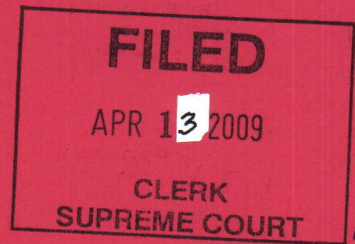


**Commonwealth of Kentucky  
Supreme Court**

CASE NO. 2008-SC-894



**COMMONWEALTH OF KENTUCKY**

**APPELLANT**

v.

On Discretionary Review from  
Court of Appeals No. 2007-CA-2518  
Fayette Circuit Court File No. 2007-CR-242

**NABRYAN MARSHALL**

**APPELLEE**

---

**Brief for Commonwealth**

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Submitted by,

**JACK CONWAY**

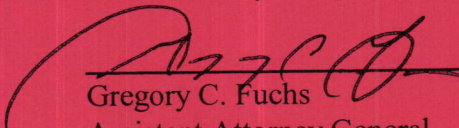
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed, postage pre-paid, this 13th day of April, 2009, to the Hon. Kimberly Bunnell, Judge, Fayette Circuit Court, 521 Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington, Ky. 40507; Sent via state delivered messenger mail to: Hon. Linda Roberts Horsman, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, and via electronic mail to: Hon. Ray Larson, Commonwealth's Attorney, Suite 300, 116 North Upper Street, Lexington, Ky. 40507. I further certify that the record on appeal has been returned to the Clerk of this Court on this 13th day of April, 2009.

  
Gregory C. Fuchs

Assistant Attorney General

## **INTRODUCTION**

This matter is before the court upon a grant of the Commonwealth's motion for discretionary review of the Court of Appeals to be published opinion vacating the trial court's denial of appellee's motion to suppress the crack cocaine seized incident to his arrest.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Commonwealth requests oral argument as the Court of Appeals opinion improperly equates judging the reasonableness of this search based upon regulations for a strip search at the sallyport of a detention center.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

**INTRODUCTION** ..... i

**STATEMENT REGARDING ORAL ARGUMENT** ..... ii

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES** ..... iii

**COUNTERSTATEMENT OF THE CASE** ..... 1

U.S. v. Robinson,  
414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) ..... 3

Robinson, 414 U.S., at 235. .... 4

**ARGUMENT** ..... 5

**I. THE COURT OF APPEALS OPINION ERRONEOUSLY HELD THAT THE ORDER OF THE FAYETTE CIRCUIT COURT DENYING THE MOTION TO SUPPRESS MUST BE VACATED EVEN THOUGH THE CIRCUIT COURT RULING WAS MADE BASED UPON TESTIMONY THAT THE SEIZURE, BASED UPON PLAIN FEEL, WAS MADE WITHOUT MANIPULATION FOR AN ITEM WHICH THE OFFICER IMMEDIATELY BELIEVED TO BE CRACK COCAINE.** ..... 5

Minnesota v. Dickerson,  
508 U.S. 366, 113 S.T. 2130, 124 L.Ed.2d 334 (1993) ..... 5

Lafollette v. Commonwealth,  
915 S.W.2d 747, 749 ( Ky. 1996) ..... 6

United States v. Blakeney,  
942 F.2d 1001 (6th Cir.1991) ..... 6

RCr 9.78 ..... 6

Canler v. Commonwealth,  
870 S.W.2d 219 (Ky. 1994) ..... 6

Ornelas v. United States,  
517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) ..... 6

<u>State v. Stone,</u> 634 S.E.2d 244 (N.C. Ct. App. 2006) .....	8
<u>Williams v. Commonwealth,</u> 147 S.W.3d 1 (Ky. 2004) .....	8
<u>Hardy v. Commonwealth,</u> 149 S.W.3d 433 (Ky. App. 2004) .....	9
<u>U.S. v. Robinson,</u> 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) .....	9
<u>Chimel v. California,</u> 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) .....	10
<u>Chimel,</u> 395 U.S., at 763 .....	10
<u>Collins v. Commonwealth,</u> 574 S.W.2d 296 (Ky. 1978) .....	10
<u>Commonwealth v. Wood,</u> 14 S.W.3d 557 (Ky. App. 1999) .....	11
<u>Terry v. Ohio,</u> 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) .....	11
<u>U.S. v. Walker,</u> 181 F.3d 774 (6 <sup>th</sup> Cir. 1999) .....	11
<u>Commonwealth v. Whitmore,</u> 92 S.W.3d 76 (Ky. 2003) .....	12
<b>II. THE COURT OF APPEALS OPINION ERRONEOUSLY HELD THAT THE SEARCH IN THIS CASE WAS UNREASONABLE UNDER THE CIRCUMSTANCES. ....</b>	<b>13</b>
<u>Bell v. Wolfish,</u> 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) .....	13, 14
<u>U.S. v. Lilly,</u> 576 F.2d 1240 (5 <sup>th</sup> Cir. 1978) .....	14

