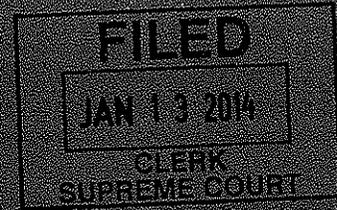


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2011-SC-000662-DG



ROBERT MASON PARKER

APPELLANT

On Review from the Court of Appeals
2010-CA-1215-MR
Jefferson Circuit Court
No. 09-CR-1470
Hon. Mary Shaw, Judge

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, ROBERT MASON PARKER

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division 5, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and to Hon. Jack Conway, Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and was delivered electronically, by agreement, to Hon. Donslee Gilbert, Special Assistant Attorney General and Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on January 10, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.


BRUCE P. HACKETT

INTRODUCTION

This is a case in which the Commonwealth appealed from the order of the Jefferson Circuit Court that denied the Commonwealth's motion to reconsider an order granting Mr. Parker's motion to suppress evidence seized during a warrantless search of Mr. Parker's automobile, incident to his arrest for driving on a suspended license. The Court of Appeals, in a "To be published" opinion, said that CR 59.05 applies to interlocutory orders and that the exclusionary rule did not apply to the unconstitutional search in this case.

STATEMENT CONCERNING ORAL ARGUMENT

At this stage of the proceedings, appellant believes that oral argument would be helpful for the proper disposition of this appeal. Although the facts and procedural history of the case are not in dispute, this appeal raises important procedural and constitutional issues. This Court has never said that CR 59.05 (which, by its own terms, applies to "final judgment[s]") applies to interlocutory orders, as the Court of Appeals concluded. Also, appellant urges this Court to continue to reject the rationale of *Davis v. United States*, 564 U.S. ___, 131 S.Ct 2419, 180 L.Ed. 2d 285 (2011), which says that the exclusionary rule should not apply to unconstitutional warrantless searches incident to arrest that occurred before April 2009, when the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In *Gant*, the Supreme Court found unconstitutional the "search incident to arrest" of a car, and in doing so, the

Supreme Court employed that same reasoning that had been employed by the Kentucky Court of Appeals some sixteen years earlier in the 1993 decision in *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993), overruled by *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008), overruled by *Rose v. Commonwealth*, 322 S.W.3d 76, 80 (Ky. 2010). Mr. Parker requests oral argument.

NOTE CONCERNING CITATIONS

References to the digital record will be in accordance with CR 98 as follows:

VR: Digitally recorded suppression hearing held on January 28, 2010.
(VR, month/day/year, hour:minute:second).

The circuit court clerk's record will be designated: (TR, page).

References to the Appendix to this brief will be: (App. page).

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STATEMENT OF THE CASE

The Commonwealth's appeal to the Court of Appeals was from the circuit court's interlocutory order suppressing the evidence obtained when the police searched Mr. Parker's car incident to Mr. Parker's arrest for driving on a suspended license. After a suppression hearing, relying on *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and other authorities, the trial court ordered that the evidence obtained as a result of the search of the car be suppressed. (TR 26, 89-92; App. A1-8, B1).

Following the January 28, 2010, evidentiary hearing, Mr. Parker filed a "Defendant's Memorandum to Motion to Suppress" and the Commonwealth filed a "Commonwealth's Response to Defendant's Motion to Suppress." (TR 27, 46). Thereafter, the circuit court entered an order that granted the motion to suppress:

The Defendant's vehicle was searched on the basis of a search incident to arrest for driving on a suspended license and as such, is invalid under Arizona v. Gant, 129 S.Ct 1710 (2009) as no broad good faith exception to the exclusionary rule applies in this case.

(TR 26; App. B1). The Commonwealth did not appeal directly from the suppression order. Rather, the Commonwealth filed a "Motion for Reconsideration" under CR 59.05. (TR 59). In that motion, the Commonwealth asked the court to reconsider its ruling and, in the alternative, in the event that reconsideration was denied, the Commonwealth requested that the court "enter findings of fact and conclusions of law into the record, as required by RCr 9.78."

(TR 59). Mr. Parker filed a response and the Commonwealth filed a reply (TR 65, 85).

On May 27, 2010, the circuit court denied the motion to reconsider in an order that also entered findings of fact and conclusions of law. (TR 89-92; App. C1-4). On June 24, 2010, the Commonwealth filed a notice of appeal to the Court of Appeals from both the March 19, 2010, order and the June 24, 2010, order. (TR 93).

