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SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-283-DG

THOMAS C. TRAZIER

APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
HON. ANTHONY W. FROELICH, JUDGE
CASE NO. 08 CR 349

COMMONWEALTH OF KENTUCKY APPELEE

BRIEF FOR APPELLANT THOMAS C. TRAZIER

SUBMITTED BY

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CERTIFICATE REQUIRED BY CR 7.6(2)(c)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by U.S. Mail, first class postage prepaid, on March 28, 2012: Hon. Anthony W. Froelich, Judge, 6025 Rogers Lane, Suite 431, Burlington, KY 41005; Hon. Linda Lally Smith, Commonwealth's Attorney, 2005 Washington Street, P.O. Box 168, Burlington, Kentucky 41005; and by state messenger mail to Hon. Jack Conway, Attorney General, 1024 Capital Center Plaza, Frankfort, Kentucky 40601-8204. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Supreme Court of Kentucky on this date.



THOMAS M. RANDELL

INTRODUCTION

This is an appeal from illegal searches and seizures and, after a jury trial, convictions for tampering with physical evidence, possession of drug paraphernalia, 1st offense, possession of marijuana, carrying a concealed deadly weapon, and criminal littering. Thomas Frazier was sentenced to five years imprisonment for tampering with physical evidence, \$25.00 for possession of drug paraphernalia, \$500.00 for possession of marijuana, 30 days imprisonment for carrying a concealed deadly weapon, and \$250.00 for littering. The misdemeanor sentence was ordered to be served concurrent to the 5 year prison sentence and the fines were capped at a total fine of \$500.00.

STATEMENT CONCERNING CITATIONS TO THE RECORD

There are two volumes of pleadings. These will be referred to at TR, followed by the volume number and page number. There are 10 CD's. The CD's have been renumbered in chronological order. They will be cited as VR 1, VR 2, etc., using the chronological numbers assigned to them, along with the date and time; e.g., (VR 1; 7/16/08; 10:35:43). There is one supplemental CD. It will be cited as VR Supp, along with the date and time.

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STATEMENT OF THE CASE

Thomas Frazier was a highly functioning professional whose life fell apart after he began exhibiting signs of mental illness. He graduated high school from the Millersburg Military Institute. (VR Supp; 11/9/08; 9:51:10). He graduated from Xavier University with a BS degree in Business Administration/Marketing. (VR Supp; 11/9/08; 9:51:44). He took some classes towards a Masters degree at Xavier. (VR 3; 8/14/08; 9:59:26). He served three years in the military as a paratrooper, and received an honorable discharge. (VR Supp; 11/9/08; 9:51:57). He was a licensed stock broker for 13 years with Fidelity Investments. (VR Supp; 11/9/08; 9:53:00). He had a wife and children. (VR Supp; 11/9/08; 9:54:59).

Then he began having problems. His wife claimed it was mental illness. (VR 3; 8/14/08; 10:16:03). His wife divorced him. (VR Supp; 11/9/08; 9:54:18). He lost his job as a stock broker. (VR 3; 8/14/08; 10:00:58). He worked as a truck driver for about 8 months. (VR Supp; 11/9/08; 9:53:25). And by the time of this case he had been unemployed for over a year. (VR 3; 8/14/08; 10:00:13). He was living in motel rooms when he had the money. (VR 1; 7/16/08; 10:34:48).

On June 7, 2008, Boone County Sheriffs Deputies Mike Moore and Nate Boggs were in the drive-thru line at Sonic. (VR 9; 1/26/09; 12:41:48). They were in an unmarked car. (VR 9; 1/26/09; 12:40:16). They saw a passenger in the vehicle in front of them toss some litter out of the car. (VR 9; 1/26/09; 12:42:07). After the two deputies got their order from Sonic, they decided to follow the car with the litterbug. (VR 9; 1/26/09; 12:42:24).

The driver, Thomas Frazier, was stopped at the light on Sam Neace, in the lane turning left on Mount Zion. (VR 9; 1/26/09; 12:42:32). He turned left onto Mount Zion without using his turn signal. (VR 9; 1/26/09; 12:42:46). The deputies decided to pull the car over.

