COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-000820

PLEAS LUCIAN KAVANAUGH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 2010-CR-727

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, PLEAS LUCIAN KAVANAUGH

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Pamela R. Goodwine, Judge, 382 Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507; the Hon. Ray Larson, Commonwealth Attorney's Office, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; the Hon. Steven C. Butcher, Department of Public Advocacy, 163 West Short Street, Suite 210, Lexington, Kentucky 40507; and to served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on November 20, 2013. The record on appeal has been returned to the Kentucky Supreme Court.

Robert C. Yang

ROBERT C. YANG

INTRODUCTION

Appellant, Pleas Lucian Kavanaugh, entered a conditional Alford plea to Criminal Attempt to Possession of a Controlled Substance and Menacing. He received a total sentence of twelve months imprisonment. The Court of Appeals affirmed the trial court's denial of his suppression motion. This Court granted discretionary review of the opinion of the Court of Appeals.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Mr. Kavanaugh, requests the opportunity to present oral argument. The issue can be explained and the error of courts below can be better understood if Appellant is allowed the opportunity to present oral argument.

STATEMENT CONCERNING CITATION TO THE RECORD

The one-volume transcript of record will be cited as "TR" with the page number cited directly following, e.g., TR 1. The court proceedings, consisting of thirteen portions, are contained on one compact disc, and will be cited in conformance with CR 98(4)(a) as follows:

Portion 1: VR No. 1: mm/dd/yyyy; hh/mm/ss;
Portion 2: VR No. 2: mm/dd/yyyy; hh/mm/ss;
Portion 3: VR No. 3: mm/dd/yyyy; hh/mm/ss;
Portion 4: VR No. 4: mm/dd/yyyy; hh/mm/ss;
Portion 5: VR No. 5: mm/dd/yyyy; hh/mm/ss;
Portion 6: VR No. 6: mm/dd/yyyy; hh/mm/ss;
Portion 7 (Suppression Hearing): VR No. 7: mm/dd/yyyy; hh/mm/ss;
Portion 8: VR No. 8: mm/dd/yyyy; hh/mm/ss;
Portion 9: VR No. 9: mm/dd/yyyy; hh/mm/ss;
Portion 10: VR No. 10: mm/dd/yyyy; hh/mm/ss;
Portion 11: VR No. 11: mm/dd/yyyy; hh/mm/ss;

Portion 12: VR No. 12: mm/dd/yyyy; hh/mm/ss; and
Portion 13: VR No. 13: mm/dd/yyyy; hh/mm/ss.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Officer Rice's Testimony

In the early morning hours of March 6, 2010, Officer Richard Rice of the Lexington Police Department was in his cruiser patrolling the 500 block of N. Upper Street when he noticed a dark-colored car parked on the side of the road with its taillights on. (VR No. 7: 12/14/10; 14:09:29, 14:07:36, 14:08:28, 14:10:17). Based on his experience, Officer Rice knew this part of Lexington was a high crime area. (VR No. 7: 12/14/10; 14:08:43, 14:03:04). Officer Rice drove past the car and did not see anyone inside. (VR No. 7: 12/14/10; 14:10:48). He became suspicious because "you don't see cars just sitting with the taillights on." (VR No. 7: 12/14/10; 14:10:22).

Several things went through Officer Rice's mind: the vehicle was possibly stolen; someone might be conducting illegal drug activity in the car; prostitution or loitering for prostitution could be occurring; or a burglary was in progress. (VR No. 7: 12/14/10; 14:11:43, 14:11:56, 14:12:07, 14:12:42).

Officer Rice drove around the block and pulled in behind the vehicle. (VR No. 7: 12/14/10; 14:10:56, 14:41:25). He radioed in the tag number of the car. (VR No. 7: 12/14/10; 14:11:03). While waiting for the tag report, he noticed two people inside the car and became more suspicious. (VR No. 7: 12/14/10; 14:46:35). There were no unusual movements from the driver or passenger and the vehicle was not rocking back-and-forth, but he wondered why they were sitting in a car at 3:40 A.M. (VR No. 7: 12/14/10; 14:41:06, 14:11:14). Before getting the report that the vehicle was not stolen, Officer Rice approached the vehicle. (VR No. 7: 12/14/10; 14:46:47). He turned on his rear lights and directed his spot light

towards the rear view mirror and the inside of the car. (VR No. 7: 12/14/10; 14:41:42). He exited the vehicle to conduct an investigatory stop. (VR No. 7: 12/14/10; 14:11:09, 14:28:44).

Officer Rice walked to the driver-side door and spoke with the driver, Faith Kimeli. (VR No. 7: 12/14/10; 14:13:03). Officer Rice explained that he was speaking with them because he was suspicious of them sitting in a high crime area in the early morning with the car's taillights on. (VR No. 7: 12/14/10; 14:13:14). Faith explained that she had just dropped a friend off after returning from a club and that she was sitting in the car talking. (VR No. 7: 12/14/10; 14:13:26). Officer Rice asked for Faith's identification and she gave it to him. (VR No. 7: 12/14/10; 14:13:34).