In the Court of Appeals, Mr. Parker argued that the interlocutory appeal from the March 19, 2010, suppression order was untimely, and that the appeal should be dismissed. The Court of Appeals found that CR 59.05 applied to the interlocutory order, allowing for the motion to reconsider and tolling the time to take an appeal. (App. A3). The Court of Appeals also found that Mr. Parker's reliance upon *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987), an untimely interlocutory appeal case, was "misplaced" because this Court had overruled "the case upon which *Cobb* rests its holding" -- *Commonwealth ex Rel. Mason v. Hughes*, 725 S.W.2d 865 (Ky. App. 1987), overruled by *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995). (App. A4).

On the merits of the suppression issue in the Court of Appeals, the Commonwealth conceded that the warrantless search of Mr. Parker's automobile incident to his arrest for driving on a suspended license violated the Fourth Amendment as explained in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and also conceded that *Gant* must be applied retroactively

to Mr. Parker's case. But the Commonwealth argued that the exclusionary rule does not apply to the unconstitutional search. During the pendency of the appeal, the United States Supreme Court rendered its decision in *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and the Commonwealth relied upon *Davis* to support its argument.

On the merits of the search issue, the Court of Appeals stated the relevant facts as follows:

On January 12, 2009, Parker was stopped by Officer Brian Reccius after Officer Reccius witnessed Parker's vehicle cross the center line after leaving a bar. Parker was arrested for driving on a suspended license. His vehicle was then searched by Officer Reccius, who discovered a loaded gun and some marijuana.

(App. A2). Based upon Officer Reccius's observations, there was probable cause for the stop of Mr. Parker's vehicle for a traffic violation. When Officer Reccius determined that Mr. Parker's driver's license was suspended, he got Mr. Parker out of the car, took him to the back of the car and arrested him for that offense. (VR, 1/28/10, 01:11:12, 01:19:13). Driving on a suspended license is a misdemeanor offense for which a person may be arrested. (VR, 1/28/10, 01:12:08). The search of the car was "incident to arrest." (VR, 1/28/10, 01:08:22, 01:19:13). The objects of the search were "officer safety and contraband." (VR, 1/28/10, 01:09:04).

Although Mr. Parker was not handcuffed by Officer Reccius, he was in the custody of Officer Reccius's "beat partner" at the rear of the car when Officer

Reccius began the search. (VR, 1/28/10, 01:11:37). Once Officer Reccius found the pistol under the front seat of the car, he signaled to his beat partner to handcuff Mr. Parker. (VR, 1/28/10, 01:11:45, 01:13:36). At that time, Officer Reccius "cleared" the weapon, and Mr. Parker was handcuffed and placed in the back of the police car while Officer Reccius continued with his search. (VR, 1/28/10, 01:13:36-01:13:45). The marijuana subsequently found by Officer Reccius was a "roach" that was in a closed cigarette packet. (VR, 1/28/10, 01:12:32, 01:20:12). Officer Reccius also found a pellet gun in the truck of the car. (VR, 1/28/10, 01:12:32-01:12:36).

In reversing the circuit court suppression ruling, the Court of Appeals relied upon *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), finding that the exclusionary rule would not be applied to the search of Mr. Parker's car because the search occurred before *Gant* was decided and the arresting officer acted in good faith in conducting the search. (App. A6-7). In *Davis*, the United States Supreme Court had refused to apply the exclusionary rule to the unconstitutional search of a car incident to arrest because the search had occurred before *Gant* was decided.

The Court of Appeals acknowledged Mr. Parker's argument that the search incident to arrest was unconstitutional under *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993), but the Court said that *Clark* had been overruled by *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008). (App. A7). Although the Court of Appeals, citing *Rose v. Commonwealth*, 322 S.W.3d 76, 80 (Ky. 2010),

noted that “[t]he standard of *Gant* was not officially implemented in the Commonwealth until 2011,” the Court of Appeals failed to acknowledge that *Henry v. Commonwealth* had been overruled by *Rose v. Commonwealth*. (App. A7). In this appeal, Mr. Parker will demonstrate that the Commonwealth’s interlocutory appeal was untimely and that the circuit court correctly ruled that the search was unconstitutional and that the evidence must be suppressed.

ARGUMENT

I. The Commonwealth’s appeal from the March 19, 2010 order granting the motion to suppress is not timely and must be dismissed.

