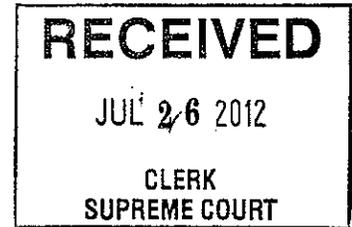


**Commonwealth of Kentucky**  
**Supreme Court**  
No. 2011-SC-0283



**THOMAS C. FRAZIER**

**APPELLANT**

v.

Appeal from Boone Circuit Court  
Hon. Anthony W. Frohlich, Judge  
Indictment No. 08-CR-0349

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**Brief for Commonwealth**

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**Submitted by,**

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**CERTIFICATE OF SERVICE**

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served July 26, 2012 as follows: by mailing to the trial judge, Hon. Anthony W. Frohlich, Judge, 6025 Rogers Lane, Suite 444, Burlington, KY 41005; by sending electronic mail to Hon. Linda Smith, Commonwealth Attorney; and by delivery through Kentucky Messenger Mail to Hon. Thomas M. Ransdell, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601.

**KEN W. RIGGS**

Assistant Attorney General

## **INTRODUCTION**

The Appellant was convicted of tampering with physical evidence, possession of drug paraphernalia, possession of marijuana, carrying a concealed deadly weapon, and criminal littering, and was sentenced to an aggregate five (5) years imprisonment. After the Court of Appeals affirmed his conviction, the Appellant sought discretionary review from this Court.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth believes that the issues raised on appeal may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

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## COUNTERSTATEMENT OF THE CASE

On June 7, 2008, Boone County Kentucky, Deputies Mike Moore and Nate Boggs were on patrol in an unmarked police car. (VR 9: 1/26/09, 12:40:18). They had just started their shift, and were assigned to general patrol duties. (Id., at 12:40:55). Around 5:00 P.M. the officers went to a local drive-in restaurant to get a soft drink. (Id., at 12:41:21). In the drive-thru line, directly in front of the officers, a silver Ford passenger car was waiting in line. Moore and Boggs noticed a passenger in the car toss some litter out of the car onto the ground. (Id., at 12:42:12). After getting their order, Moore and Boggs decided to follow the silver car. (Id., at 12:42:27). They observed the car make a left turn without using a turn signal. (Id., at 12:42:46).

Deputies Moore and Boggs initiated a traffic stop on the silver Ford. Moore approached on the driver's side, and Boggs approached on the passenger side of the vehicle. (VR 9: 1/26/09, 12:43:33). The Appellant was the driver of the car, and several other men were passengers. Moore requested the Appellant provide his operator's license and proof of insurance, and Appellant complied. (Id.). Moore noted that Appellant was very nervous and his hands were shaking. (Id., at 12:44:00). Appellant would not look Moore in the eye when talking to him and refused to tell him who the passengers were or where they were going. (Id.). To Moore, this was not just the usual nervousness of someone stopped by police, but combined with his uncooperativeness, sent up "red flags" that something was going on. (Id., at 12:44:41).

Moore requested that Appellant step out of the car, and Appellant complied. (VR 9: 1/26/09, 12:45:17). They went to the back of the car, and Deputy Boggs came around to join them. (Id., at 12:45:30). Boggs noted that Appellant appeared to be

visibly shaken, nervous, and evasive. (Id., at 1:04:56). Boggs decided to conduct a weapons frisk on the Appellant in order to ensure that he was not carrying a weapon that could harm the officers or himself. (Id., at 1:05:05). Boggs conducted an over-the-clothes frisk of the Appellant. (Id., at 1:06:03). In the Appellant's right-front pocket, Boggs felt a long hard object. (Id., at 1:06:13). Upon three (3) enquiries, the Appellant maintained that he did not have anything in his pocket. (Id., at 1:06:22). In order to verify that the object was not a weapon, Boggs pulled the top of the pocket open and looked in. (Id., at 1:06:43). Boggs noted that the object was a baggie of marijuana in "bud" form. (Id., at 1:06:43, 1:07:38). Boggs immediately arrested the Appellant and removed the baggie of marijuana "buds." (Id., at 1:07:14).