The deputies caught up with Mr. Frazier on Deer Trace Drive. (VR 9; 1/26/09; 12:43:22). Moore asked Frazier for his driver's license and proof of insurance, and he observed that Frazier looked nervous as he handed over those documents. (VR 9; 1/26/09; 12:43:55). When Moore asked who the passengers were and where they were going, Frazier replied, "Does it matter?" (VR 9; 1/26/09; 12:44:09). Moore considered that response uncooperative, which sent up a red flag, so he asked Frazier to step out of the vehicle. (VR 9; 1/26/09; 12:44:35). Once outside, he had Frazier move to the rear of the car where Deputy Boggs took over. (VR 9; 1/26/09; 12:45:35).

Boggs asked Frazier if he had any weapons on him, and Frazier responded in the negative. (VR 9; 1/26/09; 11:32:09). Boggs then asked for permission to search Frazier, which was denied. (VR 9; 1/26/09; 11:32:14). Boggs told Frazier he was going to search him anyway. (VR 9; 1/26/09; 11:32:24). During the search, Boggs felt a "long, coarse, suspicious object" in Frazier's front jeans pocket. (VR 9; 1/26/09; 11:33:18). Boggs asked Frazier three times to tell him what the object was, and each time Frazier said, "Nothing." (VR 9; 1/26/09; 11:33:52). Deputy Boggs pulled open the top of Frazier's jeans pocket and saw a plastic bag containing a green leafy substance. (VR 9; 1/26/09; 11:34:54).

Mr. Frazier was arrested and placed in the back of a marked cruiser that had arrived on the scene. (VR 9; 1/26/09; 1:08:06). Boggs proceeded to search Frazier's car,

and while that was transpiring he was approached by an onlooker who said the prisoner in the back of the cruiser was eating something. (VR 9; 1/26/09; 1:10:39). Boggs and Moore responded to the cruiser and observed Thomas Frazier eating something they determined was marijuana. (VR 9; 1/26/09; 1:10:50).

The search of the Mr. Frazier's car produced a "tire thumper," a short wooden bat used by truck drivers to check tire inflation, which was located under the driver's seat. (VR 9; 1/26/09; 1:09:23). No other drugs or drug paraphernalia were found in the car. (VR 9; 1/26/09; 1:14:00). Two pipe screens were found in Mr. Frazier's wallet when that item was later searched at the jail. (VR 9; 1/26/09; 1:35:17).

Thomas Frazier was indicted for the offenses of Tampering with Physical Evidence, Possession of Drug Paraphernalia, First Offense, Promoting Contraband in the First Degree, Possession of Marijuana, Carrying a Concealed Deadly Weapon, and Littering. TR I 13-15. Mr. Frazier represented himself at trial. His competence to stand trial was challenged by the prosecutor, but he was found competent. (VR 7; 11/6/08; 3:46:38). Mr. Frazier moved to suppress the searches and seizures at the beginning of his trial. (VR 9; 1/26/09; 11:21:31).

The jury acquitted Mr. Frazier of Promoting Contraband, but found him guilty of the other offenses. TR II 195-200. The trial judge sentenced Thomas Frazier to a total sentence of five years imprisonment and a \$500 fine. He was ordered to serve 150 days of his sentence, with the remainder being probated. TR II 217-219.

On appeal to the Court of Appeals, Thomas Frazier raised five arguments. The first three issues challenged the legality of the initial stop of the vehicle, the subsequent search of Mr. Frazier's person, and the search of his vehicle incident to his arrest. In

addition, Frazier raised doubts about his competency to stand trial following the guilt phase of his trial, and errors concerning the charge of criminal littering.