After Officer Rice spoke with Faith, he asked Mr. Kavanaugh, sitting in the passenger seat, if he had his identification and Mr. Kavanaugh answered no. (VR No. 7: 12/14/10; 14:14:25). Officer Rice then asked for his name, to which Mr. Kavanaugh responded by asking why Officer Rice wanted to know. (VR No. 7: 12/14/10; 14:14:32). Officer Rice answered that he needed to know Mr. Kavanaugh's name since he did not have his identification. (VR No. 7: 12/14/10; 14:14:38). During this time, Officer Rice claimed that Mr. Kavanaugh was not looking at Officer Rice while responding and kept reaching into his coat and digging into his pocket – things that raised Officer Rice's suspicion. (VR No. 7: 12/14/10; 14:13:36, 14:14:04, 14:14:45). For safety purposes, Officer Rice asked Mr. Kavanaugh to step out of the car. (VR No. 7: 12/14/10; 14:15:35). Officer Rice was at the driver-side door for about two minutes before asking Mr. Kavanaugh to step out of the vehicle. (VR No. 7: 12/14/10; 14:46:02).

Mr. Kavanaugh eventually climbed out and as he walked toward the rear of the car, Officer Rice saw that he had pulled a small, unidentified black item out of his pocket. (VR No. 7: 12/14/10; 14:16:02). At that point, Officer Rice believed Mr. Kavanaugh could have a weapon, so he ordered Mr. Kavanaugh to take his hands out of his pockets. (VR No. 7: 12/14/10; 14:15:02, 14:16:32). Mr. Kavanaugh put the black item back in his pocket, so Officer Rice explained to Mr. Kavanaugh that due to the suspicious actions, he needed to conduct a *Terry* frisk to look for weapons for officer safety. (VR No. 7: 12/14/10; 14:16:42).

Officer Rice ordered Mr. Kavanaugh to turn around with his back towards Officer Rice and to interlace the fingers of his hands with the palms facing outward. (VR No. 7: 12/14/10; 14:17:06). Mr. Kavanaugh did not comply – he took a small, black digital recorder and spoke into it, saying something along the lines that he was being harassed. (VR No. 7: 12/14/10; 14:17:12).

As Officer Rice tried to frisk Mr. Kavanaugh for weapons, Officer Rice claimed Mr. Kavanaugh was very non-compliant and would not cooperate, insistent on holding the digital recorder. (VR No. 7: 12/14/10; 14:17:47). Officer Rice kept asking for his name, but Mr. Kavanaugh would not say who he was. (VR No. 7: 12/14/10; 14:25:30). Sometime during the *Terry* frisk, Officer Rice pulled out Mr. Kavanaugh's wallet to look for some identification, which caused Mr. Kavanaugh to start yelling for his wallet back. (VR No. 7: 12/14/10; 14:25:38, 14:49:23). Shortly after the wallet was removed, Mr. Kavanaugh disengaged his hands while holding the recorder, laid the recorder on the trunk of the vehicle, spun around quickly, and grabbed Officer Rice in a "bear hug." (VR No. 7: 12/14/10; 14:19:10). Officer Rice decided to arrest Mr. Kavanaugh once Mr.

Kavanaugh made physical contact. (VR No. 7: 12/14/10; 14:28:01). Officer Rice thought the correct charge probably would have been Third-Degree Assault, but since things happened so quickly that night, he decided to charge Mr. Kavanaugh with menacing. (VR No. 7: 12/14/10; 14:28:18).

After the "bear hug," Officer Rice regained control of the situation and Mr. Kavanaugh turned back around, face-down towards the trunk of the car, under the threat of being "Tasered." (VR No. 7: 12/14/10; 14:26:10). Officer Rice held Mr. Kavanaugh in this position and called for additional officers. (VR No. 7: 12/14/10; 14:26:15). When the other officers arrived, Officer Tripp arrested Mr. Kavanaugh and conducted a search incident to arrest that revealed about 0.5 grams of crack-cocaine in Mr. Kavanaugh's right front pocket. (VR No. 7: 12/14/10; 14:27:50, 14:30:09, 14:32:55).

Officer Rice did not feel he had violated Mr. Kavanaugh's rights in any way. (VR No. 7: 12/14/10; 14:28:29). He believed he was just conducting his investigation and had explained to Mr. Kavanaugh why he was conducting his investigation. (VR No. 7: 12/14/10; 14:28:33). Because of Mr. Kavanaugh's actions, Officer Rice had to escalate his response in kind – from an investigatory stop to a *Terry* frisk to an arrest. (VR No. 7: 12/14/10; 14:28:44).

