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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001942-MR

BRIAN LEMONS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V., JUDGE
ACTION NO. 08-CR-00706

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JR., LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: In 2006, the General Assembly enacted KRS 503.085 and thereby dramatically changed the practice of criminal law in Kentucky. For the first time ever in this Commonwealth, trial courts are now required to determine whether one charged with assault or homicide may assert

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

immunity for the crime based on a justification defense such as self-protection or defense of others. Trial courts have struggled to apply this statute because it requires the Commonwealth to establish, prior to trial, evidence which would negate the defendant's claim of self-defense. The current case demonstrates the inherent difficulty created by this standard.

Brian J. Lemons appeals from a conditional guilty plea to second-degree manslaughter and second-degree assault under extreme emotional disturbance. On appeal, he argues that the indictment should have been dismissed pursuant to KRS 503.085(1) because the Commonwealth failed to establish probable cause in light of the evidence of self-defense. Lemons argues that the trial court's factual findings are clearly erroneous, and that there was no evidence to defeat his claim of self-defense or defense of others. After reviewing the record, we find that the Commonwealth failed to present sufficient evidence to establish probable cause that Lemons's use of force was unlawful. Hence, we reverse and remand with directions to dismiss the indictment.

On December 4, 2008, a Campbell County grand jury returned an indictment charging Lemons with one count of first-degree manslaughter. The charge arose from an incident occurring on October 11, 2008, which resulted in the stabbing death of Cory Kessnick. The grand jury returned a second indictment on April 8, 2010, charging Lemons with one count of second-degree assault, arising out of the same altercation which resulted in Cory Kessnick's death.

On April 10, 2010, shortly after the second indictment was returned, Lemons filed a motion to dismiss. Based on his claim of self-defense, Lemons argued that he was entitled to immunity from prosecution under KRS 503.085 unless the Commonwealth established probable cause that his use of force was unlawful. *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009). Lemons maintained that the Commonwealth had failed to present any evidence refuting his claim of self-defense or establishing that he had instigated the conflict which led to Kessnick's death. In response, the Commonwealth asserted that Lemons's motion, filed more than sixteen (16) months after the first indictment, was untimely. The Commonwealth also argued that there was sufficient evidence to establish probable cause showing that Lemons's use of force was unlawful.

The matter was submitted to the trial court based on the arguments of counsel and on the discovery filed of record. On July 9, 2010, the trial court entered an order finding that there was probable cause to believe that Lemons's use of force was unlawful. Consequently, the court denied the motion to dismiss.

Thereafter, on August 27, 2010, Lemons entered an *Alford*[2] plea to amended charges of second-degree manslaughter and second-degree assault under extreme emotional disturbance. His guilty plea also specifically reserved his right to appeal from the trial court's ruling denying his motion to dismiss pursuant to KRS 503.085. Kentucky Rules of Criminal Procedure (RCr) 8.09. In accord with

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

the Commonwealth's recommendation, the trial court sentenced Lemons to a total of fourteen (14) years of imprisonment.

The central issue in this case is whether KRS 503.085 was properly applied. Generally, a trial court may not dismiss an indictment without the consent of the Commonwealth. *Commonwealth v. Isham*, 98 S.W.3d 59, 61-62 (Ky. 2003). However, KRS 503.085, which was enacted in 2006, creates an exception to this rule. Under this statute, a person who justifiably uses physical force in self-protection, protection of a dwelling or residence, protection of others, or protection of property is immune from prosecution in any criminal or civil proceeding.[3] In *Rodgers,* 285 S.W.3d 740, the Kentucky Supreme Court held that the immunity afforded under this statute is not simply a defense but prohibits prosecution of a person who is covered by its provisions. *Id.* at 753.

The Court in *Rodgers* then described proper application of the statute. Since KRS 503.085 is designed to relieve a defendant from the burdens of litigation, the Supreme Court held that a defendant should be able to invoke its protections at the earliest stage of the proceeding.