Another deputy sheriff had arrived in the meantime, and was driving a traditional police cruiser. After a more through search, Boggs placed the Appellant into the back of that cruiser. (VR 9: 1/26/09, 1:08:07 - 1:08:35). Boggs then searched the Appellant's car, finding a "billy club" underneath the Appellant's seat. (Id., at 1:09:43).

Meanwhile, a neighbor who had been out in her yard watching the whole incident yelled out to Moore and Boggs. She informed the officers that Appellant appeared to be eating something in the back of the police cruiser. (VR 9: 1/26/09, 12:48:05). Boggs and Moore rushed to the cruiser, and Moore opened the door. The Appellant was still chewing on something and had marijuana on his mouth, down the front of his shirt, and on his lap. (VR 9: 1/26/09, 12:48:29). As Moore opened the door to the cruiser, the smell of marijuana was strong. (Id., at 12:48:53). Appellant was told to spit it out, but swallowed instead. (Id., at 12:49:09). A plastic bag with marijuana residue

was found. (Id., at 1:11:35). Appellant sang a song to the officers, with one of the lyrics being “no, no, they send dogs and hounds after me, but don’t catch me...” (Id., at 1:14:31).

The Appellant was taken to the Boone County Jail. As he was being booked, two (2) marijuana pipe screens were found in his wallet. (VR 9: 1/26/09, 1:13:26).

The Boone County grand jury returned an indictment against the Appellant on June 17, 2008. The indictment charged the Appellant with tampering with physical evidence, illegal possession of drug paraphernalia, promoting contraband, possession of marijuana, carrying a concealed deadly weapon, and criminal littering. (Transcript of Record (TR), Vol. I, 13-15). The Appellant proceeded *pro se* throughout the lower court proceedings, and the matter was tried before a jury. During the pendency of the case, the Appellant showed open disrespect for authorities and billed himself as a crusader for the legalization of marijuana. (TR, Vol I, 39-46, 50-51, 94, 107-109, 116-121, 128-130, 146-150). The jury convicted the Appellant of all charges, except for promoting contraband. The Appellant was sentenced to an aggregate of five (5) years and a \$500 fine by judgment entered on February 25, 2009. (TR, Vol. II, 217-219).

The Appellant appealed as a matter of right to the Court of Appeals. Before that court, the Appellant raised five distinct issues on appeal. First, the Appellant challenged the validity of the initial traffic stop. (Appellant’s Brief, Court of Appeals, 4-10). Second, the Appellant alleged that the Terry pat down of his person was unjustified.

(Id., at 10-12). Third, the Appellant alleged that the search of his vehicle was constitutionally infirm. (Id., at 12-19). Fourth, Appellant asserted error in the trial court's failure to conduct a competency evaluation. (Id., at 19-23). Finally, Appellant argued that the proof was insufficient as to littering. (Id., at 24-25).

The Court of Appeals decided the case without oral argument, and on April 22, 2011, rendered a to-be-published opinion affirming in part and reversing in part. (hereafter "Slip Opinion"). As to the reversal, the Court of Appeals determined that Appellant was correct in his argument about the criminal littering, and that conviction was reversed. The Court of Appeals affirmed on all the other convictions, rejecting the Appellant's arguments.

The Appellant then sought discretionary review from this Court, presenting two (2) questions of law dealing with search and seizure law. Discretionary review was granted, and this appeal followed.

Additional facts will be set forth below as needed.

## **ARGUMENT**

### **I.**

#### **THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS AND THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DECISION**

##### **A. Introduction**

On discretionary review, the Appellant raises two (2) issues concerning the Terry frisk of his person and the search of his automobile. Since these issues all concern the same facts as adduced at the suppression hearing, the Appellee has combined its response to these two (2) issues in this one (1) argument.

##### **B. The suppression hearing**

The Appellant proceeded *pro-se* during the jury trial in this case. During his opening statement to the jury, the Appellant argued that the search which revealed the drugs on his person was illegal. Based on that argument, the trial court believed that it was necessary to have a suppression hearing.

