IN THE

Supreme Court of Virginia

RECORD NO. 090069

KELIS ALLEN HAMILTON,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Tate C. Love, Esq. (VSB NO. 45589)
BLACK, NOLAND & READ, P.L.C.
One Barristers Row
Post Office Box 1206
Staunton, Virginia 24402-1206
(540) 885-0888
(540) 885-0890 (Facsimile)
TCL@bnrplc.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

Conclusion 10

Certificate 11

TABLE OF AUTHORITIES

Sheikh v. Commonwealth, 32 Va. App. 9, 526 S.E.2d 271 (2000)...4-5

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COMES NOW Kelis Allen Hamilton (Hamilton), appellant, by counsel, and for his Reply Brief, states as follows:

I. There is no evidence that Kelis Hamilton was present when Garrett Johnston or Daniel Payne were assaulted.

There was no witness at trial who testified to seeing Hamilton anywhere nearby when either Garrett Johnston or Daniel Payne was assaulted. Thus, in his opening brief appellant Hamilton, through counsel, argued that he could only be convicted of those assaults if this Court accepted the "Commonwealth's faulty premise that anything that any of the witnesses testified to happened at the same time and place." (Opening Br. of Appellant at 24.)

It is exactly this premise that underlies the Commonwealth's brief. In its Statement of Facts, the Commonwealth states that, "Around three in the morning, a 'big fight blew up.' (App. 48). Zachary Small, who was

wearing a blue and white shirt, 'kicked over a bottle' with his foot while walking through a crowd of people. (App. 61, 63)." (Br. of the Commonwealth at 5.) The Commonwealth then goes on to describe the assault on Zachary Small.

From the Commonwealth's description of the facts, one might surmise that the trial testimony was that the assault of Zachary Small, at which there was testimony that Hamilton was present, if not a participant, occurred at three o'clock a.m. However, this is not at all the case. The reference to three o'clock in the morning, at page 52 of the Appendix, comes from the testimony of Garrett Johnston, not any testimony about the assault of Zachary Small. The Commonwealth then makes the jump, without any evidence, that the assault on Zachary Small happened at the same time. However, none of the witnesses to the assault on Zachary Small – not Mr. Small himself (App. at 60, et seq.), not Christopher McLaughlin (App. at 82, et seq.), not Matthew Howdyshell (App. at 90, et seq.), not Daniel Stouffer (App. at 72, et seq.) – testify as to when the assault occurred. In fact, Whitney Randolph indicates that they were two distinct incidents. (App. at 171.)

Despite this fact, the assumption, without any evidence to support it, that the assaults on Johnston, Payne and Small happened at the same place and time, permeates the Commonwealth's rendition of the facts. (Br. of the Commonwealth at 6, 7 and 17.)

The Commonwealth makes a similar assumption when it asserts, again without evidence, that the incident in which Hamilton asked Jakari Hart for his gun was the same incident in which Daniel Payne had a gun put to his chest:

> Jakari Hart had been firing a gun into the air, but Hart handed the gun to Marty Scott. (App. 105, 107, 109). Hamilton asked Hart, then Scott, for the gun, but neither gave it to him. (App. 111-12). Someone said, "Kill that mother-fucker." (App. 107). Then someone put a gun to Payne's chest and pulled the trigger. (App. 69-70). Payne heard the gun "click" but it did not fire. (App. 58.)

(Br. of the Commonwealth at 7.) By the way the Commonwealth intersperses the two stories in its narrative, one would assume there was some evidence that these two events happened at the same time and in the same place.

However, there is no such evidence. Indeed, Daniel Payne testified to a gun being put to his chest. (App. at 57.) And Jakari Hart testified to

Hamilton asking him for a gun he was firing into the air. (App. 111.) However, there is not a scintilla of evidence, other than both stories involve a gun, that it was the same gun or that these incidents happened at the same or in the same place.

Perhaps if this had been a short party held in a small apartment attended by a dozen or so people, this assumption that every shred of testimony presented at trial happened at the same time and in the same place could be forgiven. That is not, however, the case. This party took place on a one hundred ten acre farm. (App. at 46.) It was attended by four hundred people (App. at 47) and lasted five hours (App. at 47).

Without this assumption, which as explained above is absurd, there is not one piece of evidence that Kelis Hamilton was anywhere nearby, or even at the party, when Garrett Johnston and Daniel Payne were assaulted. Thus, those convictions must be overturned.

In support of its position that Kelis Hamilton was a member of the mob, assuming one existed, that assaulted Garrett Johnston, the Commonwealth cites the case of Sheikh v. Commonwealth, 32 Va. App. 9, 526 S.E.2d 271 (2000). However, this case has one important fact that differentiates it from this case – in Sheikh there was no question that the

defendant was present at the time of the assault. In Sheikh, the defendant was sitting in the back seat of the vehicle from which the victim was shot. 32 Va. App. at 11, 526 S.E.2d at 272. In this case, not a single witness can place Hamilton anywhere near where Garrett Johnston and Daniel Payne were assaulted.

II. There is no evidence that Hamilton was a member of or active participant in the Nine-Trey Bloods.

The Commonwealth's own expert witness testified that based on his training, education and experience his opinion was that Hamilton was not a member of the Nine-Trey Bloods at the time of this party. (App. at 157.) However, the Commonwealth argues that Hamilton was either already a member of the gang at the time of the party, or was in the process of being initiated into the gang at the property. However, each of the pieces of evidence to which the Commonwealth points to support this argument fails to prove as much.

