

Kenneth Selby witnessed Kevin Kent's 2003 murder in Cumberland County, New Jersey. Selby provided the police with a written statement, and in February 2006 he participated in a pre-trial interview at the prosecutor's office. During the interview Selby was served with a stand-by subpoena to testify at the trial of Terrell Cornish, the man accused of killing Kent. The stand-by subpoena stated, "Do not come to court until you have called the prosecutor's office." It also instructed Selby to "call the Prosecutor's Office on Friday, March 10, 2006, and ask for Detective George Chopek. ... You will then be told when to appear."

Selby telephoned the prosecutor's office on March 10 and asked for Detective Chopek. He was told Chopek was out of the office. After Selby's call, neither the prosecutor's office nor Detective Chopek made contact with Selby prior to the beginning of Cornish's trial, which ended with a plea bargain before a verdict was reached.

In retaliation for Selby not appearing to testify, the Cumberland County Prosecutor filed for an Order to Show Cause why Selby should not be found in contempt for failing to comply with the stand-by subpoena. The contempt hearing was conducted on June 7, 2006 by Cornish's trial judge.

Before the prosecution began presenting its case the judge told Selby's lawyer, "put your client on the stand, counsel, because I

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convict him. The basis of the appeals court's rationale was that even though Pauline recanted her trial testimony that she witnessed Shannon's murder, Masina didn't recant. The court determined Masina's testimony outweighed the four witnesses to the murder who attested after Tennison's conviction that he wasn't present at the scene, and Ricard's confession to being the murderer.

The appeals court also considered Masina's testimony to carry more weight than Tennison's alibi - which as a part of his lawyer's "trial strategy" wasn't presented at his trial - that he was at a party attended by 20-25 people on the evening of the crime.

The appeals court concluded that to prevail on his compensation claim Tennison had to prove by a preponderance of the evidence that he is "innocent of the crime with which he was charged," and that he did nothing to contribute to his conviction by "way of act of omission." The court decided that Tennison failed to prove he hadn't contributed to his conviction by his attorney's failure to present his alibi defense at

Contempt Conviction Tossed For Witness Who Wasn't Notified To Testify

By JD Staff

find that it's a valid subpoena. ... I'll take his testimony and hear it and then I'll have to let the Prosecutor go from there since it's your client's burden ..." (§25)

Selby's defense was that he had fully complied with the stand-by subpoena, but at the conclusion of the hearing the judge found him guilty of contempt. Selby was sentenced to 120 days in jail and a \$500 fine. He appealed his conviction, and pending its outcome his sentence was stayed.

Selby argued in his appeal "that he was not afforded the presumption of innocence, or the requirement that the State prove his guilt beyond a reasonable doubt and, most importantly, that the court shifted the burden of proof from the State to Selby." (§24) He contended that the judge's statements mandating that he testify prior to the State's witnesses was evidence the judge impermissibly shifted the burden of proof to him and denied his due process rights during the contempt proceeding.

The three-judge appeal panel issued its unanimous decision on August 22, 2007. (*In re Selby*, No. A-6383-05T2 (N.J.Super.App.Div.

trial, and that he hadn't proven his innocence. Consequently, "substantial evidence supports the Board's determination Tennison failed to carry his burden of proof. Accordingly, the Board did not abuse its discretion in denying his request for relief under section 4900."

After learning of the ruling, Daniel Purcell, one of Tennison's attorneys, said, "We're disappointed. We think this process was set up to deny John relief." Tennison did not appeal the decision to the California Supreme Court.

Tennison's federal civil rights lawsuit that named the County and City of San Francisco and several law enforcement officers as defendants, is still ongoing. In early 2006 the federal district court denied the defendant's motions for summary judgment, and as of September 2007 their appeal of that decision is being considered by the federal Ninth Circuit Court of Appeals.

Sources:
Tennison v. California Victim Compensation and Government Claims Board, No. A112313 (Cal.App. Dist.1 06/28/2007)
Interview of Daniel Purcell by Hans Sherrer, August 1, 2007.

08/22/2007)) The Court began its analysis of the law governing a contempt proceeding by citing *In re Ruth M. Buehrer* (50 N.J. 501 (1967)), in which the N.J. Supreme Court held:

[S]ince the summary [contempt] power lends itself to arbitrariness, it should be hemmed in by measures consistent with its mission. To that end, our rules embody sundry restraints ... [A] conviction is reviewable upon appeal both upon the law and the facts, and the appellate court shall give such judgment as it shall deem just.

The presumption of innocence of course obtains, and the burden of the prosecution is to prove guilt beyond a reasonable doubt.

Thus, the defendant is afforded all the rights of one charged with crime except the right to indictment and the right to trial by jury. *Id.* at 515-16.

After reviewing how Selby's contempt hearing was conducted when compared to the requirements set forth in *In re Ruth M. Buehrer*, the appeals court concluded:

By proceeding as was done in this case, the alleged contemnor [Selby], in addition to being prohibited from confronting and cross-examining the State's witnesses before the judge in order to evaluate what, if any, defense he should mount, was denied the ability to argue ... for a dismissal at the close of the State's case on the basis that the State's evidence was insufficient to warrant a conviction. The procedure employed here was fraught with real and potential problems and is inconsistent with affording the full panoply of constitutional and procedural rights articulated in *In re Ruth M. Buehrer* to one charged with an offense which may result in incarceration.

In sum, we are convinced that the trial court's ... statements as to the burden, as well as the unorthodox procedure used in prosecuting this contempt, merits a reversal and a remand for a new trial. (§§ 36-37)

As of late September 2007 the Cumberland County Prosecutor had not refiled the contempt charge against Selby.

Sources:
In re Selby, No. A-6383-05T2 (N.J.Super.App.Div. 08/22/2007) (All quotes in text are from the indicated paragraph in the decision.)
Court reverses contempt conviction of the man who didn't testify, By John Martins, *The Press* (Atlantic City, NJ), August 23, 2007.

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