Deputy Mike Moore was the Commonwealth's first witness at the hearing. He testified that he and Deputy Nate Boggs pulled the Appellant's car over. Moore approached the driver's side of the car and ask the Appellant for his license and insurance card. (VR 9: 1/26/09, 11:22:43). The Appellant was acting strange, and was visibly shaken. (*Id.*, at 11:22:57 - 11:23:41). His hands were shaking. Appellant was uncooperative when asked about his passengers and his destination. (*Id.*). Appellant

would not look Moore in the eyes. (Id., at 11:26:25). For Moore, the circumstances combined to send up a red flag that something was going on, or that Appellant was hiding something. (Id., at 11:23:47). Moore asked the Appellant to step out of the car, and Appellant complied. (Id., at 11:23:59).

Deputy Nate Boggs also testified at the hearing. He testified that once Appellant was out of the car, he joined Moore and the Appellant at the rear of the car. (VR 9: 1/26/09, 11:31:30). He described Appellant's tone of voice with Moore as being "verbally belligerent." (Id., at 11:31:47). Boggs asked the Appellant if he had anything dangerous on his person. (Id., at 11:31:56). Deputy Boggs explained that the reason for this inquiry was Appellant's nervous behavior and his responses to Moore's questions which raised concerns that Appellant might have a concealed weapon. (Id., at 11:32:02). Appellant replied that there was nothing on his person. (Id., at 11:32:13). Boggs asked for consent to search the Appellant's person, and the Appellant refused. (Id., at 11:32:20). Boggs advised the Appellant, that for safety purposes, he was going to conduct a part down of his person, and the Appellant adamantly objected. (Id., at 11:32:27). Boggs explained that the purpose of the pat down was make sure that the Appellant had no weapons on his person. Based on Appellant's behavior and attitude, Boggs did not want the situation to escalate. (Id., at 11:32:47).

Boggs conducted an over-clothes frisk of the Appellant. (VR 9, 1/26/09, 11:33:10). In Appellant's right front jeans pocket, he felt a long hard object. (Id., at 11:33:23). Thrice Boggs asked the Appellant what he had in his pocket, and all three (3)

times the Appellant asserted that there was “nothing” in his pocket. (Id., 11:33:28 - 11:34:07). Boggs pulled the pocket open and saw a bag of marijuana.<sup>1</sup> (Id., at 11:34:14 - 11:34:58). Appellant was arrested.

Boggs eventually searched the Appellant’s car after his arrest. He found a billy club underneath the driver’s seat. (VR 9: 1/26/09, 11:36:17). Boggs testified that the weapon was within the immediate area of control of the Appellant as he drove. (Id., at 11:36:27).

The trial court overruled the motion to suppress orally. (VR 9, 1/26/09, 12:34:16 - 12:35:25). A written order overruling the motion was also entered. (TR Vol II, 208-209). The trial court made the following findings of fact:

On June 7, 2008, Boone County Deputy Sheriff Mike Moore and Boone County Deputy Sheriff Nate Boggs were in a unmarked police cruiser in the drive thru lane of Sonic restaurant in Boone County, Kentucky. The Defendant Thomas Frazier was in a vehicle in front of the police in the drive thru lane. The occupants of the vehicle threw out litter of the vehicle’s window. The police followed the Defendant’s vehicle for a distance observing it make a turn without proper use of its turn signal. Boone County Sheriff Deputy Moore and Boggs stopped the Defendant for a traffic stop and called Officer Robert Houpp in a marked cruiser to come and assist. While stopped the Defendant appeared nervous and visibly shaken and was uncooperative. The police ask the Defendant for consent to search his person and Defendant consented.[<sup>2</sup>]

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<sup>1</sup> At trial, Boggs testified that the marijuana was in “bud” form. (VR 9: 1/26/09, 1:07:38).

<sup>2</sup> This appears to be a typographical error on the part of the trial court. Appellant did *not* consent to a search of his person. The trial court obviously knew that fact since the legal analysis of the search does not consider consent as a justification.