The Court of Appeals reversed Mr. Frazier's conviction for criminal littering, but affirmed each of the other convictions. In a published opinion, the Court held there were reasonable grounds for the stop of Mr. Frazier's vehicle, that ordering Mr. Frazier from his vehicle and subsequently frisking him were appropriate actions, and that the search of his vehicle following his arrest was permissible under *Arizona v. Gant*, 556 U.S. 332 (2009). *Frazier v. Commonwealth*, 2009-CA-561, slip op. at 4-9 (rendered 4/22/11). A dissenting opinion by former Chief Justice Joseph E. Lambert, sitting as a Senior Judge, argued that there were no reasonable grounds for the search of Mr. Frazier's vehicle following his arrest for possession of marijuana. *Id.*, slip op. at 12-14. The Court of Appeals also affirmed the trial court's decisions finding Mr. Frazier competent to stand trial and allowing him to represent himself. *Id.*, slip op. at 11. Lastly, the Court of Appeals reversed Mr. Frazier's conviction for littering because of an instructional error and remanded that charge for a new trial. *Id.*, slip op. at 12.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE ILLEGAL SEARCH OF THOMAS FRAZIER'S PERSON.

This issue was preserved by appellant's *pro se* motion to suppress the results of the warrantless search of his person. (VR 9; 1/26/09; 11:16:14, 11:21:31). The motion was denied. (VR 9; 1/26/09; 12:35:10).

Thomas Frazier's vehicle was stopped by Officers Mike Moore and Nate Boggs. Moore approached the vehicle on the driver's side of the vehicle and asked Frazier for his drivers license and insurance. (VR 9: 1/26/09; 11:22:41). Moore felt that Mr. Frazier looked nervous. (VR 9: 1/26/09; 11:22:53). When Moore asked Frazier to identify his passengers and where he was going, Frazier initially responded, "Does it matter?" (VR 9: 1/26/09; 11:23:07). Moore testified that Frazier then told him the passengers were friends of his son's and they were going to pick up his son and go to a concert. (VR 9: 1/26/09; 11:23:22). Thomas Frazier was told to exit his car. (VR 9; 1/26/09; 12:45:15).

During that initial encounter, Officer Boggs was on the passenger side of the vehicle. (VR 9: 1/26/09; 11:31:06). Boggs did not hear anything Mr. Frazier had told Officer Moore. (VR 9: 1/26/09; 11:31:15). When Moore brought Frazier to the rear of his vehicle, Boggs joined them. (VR 9: 1/26/09; 11:31:30). Boggs then spoke with Mr. Frazier and asked if there was anything illegal on his person. (VR 9: 1/26/09; 11:31:52). Boggs claimed he was concerned that Mr. Frazier might have a weapon on his person. (VR 9: 1/26/09; 11:32:00). Frazier told Boggs there was nothing on his person. (VR 9; 1/26/09; 11:32:09). Boggs asked for permission to search him, but Frazier said, "No." (VR 9; 1/26/09; 11:32:14).

At that point, Boggs informed Frazier that for everyone's safety he was going to conduct a frisk of Frazier, to which Mr. Frazier objected. (VR 9; 1/26/09; 11:32:24). Boggs said, "I wanted to make sure that there was no weapons (sic) hidden on his person - knives, guns - because of his behavior and his general attitude." (VR 9: 1/26/09; 11:32:45). Boggs conducted the frisk over Frazier's clothes and felt a "long, coarse, suspicious object" in the right front jeans pocket of Frazier's pants. (VR 9; 1/26/09;

11:33:18). Boggs testified it felt “like hard in nature.” (VR 9; 1/26/09; 11:33:38). Boggs asked Frazier what was in his pocket, and Mr. Frazier said, “Nothing.” (VR 9; 1/26/09; 11:33:51). Boggs told Mr. Frazier he could feel it and he wanted to make sure it was not a weapon or something like that, and Frazier said it was “nothing.” (VR 9; 1/26/09; 11:34:00).

Boggs pulled the top of the jeans pocket open. (VR 9; 1/26/09; 11:34:10). Boggs testified, “I could feel something in his pocket and I wanted to make sure that it wasn’t something that was going to harm us.” (VR 9; 1/26/09; 11:34:22). When he looked in the pocket he saw a plastic bag containing a green leafy substance. (VR 9; 1/26/09; 11:34:54). Boggs believed it to be marijuana, and arrested Frazier. (VR 9; 1/26/09; 11:35:00).