Rochin v. California,  
342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) ..... 14

McGee v. State,  
105 S.W.3d 609 (Tx. 2003) ..... 14

**CONCLUSION** ..... 16

## COUNTERSTATEMENT OF THE CASE

Appellee was indicted in Fayette Circuit Court for trafficking in a controlled substance in the first degree and tampering with physical evidence. (TR 18-19). Upon appellee's motion, the case was set for a suppression hearing on May 17, 2007. (TR 37; 38). On that date, the court heard only testimony from Officer Robert Schwartz, the arresting officer.

Officer Schwartz testified that on January 2, 2007, he observed appellee in the course of routine patrol and believing that he had an outstanding warrant (for an arrest the officer had previously effected upon appellee) he followed him to a convenience store and called for back up. (CD 5/17/07 9:49:48). After the arrival of two other officers, they went into store and were informed by the clerk that appellee had fled the scene. (CD 5/17/07 9:51:00).

The officer next encountered appellee at a nearby apartment when a woman exiting the apartment reported to the officers screaming and hollering that appellee was inside and involved in a fracas. (CD 5/17/07 9:51:59). Appellee was found in a bedroom in the rear of the apartment with both hands placed inside his crotch. (CD 5/17/07 9:53:10).

Appellee was placed in handcuffs because he was known to carry a firearm and subjected to a Terry frisk at which time the officer felt a golf ball size object which he recognized as crack cocaine at appellee's crotch. (CD 5/17/07 9:54:20 et seq.; 10:04:06). The officer had initially testified that what he felt based upon experience was "possibly" crack cocaine. (CD 5/17/07 9:54:20 et seq.). The officer, however, clarified that conditional language later stating that he knew the substance actually to be crack cocaine

based upon experience. (CD 5/17/07 10:04:06). The officer informed appellee that they were going to visually inspect the area and pulling down appellee's boxer shorts he observed a plastic baggy of hard rock like substance in the genital area. (CD 5/17/07 9:55:27). Appellee took the crack cocaine in his hand and refused to release the crack cocaine until the officers informed him that there were going to utilize a taser. (CD 5/17/07 9:56:15).

The officers only did a visual inspection and did not touch appellee's genital area. (CD 5/17/07 10:01:50). Appellee was facing the wall and the officers were behind him when they pulled down his boxers to expose his buttocks and observed the baggie hanging through his legs. (CD 5/17/07 10:06:25) The boxers though were not pulled down as far from the front. Id.

Only Officer Eaton was in the room along with Officer Schwartz and appellee and Officer Schwartz did not believe anyone else was in line of sight. (CD 5/17/07 10:09:10). The court denied the motion finding the search not overly intrusive. (TR 42).

Appellee entered a conditional guilty plea on October 17, 2007. (CD 10/15/07 3:29:06). At that plea, appellee testified that he had a high school diploma but indicated that he had been previously diagnosed as having a bipolar disorder, post-traumatic stress disorder and obsessive-compulsive disorder and had previously received counseling and medication for the disorders. (CD 10/15/07 3:29:50). The court though made further inquiry of the appellee and appellee stated that he was not then being

affected thereby even though he was not then taking medicine and that he otherwise understood the nature of the proceedings. (CD 10/15/07 3:31:00).

The court also made a direct inquiry to counsel whether he had any doubt about the appellee's ability to understand the proceedings and counsel responded that he had no doubt and that appellant was very bright and articulate and that they had very meaningful conversations on the charges. (CD 10/15/07 3:37:25). The court accepted the plea as knowingly, intelligently and voluntarily entered. (CD 10/15/07 3:38:24).

