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Commonwealth of Kentucky
Supreme Court
No. 2012-SC-164-D

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

Appeal from Fayette Circuit Court
Hon. James Ishmael, Judge
Indictment No. 09-CR-516-2

JOSEPH WILLIAM PARKER — APPELLEE

Brief for Commonwealth

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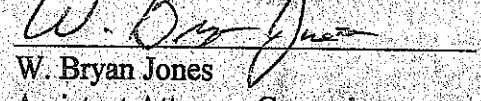
CERTIFICATE OF SERVICE

I certify that a copy of the Brief for Commonwealth has been served January 14, 2013 as follows: by U.S. postage, prepaid to Hon. James Ishmael, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, Ky. 40507; and by state messenger mail to Hon. Linda Roberts Horsman, Asst. Public Advocate, Dept. Of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, and via electronic mail to Hon. Ray Larson, Commonwealth Attorney. I further certify that the record was not checked out for the preparation of this brief.



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INTRODUCTION

This case is before this Court on discretionary review of an Opinion of the Kentucky Court of Appeals. The Commonwealth appeals the decision of the Court of Appeals reversing the Appellee Joseph William Parker's Fayette Circuit Court convictions for robbery in the first degree and fleeing and evading in the second degree and remanding this case for a new trial.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not believe that oral argument is necessary, but is prepared to participate in oral argument if it is deemed necessary by this Court.

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STATEMENT OF THE CASE

The Appellee was indicted on March 31, 20 for the offense of robbery in the first degree, fleeing or evading the police in the first degree, and tampering with physical evidence. His co-defendant, on only the robbery charge, was Justin Masengale. (TR I, "Indictment", pp. 1-2). A jury trial was conducted for both defendants on May 5-7, 2010. The Appellee was convicted of robbery in the first degree and fleeing and evading the police in the second degree. The Appellee was acquitted of tampering with physical evidence. (VR 5/6/10; 11:18:28-11:19:05; TR II, "Jury Instructions", pp. 179-180). His co-defendant, Justin Masengale, was acquitted of robbery. (VR 5/6/10; 11:17:58). The jury fixed the Appellee's punishment at eleven and one-half years for robbery in the first degree. (VR 5/7/10;1:15:00; TR II, "Sentencing Instructions", pp. 170). The Appellee agreed to a twelve month sentence for the misdemeanor conviction of fleeing and evading the police in the second degree prior to the sentencing phase of the trial. (VR 5/6/10; 11:22:30-11:23:00). The Appellee was sentenced on June 25, 2010 to eleven and one-half years imprisonment for robbery in the first degree and twelve months in jail for fleeing and evading the police in the second degree, to run concurrently, for a total sentence of eleven and one-half years in the penitentiary. (TR II, "Final Judgment, Sentence of Imprisonment", pp. 199-201).

The Appellee appealed his conviction, and the Kentucky Court of Appeals rendered an Opinion Reversing and Remanding on February 17, 2012. The Opinion reversed the Appellee's convictions and remanded the case to Fayette Circuit Court for a new trial, excluding certain evidence obtained by virtue of the show-up identification of the Appellee's co-defendant, Justin Masengale. It is that Court of Appeals Opinion

which the Commonwealth/Appellant now requests that this Court reverse, thereby reinstating the convictions of the Appellee.

In order to provide the necessary background information regarding this case, it is necessary to review the evidence at trial.

Susan Martin testified that as she was walking into the Target store on February 5, 2009, she saw two white males at the door of the store. One wore a black jacket with red writing, the other wore a white jacket with a blue shirt. The jackets were described as "skater jackets," hooded sweatshirt jackets that zipped up the front. (VR 5/6/10; 8:54:00-8:56:00). The men pulled their hoods up, approached Ms. Martin, and one went left, and the other went right. The man in the black jacket grabbed her purse. She went to the ground. She felt being hit on the right side of her face, and was hit by the man in the black jacket. She heard one man say "Goddamn bitch, let go of the purse." She got up and screamed for help, running into Target, where employees meet her. The robbers ran with her purse to the right side of the store, toward nearby Interstate 75. (5/6/10; 8:57:10-9:00:50).

Police officers and medical personnel arrived. Ms. Martin described the men to a Target employee and the police as white males wearing a black jacket with red writing or designs and a white jacket with a blue shirt. (VR 5/6/10; 9:01:36-9:02:54). The police informed her that they had a person in custody who may or may not be one of the robbers, and asked her to look at him. An officer drove her to a nearby subdivision, where she saw a man, who was not handcuffed, standing by an officer. When her driver

shined light on the man, she identified him as one of the robbers, the man in the white jacket and blue shirt. (VR 5/6/10; 9:05:06-9:06:20).

Ms. Martin testified to her injuries, and photographs, Commonwealth's Exhibits 1-8 were introduced to document her bruised/blackened eyes and swollen and cut face. (VR 5/6/10; 9:07:10-9:11:08). She testified that the contents that were in her purse included credit cards, her driver's license, house keys, an LG cell phone and an Ipod, which were evidenced by another photograph, Commonwealth's exhibit 9. (VR 5/6/10; 9:27:16-9:28:40).