After the opening statements, a hearing was held on Frazier’s motion to suppress the fruits of the various seizures and searches. The trial judge held that this particular search was legal based on *Terry v. Ohio*, 392 U.S. 1 (1968). The judge’s written order states:

An officer making a traffic stop may order the driver or passenger to get out of the vehicle pending completion of the stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). A police officer is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of a person during a legal ‘stop and frisk’ in an attempt to discover weapons which might be used to assault him. *Terry v. Ohio*, 392 U.S. 1 (1968).

TR II 209. The comments of the judge from the bench when he originally ruled this search constitutional were similar. (VR 9; 1/26/09; 12:34:17).

A traffic stop is a seizure within the meaning of the Fourth Amendment, “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Although law enforcement officers may stop a vehicle that they observe is violating a traffic law -- a stop that amounts to a seizure for purposes of the Fourth Amendment, *see Terry v. Ohio*, 392 U.S. 1, 16 (1968) - the officers may not detain the vehicle for longer than necessary to accomplish the purposes of the stop. *Illinois v. Caballes*, 543 U.S. 405, 407-408 (2005). An officer may ask a detained motorist questions unrelated to the traffic stop as long as those questions do not measurably extend the duration of the stop. *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). However, the motorist’s responses to questioning unrelated to the purpose of the traffic stop must be “voluntary and not coerced.” *United States v. Everett*, 601 F.3d 484, 496 (6th Cir. 2010). The motorist must be “free to decline the officers' requests” and “terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *United States v. Everett, supra*.

The frisk and search of Mr. Frazier after he was out of the vehicle was not justified by these constitutional principles. In order to justify a patdown of either the driver or the passengers during a traffic stop, “the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.” *Arizona v. Johnson, supra*, 555 U.S. at 327. The objective facts underlying this suspicion must be articulable. *Terry v. Ohio, supra*, 392 U.S. at 21.

Boggs’ search of Mr. Frazier was not reasonable based on the facts that the officers articulated. There was no reason to believe Frazier was armed and dangerous. Mr. Frazier had been pulled over for littering by a passenger of his vehicle while on

private property, and for not using a left turn signal in a left-turn-only lane while he was turning with a green arrow. Mr. Frazier was not belligerent as Boggs claimed. The only belligerence articulated by either officer was Moore's testimony that Mr. Frazier initially questioned the need for Moore to know who his companions were, and where they were headed. (VR 9: 1/26/09; 11:23:07). Mr. Frazier had every right not to answer those questions as they were unrelated to the traffic stop. *United States v. Everett, supra*. In *Florida v. Royer*, 460 U.S. 491 (1983), the Court said:

The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio, supra*, 392 U.S., at 32-33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; ***and his refusal to listen or answer does not, without more, furnish those grounds.***

Id., at 497-498 (emphasis added). *See also, United States v. Flowers*, 912 F.2d 707, 712 (4th Cir. 1990) (The person questioned by the police has "at a minimum the right to refuse to speak with the officers, who in turn possess ***no right to detain citizens who decline to talk.***") (emphasis added). Refusing to answer questions you have a right not to answer is not a justification for believing a person is armed and dangerous. It is not reasonable grounds for a *Terry* pat down.

Mr. Frazier's alleged "belligerent" attitude was the only fact articulated by Officer Boggs as justification for his patdown search of Frazier. Frazier was not belligerent because he had a right not to answer questions that were unrelated to the reason for the traffic stop. When Officer Moore asked him where he was going and who the passengers were in the vehicle, Mr. Frazier had a right to ask, "Does it matter," and a Fourth Amendment seizure, like a *Terry* patdown, cannot be justified on this response. *Florida*

v. Royer, 460 U.S. at 498. Frazier also had a right not to consent when Boggs asked if he could be searched, and Mr. Frazier's refusal to consent to the search was not belligerence and could not be used as grounds for conducting a *Terry* patdown, either. *Id.* Officer Moore mentioned that he thought Mr. Frazier looked nervous, but Boggs did not observe the alleged nervousness, nor did Boggs or Moore claim that this observation was conveyed by Moore to Boggs. Moreover, nervousness does not constitute a reasonable suspicion. *Adkins v. Commonwealth*, 96 S.W.3d 779, 788 (Ky. 2003); *United States v. Fernandez*, 18 F.3d 874, 879-880 (10th Cir. 1994). There were no reasonable grounds articulated for the *Terry* patdown.