Boone County Sheriff Deputy Nate Boggs did a pat down on Defendant for weapons. He felt a hard coarse object in the Defendant's right front pants pocket. The Defendant denied having anything. The officer asked two (2) more times and Defendant denied having anything. The officer looked into Defendant's pocket to find a large amount of marijuana tightly rolled up in a baggie. The officer removed the marijuana, placed the Defendant under arrest, and placed him in the back of Officer Robert Houpp's cruiser. The police conducted a search of Defendant's motor vehicle and under the driver's seat that found a billy club. The police were alerted by an observer that the Defendant was eating something and the police confronted the Defendant. The Defendant was in fact eating marijuana. The Defendant was taken to the Boone County Jail where screens used in smoking marijuana were found in his wallet.

(Id.). The Appellant's trial proceeded after completion of the suppression hearing and the trial court's oral ruling.

**C. Standard of Review**

The standard of review after a denial of a suppression motion is that determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. However, the appellate court reviews findings of facts for clear error and gives due weight to inferences drawn from those facts by resident judges and local enforcement officers. Ornelas v. United States, 517 U.S. 690 (1996). This legal standard takes into account the unique position that the trial court occupies in that it can best judge the credibility of witnesses. Thus, the United States Supreme Court is correct to conclude:

[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn

from those facts by resident judges and local law enforcement officers.

Ornelas, supra. at 699.

A trial court's factual rulings are conclusive and not clearly erroneous if they are supported by substantial evidence. RCr 9.78; Simpson v. Commonwealth, 834 S.W.2d 686 (Ky. App. 1992); Taylor v. Commonwealth, 987 S.W.2d 302 (Ky. 1999). "Substantial evidence" has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglass Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998).

**D. Appellant's challenge to the opening of his pocket was not presented to the Court of Appeals, thus is not properly before this Court, and in any event the Terry frisk was justified and properly conducted**

For his first issue on discretionary review, the Appellant asserts that the Terry frisk conducted by Deputy Boggs was improper and further that Boggs's opening of his pants pocket to reveal marijuana was not constitutionally allowed. (Appellant's Brief, 4-10). Appellant asserts that officers lacked the requisite reasonable suspicion to conduct the Terry pat down in the first place. (Appellant's Brief, 7-9). Appellant also asserts that Boggs's opening of Appellant's pocket was not reasonable based on the facts known to officers. (Appellant's Brief, 9-11). Appellant is incorrect on all counts.

Initially, the Commonwealth believes that Appellant is proffering an issue and argument to this Court on discretionary review that was not argued in the Court of Appeals, and as such, that tribunal never passed on the merits of his argument as now

presented. That issue concerns his current challenge to the actual opening of his pocket as a separate and distinct constitutional violation.

In the Appellant's brief before the Court of Appeals, Appellant raised the issue that the trial court should have suppressed the search of Appellant's person. Attached to this brief, is the relevant two (2) page argument that Appellant presented to the Court of Appeals. In his motion for discretionary review and his current Appellant's Brief before this Court, the Appellant presents a much more cogent, and lengthy argument on this point. However, upon review of the argument that he made to the Court of Appeals, Appellant failed to present the issue now on review to that tribunal. In the portion of his brief attached hereto, the Appellant focused his argument on the legality of the actual removal of the Movant from the car and the justifications for the pat down. His only reference to the what he now presents in his Appellant's Brief is a passing reference that the search of Movant was the fruit of the improper Terry pat down. He failed to specifically plead or present the precise argument now presented in this brief, namely that Boggs did not have cause to open his pocket.

Indeed, in considering the Terry stop, the Court of Appeals *did not address* the actual opening of the Appellant's pocket by Deputy Boggs. The Court of Appeals addressed the argument that Appellant actually presented to them: that the Terry pat down was unjustified. (Slip Opinion 6-7). The validity of the opening of the pocket was never passed on by the Court of Appeals because it was never directly attacked by the Appellant, but merely mentioned as a fruit of the alleged improperly based Terry pat down.