Scott Bauries testified that he lived across the Interstate from Target, and was shopping there with his one year old daughter on February 5, 2009. He had finished shopping and was at his car when he heard a woman scream, and saw a man and a woman struggling over her purse, from about fifty feet away. He described the man having on a light colored hooded sweatshirt with designs and baggie pants. The man ran toward the Interstate. Mr. Bauries decided to drive and locate the man, and saw him in the Glen Eagles area, where Mr. Bauries lived. Mr. Bauries remembered calling either Target or the police and talking to a security guard and a policeman. (5/6/10; 9:53:00-9:58:50).

Lexington Police Department Lieutenant Chris Van Brackel testified that he was a Sergeant on February 5, 2009. He had stopped for dinner nearby Target when he got the call about the robbery, so he arrived there within one minute. He met Susan Martin, who described the robbers to him as two white males, one with a black sweatshirt over a red tee shirt, the other with a white sweatshirt over a blue tee shirt. Both wore

jeans. Their sweatshirts had artwork on them. Lt. Van Brackel then broadcast those descriptions on his radio to other officers. (VR 5/6/10; 10:14:40-10:21:10).

He was in the store when Target personnel gave him a phone, and he spoke to "Scott", who told the Lieutenant about the possible location the robbers. Officer Sean Stafford later radioed to advise that he had a suspect in custody. Lt. Van Brackel spoke to Ms. Martin, informing her that the police had someone who may or may not be one of the men, and she agreed to go look at him. Lt. Van Brackel drove her to where the man was, standing without handcuffs and smoking. When he shined lights on the man, Ms. Martin identified him as one of the men. He had on jeans, a white sweatshirt with dark script and a blue tee shirt. That man was Justin Masengale, the Appellant's co-defendant. (VR 5/6/10; 10:21:55-10:31:45).

Shavon Cowan Johnson, the Target asset protection team leader and head of security, testified that the robbery was not captured on surveillance cameras, although there was footage of a female getting up and running into the store. (VR 5/6/10; 11:12:50-11:13:10).

Lexington Police Department Officer Sean Stafford testified that on February 5, 2009, he went from the robbery scene at Target to the Polo Club area nearby to look for the suspects. While driving, he saw a man in a white jacket with artwork and a blue toboggan running in the roadway. Officer Stafford got out of his vehicle, and the man was sweating, out of breath, and had one shoe missing. The man said he was coming through a field and lost his shoe. The officer detained him. (VR 5/6/10; 11:20:01-11:24:12). Another officer contacted Lt. Van Brackel regarding a possible

identification procedure. The detained man was frisked, had his hand cuffs removed, and was standing beside a police cruiser with its lights off and smoking when Lt. Van Brackel pulled up. (VR 5/6/10;11:24:25-11:25:33). After the man was identified, he was handcuffed, Mirandized, and transported to police headquarters, where Detective Todd Iddings interviewed him. Officer Stafford identified Justin Masengale as the man he apprehended, noting that his hair was now different. (VR 5/6/10; 11:25:30-11:27:45).

Lexington Police Department Officer Nathaniel Thomas Muller testified that on February 5, 2009, he was working as a plainclothes officer, and was wearing his badge on a lanyard around his neck. He went to residences looking for the other suspect in the robbery, and eventually saw a man matching the description of the man in the black jacket with artwork. (VR 5/6/10: 11:36:45-11:41:55). The officer approached him, identifying himself as an officer, and the man fled. Officer Muller chased him on foot and caught him. The officer handcuffed the man, explained why he stopped him, and Mirandized him. Before he could give him the Miranda rights, the man made spontaneous, unsolicited statements to officer Muller. The man said, "I want to tell what happened back there. Hurry up and get me to jail." The man was the Appellee, Joseph Parker. He had a cell phone and an Ipod in his possession. The Appellee was taken to police headquarters and interviewed. (VR 5/6/10:11:43:05-11:55:30).

Detective Todd Iddings testified that he was shopping at Target on February 5, 2009, when he was approached by Lt. Van Brackel to assist in a robbery investigation at the store. He met with the victim, Susan Martin. He eventually was advised that officers had a person matching the description of a robbery suspect in

custody. The victim went with Lt. Van Brackel to see if she could identify that man. (VR 5/6/10: 1:27:45- 1:30:52). Detective Iddings testified that he told Ms. Martin that there was a suspect matching the description she gave, and that he may or may not be one of the robbers. (VR 5/6/10; 2:02:05-2:03:01).

After the Lieutenant contacted Detective Iddings and informed him that Ms. Martin had identified Justin Masengale, the detective interviewed Masengale at headquarters. Masengale told him that he had gone to TGIFridays restaurant to see about a job, walked to Target, and then smoked in front of the store. He saw a lady get out of a car, heard her scream, and he then ran off. He said he lost his shoe in the Polo Club area. He stated, "I mean I ain't going to lie. I'll do my time. I admit I was there, I was right there." (VR 5/6/10; 1:32:30-1:37:00).