An appeal followed entry of judgment in accord with the plea agreement. On appeal, Marshall in his brief at page seven argued to the Court of Appeals that:

“...the arrest of Mr. Marshall for the unserved warrant was proper. The officer was certainly entitled to perform a cursory weapons inspection and a pat down of Marshall to look for any readily identifiable and easily accessible contraband. Chimel, supra, 395 U.S. T 762-763. The officer had a right to handcuff Mr. Marshall and place him in the police cruiser. What the officer did not have a right to do, under the totality of the circumstances, was to strip Mr. Marshall's pants and boxer shorts down to his knees when the object he thought he felt was of no danger to his person: Mr. Marshall was not going to kill either officer with a rock of crack cocaine.”

Because appellee conceded that he was effectively under arrest, the Commonwealth responded on page 4 and 5 of its brief:

...The right for police officers to conduct a search incident to arrest of an individual is well recognized as an exception to the warrant requirement. See U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973):

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth

Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found.

Robinson, 414 U.S., at 235.

The officer, in fact, was originally going to arrest appellee for the outstanding warrant. (CD 5/17/07 10:12:00). The warrant in fact was still unexecuted but was otherwise served upon appellee at the time of his arrest. (CD 5/17/07 9:49:14).

The Court of Appeals first noted that it agreed with the parties that the *Terry* pat-down itself was justified but held:

“We are persuaded that the police officers exceeded the bounds of propriety and reasonableness in pulling down Marshall’s pants and underwear, leaving him exposed”.

And concluded:

Forcefully disrobing an *unarrested* man in handcuffs in an apartment without even closing the door falls far short of the standard “in a dignified manner.” We hold that the search of Marshall exceeded the legitimate scope of a *Terry* frisk and that it was, therefore, unreasonable. (Emphasis added).

The court pertinent thereto vacated and remanded the circuit court judgment.

The Commonwealth’s motion for discretionary review thereof was granted on two issues:

Whether a veteran officer who has been assigned to patrol for the past year and a half in a sector known for hand to hand narcotics trafficking may seize from the

crotch of a subject based upon plain feel (in the course of a lawful Terry frisk) a golf ball size object that he knows based upon his experience to be crack cocaine (and also knows based upon experience to not be a testicle).

And whether a male officer may partially drop the pants and underwear of a male subject who is facing a wall in a room with only another male officer present to seize contraband that he knows to be cocaine based upon plain feel prior to arresting him on an outstanding warrant and taking him into custody given the nature of the contraband and exigent circumstances.

## **ARGUMENT**

### **I.**

**THE COURT OF APPEALS OPINION  
ERRONEOUSLY HELD THAT THE ORDER OF  
THE FAYETTE CIRCUIT COURT DENYING THE  
MOTION TO SUPPRESS MUST BE VACATED  
EVEN THOUGH THE CIRCUIT COURT RULING  
WAS MADE BASED UPON TESTIMONY THAT  
THE SEIZURE, BASED UPON PLAIN FEEL, WAS  
MADE WITHOUT MANIPULATION FOR AN ITEM  
WHICH THE OFFICER IMMEDIATELY BELIEVED  
TO BE CRACK COCAINE.**

The Commonwealth first submits that the Court of Appeals opinion ignored the testimony at the suppression hearing and the conclusions of the circuit court relative thereto in ruling that search of Marshall was unreasonable. The Court of Appeals opinion correctly notes that in Minnesota v. Dickerson, 508 U.S. 366, 113 S.T. 2130, 124 L.Ed.2d 334 (1993) the United States Supreme Court held that under a plain feel doctrine any unknown object must be immediately identifiable as contraband in order to be

properly seized. The court, though, noted in vacating that Officer Schwartz described the object as only “possibly” crack cocaine and the appellate court otherwise concluded (contrary to any testimony heard at the suppression hearing) that the item “could have been numerous items other than contraband.”