In the Brief for Appellee filed in the Court of Appeals, Mr. Parker argued that because the Commonwealth failed to file a timely notice of appeal from the March 19, 2010, order suppressing the fruits of the illegal search, the Commonwealth’s appeal should be dismissed. (Brief for Appellee, pp. 2-6). Mr. Parker argued that the Commonwealth’s authority for its motion to reconsider – CR 59.05 – only applies to final judgments and does not apply to interlocutory orders like the suppression order in this case. Mr. Parker relied on the plain language of CR 59.05, KRS 22A.020, *Ballard v. Commonwealth*, 320 S.W.3d 69, 71-72 (Ky. 2010), and *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987). This issue is properly preserved for this Court’s review.

In its Reply Brief filed in the Court of Appeals, the Commonwealth made several arguments against dismissal. The Commonwealth first said that *Commonwealth v. Cobb* had relied upon *Commonwealth ex Rel. Mason v.*

Hughes, 725 S.W.2d 865 (Ky. App. 1987), but *Hughes* had been overruled by *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995); therefore, *Cobb*, too, "might be overruled." (Reply Brief for Appellant, p. 1, fn. 1). Second, the Commonwealth said that CR 59.05 applies to "judgments" that are not "final judgments" and that the suppression order of March 19, 2010, was a "judgment" to which CR 59.05 applied with the net result being that the notice of appeal filed 97 days after entry of the suppression order was timely. (Reply Brief for Appellant, pp. 2-3). Next, the Commonwealth said that Mr. Parker failed to argue in the circuit court that CR 59.05 did not apply the circuit court suppression ruling. (Reply Brief for Appellant, p. 2). Mr. Parker will address these arguments in reverse order.

First, regarding "preservation" in the circuit court, Mr. Parker had no way to argue in the circuit court that the appeal was untimely until the Commonwealth filed the notice of appeal. After the Commonwealth's motion to reconsider was filed in the circuit court, the Commonwealth still had time to file a timely notice of appeal from the March 19, 2010, order. Once the appeal was initiated in an untimely manner, Mr. Parker raised the issue of jurisdiction in the appropriate forum, the Court of Appeals. Furthermore, as the appellee in the Court of Appeals, Mr. Parker was free to raise any and all reasons to support the circuit court decision. After all, it is the duty of an appellate court to affirm the lower court if there is any reason to do so, provided that the lower court reached the correct result. *See e.g. McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower

court for any reason supported by the record.")(citing *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky.App. 1991)).

Second, regarding CR 59.05, the Commonwealth's motion to reconsider did not toll the time to take an appeal. Since the Commonwealth's notice of appeal was filed on June 24, 2010, (stating that the appeal was from the March 19, 2010, order and the May 27, 2010, order), the appeal could only be timely if the Commonwealth's motion to reconsider was authorized by the rules and if CR 59.05 applies to interlocutory orders that may, under strict circumstances, be appealed.

The Commonwealth's argument that CR 59.05 applies to "judgments" that are not "final judgments" and that the suppression order of March 19, 2010, was a "judgment" to which CR 59.05 applied is contrary to the definition of judgment in the Rules. "Where the context requires, the term 'judgment' as used in these rules shall be construed 'final judgment' or 'final order.'" CR 54.01. Even though CR 59.05 used both the term "judgment" and "final judgment," clearly the rule applies only to final judgments. "A CR 59.05 motion may only be utilized to seek reconsideration of a 'final judgment.'" *Pursley v. Pursley*, 242 S.W.3d 346, 347 (Ky. App. 2007).

Third, one of the authorities cited by Mr. Parker to show that the appeal was not timely filed was *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987). In both *Cobb* and Mr. Parker's case, the Commonwealth appealed from "adverse pretrial interlocutory rulings." *Commonwealth v. Cobb*, 728 S.W.2d at

540. The Court of Appeals said Mr. Parker's reliance upon *Commonwealth v. Cobb* was "misplaced" because this Court, in *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995), had overruled "the case upon which *Cobb* rests its holding" -- *Commonwealth ex Rel. Mason v. Hughes*, 725 S.W.2d 865 (Ky. App. 1987). (App. A4).

This Court, in *Bates*, overruled that portion of *Commonwealth ex rel. Mason* that addressed the timeliness of a motion for discretionary review from a final circuit court judgment. Although this Court made specific mention of *Cobb*, it did not overrule *Cobb*. When the circuit court order being appealed is an interlocutory order, CR 59.05 does not apply and does not toll the time to take an appeal. "Although the Commonwealth may request the trial court to reconsider an adverse order, the motion does not toll the time for appealing the adverse order." *Commonwealth v. Cobb*, 728 S.W.2d at 541.