Detective Iddings testified that the Appellee was brought in. He had the victim's cell phone and Ipod. The detective Mirandized the Appellee, who admitted taking the purse, said he did not remember striking the woman, and that he had been drinking before the purse grab. (VR 5/6/10; 1:37:25-1:38:23). The Appellee said that as he ran away he kept the cell phone and the Ipod, and scattered other purse contents as he ran. He said he ran to the Polo Club area, and then in another direction. (VR 5/6/10; 1:40:45-1:44:00). Detective Iddings testified that he recovered a computer flash drive belonging to Ms. Martin from the residence of Justin Masengale's grandfather. (VR 5/6/10; 1:46:50-1:47:18). As far as a time frame of events that night, Detective Iddings got involved at Target a little after 8:00 p.m., and began his interview with the Appellee at 12:24 a.m. (VR 5/6/10; 2:36:40-2:40:15).

Justin Masengale presented testimony from private investigator James Devasher that he had obtained two pieces of evidence from Target on February 18, 2010. One was a video with footage of Target personnel showing pictures to Susan Martin. The other item was a video of parking lot footage which he viewed, and which did not capture the robbery. Devasher could not got a copy of that item, but made still photos from the video. (VR 5/6/10; 3:04:05-3:11:14).

Justin Masengale testified that on February 5, 2009, he went to TGIFridays, while the Appellee waited. They left to go to Masengale's mother's house and stopped at Target for the Appellee to use the bathroom. The Appellee mentioned snatching a purse, and Masengale told him not to do it. (VR 5/6/10; 3:25:56-3:32:05). Masengale stated that they went into Target, came out, and he put his hood up, as it was cold. He saw Ms. Martin, heard a woman scream, turned to see "him" tug on the purse, and then Masengale ran onto Man'O'War. He saw the Appellee with something in his hands. (VR 5/6/10; 3:33:08-3:35:12). Masengale said he did not touch Ms. Martin. He ran because he was shocked and scared. He said he did not plan with the Appellee to do the crime. (VR 5/6/10; 3:35:12; 3:38:10).

Jana Masengale, Justin Masengale's sister, testified that she saw the Appellee on February 5, 2009, and the Appellee told her that he had robbed a girl at Target, and that Justin had run off. She stated that the Appellee had a phone and an Ipod. (VR 5/6/10; 4:01:48-4:07:22).

The Appellee, Joseph Parker, testified. He said that on February 5, 2009, he had been staying with Justin Masengale. They went to Target, went inside, came out

and snatched a purse. He said he did not hit or kick the victim. He got the purse and ran. He testified that he feels bad. He said that he went to Masengale's house and saw his sister, Jana Masengale. He went to a couple of other houses. When he saw a vehicle, he did not think it was the police, but he ran. (VR 5/6/10; 4:36:15-4:49:29). The Appellee admitted struggling with the victim for the purse and that she went to the ground. (VR 5/6/10; 4:59:30). The Appellee testified that he took the purse, Justin Masengale did not take it, and it was not planned. (VR 5/6/10; 5:07:05).

A suppression hearing was conducted before trial regarding the show-up identification of Masengale by the victim, Susan Martin. The trial court overruled a motion to suppress evidence from the show-up identification. (VR 4/23/10; 5:34:30-5:37:20; 5:47:30-5:52:43: TR 145).[1] The basis for the Court of Appeals Opinion reversing the convictions was that the trial court erred, that the show-up was flawed, and that evidence obtained from that show-up should have been inadmissible against the Appellee. Therefore, the suppression hearing proceedings in this matter are highly relevant. Testimony from the suppression hearing will be cited and developed in the argument sections of this brief.

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[1]The trial court's written order overruling the suppression motions is evidenced in this record at TR 145. That order indicates a ruling regarding Justin Masengale and Joseph William Parker, with a line drawn over Parker's name and case number. However, the order refers to both defendant's motions to suppress the identification being denied. Mr. Parker's original brief on appeal refers to this document as the trial court suppression order being appealed by Mr. Parker. (Brief for Appellant, p. 4) Along with the trial judge's oral ruling on the record from the bench, this evidences the trial court's suppression order from which Mr. Parker appeals to the Court of Appeals.

I.

THE ISSUE OF THE APPELLEE'S STANDING TO CONTEST THE SHOW-UP IDENTIFICATION OF HIS CO-DEFENDANT WAS PRESERVED FOR APPELLATE REVIEW

The Kentucky Court of Appeals ruled that the Commonwealth had waived the issue of whether the Appellee had standing at trial to complain about the show-up identification made by robbery victim Susan Martin of the Appellee's co-defendant, Justin Masengale. The Court of Appeals stated that specific grounds not raised before the trial court but raised for the first time on appeal would not support a favorable ruling on appeal, citing to Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011). The Court of Appeals stated,

> Our review of the suppression hearing reveals that while the Commonwealth Attorney did object to Parker's Attorney questioning Detective Iddings, the basis for the objection was that Ms. Martin was not going to be making an in-court identification at trial. It does not appear that there was a more general objection to Parker' standing to move to suppress the identification. Accordingly, we agree with Parker that the issue is waived. "Lack of standing is a defense which must be timely raised or else will be deemed waived." Harrison v. Leach, 323 S.W.3d 702, 708 (Ky. 2010). Therefore, we shall consider the merits of this argument.