This Court granted *discretionary review* to examine the *decision* of the Court of Appeals. Yet as to the validity of Boggs opening the Appellant's pocket there is *nothing* to review. This tactic used by the Appellant is more than an appellate attorney merely fine tuning his argument. It appears that this issue surrounding the opening of his pocket by Deputy Boggs is a separate and distinct issue from the issues that Appellant raised in the Court of Appeals. The Appellant appears to be feeding one can of worms to this Court of Appeals and another to this Court. Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1976), *overruled other grounds by* Wilburn v. Commonwealth, 312 S.W.3d 321 (Ky. 2010).

However, as argued below, even if the issue is properly before the Court, the Appellant's argument fails.

Deputy Moore did nothing improper when he asked the Appellant to step out of his car. The United States Supreme Court has spoken on this issue, in Pennsylvania v. Mimms, 434 U.S. 106 (1977)<sup>3</sup>. In Mimms that court that there was no problem with a police offer requesting that a subject exit his vehicle:

We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.

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<sup>3</sup> This holding was recognized in Hampton v. Commonwealth, 231 S.W.3d 740, 747 (Ky. 2007).

Mimms, 434 U.S. at 111. In the case at hand, Deputies Moore and Boggs were faced with a visibly nervous Appellant who was uncooperative in a car with multiple occupants. It is only logical that for officer safety the Appellant would be asked to step out of the car.

The Court of Appeals considered the validity of the removal of Appellant from his car and the Terry pat down. Citing to Mimms, *supra.*, that Court concluded that under the specific circumstances of this case, the “request that Frazier exit the vehicle was neither unreasonable nor outside the scope of the stop.” (Slip Opinion, 6).

Once outside the car, the Terry search conducted by Deputy Moore was permissible. A Terry frisk is justified when the officer has reason to believe that he is dealing with an individual is armed and dangerous, regardless of whether the officer has probable to make an arrest. Adkins v. Commonwealth, 96 S.W.3d 779, 786 (Ky. 2003).

When an officer is justified in believing that an individual, who is unquestionably not cooperative, may be armed, it would be clearly unreasonable to deny that officer the authority to take necessary measures to determine whether the individual is, in fact, carrying a weapon, and to alleviate the threat of physical harm.

Baker v. Commonwealth, 5 S.W.3d 142, 146 (Ky. 1999). Here, the officers were faced with a very nervous, visibly shaken Appellant. Although nervousness alone is insufficient to give rise to reasonable suspicion, it is an important factor in the analysis. Adkins v. Commonwealth, 96 S.W.3d 779, 788 (Ky. 2003). Further, Appellant avoided eye contact with Deputy Moore. Additionally, the Appellant uncooperative in answering simple, reasonable, questions. Moore testified that these circumstances came together to put up a red flag that the Appellant was hiding something. (VR 9, 1/26/09, 11:23:47). Boggs

explained that the those behaviors gave him concern that the Appellant might have had a concealed weapon. (Id., at 11:32:02). Boggs explained that the purpose of the pat down was to make sure Appellant did not have a weapon, and that he wanted to prevent the stop from escalating. (Id., at 11:32:47). Safety was obviously his priority, and thus he conducted the pat down.

The Court of Appeals, in considering the Terry pat down of the Appellant, relied on the proper precedent to reach the conclusion that no error occurred. (Slip Opinion, 5-7). The Court of Appeals utilized a totality of the circumstances test to determine if Deputy Boggs had the requisite cause to pat down the Movant. The Court noted “Frazier’s nervousness, his failure to cooperate, his failure to look the officers in the eyes, and his verbal belligerence once outside the vehicle” in reaching the conclusion that the Terry pat down was proper. (Slip Opinion, 6-7). The Terry frisk in this case was justified when the Boggs has reason to believe that he is dealing with an individual that is armed and dangerous, regardless of whether Boggs had probable to make an arrest at that time. Adkins, *supra*. The decision of the Court of Appeals is correct, and should be adopted by this Court.

As for Boggs’ opening of the Appellant’s pocket, that too was justified by the circumstances. Of course, since Appellant never presented this precise issue to the Court of Appeals for adjudication, there is no ruling of that Court of examine.