Officer Rice believed that since he was conducting an investigation, Mr. Kavanaugh had a duty to supply his identification. (VR No. 7: 12/14/10; 14:43:57). He just wanted to know who Mr. Kavanaugh was. (VR No. 7: 12/14/10; 14:49:38). After the arrest, Officer Rice informed Mr. Kavanaugh that if he had simply given his name in the car, "it never would have went that far." (VR No. 7: 12/14/10; 14:29:18).

Mr. Kavanaugh's Testimony

Mr. Kavanaugh thought that he initially told Officer Rice that he did not have any identification with him, but did give him his name. (VR No. 7: 12/14/10; 14:54:01). Mr. Kavanaugh thought Officer Rice might have been right that he might not have stated his name right away, but believed he did eventually identify himself. (VR No. 7: 12/14/10; 15:01:00).

Mr. Kavanaugh conceded that he had his hands in his pockets because it was 30 degrees outside, but denied shuffling his hands in and out of his coat. (VR No. 7: 12/14/10; 15:01:32). Further, he stated that Officer Rice did not ask him to take his hands out of his pockets. (VR No. 7: 12/14/10; 15:11:21, 14:49:38, 15:15:52).

Mr. Kavanaugh also did not immediately get out of the car as Officer Rice requested; instead, he asked why and waited until he was requested a second time. (VR No. 7: 12/14/10; 14:54:33, 15:01:57). As he went to the back of the car, Mr. Kavanaugh pulled the recorder out of his pocket and told Officer Rice what it was. (VR No. 7: 12/14/10; 15:16:23).

Mr. Kavanaugh understood he was being frisked for weapons; that was why he asked Officer Rice why Officer Rice removed his wallet. (VR No. 7: 12/14/10; 14:56:20). During this time, Officer Rice was pushing Mr. Kavanaugh down to his side and he did not feel he was free to go. (VR No. 7: 12/14/10; 14:56:38). About the same time Mr. Kavanaugh turned around to question Officer Rice, Officer Rice grabbed Mr. Kavanaugh and tried to slam him to the ground. (VR No. 7: 12/14/10; 14:56:53). Reflexively, Mr. Kavanaugh put his hands on Officer Rice's shoulders to brace himself. (VR No. 7: 12/14/10;

14:57:03). He admitted to turning around without permission and to breaking Officer Rice's grasp. (VR No. 7: 12/14/10; 15:03:59, 15:09:29).

Mr. Kavanaugh knew that when a police officer asked for his identity, he did not have to respond. (VR No. 7: 12/14/10; 15:10:00). He conceded that he gave Officer Rice his old address. (VR No. 7: 12/14/10; 15:18:35). He was the one that lived and was being dropped off on 552 N. Upper St. (VR No. 7: 12/14/10; 15:18:40).

Mr. Kavanaugh's digital recorder recorded the incident in two segments that were played during the hearing. (VR No. 7: 12/14/10; 14:19:47, 14:21:31, 14:30:33).

Defense Argument

The defense, in addition to the motion to suppress (TR 28-31, Appendix, Tab 6), cited to *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), for the proposition that a detainee did not have to respond to any questioning from police. (VR No. 7: 12/14/10; 15:20:30). There was no reasonable suspicion to order Mr. Kavanaugh out of the car. (VR No. 7: 12/14/10; 15:21:02). There was no reasonable suspicion that a crime was being committed or had been committed at the time Officer Rice conducted his *Terry* frisk. (VR No. 7: 12/14/10; 15:20:55). Even if there were a reasonable suspicion for a *Terry* frisk, Officer Rice exceeded the frisk by pushing Mr. Kavanaugh's head down on the trunk of the car. (VR No. 7: 12/14/10; 15:21:27). At that point, he was under arrest, but there was no indication that Mr. Kavanaugh committed any crime, so the search was incident to an unlawful arrest. There was no reasonable suspicion to order Mr. Kavanaugh out of the car. (VR No. 7: 12/14/10; 15:21:30).

Commonwealth Argument

The prosecutor stated that a police officer may approach a citizen to conduct an investigatory stop based on the totality of the circumstances. (VR No. 7: 12/14/10; 15:22:06). In this case, Officer Rice articulated a reasonable suspicion for an investigatory stop: it was late at night and the car with people sitting inside was in a high crime neighborhood with only its taillights on. (VR No. 7: 12/14/10; 15:22:17). Based on Officer Rice's experience, he "clearly articulated a reason for wanting to know and make sure everything was OK." (VR No. 7: 12/14/10; 15:22:44). There was no problem with Officer Rice simply going and asking for identification – to check up on people to make sure everything was fine. (VR No. 7: 12/14/10; 15:22:56).

