

IN THE MISSISSIPPI COURT OF APPEALS

COPY

No. 2006-KA-01383-COA

ALBERT J. KEA

APPELLANT

Vs.

FILED

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court of Simpson County, Mississippi

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LAW AND ARGUMENT

1. **The trial court erred in admitting Bob and Lisa's unauthenticated passports to prove that they were in Turkey just before the fire.**
2. **Admission of the unauthenticated passports violated Albert Kea's right to confrontation.**

This was a case that rested almost exclusively on the testimony of a convicted felon, Robert Kea, who had been committing fraud his entire life. Indeed, most of his life, he used various fictitious identities in order to avoid authorities. In 1990, when he was thirty-six, he was convicted for passing bad checks and for making a false statement on a passport. T. 42.

On the other hand, the defendant, Robert Kea's elderly father, had lived a blameless life. The case ultimately came down to whether the jury believed Robert Kea when he testified that he was in Turkey during his father's hospitalization, or whether they believed Albert Kea's witnesses who testified that they saw Robert Kea carting boxes of things from his father's house during Albert's hospitalization. In getting the jury to believe the man (and his wife) whose **entire life** was a fraud, the prosecution knew that the key evidence was Kea's passport, as well as the passport of his wife, both of which contained a stamp purporting to show that Kea and his wife were in Turkey at the time the witnesses claimed Robert was denuding his father's house of valuables.

On appeal, the state argues that the passport stamp was properly authenticated by Robert "my-whole-life-has-been-a-fraud" Kea. The state's argument is nothing but sad given Robert Kea's lack of credibility and, furthermore, the fact that the passport had not only been issued to Kea under a false name, "Key", but that Kea had later had the passport changed to reflect another false name, "Keys." The entire passport was a fraud and, no doubt, the stamps indicating that Mr. and Mrs. Kea/Key/Keys were in Turkey in May of 1998 were frauds too.

As the prosecution's closing argument proves, with Robert's credibility at issue, the passport became the star witness in this case. During closing argument, the prosecution urged the jury to look at the passports back in the jury room.

Ladies and gentlemen of the jury, you heard those witnesses get up here and say while the Defendant was in the hospital the week before the fire Bob Kea came down to Magee, Mississippi and loaded up a van.

Now, if they told you that, which they did, they are liars. All of them lied. Because you've got proof in the pudding there with these passports. He can't be in two places at one time, can he? There are the passports. You're going to be taking them back there and looking at them. They're going to say just what we said they said. I didn't keep Lisa Keys on that stand very long. She answered the questions just like Bob did because they were very quiet, synclly [sic] and that was the way it was. no complicated answers to what I asked her. She's never had been convicted of nothing [sic].

T. 299.

The state argues that while Rule 902 requires foreign documents to have a final certification, there is no such requirement for the stamps indicating that Mr. and Mrs. Key or Mr. and Mrs. Keys were in Turkey on the days indicated by the stamp. Instead, since both Mr. and Mrs. Kea (or Mr. and Mrs. Key or Mr. and Mrs. Keys) testified that the stamps on the passports issued to Mr. and Mrs. Key, and then to Mr. and Mrs. Keys, were affixed in their presence, this was sufficient authentication.

The state's argument smacks of desperation and, indeed, the state's attempt to distinguish the case law is nothing short of feeble. *Overseas Trust Bank LTD v. Poon*, 581 N.Y.Supp.2d 92 (1991), the state argues, is inapplicable because in that case there was **no** authentication evidence offered whatsoever unlike here where the prosecution had the valuable authentication testimony of Mr. Key aka Keys aka Kea aka Cook aka Beverly aka Anderson.¹ Actually, while the opinion does not make it clear, one would assume that the defendant in *Overseas Trust* offered her own testimony in support of her contention that she was in New York

and not Hong Kong and, thus, could not have been served with process as the plaintiff bank claimed. *Overseas Trust Bank LTD v. Poon*, 581 N.Y.Supp.2d 92 (1991). The case was a civil case (which would mean that the defendant was more likely to testify on her own behalf) and was decided on summary judgment. So the facts are completely in accord with those here, i.e. the profferer of the passport stamp as evidence of the passport holder's whereabouts was the sole evidence of the stamp's authenticity except that the instant case is a criminal case and, if anything, the defendant is provided more protection from unauthenticated, hearsay evidence being used against him. And, of course, one would assume that the defendant in *Overseas Trust* was holding a passport that was in her real name.