Recall that Boggs conducted an over-clothes frisk of the Appellant out of a concern for officer safety. (VR 9, 1/26/09, 11:33:10). In Appellant’s right front jeans

pocket, he felt a long hard object. (Id., at 11:33:23). Thrice Boggs asked the Appellant what he had in his pocket, and all three (3) times the Appellant asserted that there was “nothing” in his pocket. (Id., 11:33:28 - 11:34:07). Boggs pulled the pocket open and saw a bag of marijuana.<sup>4</sup> (Id., at 11:34:14 - 11:34:58).

It is clear from the previously noted behavior of the Appellant, coupled with the fear for officer safety articulated by Boggs, that Boggs was well within his authority to open the pocket to dispel his fear that he “nothing” he felt in Appellant’s pocket was not a weapon.

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry v. Ohio, 392 U.S. 1, 27 (1968). Once the pat down is thus justified, Boggs had the right to dispel his fear that the “nothing” he felt in his pocket was not a weapon of some kind. The “nothing” in Appellant’s pocket was described by Boggs as a long, hard, coarse object. (VR 9: 1/26/09, 1:06:13). Boggs testified that he wanted to make sure that the object was not a weapon, and that is why he opened the pocket. (Id., at 1:06:43). Boggs looked into the pocket and saw that it was marijuana. (Ibid.).

Since Boggs thought that the object might be a weapon, he was justified in looking in the pocket. If he had not felt that the long, hard, coarse object which could have been a weapon, then he could not have opened the pocket unless the item was immediately

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<sup>4</sup> At trial, Boggs testified that the marijuana was in “bud” form. (VR 9: 1/26/09, 1:07:38).

apparent as contraband.

The Court reiterated that the sole justification for a Terry search is the safety and protection of the officer and others nearby. Once having concluded that the suspect's pocket contained no weapon, the officer had no basis for a continued exploration of the pocket.

Commonwealth v. Crowder, 884 S.W.2d 649, 652 (Ky. 1994). In this case, Deputy Boggs opened the pocket precisely to determine if the item was in fact a weapon. That judgment is reinforced by the Appellant's behavior that gave rise to the need to conduct a Terry stop as well as the Appellant's repeated response that "nothing" was in his pocket. The trial court, in conducting its legal analysis, understood:

During the pat down of Defendant the police believed the Defendant had a weapon. A reasonable person in Officer Boggs' circumstances could well believe the item in Defendant's pocket was a weapon. The search of Defendant did not go beyond what was necessary to determine if the Defendant was armed with a deadly weapon. The Defendant's conduct prior to the search gave the police officer belief that the Defendant posed a possible threat to their safety and those around them. Thus, to determine whether the item in the Defendant's pocket was a weapon the officer looked into the defendant's pocket to discover then it was a tightly rolled bag of marijuana.

(TR, 210). Deputy Boggs did nothing to violate the Appellant's rights. Fearing that the item might be a weapon, he took the only action available to him, and opened the Appellant's pocket. Under the circumstances, that was not an additional, impermissible search. There is no merit to the Appellant's argument. Reversal of the Court of Appeals is not required.

**E. The search of Appellant's car was proper**

As his second issue on discretionary review, the Appellant challenges the search of his car. (Appellant's Brief, 11-20). Recall that during the search of the car, a "billy club" was seized from beneath the driver's seat. (VR 9: 1/26/09, 11:36:27).

The landscape of vehicle searches changed in 2009, when the United States Supreme Court rolled back years of precedent, announced a modified rule in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009).

The Court noted that warrantless searches of automobiles incident to arrest was justified under two (2) circumstances:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Gant, 556 U.S. at 351

In the case at hand, the Appellant was under arrest and in the back of a police cruiser when his car was searched by Deputy Boggs. Thus, it cannot be said that he was within reaching distance of the passenger compartment of his car at the time it was searched.