A suppression hearing requires the moving party to carry the burden of establishing the evidence was secured by an unlawful search. Lafollette v. Commonwealth, 915 S.W.2d 747, 749 ( Ky. 1996) citing United States v. Blakeney, 942 F.2d 1001 (6th Cir.1991). And when a pre-trial suppression hearing is conducted to determine the admissibility of evidence obtained as a result of a search, the trial court’s findings are conclusive if supported by substantial evidence. RCr 9.78; Canler v. Commonwealth, 870 S.W.2d 219 (Ky. 1994). Moreover, a reviewing court reviews findings of historical fact only for clear error and give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

Officer Schwartz did initially state that he felt at appellee’s crotch a golf ball size object which based upon experience he believed to be “possibly” crack cocaine. (CD 5/17/07 9:54:20 et seq.). The officer though unequivocally clarified that conditional language later stating that he knew the substance actually to be crack cocaine based upon experience. (CD 5/17/07 10:04:06). He made that clarification when questioned about what type of weapon it could have been or if it could have been a testicle. (See CD 5/17/07 10:04:06-10:05:15). That clarification though was ignored by the Court of Appeals even though it was the testimony that the officer immediately believed this item

to be cocaine upon which the trial court based its conclusion that the search was otherwise legal.

The circuit court denied the motion at the hearing finding the search coming within the plain feel exception. (CD 5/17/07 10:31:00). In its written order, the trial court noted that the officer testified at that hearing that he immediately believed that item to be contraband, that there was no testimony of manipulation and concluded that based upon the officer's testimony that the search was then legal. (TR 41-42).

Ignoring the findings of the circuit court, the Court of Appeals' opinion at p. 6 improperly concluded this object "could have been numerous items other than contraband". There though was no testimony or other evidence at the suppression hearing that this item "could have been numerous items other than contraband". Nor was there evidence that Officer Schwartz detected "an unknown object" and that it was not immediately apparent by touch alone that the object was contraband as also concluded by the Court of Appeals at p. 9. To the contrary, the officer testified that he did not squeeze or manipulate the item but knew by touch alone that it was crack cocaine. ( See CD 5/17/07 10:05:08).

Unfortunately it appears the Court of Appeals in its review lost sight of the actual record on appeal. It also notes on page eight that:

The trial court made a finding that the search did not cause Marshall embarrassment – contrary to Marshall's direct assertion that he was "acutely embarrassed.

The trial court did not make any such finding in the record and there was no direct assertion in the hearing that appellee was “acutely embarrassed”. The finding by the trial court was “[t]here was no evidence that the officers performed the search in a manner to embarrass the Defendant.” (TR 41-42). And the so-called direct assertion that appellee was acutely embarrassed by the officer’s actions comes from the argument in Marshall’s brief to that court on page 3 without any citation to the record. The circuit court’s findings and conclusions though are supported by the evidence in that there was not evidence the search was conducted to embarrass. This court should accordingly reverse the opinion and affirm the judgment.

The latter is especially true insofar as the Court of Appeals opinion erroneously cites to the North Carolina Court of Appeals case of State v. Stone, 634 S.E.2d 244 (N.C. Ct. App. 2006) as holding that looking down a suspect’s pants exceeded the scope of a Terry frisk and erroneously distinguishes this court’s case of Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004) as occurring in a closed bathroom.

The holding in State v. Stone did not have anything to do with a Terry frisk. While the scope of a Terry frisk is discussed in that case, the item seized was found in the course of a second consensual search of the subject’s person after a thorough first search failed to disclose any contraband. The North Carolina court held that given the first search that looking down Stone’s pants with a flashlight exceeded the scope of consent that a reasonable person would have believed to have been given for that second search.

The facts in Williams v. Commonwealth are otherwise not reasonably distinguishable from this case because Williams was purportedly searched in a "closed" bathroom. The dissent in Williams notes that, the door to the bathroom, in fact, was open so that a third officer could watch.

Nor is it pertinent that the probable cause in Williams providing the exception to the warrant requirement was the result of a corroborated tip that the suspect had drugs concealed in his buttocks. There was an equally valid exception to the rule herein in that the officer identified the cocaine to be seized by plain feel.

While the Court of Appeals rejected the argument that the search was proper as incident to an arrest because appellee was not yet arrested the fact that he had an outstanding arrest warrant made him subject to arrest and it does not matter in that case which comes first the arrest or the search. See Hardy v. Commonwealth, 149 S.W.3d 433 (Ky. App. 2004).

In Williams, this Court also noted that an officer may search prior to an arrest if there is probable cause to arrest and therefore if the officers had cause to arrest appellee on warrants there clearly were grounds to seize the cocaine from his person prior to taking him to jail.