First, the Commonwealth argues that the cigarette burn on Zachary Smalls back "appears to be the start of a Trey burn." (Br. of the Commonwealth at 9.) As the pictures of Mr. Smalls' back clearly show, he has a single cigarette burn on his back. (App. at 277-78.) If the

Commonwealth's theory is correct, then anyone whom has ever had the indignity of being burnt by a cigarette was the target of members of the Nine-Trey Bloods.

Second, the Commonwealth argues that Hamilton's statement to fellow partygoer Christopher McLaughlin that he was a "Blood and don't even know it" was evidence that Hamilton himself was a member of the gang. (Br. of the Commonwealth at 24.) This is a strained interpretation of this comment. Under the same rationale, every person who had used the cliche, "you are a poet and don't even know it" did so because they were themselves poets. Hamilton's comment evidences nothing more than his awareness that members of the Nine Trey Bloods tend to wear red. Certainly there are quite a few people who are aware of this fact, and yet are not themselves members of the gang.

Third, despite the Commonwealth's assertions, there is scant evidence of Hamilton associating with the members of the Nine Trey Bloods at the party. The Commonwealth believes "it is clear that from the time of his arrival at the party, Hamilton identified with the Bloods." (Br. of the Commonwealth at 25.) However, according to Garrett Johnston, Hamilton was not with the group of Nine Trey Bloods he encountered

"chilling in one section of the tent" at the party. (App. at 48.) It was "that same group" that was involved in Johnston's assault. (App. at 48.) Thus, according to the Commonwealth's own witness Hamilton was neither with the Bloods earlier in the party nor with the same group that assaulted Johnston. In fact, Johnston does not remember seeing Hamilton at the party at all. (App. 51-52.)

Fourth, the evidence to support the theory that this was a gang initiation for Hamilton is lacking. The Commonwealth states in its brief that "one investigator noted that ... the events of the evening suggested to him that what was going on was an 'initiation' for one or more individuals into the gang." (Br. of the Commonwealth at 24.) However, upon review of the actual exchange between the Commonwealth and the witness in question, Investigator Christopher Hartless, that is not exactly what he said:

> Q. Now, you talked earlier about what you would believe – whether It was gang-related or non gang-related, if you had a – a group assaulting someone of a different – wearing a different rival gang's color, by someone wearing - a group of people wearing red, saying, "Dip Set," saying, "We're not wearing red for nothing," and "Blood-At." Take that same scenario, and – and, if you would please, what would you believe – if – if you took some

> people who had never been affiliated with that gang before and put them in that same scenario, what would that lead you to believe it was, since you said that situation – you look at it as a gang – a gang assault?
>
> A. The potential would exist in my mind, and based on my training and experience, that that incident may be a form of – of initiation for one or more of the individuals within that group.

(App. at 158-59.)

A few observations must be made about this exchange. First, Investigator Hartless does not take an opinion that this particular event was a gang initiation, but rather he responds to a hypothetical question propounded by the prosecutor. Second, Investigator Hartless does not take a position that the hypothetical would necessarily reflect a gang initiation, but merely that the "potential would exist in [his] mind" that it "may be." Third, and finally, none of the elements of the hypothetical involve actions Hamilton was personally seen taking. As already argued, there is no evidence that Hamilton was present at the assaults of Johnston and Payne. Investigator Hartless is not asked, and thus does not testiy, whether it is his opinion that Hamilton, whom he affirmatively states was not involved in a gang at the time of the party (App. at 156-57), was participating in a gang initiation.

III. Reversal of any of the assaults, at a minimum, requires remand of the case to the circuit court.

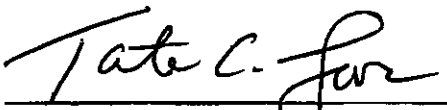
If any of the three assaults are overturned by this Court, and the gang participation charge is not overturned, then the gang participation charge would have to be remanded to the circuit court. This is because it is not clear from the Commonwealth's indictment which of the three assaults was the predicate offense for the gang participation charge. The Commonwealth disagrees with this assessment, stating that the "conviction for criminal street gang participation can be affirmed by any of the three mob assault convictions." (Br. of the Commonwealth at 25.)

The indictment charges Hamilton with committing "a predicate act" for the benefit of, at the direction of or in association with any criminal street gang. It does not state which of the three assaults is the predicate act. For this Court to overturn any of the assault convictions and yet uphold, without remand, the gang participation charge it would have to either read the Commonwealth's mind as to which of the three assaults was the predicate act, or else effectively amend the indictment for the Commonwealth. Hamilton maintains that this would not be proper, and that the only acceptable solution would be to remand the case.

CONCLUSION

WHEREFORE, the appellant, Kelis Allen Hamilton, respectfully requests that this Court reverse his convictions on all four counts or, if necessary, to remand as many of them as needed for a new trial.

BLACK, NOLAND, & READ, P.L.C.



Tate C. Love, Esq. (VSB No. 45589)
One Barristers Row
Post Office Box 1206
Staunton, Virginia 24402-1206
Telephone: (540)885-0888
Facsimile: (540)885-0890
Counsel for Kelis Allen Hamilton

CERTIFICATE

I hereby certify that I have complied with Rule 5:26(d), by filing fifteen copies of the Reply Brief with the Clerk of this Court (along with an electronic copy) and mailing three copies to opposing counsel this 14th day of July, 2009.

Tate C. Love

Tate C. Love, Esq.