However, it was reasonable to believe that the vehicle contained evidence of crime for which Appellant was arrested. Consider the circumstances: Appellant was visibly nervous and his hands were shaking, he would not make eye contact with officers, he was uncooperative in answering reasonable questions, he denied that there was

*anything* in his pocket three (3) times after Boggs felt the long hard object that turned out to be tightly wrapped marijuana bundle. Those circumstances lead to logical and reasonable belief that Appellant might have other marijuana or drugs in the car. He was certainly not honest in revealing what he had on her person, even to the point to denying the plain fact that there was *something* in his pocket. Consider that this Court has held that a search of a car is permissible when the defendant is arrested for a drug related offense, under the theory that the car might contain evidence. In McCloud v. Commonwealth, 286 S.W.3d 780 (Ky. 2009), the defendant's car was stopped after police observed the defendant with what appeared to be crack cocaine in his hand. As the defendant exited the car at the request of police, a piece of crack cocaine fell from the defendant's waist area. He was arrested and additional cocaine was found concealed on his person. The police then searched the defendant's car. This Court found that search proper, even in light of the restrictive nature of Gant. This Court found that Gant did not invalidate the search: "[i]n the case at hand, however, it was reasonable for Royse to believe that McCloud's vehicle contained evidence of the offense of arrest." McCloud, 286 S.W.3d at 785. The Court then determined that if the defendant's arrest was proper, then the search was also allowed.

Because the arrest was permissible, the later searches of McCloud's person and the Grand Prix, which flowed naturally and permissibly from the probable cause-supported arrest of McCloud, were likewise constitutionally permissible.

McCloud, 286 S.W.3d at 786. Further, this Court reached a similar conclusion in other drug cases: Owens v. Commonwealth, 291 S.W.3d 704 (Ky. 2009); Robbins v. Commonwealth, 336 S.W.3d 60 (Ky. 2011).

As in McCloud, the search of Appellant's car was justified since there existed the reasonable belief that the car might contain more drugs. There is no reason to suppress the search. Because the arrest was permissible, the later searches of Appellant's car, which flowed naturally and permissibly from the probable cause-supported arrest of Appellant, was likewise constitutionally permissible. The Court of Appeals examined this issue, applying the proper precedents, and reached the correct decision.

Although Frazier had been arrested and in the police cruiser, the fact that he had just been arrested for possession of marijuana was sufficient to establish the reasonable belief that additional evidence of that offense would be found in the vehicle, either more marijuana, additional drugs, or drug paraphernalia.

(Slip Opinion, 7).

Furthermore, the Appellant's car was searched on June, 7, 2008, well prior to the limitation of automobile searches imposed in Gant. Under prior law, specifically New York v. Belton, 453 U.S. 454 (1981), the search of Appellant's car after arrest would have been upheld without question. In Davis v. U.S., 131 S.Ct. 2419 (2011), the United States Supreme Court concluded:

But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than “ac[t] as a reasonable officer would and should act” under the circumstances. [citations omitted].

Id., at 2429. Thus, the deputies in this case relied on then-existing precedent to search the

Appellant's car after his arrest. Under Davis, that search is now not to be invalidated because it may be held to run against the more recent decision in Gant that dramatically changed the law on automobile searches.

Finally, toward the end of his argument, the Appellant asks this Court to expand the search and seizure protections under §10 of the Kentucky Constitution. However, it has long been held in this Commonwealth that the rights afforded in §10 of the Kentucky Constitution are consonant with the Fourth Amendment in scope. Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992); Holbrook v. Knopf, 847 S.W.2d 52 (Ky. 1993); Commonwealth v. Crowder, 884 S.W.2d 649 (Ky. 1994). His position lacks merit.

**F. Conclusion**

The decision of the trial court to deny the motion to suppress the evidence against the Appellant was correct. The Court of Appeals correctly affirmed those decisions. Reversal is not required.

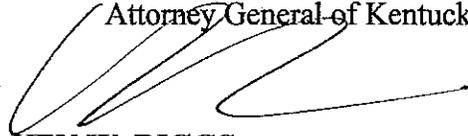
**CONCLUSION**

For all of the foregoing reasons, this Court should affirm the conviction(s)  
of Appellant.

Respectfully Submitted

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# APPENDIX

**Description**

**Appendix No.**

Appellant's Brief, Court of Appeals, Case No. 2009-CA-0561,  
Argument II, October 27, 2009. .... 1-3