In addition, in this case there was a separate search of Mr. Frazier's pants pocket. Any search beyond the *Terry* patdown or frisk required probable cause, not merely reasonable suspicion. *C.f.*, *Arizona v. Hicks*, 480 U.S. 321, 325-326 (1987) (holding that moving a turntable to view its serial number was a separate search not authorized by the initial Fourth Amendment intrusion, and that probable cause was necessary for seizure under the "plain view" doctrine); *Commonwealth v. Hatcher*, 199 S.W.3d 124 (Ky. 2006). Officer Boggs never articulated any facts to support a conclusion he had probable cause to believe the object in Mr. Frazier's pocket was a weapon or evidence of criminal activity. He merely said that the object was a "long, coarse, suspicious object." There was no testimony that the illegal nature of the long coarse object was immediately apparent to Officer Boggs. A bag of marijuana, even a "long, coarse" bag of marijuana, cannot be reasonably mistaken for a weapon. At the time of the search, Officer Boggs did not have probable cause to believe that the item in the pocket was illegal contraband.

Minnesota v. Dickerson, 508 U.S. 366 (1993), is on point. In that case the

Supreme Court stated:

Where, as here, “an officer who is executing a valid search for one item seizes a different item,” this Court rightly “has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will.” *Texas v. Brown*, 460 U.S., at 748 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to “[t]he sole justification of the search [under *Terry*:] ... the protection of the police officer and others nearby.” 392 U.S., at 29. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, see *id.*, at 26, and that we have condemned in subsequent cases. See *Michigan v. Long*, 463 U.S. [1032 (1983)], at 1049, n. 14; *Sibron [v. New York]*, 392 U.S. [40 (1968)], at 65-66.

Id., 508 U.S. at 378. When Officer Boggs opened Thomas Frazier’s pants pocket, it was an evidentiary search, unrelated to the original patdown frisk for weapons that was authorized by *Terry*.

Boggs’ search of Frazier was not reasonable based on the facts that the officers articulated. There was no reason to believe Frazier was about to commit a criminal offense and that he was armed and dangerous. Therefore, the trial court should have suppressed all of the fruits of that unlawful frisk. In addition, there was no probable cause for the second search of Mr. Frazier’s pocket. The fruits of these two unconstitutional searches and seizures include the bag of marijuana found in Frazier’s pocket, the marijuana he allegedly ate in Houp’s cruiser and the baggie that was found there, the tire thumper, and the screens that were found in Frazier’s wallet.

This Court must reverse this case and remand it to the circuit court with instructions to exclude the fruits of the unlawful searches. §§2, 7, and 10, Ky. Const.; 4th and 14th Amends., U.S. Const.

II.

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE FRUITS OF THE ILLEGAL SEARCH OF THOMAS FRAZIER'S VEHICLE.

This issue is preserved. Frazier objected to the search of his automobile. (VR 9; 1/26/09; 12:35:59). The motion to suppress the fruits of that search was denied. (VR 9; 1/26/09; 12:36:07); TR II 208-210.

The facts have mostly been stated previously. Thomas Frazier was pulled over because a passenger littered from his automobile while it was in a fast-food restaurant parking lot and because he failed to use a signal while turning left from a left-turn-only lane. (VR 9; 1/26/09; 11:24:15). Shortly after being pulled over, Frazier was asked to step out of his car, was escorted to the rear of the vehicle, and was told he was going to be frisked. (VR 9; 1/26/09; 11:32:24). The frisk located a "long, coarse, suspicious object" in Frazier's front right jeans pocket. (VR 9; 1/26/09; 11:33:18). The officer then opened the pocket and saw a plastic bag containing a green leafy substance. (VR 9; 1/26/09; 11:34:54). Frazier was arrested and placed in the back seat of Deputy Houpp's cruiser. (VR 9; 1/26/09; 1:12:36). After Frazier was placed in Houpp's cruiser, his vehicle was searched. (VR 9; 1/26/09; 11:36:27).