When Mr. Kavanaugh escalated his actions by refusing to answer basic questions and fidgeting in his pocket, it was proper to ask Mr. Kavanaugh to step out of the car for a *Terry* frisk. (VR No. 7: 12/14/10; 15:23:07). Further, Mr. Kavanaugh assaulted Officer Rice and resisted arrest, justifying the search incident to arrest that uncovered the cocaine, which formed the basis of his current charges. (VR No. 7: 12/14/10; 15:24:25).

The Trial Court's Findings of Fact and Conclusions of Law

The trial court began the analysis with the initial approach to the vehicle. (VR No. 7: 12/14/10; 15:24:38). Officer Rice noticed the vehicle's taillights were on, apparently without anyone inside, which raised his suspicion that the vehicle was stolen. (VR No. 7: 12/14/10; 15:24:45). He called in the plate, and while waiting for that information to come back, he pulled behind the vehicle and noticed it did have two occupants. (VR No. 7: 12/14/10; 15:25:59).

The trial court further found that this occurred at 3:42 A.M., when most people are asleep. (VR No. 7: 12/14/10; 15:25:08). Officer Rice approached the vehicle and spoke to the driver. (VR No. 7: 12/14/10; 15:25:13). Officer Rice noticed that Mr. Kavanaugh was not looking at him. (VR No. 7: 12/14/10; 15:25:20). Mr. Kavanaugh did not volunteer or said he did not have any identification or would not tell Officer Rice his name immediately. (VR No. 7: 12/14/10; 15:25:24). Mr. Kavanaugh had his hands in his pockets. (VR No. 7: 12/14/10; 15:25:28).

The trial court stated that an officer on duty can reasonably suspect if someone is being evasive and not giving the officer the information requested with his or her hands in his or her pockets. (VR No. 7: 12/14/10; 15:25:31). These are examples of actions that can be considered in the totality of the circumstances. (VR No. 7: 12/14/10; 15:25:44). The *McCarty* case provided by the defense even states 'the officer can approach and ask questions.' (VR No. 7: 12/14/10; 15:25:52). According to *McCarty*, the detainee is not obliged to respond. (VR No. 7: 12/14/10; 15:26:00).

In contrast, the trial court stated it had a 2004 Kentucky Supreme Court case which says that an officer has a right to ask for that information, and that person is obligated to provide that info because that is how officers determine if there are outstanding warrants or just basic information. (VR No. 7: 12/14/10; 15:26:05). The trial court did not provide a citation to that case, but based on its understanding of that case, the trial court concluded that there was no constitutional right not to provide basic information. (VR No. 7: 12/14/10; 15:26:20).

The trial court further found that when Mr. Kavanaugh was asked to step out of the car, he did step out of the car, went around to the back of the vehicle, his hands went into his pocket, and a black object appeared. (VR No. 7: 12/14/10; 15:26:27). At that point, to Officer Rice's credit, he did not start shooting Mr. Kavanaugh. (VR No. 7: 12/14/10; 15:26:40). Mr. Kavanaugh said he told Officer Rice he had a tape recorder. (VR No. 7: 12/14/10; 15:26:46). Officer Rice told Mr. Kavanaugh to put the recorder on the car so he could be frisked for weapons. (VR No. 7: 12/14/10; 15:26:48). At that point, when Mr. Kavanaugh became combative, this case became distinguishable from *McCarty*. (VR No. 7: 12/14/10; 15:26:53).

The trial court further found that Mr. Kavanaugh became upset that Officer Rice pulled his wallet out of his pocket. (VR No. 7: 12/14/10; 15:27:00). Mr. Kavanaugh got loud, turned around, broke Officer Rice's grip, and touched the officer. (VR No. 7: 12/14/10; 15:27:03). In response, Officer Rice pulled his Taser out. (VR No. 7: 12/14/10; 15:27:10). To Officer Rice's credit, he did not use the Taser. (VR No. 7: 12/14/10; 15:27:14). At that point, there was another factor that heightened Officer Rice's suspicion – Mr. Kavanaugh was menacing or assaulting the officer and resisting arrest. (VR No. 7: 12/14/10; 15:27:18). To Officer Rice's credit, he did not charge Mr. Kavanaugh with resisting or assault. (VR No. 7: 12/14/10; 15:27:33). Officer Rice determined that to get the situation under control, he had to arrest Mr. Kavanaugh. (VR No. 7: 12/14/10; 15:27:40). Since he had lost his cuffs in the shuffle, he asked Officer Tripp to arrest Mr. Kavanaugh. (VR No. 7: 12/14/10; 15:27:46). During the search incident to arrest, cocaine was found. (VR No. 7: 12/14/10; 15:27:52).