The Court of Appeals demonstrated a fundamental misunderstanding about interlocutory appeals that are authorized by KRS 22A.020(4). The Court of Appeals said that the statutory right of the Commonwealth to appeal under KRS 22A.020(4) means that the suppression order is a judgment to which CR 59.05 applies. The Court reasoned, "If we were to follow Parker's reasoning, regarding the March 19, 2010, order, then the order would not be appealable at all, because it would not be considered a 'final judgment.'" (App. A3). As authority for its appeal, the Commonwealth specifically relied upon KRS 22A.020, RCr 12.04 and Constitution Section 115. (TR 93). Constitution Section 115 and KRS

22A.020 create an exception to the general rule that an appeal must be from a final judgment. The Commonwealth's appeal was from an interlocutory order.

The Court of Appeals opinion is contrary to this Court's decisions in *Ballard v. Commonwealth*, 320 S.W.3d 69, 71-72 (Ky. 2010) ("The Commonwealth's right to appeal from an interlocutory order is established by KRS 22A.020(4)."), *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky. 2009), *Commonwealth v. Bailey*, 71 S.W.3d 73 (Ky. 2002), and *Eaton v. Commonwealth*, 562 S.W.2d 637 (Ky. 1978). All of those cases recognize that an appeal by the Commonwealth under KRS 22A.020(4) is an interlocutory appeal from a non-final order.

As noted above, CR 59.05 applies to final judgments: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of **the final judgment.**" (Emphasis added). The circuit court order granting the motion to suppress was not a "final judgment." According to CR 54.01, "A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding"

The suppression order was not a final judgment to which CR 59.05 applied. "A motion pursuant to CR 59 ... converts a final judgment to an interlocutory judgment." *Personnel Board v. Heck*, 725 S.W.2d 13, 18 (Ky.App. 1986). This Court's decision in *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), also demonstrates that CR 59.05 applies only to final judgments. "The timely filing of a CR 59.05 motion postpones finality, and a ruling on the CR 59.05 motion is necessary to achieve

finality." *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d at 458. If CR 59.05 applies to non-final, interlocutory orders, then the discussions in *Heck* and *Kurtsinger* about how a CR 59.05 motion converts a final judgment to an interlocutory judgment and about how a CR 59.05 motion postpones finality are rendered nonsensical.

The Commonwealth's appeal in Mr. Parker's case was from an interlocutory order. "By its enactment of KRS 22A.020(4), the General Assembly has exercised the authority granted by Section 111(2) and created a statutory matter-of-right appeal from interlocutory orders." *Ballard v. Commonwealth*, 320 S.W.3d 69, 73 (Ky. 2010).

Addressing the constitutionality of KRS 22A.020 in *Ballard*, this Court noted:

Accordingly, we reaffirm the constitutionality of KRS 22A.020(4) and the Commonwealth's right to appeal from interlocutory orders created therein. Because, in this case, the trial court's order was an interlocutory order, the Commonwealth was entitled to **directly** appeal the ruling. As such, the Court of Appeals had jurisdiction to consider the appeal. [Emphasis added].

Ballard v. Commonwealth, 320 S.W.3d at 73.

In Mr. Parker's case, the Commonwealth had the right to directly appeal from the March 19, 2010 order, provided the Commonwealth prosecuted the appeal "in the manner provided by the Rules of Criminal Procedure and the Rules of the Supreme Court" KRS 22A.020(4)(b). Under RCr 12.04, a notice of

appeal must be filed within thirty days of the entry of the judgment or order being appealed. Thus, the Commonwealth had until April 18, 2010, to file its notice of appeal. The Commonwealth's failure to file a timely notice of appeal means that the Commonwealth forfeited its right to prosecute an interlocutory appeal.

In *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987), as in Mr. Parker's case, the Commonwealth filed an interlocutory appeal after the denial of a motion for reconsideration of a trial court order that suppressed certain evidence. Although that appeal was filed in a timely manner from the order denying reconsideration, it was not timely from the order granting the motion to suppress. In Cobb, the Court of Appeals ruled that the appeal had to be dismissed:

This appeal is from an order denying a motion to reconsider an order which directed the appellant not to introduce certain hearsay evidence in the prosecution of the appellees on charges of trafficking in a controlled substance. The appellees filed a motion to dismiss the appeal, alleging the notice of appeal was not timely filed. We agree; therefore, we are constrained to dismiss the appeal.

The circuit court entered an order October 14, 1986, directing the appellant not to present evidence of any hearsay matters regarding statements by a deceased police detective who was involved in the investigation of the appellees. The RCr 12.06 docket notation was entered the same day. The appellant filed a motion to reconsider that order on October 23, 1986, which the circuit court denied October 30, 1986. The appellant

filed a notice of appeal November 5, 1986, designating the October 30 order as the order on appeal.