The search of the vehicle did not produce any other illegal drugs or paraphernalia. (VR 9; 1/26/09; 1:13:50). The search did, however, produce a club called a "Tire Thumper." (VR 9; 1/26/09; 1:24:24). Tire thumpers are used by commercial truck

drivers to check tires to see if they are properly inflated. Thomas Frazier possessed a commercial driver's license and had been working as a truck driver. (VR 9; 1/26/09; 1:24:35). The thumper was located under the driver's seat of Mr. Frazier's vehicle along with Frazier's CB radio. (VR 9; 1/26/09; 1:18:46).

Thomas Frazier was charged with Carrying a Concealed Deadly Weapon because of the tire thumper located under the front seat of his car during the search of his vehicle. TR I 14. He was convicted of that offense and was sentenced to 30 days imprisonment. TR II 218.

The order written by the trial judge does not address the legality of the search of Thomas Frazier's vehicle. TR II 208-210. It only addresses the search of his person that preceded his arrest and the car search. The court's trial ruling was made from the bench. The trial ruling also initially focused on the search of Frazier's person, which the judge held was a valid *Terry* search. (VR 9; 1/26/09; 12:35:13).

Mr. Frazier then pointed out that the judge's ruling did not cover the search of his automobile. (VR 9; 1/26/09; 12:35:49). The judge responded, "It's my understanding the search of the automobile was done after the arrest." (VR 9; 1/26/09; 12:36:04). The court simply said, "Okay. That motion's overruled also." (VR 9; 1/26/09; 12:36:08).

During his trial testimony, Deputy Boggs testified, "You [Frazier] were arrested. After you are arrested it's my legal right to search the vehicle incident to arrest. And I did so." (VR 9; 1/26/09; 1:27:00).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court rejected the sweeping interpretation that courts had given to the search-incident-to-arrest exception¹

¹ The "search incident to arrest" exception was first adopted by the Supreme Court in *Chimel v. California*, 395 U.S. 752 (1969).

to the Fourth Amendment's warrant requirement. *Gant* reasoned that "[t]o read [this exception] as authorizing a vehicle search incident to every recent occupant's arrest," even when the arrestee was out of reach of the passenger compartment, would "untether the rule from the justifications underlying the *Chimel* exception." *Gant, supra*, 556 U.S. at 343. Such a broad reading of the search-incident-to-arrest exception, the Court felt, "seriously undervalues the privacy interests at stake." *Id.*, at 344-345. The Court explained: "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment -- the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.*, at 345 (footnote omitted).

It is important to remember that the search-incident-to-arrest exception to the warrant requirement is a search that is not based upon probable cause, which is the touchstone of the Fourth Amendment. It is justified solely because of the exigencies surrounding the arrest of the defendant.² *Chimel v. California*, 395 U.S. at 767. In *Chimel*, the Court rejected an argument that the arrest of a person in his home allowed the police to search his entire house without a warrant. Although the Court allowed the police to make a search incident to the arrest, it was limited in its area and its purpose:

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from

² "[C]onducting a *Chimel* search is not the Government's right; it is an exception - justified by necessity - to a rule that would otherwise render the search unlawful." *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring).

within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments and the petitioner's conviction cannot stand.

Id., 395 U.S. at 768. The search in *Chimel* was limited to the area within the defendant's immediate control. The search was also limited to looking for weapons or evidence of the offense the defendant was charged with committing.

In *Gant, supra*, the Court brought the vehicular search incident to arrest exception to the warrant requirement back to the limited area and purpose of the *Chimel* exception:

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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, supra, 556 U.S. at 351.

The Commonwealth has the burden of proving by a preponderance of the evidence that a valid exception to the search warrant requirement applies. *Anderson v. Commonwealth*, 902 S.W.2d 269, 271-272 (Ky.App. 1995).