Based on the totality of the circumstances in this particular case, the court found that Officer Rice did, in fact, have a reasonable articulable suspicion to approach this vehicle to ask Mr. Kavanaugh to step out of the car. (VR No. 7: 12/14/10; 15:28:32). At that point, all Mr. Kavanaugh had to do was give Officer Rice his name, his address, or show him some identification. (VR No. 7: 12/14/10; 15:28:46). If Mr. Kavanaugh did not have any identification, he could have given Officer Rice proper information, so Officer Rice could run his information to see if Mr. Kavanaugh had outstanding warrants. (VR No. 7: 12/14/10; 15:28:50). Officer Rice let the driver go, as the driver was totally cooperative, but unfortunately, Mr. Kavanaugh was not. (VR No. 7: 12/14/10; 15:28:58).

Based on the totality of the circumstances, the court overruled the motion to suppress. (VR No. 7: 12/14/10; 15:29:07); TR 38 (Order Overruling Motion to Suppress, Appendix, Tab 5).

Procedural history

Shortly after the trial court overruled his motion to suppress, Mr. Kavanaugh entered into a conditional *Alford* plea to one count of Criminal Attempt to Possession of a Controlled Substance and one count of Menacing. TR 44-47. Mr. Kavanaugh received a sentence of twelve months for the attempted possession and 30 days for the menacing. TR 66-68 (Final Judgment, Appendix, Tab 4). He was placed on Conditional Discharge for a period of one year. TR 67.

Court of Appeals opinion

Mr. Kavanaugh appealed as a matter of right to the Court of Appeals, which issued an opinion affirming his conviction (Appendix, Tab 2). The Court of

Appeals found that "Officer Rice noticed that Kavanaugh was reaching into his coat and looking away from him." (Slip opinion at 7). The Court of Appeals concluded that the acts of reaching into the coat and not looking at Officer Rice "coupled with Kavanaugh's refusal to provide any identification, justified Officer Rice's then reasonable, articulable suspicion that criminal activity was afoot." (Slip opinion at 7).

Further, the Court of Appeals concluded that because "Kavanaugh would not look at Officer Rice, was digging in his pockets, and refused to give his name, gave rise to Officer Rice's reasonable suspicion that Kavanaugh had a weapon in his coat." (Slip opinion at 8).

The Court of Appeals did not address the issue of whether Officer Rice exceeded the scope of a *Terry* frisk by removing the wallet, believing it was not presented to the trial court. (Slip opinion at 9).

The Court of Appeals subsequently denied Mr. Kavanaugh's petition for rehearing (Appendix, Tab 1). This Court granted Mr. Kavanaugh's motion for discretionary review. (Appendix, Tab 3).

Additional facts will be recited in the argument below as needed.

ARGUMENT

I.

The Court of Appeals overlooked a material fact and engaged in hindsight analysis.

Preservation.

This issue is preserved by Mr. Kavanaugh's motion for discretionary review (Motion for discretionary review, Appendix, Tab, 3) and the opinion by the Court of Appeals (Court of Appeals slip opinion, Appendix, Tab 2).

Law and Analysis.

A. Standard of review.

This Court's standard of review of a trial court's ruling on a motion to suppress is a two-step process. This Court first considers the trial court's findings of fact "conclusive" if the findings are "supported by substantial evidence." *King v. Commonwealth*, 374 S.W.3d 281, 286 (Ky. 2012), *quoting* Rules of Criminal Procedure ("RCr") 9.78. Second, the court conducts "a *de novo* review of the trial court's application of law to those facts to determine whether the decision is correct as a matter of law." *King*, 374 S.W.3d at 286, *quoting Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006).

B. The Court of Appeals overlooked a conclusive and material fact supported by substantial evidence.

In the case below, the Court of Appeals acknowledged that there was "substantial evidence to support the trial court's findings of fact." (Slip Opinion at 6). But when the Court of Appeals held that "Kavanaugh was reaching into his coat," it improperly disturbed the trial court's finding that Mr. Kavanaugh had his

hands in his pockets (Slip Opinion at 7). Later, the Court of Appeals again materially modified the trial court's finding and found that Mr. Kavanaugh "was digging in his pockets." (Slip Opinion at 8).

The Court of Appeals overlooked the trial court's finding that Mr. Kavanaugh had his hands in his pockets. (VR No. 7: 12/14/10; 15:25:28). This fact was supported by Mr. Kavanaugh's testimony that he did not shuffle his hands and was only trying to keep his hands warm. (VR No. 7: 12/14/10; 15:01:32).

This overlooked material fact supported Mr. Kavanaugh's suppression motion, that he kept his hands in his pocket to keep warm. More importantly, the Court of Appeals failed to follow its own rule that if factual findings were supported by substantial evidence, they are "conclusive" and not to be disturbed. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002).

