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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-000819-MR

RICHARD FUSTON

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE JERRY D. WINCHESTER, JUDGE  
ACTION NO. 01-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: NICKELL, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Richard Fuston (“Richard”) appeals from an order of the Whitley Circuit Court denying post-conviction relief under Kentucky Rules of Criminal Procedure (“RCr”) 11.42 from his conviction for first-degree manslaughter. The

trial court originally denied relief and Richard appealed to this Court. This Court affirmed in part and remanded in part for an evidentiary hearing. On remand, an evidentiary hearing was held, and the trial court again ruled against Richard. We now review the issues in Richard's RCr 11.42 motion; namely, whether the domestic violence exception to the violent offender statute should apply to him as a matter of law; whether his trial counsel was ineffective for failing to move the trial court to apply the domestic violence exception to the violent offender statute; and whether the trial court erred by refusing to qualify his expert in domestic violence at the hearing. We reverse and remand, with direction to the trial court to apply the domestic violence exception to the violent offender statute.

### **Background**

In 2001, Richard and several of his family members resided in the Mount Morgan Apartment Complex in Williamsburg, Kentucky. Richard's youngest sister, Tammy, also lived in the Mount Morgan Apartment Complex. Tammy and her boyfriend, Kevin Brown ("Brown"), had an ongoing, yet frequently troubled, relationship. Tammy and Brown often cohabitated, but their relationship was "on-again, off-again."

On July 14, 2001, Tammy was staying at her parents' house because she and Brown were having some problems. She went by the apartment to pick up some clothes and laundry. Brown arrived shortly thereafter and began to be violent with Tammy. He pulled her to the ground by her hair and burned her neck with a cigarette. Tammy managed to get free, ran to the balcony, and asked

neighbors to call the police. By the time Williamsburg Police arrived at the scene, Brown had already left. Tammy obtained an emergency protective order (“EPO”) and a warrant against Brown upon advice of the police. She then went to the hospital to receive treatment for her injuries.

While Tammy was in the hospital, her brothers, Richard and Scottie, drove to Jellico, Tennessee, to pick up some beer. While there, Richard and Scottie observed Brown’s truck in the parking lot of the Starlight Tavern. Thereafter, Richard drove to the Jellico Police Department and informed them that there was a warrant out for Brown’s arrest. The Jellico Police Department called the Williamsburg Police and confirmed there was a warrant out for Brown’s arrest. Richard and Scottie drove back to their parents’ home in Williamsburg.

Thereafter, Richard and Scottie returned to Tammy’s apartment to repair her phone, which had been damaged in the struggle that had taken place earlier. Apparently, fixing the phone was an important task as Tammy was supposed to call the apartment for a ride home from the hospital and the other members of the family didn’t have individual phone service. Richard took his father’s gun with him to the apartment when he went. He was eventually joined by his sister-in-law, Rachel, and Rachel’s friend, Cherish.<sup>1</sup> Tammy was not at the apartment at the time. At approximately 1:30 a.m., the party heard a thump on the door. Cherish went to the door to look through the peephole, but the peephole was

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<sup>1</sup> Cherish was fourteen years old at the time. Rachel brought Cherish by the apartment to use Tammy’s telephone so that she could check in with her mother, as Rachel and Scottie did not have a telephone.

blocked – as if being covered by someone. Immediately thereafter, Brown walked in the door. The members of the party each individually asked Brown to leave. However, Brown continued to advance into the apartment.

As Brown advanced, Richard picked up his gun and cocked it. While pointing the gun at the floor, Richard again asked Brown to leave the apartment. Rachel and Cherish continued to yell at Brown, begging him to leave. According to Richard, Brown threatened to kill him – although the other members of the party do not recall hearing this statement. All members did agree, however, that Brown continued to advance upon Richard. When Brown was within a few feet of Richard, he reached for Richard's gun with his left hand and began reaching toward his back pocket with his right hand. Richard then fired the gun, shooting Brown a total of seven times. Brown staggered out of the apartment and died shortly thereafter. No weapon was found on Brown – only a cell phone was found in his back pocket. His blood alcohol concentration was shown to be 0.144.