Parker v. Commonwealth, 2010-CA-1371-MR, pp. 6-7 (Ky. App., Feb. 17, 2012)

While standing is an issue that can be waived, the Appellant respectfully submits that the circuit court proceedings indicate that the issue was sufficiently brought before the trial court. Following the questioning of Detective Todd Iddings at the suppression hearing by co-defendant Masengale's counsel, the witness was passed to the

Appellee's attorney, who began by asking the detective how long he had been an officer. (VR 4/22/10; 5:03:12). At that point, the issue of standing was raised by the Commonwealth Attorney, who said,

> Judge, may I, I don't think at this point Mr. Friedman [Appellee's attorney] has the standing to ask questions. We've all agreed that there's not going to be an in-court identification and that's what he's asked to suppress at this point. And we all agree that there's not going to be an in-court. This is about the show-up and his client was not identified in the show-up.

(VR 4/22/10; 5:03:17-5:03:36).

The Appellee's counsel, Mr. Friedman, then stated,

> Your Honor, we're alleging a Brady violation, for one thing, and for another thing, my motion to suppress clearly says and all its fruits, including but not limited to his statement to the police. Uh, and if anyone has, as it were, standing to ask questions, uh, directed at the suppression of his own client's statements to the police, I'd say it was I.

(VR 4/22/10; 5:03:36-5:04:04).

The trial judge then said,

> I'll overrule the motion, uh, let's go ahead and hear whatever we need to hear today and get it on the record and we'll kind of filter it out as we go along.

(VR 4/22/10; 5:04:04-5:04:15).

The trial judge overruled the Commonwealth's motion, and the Appellee's counsel questioned Detective Iddings, including questions about the show-up identification. (VR 4/22/10: 5:04:00-5:06:04). The Appellee's attorney also argued that the identification of co-defendant Masengale was tainted, led to the co-defendant telling

the police about the Appellee, which led to the Appellee's arrest and interview, which he argued should have been suppressed because of improper identification of the co-defendant Massengale. (VR 4/22/10; 5:36:50-5:39:23).

The trial court record indicates that when the Appellee's lawyer sought to participate in questioning of Detective Iddings, the Commonwealth Attorney objected, cited a lack of standing to ask questions, and pointed out to the trial court that the issue was the show-up identification of the Appellee's co-defendant, not the Appellee. The record shows that the trial court overruled the objection by the Commonwealth. The Appellant respectfully maintains that this objection and trial court ruling sufficiently raised the issue of the Appellee's lack of standing to contest an identification of someone other than the Appellee, and preserved the issue for appellate review.

"It is a rule of longstanding that to secure appellate review of a ruling of the trial judge, the question must have been fairly brought to the trial court's attention." Smith v. Commonwealth, 370 S.W.3d 871, 881 (Ky. 2012) (citations omitted). In the context of jury instructions, this Court has stated, "The gravamen of the instruction-error preservation requirement is presentation of the party's position 'fairly and adequately' to the trial judge." Elery v. Commonwealth, 368 S.W.3d 78, 89 (Ky. 2012).

RCr 9.22 governs objections, and does not require formal exceptions to rulings or orders of the trial court. The rule only requires that the objecting party "...makes known to the court the action which that party desires the court to take or any objection to the action of the court, and on request of the court, the grounds therefore;...." The Kentucky Court of Appeals noted that "However, RCr 9.22 does not require formal

exceptions to court rulings; a response is sufficient if it apprises the court of the action desired." Commonwealth v. Gonzalez, 237 S.W.3d 575, 577 (Ky. App. 2007).

The Commonwealth apprised the trial judge during the suppression hearing that it objected to the Appellee's counsel participating in the questioning. While indicating a mutual understanding between the parties that there would not be an in-court identification by the victim, the Commonwealth clearly stated, " This is about the show-up and his client was not identified in the show-up." Counsel for the Commonwealth indicated to the court that the prosecution had a problem with the Appellee's participation, that the Appellee lacked "standing," and that the issue was the show-up identification of the Appellee's co-defendant. This raised the issue of standing of the Appellee to challenge the show-up procedures regarding his criminal cohort. This preserved the issue of standing for appellate review in the Court of Appeals, the Commonwealth raised that issue in the Court of Appeals, and the issue is preserved for consideration in this Court.

Should this Court conclude that the matter was not preserved, the Appellant requests appellate review pursuant to the palpable error provisions of RCr 10.26. The Commonwealth may advocate for such review as an appellant. The Kentucky Court of Appeals has indicated that palpable error review as requested in the alternative to preserved review by the Commonwealth as an appellant was not necessary in a case, but did not seem to find that it was an inappropriate request. Commonwealth v. Gonzalez, supra, at 577-78. The error of allowing the Appellee to contest the identification of his co-defendant certainly "affects the substantial rights of a party" under

RCr 10.26, the party in this case being the Commonwealth. There is certainly under RCr 10.26 "the probability of a different result or error so fundamental as to threaten his [the Commonwealth's] entitlement to due process of law." Brooks v. Commonwealth, 217 S.W.3d 219, 225 (Ky. 2007). The error has resulted in manifest injustice under RCr 10.26, as the ruling to allow the Appellee to challenge identification of someone else has led to the Court of Appeals concluding that crucial evidence of the Appellant's guilt, his confession and possession of items stolen from the victim, is to be excluded.