The Court of Appeals disturbed the trial court's conclusive finding and then twice used that disturbed finding that Mr. Kavanaugh was reaching into his coat or digging in his pockets as improper justification for a *Terry* frisk. First, the Court of Appeals used the "fact" that Kavanaugh was reaching into his coat as part of Officer Rice's reasonable, articulable suspicion that criminal activity was afoot. (Slip Opinion at 7). Second, the Court of Appeals used the "fact" that Kavanaugh "was digging in his pockets" as part of "Officer Rice's reasonable suspicion that Kavanaugh had a weapon in his coat." (Slip Opinion at 8).

C. The Court of Appeals failed to conduct a proper *de novo* review when it overlooked the trial court's use of wrong law on whether a person is required to provide identification to police.

The Court of Appeals concluded that not looking at Officer Rice, digging in his pockets, and refusing to give his name, gave Officer Rice sufficient reasonable suspicion that Mr. Kavanaugh had a weapon in his coat. This is not the rule of law under *Terry*. As an initial matter, refusing to give one's name is of no import. *Berkemer v. McCarty*, 468 U. S. 420, 439 (1984) ("officer may ask the [Terry] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond."). Second, as argued *supra*, the Court of Appeals overlooked at material fact found by the trial court, that Mr. Kavanaugh had his hands in his pocket to keep warm - not digging in his pockets.

Compounding the error of ignoring a conclusive and material fact, the Court of Appeals did not conduct a *de novo* review as required under RCr 9.78 when it permitted the trial court to use non-existent law. The trial court believed there was a 2004 case from this Court that held Appellant had an obligation to provide identification to Officer Rice. The trial court never cited to this case. Appellant was unable to find that case. And the Court of Appeals did not cite to, and presumably could not find, this case.

In contrast, Appellant's trial counsel pointed out the *McCarty* case from the U.S. Supreme Court which held that a person was not obligated to provide identification. The trial court ignored *McCarty's* holding, then used the "law" that Mr. Kavanaugh's failure to provide his identification as part of its rationale that Officer Rice had a right to conduct a *Terry* frisk. Similarly, the Court of Appeals failed to conduct a *de novo* review of the trial court's use of incorrect law. The

Court of Appeals ignored *McCarty*, then used Mr. Kavanaugh's refusal to give his name as part of the justification for a *Terry* stop and frisk. Slip Opinion at 8.

The Court of Appeals disturbed a material fact that was supported by substantial evidence. It then used the disturbed fact as part of the rationale to permit a *Terry* stop and frisk. Lastly, the court erred when it permitted the trial court to cite to a non-existent case law, ignoring binding U.S. Supreme Court case law in the process.

D. The Court of Appeals engaged in improper hindsight analysis.

The Court of Appeals also ignored binding precedent from this Court. A reviewing court must examine the 'principal components,' or events which occurred leading up to the search, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion." *Jones*, 217 S.W.3d at 197 n. 18 (Ky. 2006) (*quoting Ornelas v. United States*, 517 U.S. 690, 696 (1996)); *see also Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008) (additional factors that did not become known until after the seizure cannot be factors articulated to justify the reasonableness of the seizure).

In this case, the Court of Appeals used Officer Rice's suspicion that Mr. Kavanaugh's recorder was a weapon as proper justification for a *Terry* frisk, even though Officer Rice had already asked Mr. Kavanaugh to step out of the car. For a proper *Terry* frisk, the reasonable suspicion must have existed when Officer Rice asked Mr. Kavanaugh to step out of the car, not after. Nonetheless, even if Officer

Rice was justified in a *Terry* frisk, he exceeded the scope of the frisk by conducting an illegal warrantless search of Mr. Kavanaugh's wallet.

II.

Kentucky law does not require a person to provide identification when requested by police, nor does it permit a warrantless search of a wallet if the person does not provide identification.

Preservation.

This issue is preserved by Mr. Kavanaugh's motion to suppress (TR 28-31, Appendix Tab, 6), his conditional plea (TR 40-42, Appendix, Tab 7), the trial court's overruling of the motion to suppress, (TR 38, Appendix, Tab 5), the final judgment (TR 66-68, Appendix, Tab 4), and the opinion of the Court of Appeals (Appendix, Tab 2). If there is any portion of this issue unpreserved, Appellant requests review under RCr 10.26.

Law and Analysis.

A. Mr. Kavanaugh was seized when he was informed he was part of an investigative stop.

The United States Supreme Court has held that a person is seized for Fourth Amendment purposes only when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

In this case, Officer Rice pulled up behind Mr. Kavanaugh vehicle, turned on his rear lights, directed his spot light towards the rear view mirror and the inside of the car, and informed Mr. Kavanaugh that he was conducting an investigatory stop. (VR No. 7: 12/14/10; 14:28:33). An average citizen, when

informed that he was being investigated under suspicion of criminal activity, would not feel free to leave. Mr. Kavanaugh was seized for Fourth Amendment purposes at this point.