The right for police officers to conduct a search incident to arrest of an individual is well recognized as an exception to the warrant requirement. See U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is

necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found.

Robinson, 414 U.S., at 235. Similarly, in Chimel v. California, 395 U.S. 752, 89 S.Ct.

2034, 23 L.Ed.2d 685 (1969), in defining “search incident to arrest”, the U.S. Supreme Court stated:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction . . . there is ample justification, therefore, for a search of the arrestee’s person in the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. Chimel, 395 U.S., at 763.

The Kentucky courts have adopted the Robinson-Chimel analysis of search incident to arrest and have upheld such searches in a variety of situations.

The Court of Appeals’s opinion is wrong in concluding that it is somehow significant that appellee was in handcuffs and because of the handcuffs, Marshall could not have destroyed the evidence. See Collins v. Commonwealth, 574 S.W.2d 296 (Ky. 1978) (police officer need not weigh arrestee’s probability of success in obtaining a weapon or destructible evidence before conducting a search incident to the arrest). The

search is not limited by what can or cannot be destroyed. See also Commonwealth v. Wood, 14 S.W.3d 557 (Ky. App. 1999) (search incident to arrest for OSL/DUI justified warrantless search of vehicle's glove compartment).

Ordinarily, the first step in the analysis of the situation in the case at bar requires a determination whether the appellee was subject to arrest. Appellee, however, did not contest the authority for the search but argued only that the "strip search" was unreasonably intrusive. (See CD 5/17/07 9:44:30)

However, once the appellee was located in the back bedroom of the apartment on Dalton Court, he was seen with his hands down his crotch area and a pat-down search was conducted under the authority of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) as the officer believed appellee to carry a weapon. In the course of that search, the officer felt at Marshall's crotch the golf ball size object which he recognized as crack cocaine. (See CD 5/17/07 9:54:20 et seq.).

The importance of experience and observation in searches and seizures was discussed in the case of U.S. v. Walker, 181 F.3d 774 (6<sup>th</sup> Cir. 1999). In Walker, as the result of a Terry-type search, an officer felt a bulge under Walker's clothing that led the officer to suspect the presence of controlled substances. A second officer then pulled Walker's pants down and recovered a plastic bag containing approximately 40 rocks of crack cocaine hidden between Walker's buttocks. In upholding Walker's conviction, the United States Sixth Circuit Court of Appeals noted the following:

Though [defendant] Walker asserts that the crack cocaine found hidden in his buttocks should have been suppressed because the police officers exceeded their right to pat down

the outer layers of his clothing to search for weapons, Walker's assertion must be rejected because the seizure of the plastic bag from Walker's buttocks was justified by Officer Green's experience as a narcotics officer and his immediate recognition that the plastic bag hidden on Walker's body contained crack cocaine. Indeed, at the time of the search, Officer Green had six years of experience as a narcotics officer, and he had come across illegal substances in plastic bags on many occasions. Accordingly, when Officer Green felt the bulge underneath Walker's pants during his search of Walker's groin and buttocks, Officer Green immediately identified the purpose of the plastic bag that he felt. Walker, 181 F.3d, at 779.

Applying the Walker analysis to the situation in the case at bar, Officer Schwartz had the benefit of his experience and observations in dealing with street level narcotics, and the circumstances justified the officer's actions as he recognized the hard rock like substance to be cocaine.

The circumstances in this case are very similar to the circumstances in the case of Commonwealth v. Whitmore, 92 S.W.3d 76 (Ky. 2003) wherein the court upheld a plain feel seizure of cocaine. The circumstances that are different in this case are that while the officer was pursuing Marshall on outstanding warrants the officer had information that he was trafficking in narcotics, observed that had both his hands shoved down his pants when the officer first saw him and the person with whom he was arguing was yelling "it's in his crotch." A hard, round object under those circumstances could not have been numerous items other than contraband when the only evidence before the court was that it was known to the officer to be crack cocaine. The circuit court then should have been affirmed.

