IN THE

Supreme Court of Virginia

RECORD NO. 090518

MELONI THOMAS,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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Without waiving any argument in her opening brief, rather as a supplement thereto and in reply to the Commonwealth's brief, Appellant adds the following:

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

1. Question No. 1 and Assignment of Error No. 1: The applicable portion of Virginia Code §19.2-389 provides that the criminal records sought may be relevant not would be relevant.

2. Question No. 2 and Assignment of Error No. 2: "Knowing her father would resist her efforts to obtain the checks, she entered with Avent carrying a sawed-off shotgun and demanded the checks." (Comm.'s Brief, p. 23). In her trial testimony, Meloni Thomas stated that Avent entered her father's house "maybe a minute or two" after her entry, "it wasn't very long. ...", and that the first time she observed the sawed-off shotgun in Avent's possession was when he pulled the same from his pants after Avent had followed her into her father's house. (App. 752). On cross-examination, Meloni Thomas explained that Avent entered into her father's residence a brief period of time after her and not simultaneously with her, and that in her statements to the police she had been

directed to give a summary of what happened and that she had given more detail regarding what happened which was not reflected in her audio and signed statements. (App. 782-786).

6. Question No. 6 and Assignment of Error No. 6: The Defense *voir dire* question was not abstract -- "Is there anyone who would give greater weight to the testimony of a police officer than to that of another witness or the accused simply because of the officer's official status?" The question could easily be answered "yes" or "no". This issue goes beyond whether a prospective juror would automatically believe a police officer over another witness or the accused, rather to bias by a prospective juror in favor of a police officer as a government witness. To lean is bias. An examination of the entire *voir dire* of prospective juror Heizer (App. 296-303) clearly reflects he would lean toward the police officer's testimony. The Commonwealth asserts that "any error in not striking the jurors was harmless in light of the absence of any credibility issues involving the police witnesses. The Defendant limited her attack on the Commonwealth's case to contradiction of several lay witnesses and challenges to their credibility. ..." (Comm.'s Brief, p. 34). From *voir dire* throughout the trial the Defense attacked the interrogating officers' testimonies, in not accurately reflecting in the recorded and signed statements furnished by Meloni Thomas to them or in their trial testimony, all that was said and done during their lengthy custodial interrogation of Meloni Thomas (to include

mitigating statements). The obvious impact of these two interrogating officers' testimonies on any juror as to custodial interrogation statements and answers allegedly given by Meloni Thomas without courtroom procedural and substantive safeguards would not be the basis of harmless error.

An examination of the entire *voir dire* of prospective juror Finch reflects her bias in favor of a police officer's testimony as a government witness (App. 287, 294-295, 303-307). In answer to the Commonwealth Attorney's voir dire question, "Have you, a family member, or a close friend of yours been the victim of a violent crime?", prospective juror Finch advised, "Yes. My grandson's mother, and probably about six months ago. The trial was just last week." (App. 287). This information compounded her bias in favor of a government witness and juror bias in general (presumed or proven). The Commonwealth, in its Brief, asserts that this additional answer given by prospective juror Finch is not included in this assignment of error (Comm.'s Brief, p. 35). To the contrary, the language in Assignment of Error number six following the semi-colon, ("and juror bias, whether presumed or proven, requires automatic reversal..."), addresses this matter. Prospective juror Finch gave a direct "yes" answer to the Defense's non-abstract question as to giving greater weight to the testimony of a police officer than to that of another witness or the accused, then gave equivocal responses to further questioning, and was not rehabilitated by her assent to persuasive suggestions from the Trial Court.

9. Question No. 9 and Assignment of Error No. 9: "...(flight) should be cautiously considered, because it may be attributable to a number of other reasons than consciousness of guilt." Anderson v. Commonwealth, 100 Va. 860, 863, 42 S.E. 865 (1902). "The inference that one who flees from the law is motivated by consciousness of guilt is weak at best...". U. S. v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976) -- cited in U. S. v. Hawkes. The Supreme Court of Virginia in the Turman case plainly advises that the model flight jury instruction in its present form as given in the instant case, is/was defective and in need of revision, using the following language:

"The jury instruction at issue in this case (Turman) is substantially similar to an instruction in the Virginia Model Jury Instructions and, therefore, we are compelled to point out that the model jury instruction suffers from a significant defect. (Virginia Model Jury Instructions - Criminal, No. 2.300). ...The phrase, 'if a person leaves the place where a crime was committed', renders both the model jury instruction and the instruction that was used in this case incorrect statements of law because almost every person who commits a crime and is not apprehended at the crime scene invariably will leave the place where the crime was committed. Thus, except when the fact of leaving the place where a crime was committed is itself an element of the crime charged, the above phrase is overly broad and would apply in every criminal trial when a suspect was not arrested at the scene of the crime, even when the suspect did not flee to avoid detection, apprehension, arrest, or criminal prosecution. This incorrect portion of the instruction would allow a jury to infer that a person had a consciousness of guilt merely because that person left the place where a crime was committed. Departure from a place where a crime has been committed does not always constitute, and is often different from, leaving or flight to avoid detection, apprehension, arrest, or criminal prosecution." Turman v. Commonwealth, 276 Va. 558, 667 S.E.2d 767 (2008).