The Commonwealth's theory of the case at trial was that Richard shot Brown in retaliation for the acts of domestic violence committed upon his sister earlier that night. The defense's theory was self-defense. The jury convicted Richard of first-degree manslaughter and recommended a sentence of seventeen years. Under the violent offender statute, Richard is required to serve 85% of that sentence before becoming eligible for parole. The domestic violence exception to the violent offender statute found in Kentucky Revised Statute ("KRS") 439.3401(5) was never raised at sentencing.

## Procedural History

Richard filed a direct appeal wherein this Court affirmed the judgment of the trial court on October 10, 2003. *Fuston v. Commonwealth*, 2003 WL 22319397 (Ky. App. 2003). Discretionary review was denied by the Kentucky Supreme Court. Richard later filed a *pro se* RCr 11.42 motion which raised numerous claims of ineffective assistance of counsel. The trial court denied that motion and Richard appealed to this Court. On March 2, 2007, another panel of this Court held that material issues of fact existed concerning whether Richard was eligible for the domestic violence exemption to the violent offender statute. *Fuston v. Commonwealth*, 217 S.W.3d 892 (Ky. App. 2007). Specifically, the Court found that Richard was Tammy's brother, and therefore, clearly a family member as defined in KRS 403.720(2). However, the panel also noted that other material facts were not clear, such as (1) whether Brown and Tammy were members of an "unmarried couple" under KRS 403.720(3); (2) whether the alleged violence between Brown and Tammy was "domestic violence" under KRS 403.720(1); and (3) "whether the requisite connection existed between any history of domestic violence and the actions [Richard] took against Brown." *Id.* at 898.

On remand, the trial court held an evidentiary hearing. Richard's trial attorneys, Warren Scoville and Paul Croley, testified at the first part of the hearing on August 6, 2007. Both attorneys argued that they felt the domestic violence exception was inapplicable because it would have conflicted with Richard's theory of self-defense. At the second portion of the hearing, on January 11, 2008, Tammy

also testified. She testified to prior domestic violence between her and Brown. She stated that she had taken out two prior EPO's against Brown and had obtained a domestic violence order ("DVO") specifying that there be no violent contact. Her brother Scottie also testified that he was aware of the violence between Tammy and Brown.

Tammy further testified that Brown's name was not on the lease because it would disqualify her from the low-income housing where she resided. Despite this fact, she testified that she put her money into his bank account to pay bills and that he helped her to pay bills. Another witness, LeTonia Jones of the Kentucky Domestic Violence Association, was not permitted to testify because the trial court would not qualify her as an expert in domestic violence. The trial court also refused to permit defense counsel to enter Jones' testimony by avowal during the hearing. However, Jones' affidavit was entered into the record by agreement of the parties. The trial court subsequently made several findings of fact and conclusions of law and denied Richard's RCr 11.42 motion for post-conviction relief.

### **Analysis**

Richard argues that the trial court erred by (1) denying his motion to declare him eligible for the domestic violence exception contained in KRS 439.3401(5); (2) holding that he was provided with effective assistance of counsel where defense counsel did not seek application of the domestic violence exemption; and (3) denying his motion to have LeTonia Jones of the Kentucky

Domestic Violence Association qualified as an expert witness in domestic violence. We address each, respectively.

***1. Eligibility for the Domestic Violence Exception***

Richard first argues that the trial court erred by denying his motion to declare him eligible for classification under the domestic violence exception as contained in KRS 439.3401(5). He argues that each of the necessary elements for application of the domestic violence exception was argued by the Commonwealth and is present in the trial record. Accordingly, he argues that the Commonwealth is now estopped from arguing a contrary position. He further argues that it was clearly erroneous for the trial court to deny his motion to declare him eligible for the domestic violence exception.