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[3] Specifically, KRS 503.085(1) provides as follows:

> A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

> While the trial courts need not address the issue *sua sponte*, once the defendant raises the immunity bar by motion, the court must proceed expeditiously. Thus a defendant may invoke KRS 503.085 immunity and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury proceedings and, if indicted, present his motion to the circuit judge. A defendant may not, however, seek dismissal on immunity grounds in both courts. Once the district court finds probable cause to believe that the defendant's use of force was unlawful, the circuit court should not revisit the issue. In the case of a direct submission or where a defendant has elected to wait and invoke immunity in the circuit court, the issue should be raised promptly so that it can be addressed as a threshold motion.

Id. at 755.

Upon the foregoing, the Commonwealth first asserts that Lemons's motion was untimely. Although the Supreme Court emphasized that a defendant *should* invoke immunity in the circuit court promptly so that it can be addressed as a threshold matter, the Court did not hold that the motion *must* be raised immediately upon appearance in the circuit court. In view of the broad immunity from prosecution afforded by KRS 503.085(1), we conclude that legislative intent would be defeated by a narrow application. As such we conclude that a defendant may be heard by raising the issue within a reasonable time prior to trial.[4]

[4] We also note that the opinion in *Rodgers* was released on June 25, 2009, and became final as of July 27, 2009. At this time, discovery was already proceeding in the prosecution of Lemons's case in circuit court. And as noted above, the Commonwealth added an additional charge of assault shortly before the first scheduled trial date. Lemons filed his motion to dismiss on April 15, 2010. Considering the unsettled state of the law governing the application of KRS 503.085(1), we cannot find that Lemons acted unreasonably by failing to bring his motion to dismiss under the statute at an earlier time.

Consequently, Lemons's motion was not untimely and the trial court properly considered it on the merits.

The remaining issues concern the application of KRS 503.085(1), as well as our standard of review of the trial court's decision on the immunity issue. In *Rodgers*, the Supreme Court held that, when a defendant invokes immunity under the statute, the trial "court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified." The Commonwealth bears the burden of proof on this issue. *Rogers*, 285 S.W.3d at 755. The Court went on to discuss the probable cause standard as follows:

> Probable cause is a standard with which prosecutors, defense counsel and judges in the Commonwealth are very familiar although it often eludes definition. Recently, in *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006), this Court noted the United States Supreme Court's definition in *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983): "[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful. If such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed.

Id. at 754-55.

Lemons correctly points out that the *Rodgers* opinion does not specifically address the quantum of proof the Commonwealth must present to show

probable cause that his use of force was unlawful. However, the Supreme Court specifically stated that "[T]he burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Id.* at 755. Furthermore, the trial court is not required to conduct an evidentiary hearing on this issue, but need only consider matters of record in making a probable cause determination. *Id.*

The Court in *Rodgers* also referenced the "totality of the circumstances" test laid out in *Gates*, *supra*. In *Gates*, the United States Supreme Court specifically addressed whether probable cause existed to issue a warrant based on an anonymous tip. The Court held that the officer's affidavit must provide sufficient information for the issuing magistrate to find a reasonable basis that "contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332. *See also Beemer v. Commonwealth*, 665 S.W.2d 912 (Ky. 1984). In applying this test to warrantless searches, a reviewing court must likewise examine whether "the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Jones*, 217 S.W.3d at 196, quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62, 134 L. Ed. 2d 911 (1996). Finally, to determine whether an officer had probable cause to arrest, the

trial court must examine "the events leading to the arrest and the decision of the officer as to whether these facts, viewed from the standpoint of an objectively reasonable police officer amount to probable cause." *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006), citing *Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 800–01, 157 L. Ed. 2d 769 (2003).

In this case, the "totality of the circumstances" test must be applied in a substantially different setting. Rather than considering whether a police officer had probable cause for a search warrant at a particular point in time, the trial court must broadly evaluate the evidence supporting the charge. Moreover, since justification is an affirmative defense, any prior determinations of probable cause, either in a preliminary hearing or by grand jury indictment, concern only the elements of the charge and not the sufficiency of the Commonwealth's evidence to defeat an immunity claim. Consequently, a probable cause determination under KRS 503.085(1) will likely be the first time that a court has considered the issue.