Commonwealth v. Cobb, 728 S.W.2d at 540 (Ky. App. 1987). Therefore, in Mr. Parker's case, it is of no consequence that the Commonwealth's notice of appeal was timely filed from the May 27, 2010, opinion and order that denied the motion to reconsider the March 19th order.

In *Cobb*, the Court quoted RCr 12.04 and noted:

The rule provides an extension of time for an appeal from a *judgment of conviction* when a motion for new trial is filed. This appeal is not from a judgment of conviction and RCr 12.04 directs that the notice of appeal be filed within ten (10) days of the order directing the appellant not to introduce certain evidence. [Emphasis in original].

Commonwealth v. Cobb, 728 S.W.2d at 541. Since the *Cobb* decision, RCr 12.04 was amended to require than an appeal be filed within thirty days of the order or judgment being appealed.

In Mr. Parker's case, the notice of appeal was filed well after the thirty-day deadline. The *Cobb* Court's reasoning as to why the timely appeal from the order denying reconsideration did not allow the Court to address the merits of the suppression order is equally applicable to Mr. Parker's case:

In the present case, the ruling vital to the prosecution's case was the order of October 14, suppressing evidence of the statements by the deceased officer and it is this order which was properly appealable. The

ruling of October 30 did the prosecution no further damage.

Commonwealth v. Cobb, 728 S.W.2d at 541. Here, it was the March 19, 2010, order suppressing evidence that was "the ruling vital to the prosecution's case," and the May 27, 2010, opinion and order "did the prosecution no further damage." The Commonwealth's interlocutory appeal was untimely.

In its motion for reconsideration, the Commonwealth asked, alternatively, for findings of fact and conclusions of law, citing RCr 9.78. (TR 59). While RCr 9.78 does require that the court make essential findings, that rule is not a vehicle by which a party may ask for additional findings. In the Court of Appeals, the Commonwealth argued that CR 52.04 required that it bring the matter of findings to the trial court's attention. (Reply Brief for Appellant, p. 3). But CR 52.04 is no help to the Commonwealth, since "a request made pursuant to CR 52.04 does not stop the running of time to appeal." *Burchell v. Burchell*, 684 S.W.2d 296, 299 (Ky. App. 1984).

Also for the first time on appeal, the Commonwealth noted that CR 52.04 references CR 52.02. (Reply Brief for Appellant, p. 3). As a result of that reference, the Commonwealth argued that its motion for reconsideration was actually a motion under CR 52.02, which tolled the time to file its appeal. (Reply Brief for Appellant, p. 3). The problem is that the Commonwealth's circuit court motion never cited either CR 52.02 or CR 52.02. The only authority cited for reconsideration was CR 59.05. CR 52.02 actually makes reference to Rule 59, clearly indicating that a motion under Rule 59 is something different from a

motion under CR 52.02. The Commonwealth never invoked CR 52.02 in the circuit court. While the Commonwealth was free to ask the circuit court to reconsider its ruling or to issue additional findings, that request did not toll the time to file the appeal. The Court of Appeals did not have jurisdiction to decide the merits of the interlocutory appeal. As a result, the Commonwealth's appeal should have been dismissed.

II. The circuit court order granting the motion to suppress must be affirmed.

On October 8, 2009, Mr. Parker, by counsel, filed a motion to suppress evidence seized as result of the stop and search of Mr. Parker's car on January 12, 2009. (TR 23). Mr. Parker relied upon the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Sections Ten and Eleven of the Kentucky Constitution, and RCr 9.78. (TR 23). After the January 28, 2010, evidentiary hearing, Mr. Parker filed a "Defendant's Memorandum to Motion to Suppress" and the Commonwealth filed a "Commonwealth's Response to Defendant's Motion to Suppress." (TR 27, 46). The circuit court, relying on *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and other authorities, ordered that the evidence obtained as a result of the search of Mr. Parker's car be suppressed. (TR 26, 89-92; App. A1-8, B1).

In reversing the circuit court suppression ruling, the Court of Appeals relied upon *Davis v. United States*, 564 U.S. ____, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), finding that the exclusionary rule would not be applied to the search of Mr. Parker's car because the search occurred before *Gant* was decided and the

arresting officer acted in good faith in conducting the search. (App. A6-7). Presumably the Court of Appeals made the "good faith" finding because the officer was following the law on search and seizure set out in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which would have allowed for a search of the car incident to arrest. Circuit Court Judge Shaw had specifically found that "no broad good faith exception to the exclusionary rule" applied. (TR 63, 91).

