony. I agree. In Commonwealth v. Spaulding, 991 S.W.2d 651, 657 (Ky. 1999), our Court held that "a criminal conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f) and subject to the reasonable time limitation of the rule."

The Spaulding Court also had to wrestle with the issue of whether a conviction based on the introduction of perjured testimony amounted to a denial of due process of law. The Court started out recognizing "[w]hen the perjured testimony could 'in any reasonable likelihood have affected the judgment of the jury,' the knowing use by the prosecutor of perjured testimony results in a denial of due process under the Fourteenth Amendment and a new trial is required." Id. at 655-656 (internal citation omitted). In discussing the unknowing use of perjured testimony, the Spaulding Court acknowledged split authority but cited Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988), with approval for the proposition that: "[t]here is no logical reason to limit a due process violation to state action defined as prosecutorial knowledge of perjured testimony or even false testimony by witnesses with some affiliation with a government agency. Such a rule elevates form over substance." Id. Spaulding also cited with approval, Anderson v. Buchanan, 168 S.W.2d 48, 54 (Ky. 1943), for the proposition that "the 'question of the guilt or innocence of the accused is not a necessary subject of the inquiry.'" Id. at 657. And, "the integrity of the judicial process was the overriding concern to the Anderson [C]ourt." Id.

The Spaulding Court then decided that "the introduction of perjured testimony, which is not known as such by the prosecutor, can result in a violation of the right to due course of law and the right to due process of law as provided by the Kentucky and

[2] Recognizing the witness did not actually give perjured testimony, but that false testimony was presented to the jury.

United States Constitutions." Id. (emphasis added). Spaulding then set the standard for unknowingly introducing perjured or false testimony with the burden "on the defendant to show . . . that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." Id.

This is an incorrect standard to show reversible error. In the case of Satterwhite v. Texas, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. Ed 284 (1988), the United States Supreme Court reviewed error in a Texas death penalty case, wherein a psychiatrist's testimony about the future dangerousness of the defendant was erroneously admitted. After concluding this testimony violated a constitutional right (Sixth Amendment), the Court nevertheless concluded that the constitutional violation was subject to harmless error analysis. The Satterwhite Court recognized that the test for harmless error with error with regard to a constitutional right comes from Chapman v. California, "[t]he question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 258-259 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Chapman is a United States Supreme Court case that creates the harmless error standard for constitutional violations. Spaulding uses the Chapman standard for false testimony knowingly introduced at trial, but creates a much more difficult standard for relief (reversible error) when the false testimony was unknowingly false when introduced at trial. Spaulding, 991 S.W.2d at 657, n.1. We are bound to follow Chapman, and ask whether beyond a reasonable doubt that the error complained of did not contribute to Bowling's conviction. See Chapman, 386 U.S. at 26.

In his opening statement, the prosecutor claimed the now discredited CBLA was "the string that ties all the evidence together, and goes back to this man on the murders." In his closing statement, while the prosecutor was discussing the CBLA expert, he claimed "It goes without disputing, no one here could question the testimony of the expert or the finding or conclusions of that expert. A point conceded by the defense . . . . Those are facts, that's not someone's memory working with it." Later in his closing statement, the prosecutor while discussing the CBLA tests performed after the rifling examinations stated:

> And then he sent it off also to the F.B.I. and what we know there is Q3, found in the body of Smith, one here, with the rifling, fired from this gun over here, was made in this batch C; we also know that E, found in the body of Marvin Hensley, fired definitely, positively, from that gun right there, was made in batch C; and then when these blue start attaching down through here with the other batches and with the Sunoco bullets and with the bullets found in Ronnie Bowling's house, then you have it all tied together that that is the murderer. Those circumstances just didn't happen. Mr. Havekost said finding bullets out of the same batches in unrelated crimes has not been his experience. In related crimes you get bullets out of the same batch . . . . [W]hat ties them together is that man right there, with that gun, that's what the experts put together, that the bullets found in his house; that the bullets that Ricky Smith says that he was shooting at him in the Sunoco station, and that are found in the dead bodies were all out of the same batch and fired out of this gun.

In light of the prosecutor's emphasis on the CBLA, can we say, beyond a reasonable doubt that the error complained of did not contribute to the conviction? I believe the United States Supreme Court case of Chapman v. California requires us to vacate the conviction and remand for a new trial.

Noble, J., joins this dissenting opinion.

Supreme Court of Kentucky

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ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellant, of the Memorandum Opinion rendered September 18, 2008, is DENIED.

Noble and Schroder, JJ., and Combs, Special Justice, would grant.

ENTERED: April 23, 2009.

CHIEF JUSTICE