Nevertheless, the underlying analysis is not dissimilar. In making a determination of probable cause under KRS 503.085(1), the trial court's role is not to consider the objective merits of the evidence for the prosecution and the defense. *Instead*, the trial court must only consider the totality of the circumstances to determine whether there is an objectively reasonable basis to conclude that the defendant's use of force was unlawful. Since the trial court's factual findings are not at issue, this Court conducts a *de novo* review of the trial court's conclusions regarding the existence of probable cause. *Commonwealth v.*

Banks, 68 S.W.3d 347, 349 (Ky. 2001), citing *Ornelas,* 517 U.S. at 691, 116 S. Ct. at 1659.

This brings us to the central issue raised in this appeal: the sufficiency of the Commonwealth's evidence showing probable cause that Lemons's use of force was unlawful. In pertinent part, KRS 503.050(2) provides that "[t]he use of deadly physical force by a defendant upon another person is justifiable . . . only when the defendant believes that such force is necessary to protect himself against death, [or] serious physical injury[.]" Prior to the enactment of KRS 503.085, our courts consistently held that a defendant relying on self-defense will rarely be entitled to a directed verdict. *Barnes v. Commonwealth*, 91 S.W.3d 564, 570 (Ky. 2002). "Only in the unusual case in which the evidence conclusively establishes justification and all of the elements of self-defense are present is it proper to direct a verdict of not guilty." *Id.* quoting *West v. Commonwealth*, 780 S.W.2d 600, 601 (Ky. 1989). A jury is not required to accept the defendant's version of events at face value, and the defendant who asserts self-defense "bears the risk that the jury will not be persuaded of his version of the facts." *West*, 780 S.W.2d at 601. *See also Taul v. Commonwealth*, 249 S.W.2d 45 (Ky. 1952).[5]

[5] While this rule has been set out in recent cases, such as *Barnes* and *West*, we note that it may conflict with other caselaw interpreting KRS 500.070(1). *See Estep v. Commonwealth*, 64 S.W.3d 805 (Ky. 2002), holding that, under the statute, "[o]nce a defendant produces evidence that he acted in self-protection, the burden of proof as to that issue shifts to the Commonwealth and is assigned by including as an element of the instruction on the offense 'that he was not privileged to act in self-protection.'" *Id.* at 811, citing *Commonwealth v. Hager*, 41 S.W.3d 828, 833 n.1, 837-38 (Ky. 2001), and *Slaven v. Commonwealth*, 962 S.W.2d 845, 857 (Ky. 1997). *See also LaPradd v. Commonwealth*, 334 S.W.3d 88, 91 (Ky. 2011). Since the party bearing the burden of proof on an issue also bears the risk of non-persuasion, it would seem that a jury may not simply disbelieve the defendant's claim of self-defense in the absence of any affirmative evidence from the Commonwealth disproving the claim.

By its enactment of KRS 503.085, the General Assembly firmly required the Commonwealth to bear the initial burden of going forward with evidence establishing probable cause that the defendant's use of force was unlawful. As we interpret the statute, the Commonwealth cannot meet this burden simply by asserting that a jury could reject the defendant's version of the facts. Otherwise, KRS 503.085 would not result in any meaningful change in the law in circumstances where a change was clearly intended. Rather, the Commonwealth must now present affirmative evidence to establish probable cause on the issue. The Commonwealth may meet its burden either by presenting direct evidence contradicting the defendant's account or through circumstantial evidence which casts doubt on the defendant's credibility. *See Commonwealth v. Bushart*, 337 S.W.3d 666, 669 (Ky. App. 2011) (Commonwealth relied on circumstantial evidence to rebut the defendant's claim of self-defense).

With this standard in mind, we turn to the relevant facts surrounding the charges against Lemons. As the trial court detailed in its written opinion, Lemons was arrested on October 11, 2008, after a fight in the parking lot of the "Brass Ass" nightclub in Newport, Kentucky. The parties agree that Cory Kessnick died from stab wounds which Lemons inflicted during this fight. During the course of the investigation, the police interviewed numerous witnesses who were present during the fight. However, Lemons was the only actual witness to his

confrontation with Cory Kessnick, and he gave several contradictory accounts of those events to the police.

During the early morning hours of October 11, 2008, Lemons and his friend Patrick Link drove to the Brass Ass to pick up their girlfriends, Yvonne Weaver and Jaemichael Goodwin, who were getting off from work at the club. When they arrived, they found Weaver and Goodwin in the parking lot with some other women and a couple of men. The men were later identified as Dustin Kessnick and Gary Damon, Cory Kessnick's brothers.