In declining to apply the exclusionary rule to the unconstitutional search, the Court of Appeals noted that "[i]n Kentucky the exclusionary rule has also been historically utilized in an effort to deter future police misconduct. *See, e.g., Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992)." (App. A7). The Court of Appeals rejected Mr. Parker's argument that "the law of *Gant* has been in place in the Commonwealth since 1993, by means of *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993)." *Id.* The Court of Appeals said that "Parker's argument fails by the simple fact that *Clark* was overruled in 2008 by *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008)." *Id.* The Court of Appeals failed to acknowledge that *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008), was overruled by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010).

The United States Supreme Court opinion in *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), appears from some perspectives to be one more significant step in the United States Supreme Court's journey to overruling *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6

L.Ed.2d 1081 (1961), and declaring that the United States Constitution does not require the suppression of evidence in state courts when that evidence was obtained in violation of the federal Constitution. In Kentucky, the exclusionary rule is an essential part of the fabric of our search and seizure jurisprudence. The rule was not created for the purpose of deterring police misconduct. Rather, it exists to avoid having the Court of Justice become complicit in constitutional violations, which would lead to the citizens of the Commonwealth losing respect for the judicial branch of government. *See Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920).

Although this Court, in *Henry*, characterized *Youman* as a "thin reed," this Court has since making that statement implicitly rejected the *Davis v. United States* approach to the exclusionary rule. In both *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010), and *Frazier v. Commonwealth*, 406 S.W.3d 448 (Ky. 2013), the searches incident to arrest were both conducted **before** *Gant* was decided (just like the search in *Davis v. United States*). Yet, this Court applied the exclusionary rule and ordered suppression of the evidence, rejecting the argument that because *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed2d 768 (1981), was the law at the time of the searches, the "good faith" exception validated the otherwise unconstitutional searches. In fact, in the *Frazier* case, the Commonwealth cited *Davis v. United States* and urged this Court to follow the United States Supreme Court's lead. (Brief for

Commonwealth, pp. 18-19).¹ This Court declined to do so. This Court ordered the suppression of the evidence obtained as a result of the unconstitutional incident-to-arrest car searches in *Rose* and *Frazier* and should do the same in Mr. Parker's case.

A. *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993)

The Court of Appeals rejected Mr. Parker's argument that was based upon *Clark* and the Kentucky Constitution by correctly noting that *Clark* was overruled in 2008 by *Henry v. Commonwealth*, 275 S.W.3d 194 (Ky. 2008). (App. A7). But what the Court did not state is that *Henry* was subsequently overruled by this Court in *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). In *Henry*, the appellant had also argued that *Clark* had been the law in Kentucky since 1993, and that under *Clark*, the search was unconstitutional. *Henry v. Commonwealth*, 275 S.W.3d at 201. This Court rejected the argument: "In *Rainey v. Commonwealth, supra*,² accordingly, we rejected a similar argument based on *Clark* and held that, like the Fourth Amendment, Section Ten permits a vehicle search incident to the arrest of a recent occupant even where the arrestee has been secured away from the vehicle." *Henry v. Commonwealth*, 275 S.W.3d at 201. But this Court did not stop there. It overruled *Clark*: "*Clark* having thus been rendered obsolete, we hereby expressly overrule it." *Id.*

¹Commonwealth's brief found at (visited on January 7, 2014): http://chaselaw.nku.edu/documents/kysctbriefs/oral/Frazier%20v.%20Commonwealth_2011-SC-0283_applee.pdf

² *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006), overruled by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010).

Now that *Henry, Rainey and Penman v. Commonwealth*, 194 S.W.3d 237 (Ky. 2006) (decided on the same day as *Rainey*) have been overruled in *Rose v. Commonwealth*, 322 S.W.3d 76, 80 (Ky. 2010), and the United States Supreme Court has decided *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), we now know that *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993), was a decision that was ahead of its time and certainly not a decision that was or is "obsolete." *Clark* is consistent with *Youman, Rose* and *Frazier*.