KRS 439.3401(3) directs that violent offenders, as defined in the statute, shall not be eligible for parole until they have served at least 85% of the sentence imposed upon them. However, KRS 439.3401(5) *exempts* from the statute any defendant who has been a victim of domestic violence under KRS 533.060. KRS 533.060(1) requires the exemption of a defendant who:

establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted *or a family member as defined in KRS 403.720 of the person convicted.*

(Emphasis added.) Thus, a criminal defendant who commits a felony while using a weapon against someone who has previously (or is currently) engaging in act(s) of

domestic violence against the defendant or a defendant's family member is not subject to the 85% mandate. As we have previously stated, there is no requirement that "the domestic abuse [be] contemporaneous with the offense for which the defendant was charged." *Holland v. Commonwealth*, 192 S.W.3d 433, 438 (Ky. App. 2006). However, there must be some "connection" between the domestic violence and the offense. *Commonwealth v. Vincent*, 70 S.W.3d 422, 423-424 (Ky. 2002).

When this Court initially addressed this issue on Richard's first RCr 11.42 motion for post-conviction relief, the panel found that there was not enough information in the record to determine whether he was eligible for the exception and remanded the matter for an evidentiary hearing. Although it was apparent that Richard was Tammy's family member, it was unclear whether Tammy and Brown were "member[s] of an unmarried couple" as defined in KRS 403.720(3), and whether any connection existed between the history of domestic violence and the actions Richard took against Brown. *Fuston, supra*. On remand, the Whitley Circuit Court held an evidentiary hearing to determine these issues.

After holding the evidentiary hearing (which was conducted in two parts, several months apart), the Whitley Circuit Court held: (1) that domestic violence or abuse never occurred; (2) that Brown was unarmed when he was killed at a location where he previously lived and sometimes stayed; (3) that there was no evidence Brown intentionally violated an EPO or DVO; (4) that it was trial strategy to argue self-defense and not argue the domestic violence exception; (5)



that domestic violence was “blatantly inconsistent” with the facts from trial; and (6) that there was no connection between the allegations of domestic violence and Brown’s death.

These findings are reviewed under the “clearly erroneous standard.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). We regret to say that, upon a review of the record and the evidentiary hearing, it is sufficiently clear that the trial court’s findings of fact are clearly erroneous. As there is enough information present in the record for this Court to determine whether Richard is eligible for the domestic violence exception to the violent offender statute, we now do so.

To begin, four things must be shown in order for Richard to qualify for the domestic violence exemption: (1) that he is a family member of the victim (Tammy) as defined in KRS 403.720(2); (2) that Brown and Tammy were members of an “unmarried couple” as defined in KRS 403.720(3); (3) that the violence between Brown and Tammy satisfied the definition of domestic violence under KRS 403.720(1); and (4) that a connection existed between the domestic violence and Brown’s death. There is no dispute that Richard is Tammy’s brother, and thus, a family member. The other requirements will be discussed in more detail below.

We find substantial evidence in the record that Tammy and Brown were members of an unmarried couple. Although the Commonwealth argues that Brown and Tammy are not members of an unmarried couple, they made a contrary

argument at trial. In fact, they introduced paid checks at trial showing that Brown paid many of Tammy's bills from his checking account in an attempt to prove that Brown resided in her home and helped pay the bills. We agree with Richard that it is inconsistent for the Commonwealth to now argue an opposite position. More importantly, however, most of the testimony in the record shows that Brown primarily resided with Tammy but would occasionally stay elsewhere when they were in a fight or he had to be out of town for work. We also note that the Whitley District Court *previously found* Brown and Tammy to be members of an unmarried couple because it entered a DVO on April 16, 2001. KRS 403.725 clearly requires that only a family member or member of an unmarried couple may obtain such an order.