Ms. Weaver got into an argument with one of the men, and Lemons attempted to break the two apart. Cory Kessnick then pulled into the parking lot and got out of his truck. Lemons stated that Cory Kessnick punched Link in the face and that Dustin Kessnick struck Weaver. Link, Weaver and Goodwin mostly confirmed that account. Neither Dustin Kessnick nor Gary Damon identified who threw the first punch but stated that the fight began just before Cory Kessnick arrived.

Dustin Kessnick and Gary Damon, the victim's brothers, joined the fight, and an all-out melee erupted. Link was struck several more times and woke up a short time later on the ground. Weaver recalled being "slammed down" on the ground several times and Lemons carrying her away to the corner of the building. Goodwin stated that she saw Link go down and then attempted to care for him. Neither Goodwin nor Dustin Kessnick nor Gary Damon saw the

confrontation between Lemons and Cory Kessnick, but the two brothers both stated that Cory Kessnick was down almost immediately after he exited his truck.

According to Lemons, Cory Kessnick came at him and threatened to kill him. Lemons pulled out his pocketknife and said something like, "get the f**k away, leave me alone . . . ." Cory Kessnick backed Lemons against the side of a car and swung his fist at him. At this point, Lemons stabbed Cory Kessnick in the shoulder. When Cory Kessnick came at him again, Lemons stated that he stabbed him a second time. When one of Kessnick's brothers came at him, Lemons ran across the street. He threw the knife in a garbage can and then returned to the parking lot.

To support a finding of probable cause, the Commonwealth relies on circumstantial evidence to cast doubt on Lemons's account. The Commonwealth first contends that the accounts given by other witnesses significantly contradict each other as well as Lemons's account. The Commonwealth maintains that these contradictions cast significant doubt on Lemons's claim of self-defense. While the versions of events given by Link, Goodwin and Weaver differ in certain details based on their respective locations and abilities to perceive the events, the differences in their accounts fall within the normal range of variation expected when different people with different vantage points describe a chaotic event.

The Commonwealth also focuses heavily on the statements given by Gary Damon and Dustin Kessnick. The Commonwealth argues that Lemons's version of his confrontation with Cory Kessnick is impossible based the brothers'

accounts that Cory Kessnick went down almost immediately after the fight started. However, Gary Damon and Dustin Kessnick both gave inconsistent and vague accounts of the fight. Neither stated how the fight started or who threw the first punch. And neither of them saw the confrontation between Lemons and Cory Kessnick. Furthermore, Gary Damon stated that he had consumed at least twelve (12) beers that evening, and Dustin Kessnick stated that he blacked out at some point during the fight. Consequently, their statements regarding the events are of doubtful reliability.

The Commonwealth next argues that the physical evidence is inconsistent with Lemons's claim of self-defense. The Commonwealth notes that the autopsy report reveals no physical evidence that Cory Kessnick was involved in an altercation. The report does not mention any bruising or cuts on Kessnick other than the knife wounds which killed him. Likewise, the Commonwealth also points out that Lemons did not have any defensive wounds on him. From this, the Commonwealth infers that Kessnick could not have been the initial aggressor. The Commonwealth also emphasizes that Kessnick was stabbed twice on the upper back, suggesting that this contradicts Lemons's claim of self-defense.

In our view, these facts are equally, if not more, consistent with Lemons's account of the fight. We fail to understand how the absence of any other wounds on Cory Kessnick supports the Commonwealth's claim that he could not have been the initial aggressor. Indeed, this fact more strongly supports the accounts by Lemons, Link, Goodwin and Weaver that Cory Kessnick was one of

the primary aggressors. Furthermore, the absence of any defensive wounds on Lemons may support his claim that he was moving away from the altercation. Likewise, the fatal wound on Cory Kessnick's back is consistent with Lemons's account of the confrontation.

The Commonwealth primarily challenges Lemons's credibility by pointing to his conduct during and after the fight. The Commonwealth notes that he deliberately fled the scene and disposed of the knife after the stabbing. In addition, Lemons gave conflicting accounts of the stabbing to the police and he initially denied any involvement in the stabbing. Lemons changed his account several times during subsequent interviews with the police.