B. In Kentucky, a person seized under *Terry* is not required to give identification.

A person detained can be questioned but is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). Years later, writing for the majority in *Florida v. Royer*, 460 U.S. 491, 497-98 (1983), Justice White stated, "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."

Similarly, the Court wrote that an "officer may ask the [Terry] detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Berkemer v. McCarty*, 468 U. S. 420, 439 (1984); *see also Kolender v. Lawson*, 461 U. S. 352, 365 (1983) (Brennan, J., concurring) (*Terry* suspect "must be free to ... decline to answer the questions put to him").

However, some states have statutes that do require a person to provide identification. In *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 187 (2004), Nevada required a person to identify oneself to a police officer. ("the source of the legal obligation [to identify oneself] arises from Nevada state law."). Accordingly, in *Hiibel*, the Court held, "[i]n other States

[without a stop and identify law], a suspect may decline to identify himself without penalty."

While *Hiibel* lists 21 states[1] with "stop and identify" laws, Kentucky is not on the list. *Hiibel*, 542 U.S. at 182. Thus, in Kentucky, "a suspect may decline to identify himself without penalty" because Kentucky does not have a state law requiring a person to give a name to a police officer. In contrast, Indiana[2], for example, explicitly requires an obligation under penalty of law to provide identifying information when requested by a police officer.

Kentucky does prohibit a person from giving a peace officer a false name or address[3]; however, that statute, unlike the states from the "stop and identify" states, stops short of requiring a person to provide a name or address to a police officer.

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[1] 542 U.S. at 182 ("NRS § 171.123(3) is an enactment sometimes referred to as a "stop and identify" statute. See Ala. Code § 15-5-30 (West 2003); Ark. Code Ann. § 5-71-213(a)(1) (2004); Colo. Rev. Stat. § 16-3-103(1) (2003); Del. Code Ann., Tit. 11, §§ 1902(a), 1321(6) (2003); Fla. Stat. § 856.021(2) (2003); Ga. Code Ann. § 16-11-36(b) (2003); Ill. Comp. Stat., ch. 725, § 5/107-14 (2004); Kan. Stat. Ann. § 22-2402(1) (2003); La. Code Crim. Proc. Ann., Art. 215.1(A) (West 2004); Mo. Rev. Stat. § 84.710(2) (2003); Mont. Code Ann. § 46-5-401(2)(a) (2003); Neb. Rev. Stat. § 29-829 (2003); N. H. Rev. Stat. Ann. §§ 594:2 and 644:6 (Lexis 2003); N. M. Stat. Ann. § 30-22-3 (2004); N.Y. Crim. Proc. Law § 140.50(1) (West 2004); N. D. Cent. Code § 29-29-21 (2003); R. I. Gen. Laws § 12-7-1 (2003); Utah Code Ann. § 77-7-15 (2003); Vt. Stat. Ann., Tit. 24, § 1983 (Supp. 2003); Wis. Stat. § 968.24 (2003).") (citations omitted).

[2] Indiana Code 34-28-5-3.5 states as follows:

Refusal to identify self

Sec. 3.5. A person who knowingly or intentionally refuses to provide either the person's:

(1) name, address, and date of birth; or

(2) driver's license, if in the person's possession;

to a law enforcement officer who has stopped the person for an infraction or ordinance violation commits a Class C misdemeanor.

[3] KRS 523.110 states:

Giving peace officer a false name or address

(1) A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.

(2) Giving a peace officer a false name or address is a Class B Misdemeanor

In this case, Officer Rice and the trial court were under the mistaken impression that Mr. Kavanaugh had to provide identification when asked – that Kentucky was a "stop and identify" state. And the failure to provide identification was part of the totality of circumstances that gave rise to the *Terry* frisk. Further, Officer Rice erroneously believed he had the right to require Appellant to provide identification. The trial court believed there was an opinion from this Court requiring a Mr. Kavanaugh to provide identification. The trial court then based its finding that a *Terry* stop and frisk was justified, at least in part to Mr. Kavanaugh's failure to provide identification. It is reasonable to assume that the trial court approved of the warrantless search of Mr. Kavanaugh's wallet for identification purposes. In turn, the Court of Appeals failed to address this issue - that Mr. Kavanaugh had to provide identification and the warrantless wallet search - believing the issue to be unpreserved.

This issue of the illegal wallet search was preserved when defense counsel argued Officer Rice exceeded the *Terry* frisk. Further, in the defense motion to suppress, counsel argued there was an improper warrantless search and a finding of contraband which should have been suppressed as the fruit of the poisonous tree under *Wong Sun v. U.S.*, 371 U.S. 471 (1963). While counsel did not specifically mention the wallet search as part of the acts that exceeded the *Terry* frisk, the trial court was on notice that the search exceeded *Terry*. And the trial court was given the *McCarty* holding that a detainee did not have to respond to any questioning from police.

