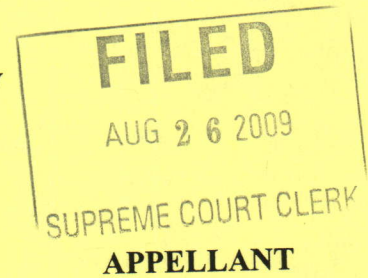


Commonwealth of Kentucky
Supreme Court
CASE NO. 2008-SC-894



COMMONWEALTH OF KENTUCKY

v.

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

NABRYAN MARSHALL

APPELLEE

Reply Brief for Commonwealth

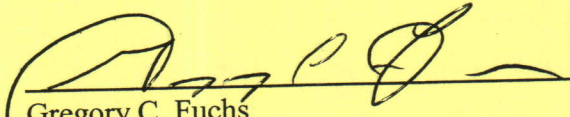
Submitted by,

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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 26th day of August, 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 was not checked out.



Gregory C. Fuchs
Assistant Attorney General

PURPOSE OF REPLY BRIEF

This reply brief will respond to the arguments made in the Brief for the Appellee, Nabryan Marshall.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF REPLY BRIEF i

COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

ARGUMENT 1

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 COCAINE. 1

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

Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.,
91 S.W.3d 575, 579 (Ky. 2002) 2

Kentucky Racing Commission v. Fuller,
481 S.W.2d 298, 308 (Ky. 1972) 2

II. THE COURT OF APPEALS OPINION ERRONEOUSLY HELD THAT THE SEARCH IN THIS CASE WAS UNREASONABLE UNDER THE CIRCUMSTANCES. 3

Bell v. Wolfish,
441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 3

Williams v. Commonwealth,
147 S.W.3d 1 (Ky. 2004) 5

CONCLUSION 6

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 COCAINE.**

The Appellee commences his argument in response noting to the court that it must be remembered what transpired at the suppression hearing and notes "Officer Schwartz testified that he did not think the object he felt in the Appellee's groin was a weapon and that he was not sure what the object he felt in Marshall's crotch was, but believed it to be "possibly" a rock of crack cocaine." (Brief for Appellee @ p. 4). The Commonwealth agrees that it must be remembered what happened at the suppression hearing but Officer Schwartz never testified at the suppression hearing that he was not sure what the object he felt was. Officer Schwartz did initially state that he believed it to be "possibly" crack cocaine. (CD 5/17/07 9:54:20 et seq.). The officer though clarified that conditional language 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)].

And based upon this evidence, 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).

The trial court's order noted that the officer testified 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).

Appellant wants to and the Court of Appeals did ignore this part of the officer's testimony and the trial court's finding thereon. And that is the problem herein, is the purpose of appellate review a second opinion or is it to review findings for error.

A reviewing court though should only review findings for clear error. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The trial court's findings are otherwise conclusive if supported by substantial evidence. RCr 9.78; Canler v. Commonwealth, 870 S.W.2d 219 (Ky. 1994).

“Substantial evidence is defined as evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons].” Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc. 91 S.W.3d 575, 579 (Ky. 2002). The test is whether the evidence taken alone or in light of all the evidence has sufficient probative value to induce conviction. Kentucky Racing Commission v. Fuller, 481 S.W.2d 298, 308 (Ky. 1972).

The circuit court's findings and conclusions though are supported by such evidence in that the officer when asked what else it could have been stated that he knew the substance actually to be crack cocaine based upon experience. (CD 5/17/07 10:04:06).

Appellant also argues that appellate review must consider “the efficacy of a statement that the nature of a round golf-sized ball could be contraband rather than,

patently apparently, an actual golf ball.” (Brief for Appellee @ p.7). And jurists must employ their life experiences as sense utilizing human beings to adequately evaluate the testimony requiring the sensations of others. However, this frisk was not done on the golf course and it is not an abandonment of one’s life experience to find it reasonable that a trained law enforcement officer can tell the difference between a golf ball and rock of cocaine.

The law also does state that the reviewing court must otherwise give due weight to inferences drawn by resident judges and local law enforcement officers. Ornelas v. United States, *supra*. This court should accordingly reverse the Court of Appeals opinion and affirm the trial court judgment.

II.

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

The Appellee argues that the Commonwealth can cite no precedent which demands a different determination than the Court of Appeals’ that the search was unreasonable. The Court of Appeals though applied a test under Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) wherein 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. The Commonwealth can respect the Court of Appeals’ preference for more orderly strip searches but will note further the caveat given by the Supreme Court in the last paragraph

of Bell v. Wolfish.

Pertinent herein, Bell v. Wolfish considered the constitutionality of body cavity searches in prisons and in its last paragraph the court noted:

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

The Commonwealth submits that the search was not unreasonable under the totality of the circumstances especially the exigent circumstances as while the Court of Appeals may believe that a person in handcuffs is not able to destroy evidence the

officer in this case had that concern and it is he that had to make the judgment call relative thereto. In fact, in the case most similar to this case in recent history to which law enforcement could have looked for guidance, this court would agree with the officer's judgment call. See Williams v. Commonwealth, 147 S.W.3d 1 (Ky. 2004).

The facts in Williams v. Commonwealth are not reasonably distinguishable from this case because Williams too was in handcuffs when he too was "strip searched" by the pulling back the waistband of his underwear to reveal his buttocks. And when the court considers the factors as argued in the Commonwealth's initial brief as to the reasonableness of the search under a Bell v. Wolfish analysis, the Commonwealth submits that Appellee cannot make a showing that the trial court abused its discretion in finding that the search did not violate the constitution as the search was not unreasonable under the circumstances. Williams.

CONCLUSION

For all the foregoing reasons as well as the reasons set forth in the argument in its initial brief, 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 large, sweeping flourish at the beginning.

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