Although Lemons's behavior and statements after the fight are suspicious, we cannot find that they are sufficient to meet the Commonwealth's burden of showing probable cause. If the other circumstantial and physical evidence was more definitive, we would agree with the trial court that this evidence would reasonably cast doubt on Lemons's credibility. But as the evidence of record stands, the contradictory and inconsistent statements which Lemons made shortly after the fight are the only significant grounds for questioning his credibility. Since the burden of proof was on the Commonwealth, we conclude that the Commonwealth failed to present sufficient evidence to establish probable cause to believe that Lemons's use of deadly force was unlawful. Consequently, the trial court erred by denying the motion to dismiss the indictment pursuant to KRS 503.085.

Accordingly, the judgment of conviction by the Campbell Circuit Court is reversed and this matter is remanded with directions to dismiss the indictment pursuant to KRS 503.085.

CAPERTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. "It is the tradition that a Kentuckian never runs. He does not have to." *Gibson v. Commonwealth*, 237 Ky. 33, 34 S.W.2d 936 (1931). In 2006, the Kentucky legislature not only reinforced the common law notion that there is no duty to retreat but provided that a defendant entitled to self-defense is immune from prosecution. Thus, even after indictment, a defendant is no longer subjected to judgment by a jury if the court determines that the defendant is entitled to KRS 503.085 immunity. I do not delve into the divergence of public opinion concerning the law: As a jurist, that is not my role. I dissent because the majority has misinterpreted the statute and our Supreme Court's opinion in *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009).

As noted in *Rodgers*, KRS 503.085 offers little guidance to the trial courts regarding how to implement its provisions. *Id*. at 754. Although unnecessary because Rodgers was tried and convicted by a jury, our Supreme Court recognized the need to provide a detailed explanation to our trial courts regarding the burden of proof, the standard of proof and the evidence to be

considered. Because the statute is relatively recent and caselaw scant, *Rodgers* is the sole controlling precedent.

The majority properly states that the Commonwealth has the burden of proof. The flaw in the majority's reasoning begins with its analysis of the standard of proof. Although KRS 503.085 could have been more clearly written, it provides that the standard of proof is probable cause. KRS 503.085(2). The legislature could have chosen the more onerous standards of preponderance of the evidence or beyond a reasonable doubt. It did not. By the express terms of the statute, the standard to be applied by trial courts when determining the threshold immunity question is probable cause. I quote our Supreme Court:

> The trial judge's uncertainty regarding how to implement the immunity provision is understandable because the statute offers little guidance. Indeed, the only express indication of legislative intent is in KRS 503.085(2) which provides that immunity must be granted pre-arrest by the law enforcement agency investigating the crime unless there is "probable cause that the force used was unlawful." Because the statute defines the "criminal prosecution" from which a defendant justifiably acting in self-defense is immune to be "arresting, detaining in custody and charging or prosecuting," we can infer that the immunity determination is not confined to law enforcement personnel. Instead, the statute contemplates that the prosecutor and the courts may also be called upon to determine whether a particular defendant is entitled to KRS 503.085 immunity. Regardless of who is addressing the immunity claim, we infer from the statute that the controlling standard of proof remains "probable cause." Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provision or

> provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

Id. at 754. The Court held that the trial court must apply the totality of the circumstances test set forth in *Illinois v. Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 2329, 76 L. Ed. 2d 527 (1983). "Just as judges consider the totality of the circumstances in determining whether probable cause exists to issue a search warrant, they must consider all of the circumstances then known to determine whether probable cause exists to conclude that a defendant's use of force was unlawful. If such cause does not exist, immunity must be granted and, conversely, if it does exist, the matter must proceed." *Rodgers* at 754-755.

Although the majority holds that the proper standard is probable cause, it ignores the legal definition of that standard and our role as an appellate court when reviewing the trial court's conclusion. Notably absent from its opinion is any discussion of *Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010), decided after *Rodgers* and a case that clarified the distinction between review of a ruling on a warrantless search and a ruling on a search conducted pursuant to a warrant.