Should this Court conclude that the issue of standing was not preserved for review, this Court may still consider that issue on appeal. In McCloud v. Commonwealth, 286 S.W.3d 780 (Ky. 2009), the trial judge denied a motion to suppress based on a finding that the defendant lacked standing to object to a search. This Court concluded that the search was permissible based on the doctrine of "search incident to arrest." This Court pointed out that the trial court reaching the same result (no suppression) for a different reason (lack of standing, not search incident to arrest) did not change this Court's result "...because it is well-settled that an appellate court may affirm a lower court for any reason supported by the record. *See, e.g. Kentucky Farm Bureau Mutual Insurance Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991)." Id. at 786, FN 19. The record here supports the conclusion that the Appellee Parker did not have the standing to object to the identification procedure of his co-defendant.

II

THE APPELLANT DID NOT HAVE STANDING TO CHALLENGE THE SHOW-UP IDENTIFICATION OF HIS CO-DEFENDANT MASENGALE

Since the issue of standing was preserved for appellate review or is subject to palpable error review, it must be discussed on the merits. The Appellee clearly lacked standing to contest the show-up identification of his co-defendant.

It is a well-recognized rule that a defendant may only assert his own constitutional rights. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In Alderman, the United States Supreme Court ruled that illegally wiretapped information obtained from another defendant was admissible against co-conspirators and co-defendants, as their rights were not violated by the improper acquisition of the evidence. Id. at 394 U.S. 171-72. The United States Supreme Court has also held that documents illegally seized from the briefcase of a bank officer were admissible against a co-defendant, who lacked standing to contest the seizure of the papers. United States v. Payner, 477 U.S. 727, 728-32, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). A defendant was also held to have no expectation of privacy to enable him to challenge the search of his girlfriend's purse in Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). These cases establish the long-standing principle that a defendant may contest a search only when his personal rights are at stake.

Kentucky authority, also in a Fourth Amendment context, is consistent with the previously noted federal cases on the subject of standing. It has been held that a

passenger did not have the right to contest the stop or search of a car in Garcia v. Commonwealth, 185 S.W.3d 658, 666 (Ky. App. 2006), and that a defendant lacked standing to challenge the search of his accomplice's car in Lindsey v. Commonwealth, 306 S.W.3d 522, 527 (Ky. App. 2009). A defendant has the burden to prove a legitimate expectation of privacy in a place that is searched in order to make a successful suppression claim. Sussman v. Commonwealth, 610 S.W.2d 608, 611-12 (Ky. 1980). Just because a defendant may find it to his advantage to contest a search does not mean that he has the authority to do so. As the defendant has the burden to establish standing, a defendant's subjective expectation of privacy will yield to the legitimate public interest, such as the public's interest in safety in determining the circumstances of a fatal automobile crash. Cormney v. Commonwealth, 943 S.W.2d 629, 632 (Ky. App. 1996).

The previously discussed Fourth Amendment cases should apply to identification scenarios such as the Appellee's in this case. The Appellant did not locate Kentucky authority on point, but other jurisdictions have addressed the present issue. In Burton v. State, 442 S.W.2d 354 (Tex. Cr. App. 1969), the Texas Court of Criminal Appeals dealt with a challenge by one defendant to an identification of his co-defendant. The Texas court made reference to Fourth Amendment search and seizure law that held an accused did not have standing to claim a constitutional violation of the rights of a co-conspirator. In disposing of the defendant Burton's argument that his co-indictee Evans's Sixth Amendment rights were violated by an identification procedure conducted without counsel, the court stated,

> There is no reason to apply a different rule when a Sixth Amendment right to counsel at a lineup is claimed from the rule when a Fourth Amendment right against unreasonable searches and seizures is claimed. It is not necessary to decide if the constitutional rights of Evans [co-defendant of Burton] were violated, because Burton has no standing to complain.

Id. at 358-59.

In federal cases addressing one defendant contesting identification of a co-defendant, United States v. Jones, 652 F. Supp. 1561 (S.D.N.Y. 1986), the court considered the claims of defendant Ogletree to suppress the identifications of co-conspirators Roland and Rembert. Ogletree argued that he had "standing" to challenge those identifications because evidence concerning them would be admissible against him in a conspiracy trial. The court reasoned that,

> Ogletree's contention, if sound, would vest every participant in an alleged conspiracy with vicarious standing to assert any other participant's Fifth Amendment right to a "reliable" identification *of that other participant*, even where (as in the case of co-defendant Roland) that other participant makes no constitutional claim of her own....

Id. at 1572.

The court in Jones cited to Bryson v. United States, 419 F.2d 695 (D.C. Cir. 1969), which states that a defendant has no standing to challenge fruits of a violation of another party's Fourth Amendment rights (citing to Wong Sun v. United States, 371 U.S. 471,

491-492, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)) and Fifth Amendment rights (citing to Long v. United States, 360 F.2d 829, 833 (D.C. Cir. 1966). The court in Bryson adhered "...to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Bryson, at 698-99.