## II.

### **THE COURT OF APPEALS OPINION ERRONEOUSLY HELD THAT THE SEARCH IN THIS CASE WAS UNREASONABLE UNDER THE CIRCUMSTANCES.**

The Court of Appeals' opinion finally held that the search exceeded the legitimate scope of a Terry frisk and that it was therefore unreasonable. The search in this case did exceed the extent of a Terry frisk. However, the fact that it exceeds a Terry frisk does not make it unreasonable as the Court of Appeals concludes. The search was clearly within at least two exceptions to the warrant requirement and possibly a third as a search incident to an arrest, a search based upon plain feel and a search under exigent circumstances as the officer testified that he did not want to give Marshall any opportunity to discard it or conceal it somewhere else. (See CD 5/17/07 10:01:20). The Commonwealth can respect the Court of Appeals' preference for more orderly strip searches. However, as evidenced by the actions of the appellee in this case in taking the contraband in hand and wrestling three officers to the ground, the police in the field are not always given the luxury of following such procedures because the objects can be taken into hand even by someone who is handcuffed and tampered with creating exigent circumstances. (See CD 5/17/07 9:55:45).

The Commonwealth submits that the search did not exceed the legitimate scope under the plain feel doctrine and was otherwise proper as incident to appellee's arrest, the search then was not unreasonable under the totality of the circumstances especially the exigent circumstances. In the case of Bell v. Wolfish, 441 U.S. 520, 99

S.Ct. 1861, 60 L.Ed.2d 447 (1979), the United States Supreme Court held that a reasonableness inquiry requires a court to balance the need for the particular search against the invasion of the personal rights that the search entailed. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Each analysis shall turn on the particular facts and circumstances of the underlying case, and no one factor is determinative. 441 U.S. 520, at 559; see also U.S. v. Lilly, 576 F.2d 1240 (5<sup>th</sup> Cir. 1978).

Applying this analysis to the case at bar, the scope of the appellee's intrusion was limited as it entailed a brief exposing of his buttocks while appellee faced the wall. This type of search does not elevate to the level of a fully body-cavity search (where there is actual intrusion into body cavities) or the pumping of the stomach as complained of in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

The justification for initiating the search was proper under the totality of the circumstances in that the only testimony was that it was in a course of a proper Terry frisk for weapons that the officer felt the hard object that based upon experience he knew to be crack cocaine.

The duration of the search was also brief, and did not expose the appellee to any undignified, humiliating, or terrifying touching or trauma. See McGee v. State, 105 S.W.3d 609 (Tx. 2003). When all of these factors are weighed to determine the reasonableness of the search, the Commonwealth submits that appellee did not make a showing that the trial court abused its discretion in finding that the search was not constitutionally violative.

While it is true that the courts must be continually vigilant in protecting the rights of citizens against unreasonable searches and seizures as provided under the Fourth Amendment, the societal interests in controlling and punishing narcotics activity should not be curtailed by the secreting of contraband upon the person. In one sense, one can extend the necessary scope of a search by his own actions – if an officer has reasonable suspicion that contraband is held in the mouth, a situation may arise which justifies viewing the interior of the potential suspect’s mouth. Appellee’s own conduct here in shoving his hands down his crotch gave rise to a suspicion that he was concealing something in that area and that suspicion was confirmed by the officer’s experience in the course of the following frisk.

The officer in the case at bar had to make an ad hoc decision in order to secure concealable and destroyable evidence. The appellee is not otherwise entitled to relief because the officer had to remove part of clothing to secure the evidence. Robinson, supra. The search was not unreasonable under the circumstances. Id.

The latter is especially true in this case as the Court of Appeals otherwise noted from Minnesota v. Dickerson that touch is more intrusive than sight but the officer did not ever touch appellee in this case after the initial frisk (which the Court of Appeals and appellee otherwise noted was proper). (See CD 5/17/07 10:02:33). The judgment of the circuit court should have then been affirmed in full.

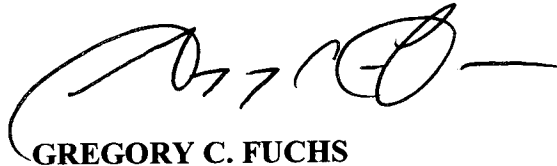
**CONCLUSION**

For all the foregoing reasons, the Commonwealth respectfully submits that the opinion of the Court of Appeals be reversed to the extent it vacated the judgment of the Fayette Circuit Court and the judgment of the Fayette Circuit Court otherwise affirmed.

Respectfully submitted,

**JACK CONWAY**

Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'G. C. Fuchs', with a horizontal line extending to the right.

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