B. *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992)

In declining to apply the exclusionary rule to the unconstitutional search in Mr. Parker's case, the Court of Appeals noted that "[i]n Kentucky the exclusionary rule has also been historically utilized in an effort to deter future police misconduct. *See, e.g., Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992)." (App. A7). In *Parks v. Commonwealth*, 192 S.W. 3d 318, 335 (Ky. 2006), this Court, citing *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Crayton v. Commonwealth*, noted that "[t]he exclusionary rule is designed to deter police misconduct...." But *Crayton* was a 4-3 decision in which the dissenters, Chief Justice Stephens, Justice Reynolds and Justice Combs, argued that Section Ten did not allow for a good faith exception to the exclusionary rule. *Crayton v. Commonwealth*, 846 S.W.2d at 690-693, Stephens, C.J., dissenting and Combs, J., dissenting.

The "police deterrence" justification for the exclusionary rule goes back to, or even beyond, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). But in *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920), the Court explained that the deterrent effect is not the basis for the Kentucky exclusionary rule. Rather, Kentucky Courts will not allow the use at trial of illegally obtained evidence because the Court of Justice should not be a party to unconstitutional actions by state actors. Regarding the admission at trial of evidence obtained in violation of the Constitution, the Court said:

It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of those rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified.

Youman v. Commonwealth, supra, 224 S.W. at 866.

In *Henry*, this Court rejected the assertion "that *Youman* represents an independent Kentucky tradition of excluding tainted evidence not simply to deter police misconduct but more broadly to ensure that courts do not become

implicated in constitutional violations." *Henry v. Commonwealth, supra*, 275 S.W.3d at 199. This Court dismissed *Youman* because it found the case to be nothing more than a "thin reed." *Id.* Now that *Henry* has been overruled, this Court should re-examine *Youman* and the underlying basis for the exclusionary rule in Kentucky. This re-examination is necessary because the premise upon which this Court based its conclusion – that Section Ten of the Kentucky Constitution is to be interpreted the same as the Fourth Amendment to the United States Constitution – is flawed.

C. Section Ten of the Kentucky Constitution

Crayton and many other decisions of this Court are based upon the premise that Section Ten and the Fourth Amendment have the same meaning. But this conclusion is simply wrong. In *Crayton*, the Court cited *Rooker v. Commonwealth*, 508 S.W.2d 570 (Ky. 1974), *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983), and *Collins v. Commonwealth*, 574 S.W.2d 296 (Ky. 1978), as standing for the proposition that Section Ten and the Fourth Amendment were "parallel." *Crayton v. Commonwealth*, 846 S.W.2d at 687. In *Rooker*, the Court made no comment about the two constitutional provisions. It merely quoted each one. In *Collins*, the Court based its decision on *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and never mentioned Section Ten.

Estep has been cited several times for the proposition that there is no difference between the application of Section Ten or the Fourth Amendment to a

search and seizure. But in 2006, two members of this Court demonstrated that the *Estep* decision never said what had been attributed to it. Justice Roach, joined by Chief Justice Lambert, pointed out that citing *Estep* and *LaFollette v. Commonwealth*, 915 S.W.3d 747, 748 (Ky. 1996), which had relied upon *Estep*, for the proposition that Section Ten of the Kentucky Constitution provides no greater protection for the citizens of the Commonwealth than does the Fourth Amendment was simply wrong. *Rainey v. Commonwealth*, 197 S.W.3d 89, 95 (Ky. 2006), Roach, J. concurring, joined by Chief Justice Lambert,³ overruled by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). As Justice Roach's concurring opinion pointed out, *LaFollette* relied upon *Estep* for the proposition that Section 10 and the Fourth Amendment had the same meaning, but *Estep* does not actually make such a statement. *Rainey, supra*, 197 S.W.3d at 96, Roach, J., concurring, joined by Lambert, C.J.

The appellant would respectfully submit that with the United States Supreme Court's decision in *Davis*, the concurring opinion in *Rainey* provides good reason for this Court to re-examine *LaFollette*, *Estep* and related cases. This is especially important because *Estep* is the case that purportedly overruled *City of Danville v. Dawson*, 528 S.W.2d 687 (Ky. 1975) and *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979). In *Wagner*, this Court based its

³ Curiously, Chief Justice Lambert was the author of *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992), in which he said that Section Ten and the Fourth Amendment were "parallel," citing *Estep* as support for this statement. By 2006, Chief Justice Lambert had apparently seen the error that the Court had made in 1992, and he concurred in Justice Roach's opinion in *Rainey*. Since *Crayton* was a 4-3 decision, Chief Justice Lambert's change of heart is significant.

decision upon Section 10 of the Kentucky Constitution, finding that our constitution provided greater protection for its citizens than the federal constitution. *Wagner v. Commonwealth*, 581 S.W.2d 352, 356 (Ky. 1979) (“[W]e now find it necessary to restate our views and rest our holding solely upon Section 10 of our constitution.”) (footnote omitted).