Some jurisdictions have taken the path of giving defendants the opportunity to contest evidence even though the argument is based on an allegation of deprivation of a co-defendant's constitutional rights. In State v. Miller, 626 S.E.2d 328, 331-32 (S. Ca. 2006), the Supreme Court of South Carolina, calling it a "novel issue," held that a defendant could challenge the reliability of show-up identification of an alleged co-participant. The South Carolina court cited State v. Clausell, 580 A.2d 221 (N.J. 1990), in which that state's Supreme Court found that a defendant had standing to attack the identification of a co-defendant. The South Carolina court in Miller also cited to People v. Bisogni, 483 P.2d 780 (Cal. 1971), in which the California court stated that the defendant had standing to challenge the show-up identification of a co-participant because the show-up adversely affected the defendant's alibi.

The holding in Bisogni was considered by the Kansas Supreme Court in State v. Evans, 834 P.2d 335, 340-41 (Kan. 1992), and although distinguished, was found to be unpersuasive. The rationale of Bisogni, and the cases in line with its holding that a defendant can attack evidence based on a theory that someone else's rights were violated, is that if the identification is unreliable, this is detrimental to the defendant, and he ought be able to contest that process.

While courts face the argument that the reliability of co-defendant identification evidence should be subject to testing by an unidentified defendant, courts should also give great regard to the idea that a defendant's rights must be balanced against those of the larger society. The possible benefit of the exclusionary rule must be weighed against the substantial societal costs exacted by that rule. Herring v. United States, 555 U.S. 135, 145, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (Citation and quotation marks omitted). "The principle cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free....' Herring v. United States, 555 U.S. 135_____, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)." Montejo v. Louisiana, 556 U.S. 778,796, 129 S.Ct. 2079, 173 L.Ed. 955 (2009). This brief has already quoted the concern recognized by the federal court in United States v. Jones, 652 F.Supp. 1561, 1572 (S.D.N.Y. 1986), that to allow a defendant to contest evidence based on a claim that some other defendant's rights were violated opens the door for every participant in a conspiracy to have vicarious standing to argue alleged constitutional deprivations of other co-defendants. This would impact prosecutions for conspiracy crimes, gang-related offenses and criminal syndicates, with defendants having the ability to challenge evidence based on an argument that there was a denial of someone else's constitutional privilege. Such would negatively impact the ability of law enforcement to effectively gather evidence and successfully prosecute serious criminal offenses. It is entirely appropriate for this Court to consider the societal cost involved in extending standing to a defendant to assert rights that do not belong to that defendant.

The better approach in this matter would be to adhere to the line of authority holding that a defendant like the Appellee in this case does not have the standing to challenge identification evidence based on a claim that the rights of a co-defendant were violated.

III.

THE TRIAL COURT DID NOT COMMIT ERROR BY OVERRULING THE DEFENSE MOTION TO SUPPRESS IDENTIFICATION MADE BY THE VICTIM BECAUSE THE IDENTIFICATION PROCEDURE WAS RELIABLE

While the trial judge erroneously overruled the Commonwealth's objection on the basis of standing, the trial judge did reach the correct result in overruling the motion to suppress by finding that the show-up identification of Masengale by the victim was reliable.

The Supreme Court of Kentucky stated in King v. Commonwealth, 142 S.W.3d 645, 649 (Ky. 2004), as follows:

> The "clearly erroneous" standard applies to a trial judge's findings of fact on a motion to suppress evidence. Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972). A trial judge's ruling as to the admissibility of evidence is reviewed under an abuse of discretion standard. Cf. Goodyear Tire & Rubber Co. V. Thompson, Ky., 11 S.W.3d 575 (2000). An abuse of discretion occurs when a "trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. at 581 citing Commonwealth v. English, Ky., 993 S.W.2d 941 (1999).

To determine if identification testimony violates due process requires a two-step process. The trial court first must examine the pre-identification encounters to

determine if they were unduly suggestive. If not unduly suggestive, the process is over and the testimony is admissible. If the trial court concludes that the pre-identification encounters were unduly suggestive, the testimony may still be admissible if under the totality of the circumstances, the identification was reliable. King, supra at 649, citations omitted.

The determination of whether an identification is reliable under the totality of the circumstances calls for a consideration of five factors enumerated in Neil v. Biggers, supra. Those factors are: 1) the opportunity of the witness to view the criminal at the time of the offense; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation with the criminal; and 5) the time between the crime and the confrontation. The Kentucky Supreme Court adopted these five factors in Savage v. Commonwealth, 920 S.W.2d 512, 513-14 (Ky. 1995). The trial court must use these five factors to assess the possibility that a witness would make an "irreparable misidentification." Id. at 513, citations omitted.