Unfortunately, the trial court based its ruling on a non-existent standard that when an officer asked for identification, a person was obligated to provide

identification. The trial court addressed the illegal wallet search issue by concluding it was permissible based on the improper "obligated to provide identification" standard. Thus, the question was "fairly brought to the trial court's attention." *Lanham v. Commonwealth*, 171 S.W.3d 14, 21 (Ky. 2005) (internal citations omitted).

In *Buster v. Commonwealth*, 364 S.W.3d 157, 161 (Ky. 2012), this Court discussed appellate review regarding motion to suppress cases, and held that the issue was preserved by the argument presented to the trial court and included in the conditional guilty plea. The Kentucky Supreme Court concluded that "[t]he argument presented by Appellant on appeal is not an attempt to feed the Court a 'new can of worms....'" *Id.* at 163. This Court explained its rationale, stating:

> Appellant's argument on appeal is simply a more focused and specific version of the argument she presented to the trial court. It is not uncommon for litigants to refine their claims when they get to the appeals stage to present clearer and better supported arguments.

In this case, in the suppression hearing and in the motion to suppress, the defense argued this was an improper warrantless search. Just as in *Buster*, Mr. Kavanaugh's argument on appeal to the Court of Appeals was simply a more focused and specific version of the argument he presented to the trial court and preserved by his conditional guilty plea. His appellate brief was merely a refinement of his claims to present clearer and better supported arguments before the Court of Appeals. The conditional guilty plea properly preserved this issue. The record and briefs were sufficient for the Court of Appeals to make a ruling. The Court of Appeals should have ruled on this issue.

If the Court of Appeals had reviewed the issue, it would have found that a warrantless search of Mr. Kavanaugh's wallet under the guise of a *Terry* frisk far exceeded the scope of a quick patdown for weapons.

In *Terry*, the U.S. Supreme Court held that an officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 392 U.S. at 30.

In this case, Officer Rice exceeded the scope of a *Terry* frisk when he removed Mr. Kavanaugh's wallet, not to search for weapons, but to check for Mr. Kavanaugh's identification. (VR No. 7: 12/14/10; 14:25:30). Apparently, Officer Rice believed that he had the authority to determine Mr. Kavanaugh's identification and he used that supposed authority to look through Mr. Kavanaugh's wallet. The trial court believed it to be proper as well even though U.S. Supreme Court cases disagree. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) ("stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity" is not permitted by the Fourth Amendment. "When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."); *see also Commonwealth v. Sanders*, 332 S.W.3d 739, 740-41 (Ky. App. 2011) (quoting *Brown*, supra).

Further, "[i]f the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

The fact that Officer Rice checked Mr. Kavanaugh's wallet belies the officer's claims that he was afraid that Mr. Kavanaugh was armed and dangerous. Why would Officer Rice interrupt his *Terry* frisk for weapons to go through Mr. Kavanaugh's wallet? (VR No. 7: 12/14/10; 14:48:38). The trial court believed this was merely an issue of providing requested information to the police officer – all Mr. Kavanaugh had to do was give Officer Rice his name, his address, or show him some identification. (VR No. 7: 12/14/10; 15:28:46).

Even if a *Terry* frisk was permissible, Officer Rice exceeded the scope by removing and searching Mr. Kavanaugh's wallet. The fruits from this illegal warrantless search should have been suppressed. The Court of Appeals erred when it decided not to review this issue for lack of preservation.

If this Court believes that the issue was not raised or adequately addressed in the trial court, a conviction based on an incorrect application of the law is *per se* palpable. A warrantless search of the wallet violates the Fourth Amendment of the U.S. Constitution, Section 10 of the Kentucky Constitution, and the search and seizure law established in *Terry v. Ohio* and its progeny. Accordingly, Mr. Kavanaugh requests palpable error review under RCr 10.26 if this Court deems the illegal wallet search to be unpreserved.

CONCLUSION

Citizens of Kentucky are not required to give their identifications to police officers. Police officers do not have the right to search through a citizen's wallet if the citizen refuses to provide identification to police. The trial court erred when it believed a search of Mr. Kavanaugh's wallet was justified when Officer Rice

wanted to verify Mr. Kavanaugh's identification. The Court of Appeals erred when it endorsed Officer Rice's behavior, disturbed a conclusive, material fact, and refused to address the illegal wallet search issue. For all the above reasons, Mr. Kavanaugh requests relief.

This Court must remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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APPENDIX

Tab Number	Item Description	Record Location
1	Court of Appeals order denying petition for rehearing	
2	Court of Appeals slip opinion	
3	Movant's motion for discretionary review	
4	Final Judgment	TR 66-68
5	Order Overruling Motion to Suppress	TR 38
6	Defense Motion to Suppress	TR 28-31
7	Conditional plea	TR 40-42