The carefully worded flight instruction utilized in U. S. v. Hawkes is

representative of a more properly worded flight instruction:

"The intentional flight of a defendant immediately after the commission of a crime, or at the time criminal conduct is discovered, is not sufficient in itself to establish that defendant's guilt, but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury. In your consideration of the evidence of flight, you should consider that there may be reasons for that which are fully consistent with innocence. Those may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt." (U.S. v. Hawkes, 753 F.2d 355 (4th Cir. 1985).

This Hawkes instruction is a better example of a properly worded flight instruction where the evidence will support the giving of a flight instruction. In considering this Court's harmless error analysis set forth in Turman, the challenged jury instruction in the instant case constitutes reversible error. The instruction given unfairly emphasized to the jury the Commonwealth's version of the facts and gave preference to the Commonwealth's theory of the case versus the Defendant's version of the facts and theory of the case, was an improper comment on the evidence, drew specific attention to something in evidence, amounted to the functional equivalent of a directed verdict, and shifted the burden of proof regarding a defendant's criminal intent.

10. Question No. 10 and Assignment of Error No. 10: It is counsel's understanding that several states are now requiring station house custodial

interrogations to be video and audio recorded in recognition of the historical problem in our criminal justice system of cases in effect being tried before the courtroom trial with its attendant procedural and substantive safeguards for ensuring a fair trial.

11. Question No. 11 and Assignment of Error No. 11: The witnesses apparently in question were Freedom Bottoms, Page Barham, Pamela Weist, and Tara Jackson. The Defense was not asking for an expert witness with an attendant "particularized need" analysis. The Defense was asking for an investigator to help defense counsel locate certain Commonwealth witnesses in order that defense counsel could then interview them and be advised by them or the Commonwealth Attorney pre-trial as to their pre-trial statements given to the authorities and be adequately prepared for cross-examination of them at trial. The alleged incriminating statements these witnesses attributed to Meloni Thomas were obviously prejudicial to Ms. Thomas and were refuted by her in her trial testimony. As noted by defense counsel, the irony was that there was no need to go to state expense, as the Commonwealth could easily have furnished the identifying and locating information of these witnesses to the Defense (App. 156). (Compare the federal rules of discovery, where witness statements are furnished to the Defense. Some Virginia Commonwealth Attorney Offices also have an "open file" discovery policy).

12. Question No. 12 and Assignment of Error No. 12: Whether or not Meloni Thomas had committed a "murder" was the ultimate issue and within the province of the jury.

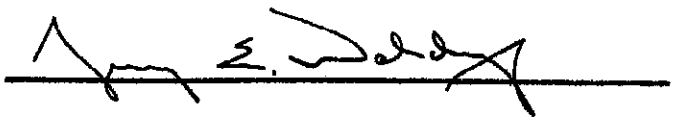
14. Question No. 14 and Assignment of Error No. 14: Officer Brian Roberts testified at trial in the Commonwealth's case-in-chief as follows: "Later on that evening around 8:30, 9:00 time frame, I went back to see her about obviously some discrepancies, and Cardell's comments that he had given us in the interview certainly didn't line-up with what she had said. So I went to re-interview her and debrief her on those comments." (App. 399). Such testimony had the same effect as if the actual statements of Cardell Avent were testified to by witness Roberts. The direct implication to the jury was that Cardell Avent's statements to us (the police) differed from the statements Meloni Thomas gave us (the police), and thus tended to incriminate or inculpate Meloni Thomas by implying criminal liability on Meloni Thomas' part. The Defense was unable to cross-examine co-defendant Avent regarding same. This confrontational problem with respect to a non-testifying co-defendant is a historical one in our criminal justice system addressed by state and federal courts from Bruton and its progeny through Crawford v. Washington. The Defense preserved the objection to such testimony through a *limine* motion and pre-trial ruling, and, further, though unnecessary, by objection at trial (App. 388).

15. Question No. 15 and Assignment of Error No. 15: In *limine* motion number 12 (App.9-10) and Memorandum of Defense (App. 20-24), the Defense objected pre-trial to the Commonwealth referring to or bringing into evidence other alleged unrelated offenses or alleged prior bad acts of Meloni Thomas, and, in particular, an alleged assault and battery of the decedent by Meloni Thomas. In its letter ruling dated 7 September 2007, the Trial Court noted that this alleged assault was simply a prior bad act, and the affidavit regarding same not admissible in the Commonwealth's case-in-chief (App. 28).

RESPECTFULLY SUBMITTED,

MELONI THOMAS

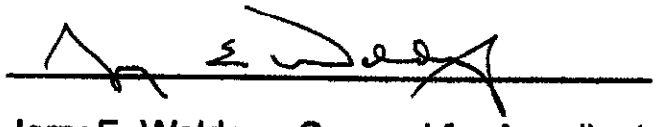
BY COUNSEL



Jerry E. Waldrop, Counsel for Appellant

CERTIFICATE

I hereby certify that three (3) copies of the foregoing Reply Brief of Appellant were mailed or delivered to Counsel for the Appellee, Eugene Murphy, Esquire, at the Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 8th day of October 2009; fifteen (15) copies of the foregoing Reply Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia this 8th day of October 2009; an electronic copy of this Reply Brief of Appellant has been filed contemporaneously with the Clerk of the Supreme Court of Virginia this 8th day of October 2009, the electronic copy filed by email (PDF form); and a copy of this Reply Brief of Appellant has been mailed to Meloni Thomas at Fluvanna Correctional Center for Women, Building 1, Wing A-109-B, P. O. Box 1000, Troy, Virginia 22974, this 8th day of October 2009.



Jerry E. Waldrop, Counsel for Appellant

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