In this matter, the suppression hearing record established that after Susan Martin was robbed, personnel of Target came to her aid, and she described her robbers. An employee of Target showed her some pictures of two men who had been in the store right before the robbery. Ms. Martin was then transported by the police to the scene where a suspect had been detained to determine if she could identify that suspect as one of her robbers. Ms. Martin did identify Justin Masengale as one of the robbers during that show-up procedure. Masengale later gave a statement to police, during which he

provided information about the Appellee Joseph Parker's involvement. The police apprehended the Appellee, who then admitted to his role in the robbery of Ms. Martin.

The show-up procedure with Ms. Martin was a reliable identification. Show-up evidence is not *per se* violative of due process. Brown v. Commonwealth, 564 S.W.2d 24, 29 (Ky. App. 1978). When the Masengale show-up was arranged, both Detective Iddings and Lt. Van Brackel informed Ms. Martin that a person was in custody who matched the description she gave, and that he might or might not be one of the robbers. There is nothing inappropriate about this, as one would reasonably expect that the police would arrange to have her view a person recently stopped in the area of the robbery who fit the description the victim provided. The police would not be expected to ask her to look at someone of a different gender or race or wearing a business suit, and two different police officers cautioned Ms. Martin that the person may or may not be one of her robbers. The police also took further steps to minimize a suggestive atmosphere by making sure that Masengale was not handcuffed, was engaged in a common activity by smoking, and was accompanied by only one officer at the show-up.

However, the trial court concluded that the show-up procedure utilized with Ms. Martin to identify Masengale was suggestive, and then applied the five Neil v. Biggers factors to the case to determine if the identification would be admissible as reliable under the totality of the circumstances. (VR 4/23/10; 5:22:40-5:28:20). Through the consideration of these five factors and the hearing evidence, the trial court correctly ruled that the identification was reliable and admissible at trial.

As to the first factor, Ms. Martin had ample opportunity to observe the robbers. Target store manager Robert Branham testified at the hearing that he recalled Ms. Martin telling Target staff that she had been attacked outside the store by two males with light complexions and buzz haircuts. One wore a light colored jacket with numbers and distinctive design on the jacket. (VR 4/22/10; 4:11:32-4:14:04). Police officers arrived and spoke with Ms. Martin while Target staff printed out pictures from surveillance video of two men who had been in the store and matched the description given by Ms. Martin. (VR 4/22/10; 4:11:32-4:12:42; 4:14:21-4:15:20; 4:15:21-4:15:40). Ms. Martin looked at the pictures and stated, "Those are the guys." (VR 4/22/10; 4:15:41-4:16:26).

Lexington Police Department Lieutenant Chris Van Brackel testified at the hearing that he arrived at Target within a minute of receiving notification of the robbery. He spoke with Ms. Martin, who stated that as she was walking up to the store, two men came from the store toward her, one of two men hit her, and her purse was taken. She described the offenders as two males, both wearing jeans and zip-up sweatshirts with hoods. Both "hoodies" bore what she described as "skateboarder" style writing or design. One robber was wearing a black hoodie with lighter writing/design, and a red cap. The other man had on a white hoodie with darker writing/design, a blue undershirt, and a blue hat. She said that the men then ran away toward the Interstate. (4/22/10; 4:38:05-4:40:40). The trial judge focused on the ability of Ms. Martin to describe the two men, as well as the concept that victims pay attention when being victimized, to conclude that she had an opportunity to view the robbers during the crime. (VR 4/23/10; 5:28:20-5:30:46).

This finding is supported by the evidence that Ms. Martin could view the robbers as she walked up to the store and that they were in close proximity to her in order for her to be struck and have her purse taken away from her.

Regarding the second factor, Ms. Martin paid attention to the robbers. Again, her previously noted description of the two men indicates that she was paying attention to them during the crime, as she was able to recount their gender, complexions, haircuts and clothing. As the trial judge correctly found that one would expect that Ms. Martin would be paying attention when being assaulted and having her purse stolen from her (VR 4/23/10; 5:30:47-5:32:07), and the quality of her descriptions supports this conclusion. Bystander Scott Bauries testified at trial that he saw her engaged in a struggle over her purse, which also suggests the conclusion that she was paying attention to what was happening to her and who was responsible.

Concerning the third factor, the accuracy of the witness' prior description of the criminals, Ms. Martin detailed what the two white males were wearing. The trial judge noted that upon being apprehended and while at the show-up identification, Justin Masengale was wearing a light colored sweatshirt, which matched the description provided by Ms. Martin as to what one robber was wearing. (VR 4/23/10; 5:32:07-5:32:45). Lieutenant Van Brackel testified that when apprehended by the police, Masengale was wearing a white sweatshirt and only one shoe, and had been running when spotted by the police. (VR 4/22/10; 4:43:00-4:43:56). Masengale's appearance and condition when caught, wearing a sweatshirt that matched Ms. Martin's description and having lost a shoe, evidence of flight when he ran away after the robbery as she described,

also establish the accuracy of her prior description, and support the trial judge's finding and ruling.