The state attempts to distinguish *Gullotta v. United States*, 113 F.2d 682 (8th Cir. 1940), on the same basis arguing that there was no authentication in that case whereas here we have the testimony of Mr. Key aka Keys aka Kea aka Cook aka Beverly aka Anderson. In *Gullotta* the court held that the government's failure to prove the passport's authenticity mean that it was error to introduce it as substantive evidence of the defendant's citizenship. *Gullotta v. U.S.*, 113 F.2d 683, 685 (C.A.8 1940). It was not reversible error, though, because the government had also offered the defendant's confession as well as other evidence of the defendant's citizenship. The passport evidence was merely cumulative. In this case, the error in admitting the passport stamps was not harmless because the

¹ These are the various aliases Kea admitted to.

evidence, unlike that in *Gullotta*, was not cumulative. Indeed, the passport stamps were crucial to the prosecution's case.

The reality is that in this case, the prosecution's star witness was an admitted con man and his wife. To buttress the con man's testimony, the prosecution needed the passport to convince the jury that, at least on this one occasion, the con man was telling the truth. And, as expected, the prosecution told the jury to look at the passport stamps, which purported to be authentic government insignia, as evidence that the con man was telling the truth about having been in Turkey. "[Y]ou've got proof in the pudding there with these passports. He can't be in two places at one time, can he? There are the passports. You're going to be taking them back there and looking at them. They're going to say just what we said they said." T. 299. Now, the state makes the unbelievable argument that the only evidence the state needed to authenticate the passport's stamps was the testimony of the con man, Mr. Key aka Keys aka Kea aka Cook aka Beverly aka Anderson. As the cases indicate, the passport holder's testimony is not sufficient to authenticate the passport or the information it contains even if the passport holder is not an admitted con man as is the case here.

Finally, the state argues that "these federal cases are not authority in this court. **Since their factual settings are similar**, they are not useful as persuasive authority." *State's Brief p. 11* (emphasis added). All one can say to this is that

the federal cases' similarities to this case means that they should be viewed by this Court as persuasive authority.

The evidence against Albert Kea consisted of the testimony of his son - a man who admitted that his life was an entire life was a lie and who held a grudge against his father for failing to bail him out of his legal difficulties - and what was probably a forged passport stamp. Introduction of the passport was reversible error.

- 3. The trial court erred in failing to instruct the jury on the "two-witness" rule.**
- 4. The evidence is insufficient to support the verdict or, in the alternative, the verdict is against the overwhelming weight of the evidence**

(Because the state argues that the court's failure to give the "two-witness rule" instruction was harmless in light of the amount of evidence against Kea, Appellant has combined his reply to these two issues)

The state agrees that it is error to not give a "two witness rule" instruction even if the defendant fails to request it. However, the state argues that, it is not error if the defendant's own testimony demonstrates his guilt or if the evidence is such that a conviction was inevitable. This, the state says, is just such a case.

Nothing could be further from the truth. First of all, the state here, as did the prosecution at trial, apparently believes that Albert Kea is guilty of perjury if 1) he testified at the trial against Entergy that his valuables burned up in the fire

and 2) the evidence subsequently proves that the valuables were not in the house at the time of the fire.

The state argues that

[t]he facts of the case demonstrate clearly that the possessions claimed by the Appellant were not in his house and were not destroyed by the fire. He admitted this. There is no question but that he stated under oath, in the civil action against Entergy, that the items the Appellant claimed were never in the Appellant's house.

State's brief at p. 13. This, however, does not prove that Albert committed perjury. What the state apparently doesn't understand is that Albert Kea is not guilty of perjury unless he **knew** the valuables were not in the house during the fire but testified otherwise. Most of the witnesses testified that Robert Kea removed the valuables while Albert was in the hospital and, thus, Albert **mistakenly** believed that they were still in the house when it burned to the ground. For testimony to be considered perjury, the witness must have testified "with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (citations omitted).

The only testimony to the effect that Albert Kea knew the valuables were not in the house (because the valuables had always belonged to his son Robert with the ever-changing last name) was the testimony of Robert Kea/Key/Keys, etc., his wife, and the passport stamps. Robert Kea/Key/Keys, etc. was just not

credible. Nor were the no-doubt-forged passport stamps. Not only was Robert Kea/ Key/Keys not credible, he had a motive to lie because his father was no longer willing to help him get out of his legal troubles.

Perjury requires stringent proof of a direct and compelling character. *Hall v. State*, 751 So.2d 1161, 1164 (Miss.App. 1999). The uncorroborated testimony of a disgruntled convicted thief and liar is not sufficient to support Albert Kea's perjury conviction.

Conclusion


For these reasons, Albert Kea's conviction and sentence must be vacated or reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

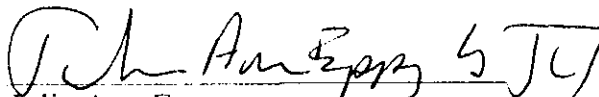
I, Julie Ann Epps, hereby certify that I have this day mailed by first-class mail, postage prepaid, a true and correct copy of the foregoing Reply Brief to the following:

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This, the 21st day of October, 2007.


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