

Kirkwood cont. from page 32

The trial judge denied a post-conviction motion for a new trial based on the new evidence. Kirkwood appealed to the Pennsylvania Superior Court. During oral arguments about the appeal's merits, Tolvanen "admitted she tricked Fitts with the telephone records she waved in front of him. She acknowledged that she knew the telephone records didn't contain local calls and that she had misled the jury."⁴

After she made that admission, Superior Court Judge John Bender responded, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She answered "yes."⁵

The Superior Court decided to send the case back to the trial court for an evidentiary hearing.

On August 10, 2005, Common Pleas Judge Dominick Motto — who presided over Kirkwood's trial — vacated Kirkwood's conviction and ordered a new trial. In his 24-page opinion the judge ruled that Assistant DA Tolvanen's use of the telephone record to trick defense witness Fitts and mislead the jury denied Kirkwood's right to a fair trial. He wrote,

"The question was clearly a ruse designed to confuse the witness by suggesting that the telephone record disputed his testimony, when in fact it did not. Although it is entirely proper to test the credibility of a witness, it is not proper to test the credibility of a witness by misrepresenting evidence."⁶

Judge Motto also ruled that Kirkwood's trial lawyer was ineffective for failing to object to Tolvanen's use of the records she waived in the air and failing to request to examine them. If he had done that, "the implication made by the prosecutor would have been clearly refuted."⁷ The judge ordered a retrial instead of dismissing the charges because he said Tolvanen's misconduct undermined the credibility of the witness, and not the court's credibility.

At the same time Judge Motto announced his ruling, he granted Kirkwood bail pending his retrial. He also ordered the Lawrence County sheriff to transport him back to New Castle from SCI Laurel Highlands in Somerset. However a day and a half later the sheriff hadn't dispatched a deputy to transport Kirkwood back to New Castle. So Kirkwood's lawyer persuaded the judge to allow his parents to pick him up. Kirkwood didn't know until he walked out of the prison that his parents, and not the sheriff, would be taking him back home.

As of mid-September 2005, the Lawrence County DA hasn't announced whether Kirk

Prosecutor Accused Of Using Fraud To Win Kirkwood's Conviction

By JD Staff

A complaint filed with the Pennsylvania Disciplinary Board of the state Supreme Court accuses Lawrence County Asst. D.A. Birgitta Tolvanen of committing fraud during Justin Kirkwood's 2003 armed robbery trial in New Castle, Pennsylvania.

Jonathan Solomon, president of the Lawrence County Bar Association, filed the complaint in May 2005 — three months before Kirkwood's conviction was vacated on August 10, 2005, and a new trial ordered on the same misconduct by Tolvanen that Solomon described in his complaint.

During Kirkwood's trial, Bill Fitts' — the owner of New Castle's largest and oldest car dealership — testified that he called Kirkwood's home and talked with him at the exact time the robbery was being committed 20 minutes across town. In an effort to undermine Fitts' credibility, during her cross-examination of him, Tolvanen waved a sheaf of his phone records in his face during her cross-examination, and asked,

"Would you also be surprised, sir, that it shows ... no record of a telephone call being made to the Kirkwood residence on that day?"

Fitts response was, "I would be very surprised, because ... I did make the phone call."¹

It was later discovered that Tolvanen deceived the jury, the judge, and Fitts, because his phone records only listed long distance calls, and a call from Fitts' house to Kirkwood's house is a local call.

Solomon wrote in his complaint, "the testimony of the witness impeached by Ms. Tolvanen was crucial to the defense, in light

wood will be retried or the charges dropped. Although they have spent most of their life savings paying for their son's lawyers, his parents have vowed to help him until he is exonerated. After he was released on bond his dad David said, "He's innocent. He's wrongly accused. We'll fight this thing to the end. He had a very unfair trial."⁸ His mother Debbie said, "I know he didn't do it. He was sitting in that kitchen with me and there's no way I'm giving up, no way."⁹

of the weakness of [other] evidence connecting the defendant to the crime.

"The district attorney's office has committed a fraud, not only upon the accused but also upon the court and upon the cause of justice. It is also an embarrassment to the legal profession."²

During the Pennsylvania Superior Court's October 2004 hearing of Kirkwood's appeal, Tolvanen admitted she deceived Fitts and misled the jury when she waved the phone records in his face and implied that if he had made the call to Kirkwood's home it would be listed on the bill.

When she made that admission, Superior Court Judge John Bender said, "Did you just say, 'It really doesn't show anything. I was just trying to trick him?'" She said yes.³

After the Superior Court sent the case back to the trial court for an evidentiary hearing, Kirkwood's conviction was vacated on the basis of Tolvanen's deception, and a new trial ordered. Kirkwood was released on bond after two years imprisonment.

Solomon's complaint also requested investigation of the Lawrence County district attorney's office for its failure to disclose to Kirkwood's attorney that the New Castle police officer who showed Kirkwood's photo to the eyewitnesses was under suspension for misconduct when he testified at Kirkwood's trial.

Solomon's complaint further requested investigation of allegations that a man who resembled Kirkwood and admitted committing other robberies near the craft store before he committed suicide at the Lawrence County Jail, may have confessed to the robbery Kirkwood was convicted of committing.

Endnotes and Sources:

1 Lawrence County Prosecutor Accused of Trial Misconduct, Bill Moushey, *Pittsburgh Post-Gazette*, May 24, 2005.

2 *Id.*

3 Kirkwood Robbery Case Brings Witnesses' Memories Into Question, Bill Moushey, *Pittsburgh Post-Gazette*, May 8, 2005.



Endnotes (Sources the same):

1 Kirkwood Robbery case brings witnesses' memories into question, by Bill Moushey and Nathan Crabbe, *Pittsburgh Post-Gazette*, May 8, 2005.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 New Castle Conviction Tossed Out, Bill Moushey, *Pittsburgh Post-Gazette*, August 11, 2005.

7 *Id.*

8 Convicted Man Gets New Trial, Debbie Wachter Morris, *New Castle News*, August 11, 2005.

9 New Castle Man Released From Prison After Judge Tosses Out 2003 Robbery Conviction, Bill Moushey, *Pittsburgh Post-Gazette*, August 13, 2005.