While the actual clothing of the Appellant and Masengale was not introduced at the hearing, their attire was introduced at trial and is part of the record in this matter. Detective Todd Iddings testified and produced the clothes that the pair were wearing when arrested on the same night as the robbery. Masengale wore a light colored zip-up hoodie sweatshirt with writing, a blue stocking cap with a bill, a light blue tee shirt and jeans. The Appellee wore a black hoodie zip-up jacket with a red and white pattern design and jeans. (VR 5/6/10; 1:48:08-1:48:40). These items were introduced as Commonwealth exhibits 13 and 14. (VR 5/6/10; 1:49:25-1:53:43). This is evidence of the accuracy of Ms. Martin's description of both men. It is noteworthy that Ms. Martin had described the robbers as having buzz haircuts. As can also be observed in a photograph of the Appellee, Commonwealth's Exhibit 15 at the trial, the Appellant had closely cropped hair. The trial judge correctly found that the prior description of the robbers provided by Ms. Martin was accurate and reliable. (VR 4/23/10; 5:32:07).

The fourth factor to consider is the level of certainty of the witness' identification. Lieutenant Van Brackel testified at the hearing that he drove Ms. Martin to the scene where an officer and Masengale were located. He had told her that the police had someone who may or may not be involved in the robbery, but needed her to view this person. Upon arrival at that scene, Masengale was standing by a police car with one officer present, he was not handcuffed, and he was smoking a cigarette. Lieutenant Van Brackel testified that when he shined his spotlight and headlights on Masengale as he

pulled up with Ms. Martin, she "didn't have any hesitation at all. She said, 'Yes, that's him.'" (VR 4/22/10; 4:44:30-4:46:00). The trial judge cited to this immediate identification when making his findings and concluding that this prong of the reliability test had been satisfied. (VR 4/23/10; 5:32:45).

It is also noteworthy that at the hearing, Target store manager Robert Branham testified that before the show-up, when Ms. Martin was shown pictures of the two men on the surveillance film who had been in the store before the robbery, she said, "Those are the guys." (VR 4/22/10; 4:15:41-4:16:26). When asked if Ms. Martin showed any hesitation, he testified, "No, absolutely not." (VR 4/22/10; 4:16:28-4:16:40).

The fifth and final factor to be considered is the passage of time between the crime and the identification. The trial court stated that it "guesstimated" a passage of time from the robbery to the show-up to be fifteen to twenty minutes. (VR 4/23/10; 5:33:05-5:34:00). The hearing evidence from defense investigator James Devasher established that Ms. Martin came into the store at 7:51 p.m. (VR 4/22/10; 5:20:57-5:21:35). His testimony also indicated that by 8:07 p.m., store guest services, medical personnel, police, and Ms. Martin's family had arrived at Target. Mr. Devasher also testified that video evidence showed Target personnel showing pictures to Ms. Martin at 8:11 a.m. (VR 4/22/10; 5:22:57-5:23:49).

Detective Iddings made reference to the "short" passage of time between the robbery and the apprehension of Masengale. (VR 4/22/10; 5:05:10-5:05:50). Masengale was then identified by Ms. Martin. It was Masengale's statement that led the police to the Appellee (VR 4/22/10; 5:06:05-5:06:04), and the record shows that the

Appellee was arrested and in custody by 23:46 hours, or 11:46 p.m. on February 5, 2010, the night of the robbery. (TR I, "Uniform Citation," p. 4). The trial judge referred to the short passage of time between the crime and the show-up in making his ruling. (VR 4/23/10; 5:01:30).

While the timing of all events from robbery to show-up was not precisely defined, the record indicates that the crime occurred a little before 8:00 p.m., that Ms. Martin described her assailants, looked at Target pictures, participated in a show-up regarding Masengale, that police took a statement from Masengale, and then located and arrested the Appellant. All of this was done by 11:46 p.m. The robbery to show-up time frame fits into the earlier part of this total time frame of approximately four hours. It is certain that there was less than that amount of time between the offense and the identification of Masengale. The passage of time between the two events was certainly brief for purposes of a Neil v. Biggers analysis, and the record supports the trial judge's conclusion that the fifth prong of the reliability test was satisfied in the victim's favor. (VR 4/23/10; 5:33:05-5:34:00).

The factual findings of the trial court are supported by substantial evidence and should be considered conclusive. RCr 9.78. The trial court made the correct decision in overruling the motion to suppress the out-of-court identification of Masengale at the show-up, and there was no abuse of discretion. The police took steps to reduce the potentially suggestive nature of the show-up. The circumstances preceding the show-up indicate that Susan Martin had ample opportunity to observe her robbers, paid sufficient attention to them to describe them, made an accurate description of them, was certain of

her identification of Masengale, and that the passage of time from the robbery to her identification was short and did not impair her ability to identify. The totality of the circumstances indicates that her identification was reliable and admissible. Neither the identification of Masengale or evidence from interviews with Masengale and the Appellee and evidence recovered from the Appellee should have been suppressed.

CONCLUSION

The Appellant respectfully requests that this Court reverse the Opinion of the Kentucky Court of Appeals reversing and remanding this case and affirm the convictions of the Appellee Joseph William Parker in the Fayette Circuit Court.

Respectfully submitted,

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APPENDIX

1) Parker v. Commonwealth of Kentucky, 2010-CA-1371,
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2) Final Judgment/Sentence of Imprisonment,
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3) Order - Suppression Ruling
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