The Commonwealth failed in its burden of proving this was a valid search incident to Thomas Frazier's arrest. The evidence was uncontroverted that Frazier was handcuffed in the back of Houpp's cruiser when the search took place. Therefore, Frazier could not have been within reaching distance of the passenger compartment of the vehicle.

Moreover, the offense Frazier was charged with committing was possessing a quantity of marijuana in the front pocket of his blue jeans. There was no way evidence of this offense could be found in Frazier's vehicle. Frazier was wearing his blue jeans, and they were with him in the back seat of Houpp's cruiser. The offense of possession was complete as soon as Deputy Boggs found the marijuana. The police officers could only have been searching for evidence of additional crimes when they searched the vehicle.

Nor was there any other evidence presented that would have provided the officers with probable cause or even reasonable suspicion to believe that evidence of additional drug possession or any other additional crimes would be found in Mr. Frazier's vehicle. There was no evidence of anything being in plain view in the vehicle. The police did not see any evidence of drugs or drug paraphernalia in the vehicle. There was no evidence of any odor of marijuana emanating in or around the vehicle or its occupants.

Appellant is aware that some courts have extended *Gant* to allow searches of vehicles whenever the defendant is arrested for a drug offense. E.g., *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009). Appellant submits that once again goes beyond what intended by either *Chimel* or *Gant*, and certainly beyond what was intended by the framers of the U.S. Constitution. *Gant* did not limit its application to arrests for traffic offenses, nor did it carve out an exception for drug offenses.

The opinion in *Gant* did not elaborate on the circumstances under which it would be "reasonable to believe the vehicle contains evidence of the offense of arrest," thereby leaving some ambiguity in regard to the precise parameters of the newly defined search-incident-to-arrest exception. The uncertainty concerning the Supreme Court's intention

when including this phrase in its *Gant* decision is the subject of a detailed analysis in LaFave, *Search and Seizure*, §7.1(d) (2011 Supp. to 4th ed., pp. 139-167).

The Court of Appeals of Kentucky, in its majority opinion in this case, looked solely to the offense of arrest, possession of marijuana, and held, “Although Frazier had been arrested and placed 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.” *Frazier v. Commonwealth*, *supra*, slip op. at 7. In his dissent to the majority opinion in the Court of Appeals of Kentucky, former Chief Justice Lambert expressed a view that looked toward the totality of the circumstances when determining the reasonableness that evidence of the crime of arrest would be found in the vehicle:

While the majority quotes from *Arizona v. Gant*, for a full understanding of the opinion, an expanded quotation is appropriate:

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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. at 1723–1724.

At the outset, I am unable to think of any circumstance in which it would be unreasonable to believe that evidence of the criminal conduct of one just arrested might be found in the motor vehicle from which he had just been removed. There would always be an argument that one arrested for murder, robbery or any other crime would have left

evidence of the crime in his motor vehicle. If this is a proper interpretation, then *Arizona v. Gant* is of no import, and despite the efforts of the Supreme Court of the United States, *New York v. Belton*, 453 U.S. 454 (1981), would continue to be the prevailing rule. Clearly, the Supreme Court intended no such result.

A proper interpretation of *Arizona v. Gant* is that the reasonable belief pertains directly to the offense of arrest. In a proper case there might be evidence justifying arrest for possession of marijuana without marijuana being found on the person of the arrestee. In that case, if a reasonable belief existed, a warrantless search of the vehicle would be authorized. In this case, however, the marijuana was found on Appellant's person. The search could not have been for "evidence of the offense of arrest." In reality, the search was for evidence of other or additional offenses, and such a search exceeds the scope of the Fourth Amendment and Section 10 of the Constitution of Kentucky.

Id., slip op. at 13-14.