In *Pride*, our Supreme Court held that this Court erroneously applied the two-step test set forth in *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), and as adopted in *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). *Id*. at 47-48. It was pointed out that those cases dealt

with warrantless searches and *Terry* searches. Quoting *Gates*, the Court reiterated the inquiry under the totality of the circumstances test:

> The task of the [warrant] issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.

Id. at 48. The Court stressed that the *de novo* review standard applied only to warrantless searches. Where the question is whether there was probable cause to issue a warrant, the Court emphasized that a *de novo* review is inappropriate and "tends to lead to overly technical analysis[.]" *Id*.

As evidenced by the quote that began my dissent, the amendments to KRS Chapter 503 codified existing common law. However, the legislature also created an anomaly in criminal law by granting immunity to defendants who qualify under its provisions and conferring upon trial courts the authority to dismiss the indictments. Just as there is a preference for searches pursuant to warrant, there is a "strong preference for jury trials on all elements of a criminal case[.]" *Rodgers*, 285 S.W.3d at 755. Accordingly, RCr 9.26 specifically provides that even if a defendant waives a jury trial in writing, the Commonwealth and the court must agree.

Using the proper standard set forth in *Gates* and paraphrasing its holding, I submit that the task of the trial court and that of a reviewing court in determining the totality of the circumstances surrounding the application of KRS 503.085 immunity is as follows: The task of the trial court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the record, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that the defendant's use of force was unlawful. The duty of the reviewing Court is simply to ensure that the trial court had a substantial basis for concluding that probable cause existed. Although the majority references the probable cause standard of proof and the totality of the circumstances test, it proceeds to subject the trial court's order to a *de novo* standard of review and conducts an "overly technical analysis" of the facts.

Lemons was not defending his "castle" but was a participant in a "brawl" outside a nightclub. The autopsy report indicated that the victim died from stab wounds in his back. Lemons had no defensive stab wounds and only Lemons's version of the facts supported his self-defense theory. There were witnesses who testified that the victim was an aggressor while others testified that the victim had just exited his truck when he was stabbed. As noted by the trial court and by this Court, the witnesses' accounts of the events on the evening in question were contradictory. Based on the limited record, the trial court concluded that probable cause existed that the use of force by Lemons was unlawful. It stressed that its

ruling did not prevent Lemons from entitlement to a self-defense instruction at trial if warranted by the evidence.

The majority emphasizes that evidence was contradictory and, therefore, the Commonwealth failed to meet its burden of proof. Again, I stress that the standard of proof is probable cause. There was substantial evidence in the record to support the trial court's conclusion. It was a practical and common-sense conclusion based on the totality of the circumstances. As noted in *Rodgers*, probable cause hearings do not involve proof to establish the essence of the crime. In the context of KRS 503.085, it is merely a preliminary finding that probable cause exits to submit the matter to the jury. *Id*. at 755. During a trial, the Commonwealth and Lemons would have had the opportunity to produce expert testimony regarding the autopsy report, call and cross-examine witnesses, and present other evidence relative to Lemon's guilt or innocence. Instead, Lemons exercised his right to enter a conditional guilty plea.

The amendments to KRS Chapter 503 are significant to victims and their families who seek justice and to the defendants who lawfully used force, yet, are subjected to prosecution. As revealed by my dissent from the majority, the law on self-defense is in need of clarification by our Supreme Court. In addition to addressing the points of disagreement presented by my dissent, I also urge our Supreme Court to address an issue that was presented in *Rodgers* and will inevitably arise in a future case.

Rodgers was tried and convicted and, therefore, the immunity issue was determined to be non-prejudicial error. However, a crucial question was not addressed. Is a denial of an immunity claim under KRS 503.085 immediately appealable? If not, an innocent defendant would be subjected to a trial, a result that KRS 503.085 was enacted to prevent, and a defendant that is tried and convicted would be subject to the harmless error rule. I submit that, because the statute provides immunity from prosecution, an order denying KRS 503.085 is immediately appealable. Although advisory opinions are not favored, in this instance to further effectuate the legislative intent of the statute and apprise defendants of their rights, I urge our Supreme Court to address the issue.

In the future, much will be written regarding KRS 503.085. In this case, the issues regarding the standard of proof and this Court's standard of review were directly presented. I am convinced that the majority erroneously decided both issues. I would affirm the trial court's detailed and well-written order.

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