As we find that Brown and Tammy were members of an unmarried couple, the physical injuries Brown inflicted upon Tammy qualify as domestic violence. KRS 403.720. It is clear from the record that Brown caused physical harm and injury to Tammy on July 14, 2001. It is also clear that this was not the first time that domestic violence had occurred. Testimony at trial indicated that Brown held a gun to Tammy's head a few weeks prior to this incident and pulled the trigger (however, unbeknownst to Tammy prior thereto, the gun was not loaded). As aforesaid, a DVO was previously entered on April 16, 2001 which restricted Brown from having any further violent contact with Tammy.<sup>2</sup>

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<sup>2</sup> This DVO was amended from "no contact" to "no violent contact" at Tammy's request.

Finally, we find that there was a connection between the domestic violence and the offense charged. It is clear from Richard's testimony at trial and at the hearing that Brown's acts of domestic violence against his sister made him fearful of Brown. Richard saw Tammy's injuries on the evening that he shot Brown and knew that she had gone to the hospital to receive treatment. Richard was also aware of an incident which had occurred a few weeks prior where Brown held a gun to Tammy's head and pulled the trigger. He testified at trial to knowing about prior incidences of violence between Brown and Tammy. As Richard was a much shorter and smaller man than Brown, and as he knew of the history of Brown's violence toward Tammy and others, it was not unreasonable for him to think he should take a weapon to Tammy's apartment for protection (It was established in the medical examiner's report that Brown was 5'11" and 219 pounds). Further, the parties testified that, once Brown entered the apartment, they were all afraid of him. As Brown approached Richard, and as Richard knew of Brown's violent tendencies through the violence committed upon his own sister earlier that day and upon previous occasions, he feared that Brown intended to cause him serious harm. Moreover, the whole reason Richard was at the apartment was to fix a telephone that was broken during the domestic dispute occurring earlier that day. We find this to be enough of a connection between the domestic violence and the shooting to warrant application of the exemption to Richard in this particular situation.

This case is distinguishable from the seminal case of *Commonwealth v. Vincent, supra*, where the Supreme Court found that the domestic violence exception to the violent offender statute did not apply because there was no connection between the offense charged and the history of domestic violence. In *Vincent*, there appeared to be absolutely no connection between the prior acts of domestic violence and the offense. *Id.* at 423-424. In *Holland*, we stated that “*Vincent* makes no more requirement than that the evidence *connect* the crime and the abuse.” *Holland v. Commonwealth*, 192 S.W.3d 433, 438 (Ky. App. 2005). We take this opportunity to again warn against “over-technical reading of the statutes and case law which do not promote the purpose of the legislative enactment at issue.” *Id.* at 435.

## ***2. Ineffective Assistance of Counsel Claim***

We may quickly dispense with Richard’s allegation of error that he received ineffective assistance of counsel at trial. As we are holding that the domestic violence exception applies to the facts of this case, questions as to the effectiveness of assistance of counsel Richard received at trial are now moot. We do note, however, contrary to trial counsel’s assertion, evidence of a claim of self-protection during trial and a claim of an exemption under KRS 439.3401(5) during sentencing before the trial judge are not mutually exclusive.

## ***3. Failure to Qualify Expert in Domestic Violence***

We may, again, dispense with this issue swiftly. As we are holding that Richard is eligible for the domestic violence exception, questions as to the trial

court's failure to qualify the expert in domestic violence at the hearing are now moot. While we find it curious that the Whitley Circuit Court had previously qualified LeTonia Jones as an expert in domestic violence for other cases, but refused to do so in this case, any further discussion of this issue is unnecessary.

### **Conclusion**

For the foregoing reasons, we reverse and remand. As we find that Richard is eligible for the domestic violence exception, we remand with instructions for the trial court to apply the domestic violence exception, thus exempting him from the minimum parole-eligibility of 85% to serve of the violent offender statute.

ALL CONCUR.

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