In *Arizona v. Gant*, *supra*, the Supreme Court referred to Justice Scalia's concurring opinion in *Thornton v. United States*, 541 U.S. 615 (2004), to explain when it considered a warrantless search proper because it was "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.*, 556 U.S. at 343. Justice Scalia, in *Thornton*, had argued for a vehicular search incident to arrest rule based on *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) and *United States v. Rabinowitz*, 339 U.S. 56 (1950) (*overruled in part by Chimel v. California*, 395 U.S. 752 (1969)). *See, Thornton*, 541 U.S. at 631, (Scalia, J., concurring). Justice Scalia's concurrence argues that *Wyoming v. Houghton* stands for the proposition that individuals maintain a lesser expectation of privacy in a motor vehicle and that the governmental interest in prompt automobile searches is substantial because "the 'ready mobility' of an automobile creates a risk that the evidence or contraband will be permanently lost while a warrant is

obtained.” *Houghton*, 526 U.S. at 304 (Scalia, J. concurring). However, until *Belton*, warrantless motor vehicle searches had always required probable cause, and Justice Scalia’s opinion in *Houghton* was premised on the fact that, “It is uncontested in the present case that the police officers had probable cause to believe there were illegal drugs in the car.” *Houghton*, 526 U.S. at 300. Likewise, the government agents in *Rabinowitz* had a warrant for the arrest of the defendant when his “one-room office open to the public” was searched, and “the officers had probable cause to believe that a felony was being committed in their very presence.” *Id.*, 339 U.S. at 60-61.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Generally, the Fourth Amendment has been construed to forbid a search absent probable cause, unless there is an overriding necessity such as public safety, the safety of the officer or “special needs beyond the normal need for law enforcement.” *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The search of an automobile is not an exception to this general rule. The warrantless search of an automobile requires probable cause. *Carroll v. United States*, 267 U.S. 132, 149 (1925). (“[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.”) The Fourth

Amendment protects an individual from being “subject to unfettered governmental intrusion every time he enter[s] an automobile.” *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

The search of Thomas Frazier’s vehicle was not reasonable under the facts and circumstances of this case. The fact that Thomas Frazier was arrested for possession of marijuana found in his jeans does not establish an objective reason to believe there was additional evidence of drugs in his car. The offense of possession was already complete. There was no evidence he was presently under the influence of any substance. There was no evidence of any additional drugs or drug paraphernalia in plain view in the vehicle. If evidence of the completed possession offense established reasonable grounds to search, then the police would not only have had grounds to search the passenger compartment of his vehicle, but they would have had reasonable cause to search his trunk, his home, any place he had recently been, and the passengers in his vehicle as well. The fact that there were no reasonable grounds to search the vehicle is proven by the fact that the police did not find any drugs or drug paraphernalia in the vehicle when they searched it. All they found was a tool used by truck drivers for checking tire inflation, underneath the front seat of the car, next to the CB radio.

Appellant has no way of knowing how the United States Supreme Court will eventually resolve the ambiguity of its holding in *Gant*. However, Mr. Frazier would suggest that this Court should clearly limit the search-incident-to-arrest exception under §10 of the Kentucky Constitution to the parameters stated in *Chimel v. California, supra*, which is “the area from within which he might have obtained either a weapon or something that could have been used as evidence against him.” *Id.*, 395 U.S. at 768.

Any search of a vehicle beyond that point should be based upon probable cause. *Carroll v. United States, supra*, has adequately addressed the exigencies posed by the mobility of an automobile for the better part of a century. Exceptions to the Fourth Amendment's warrant requirement are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958), and *McDonald v. United States*, 335 U.S. 451, 456 (1948)). Any search of an automobile after the defendant has been arrested, handcuffed, and placed in the back of a police cruiser should be justified solely based upon the exigencies of the automobile, which, according to *Carroll* and its progeny, requires probable cause before conducting the search.

The police officers had no evidence there were any additional drugs in Thomas Frazier's vehicle at the time it was searched. The search they conducted was nothing more than general rummaging through the personal effects of a citizen to see if he might have anything illegal in those effects. That type of indiscriminate search violates the core concern of the Fourth Amendment and § 10 of the Kentucky Constitution. *Stanford v. Texas*, 379 U.S. 476, 481-482 (1965). That search was unlawful absent probable cause.

Reversal for a new trial is required because of this error. §§2, 7, 10, and 11, Ky. Const.; 4th, and 14th Amends., U.S. Const.

CONCLUSION

Reversal is required.

Respectfully submitted.

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APPENDIX

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