In *Commonwealth v. Mobley*, 160 S.W.3d 783, 784 (Ky. 2005), this Court cited *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996), for the proposition that Section Ten of the Kentucky Constitution is “consonant with the Fourth Amendment [to the United States Constitution].” But in addition to erroneously relying upon a mistaken belief about what was said in *Estep*, the *LaFollette* decision actually reached the wrong result. In *LaFollette*, this Court examined the constitutionality of the police practice of using infrared radar to survey heat emissions from a person’s home. This Court found that such a practice did not amount to a search and was therefore constitutional, even in the absence of a warrant. Among the cases cited by the Court in finding that there was no unconstitutional invasion of the citizen’s privacy was *United States v. Kyllo*, 809 F. Supp. 787, 792 (D. Oregon 1992). *LaFollette*, 915 S.W.2d at 749. As this Court is well-aware, *Kyllo* was the case in which the United States Supreme Court ultimately ruled that the use of infrared radar to monitor heat emissions from a home was an unconstitutional search in the absence of a warrant. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

There is another, more important mistake made in *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992), in regard to the erroneous belief that the exclusionary rule in Kentucky is designed to deter police misconduct. One of the cases upon which the *Crayton* Court relied was *Benge v. Commonwealth*, 321 S.W.2d 247 (Ky. 1959). *Crayton v. Commonwealth*, 846 S.W.2d at 686-687. In *Benge*, the Court said that Section Ten was "based" upon the Fourth Amendment. *Benge v. Commonwealth*, 321 S.W.2d at 250. But this Court's opinion in *Commonwealth v. Wasson*, 842 S.W.2d 487, 492-493 (Ky. 1992), points out the flaw in this view, since the Kentucky Constitution was based upon provisions from the Pennsylvania Constitution, which preceded the federal Bill of Rights. *LaFollette*, *Rainey* and other related cases demonstrate the problems inherent with the process of simply adopting the United States Supreme Court's search and seizure jurisprudence without considering Kentucky constitutional law. That approach allows a majority of the Justices on the United States Supreme Court to decide what Section Ten of the Kentucky Constitution means.

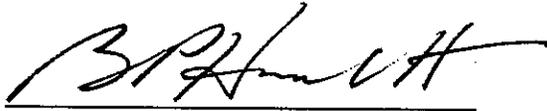
Should this Court determine that it has jurisdiction to reach the merits of the Commonwealth's interlocutory appeal, the Court must, nonetheless, affirm the order suppressing the fruits of the unconstitutional search. In both the circuit court and in this Court, the Commonwealth has conceded that the warrantless search of Mr. Parker's automobile incident to his arrest for driving on a suspended license violated the Fourth Amendment as explained in *Arizona v.*

Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and has also conceded that *Gant* is to be applied retroactively to Mr. Parker's case. (VR, 1/28/10, 01:26:50; TR 28-29; Brief for Commonwealth filed in the Court of Appeals, pp. 5-7). Obviously, if the search violates the Fourth Amendment, it cannot be upheld as constitutional under Section Ten.

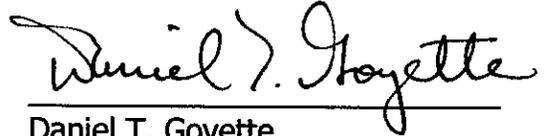
What the Commonwealth asked the circuit court to do and what it urges this Court to do is to refuse to apply the exclusionary rule to the unconstitutional search of Mr. Parker's car. The Commonwealth's appeal is based upon the argument that the "good faith" exception created by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct 3405, 82 L.Ed2d 677 (1984), to uphold a search carried out pursuant to a warrant should apply to Mr. Parker's case. (VR, 1/28/10, 01:28:27, 01:29:08: TR 27; Brief for Commonwealth filed in the Court of Appeals, pp. 12-22). In Mr. Parker's case, the circuit court correctly found that the *Leon* "good faith" exception did not apply to the unconstitutional warrantless search of Mr. Parker's vehicle. That decision must be upheld on appeal.

CONCLUSION

For the foregoing reasons, the appellant, Robert Parker, respectfully requests that the March 19, 2010 order of the Jefferson Circuit Court be affirmed.



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APPENDIX

APP.

Court of Appeals opinion rendered on September 30, 2011	A1-8
Jefferson Circuit Court Order denying motion to Suppress entered on March 19, 2010 (TR 26)	B1
Jefferson Circuit Court Opinion and Order denying motion to reconsider entered on May 27, 2010 (TR 89-92)	C1-4