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SUPREME COURT

COMMONWEALTH OF KENTUCKY

**SUPREME COURT
2008-SC-000894-DG**

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

**On Review From The Kentucky Court Of Appeals
Court Of Appeals No. 2007-CA-002518-MR
Fayette Circuit Case No. 07-CR-00242**

NABRYAN MARSHALL

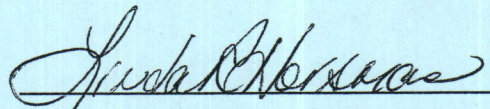
APPELLEE

BRIEF FOR APPELLEE

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The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class postage prepaid on August 11, 2009: Honorable Kimberly Nell Bunnell, Fayette Circuit Court, 120 N. Limestone, Lexington, KY 40507-1151; Hon. Daniel M. Laren, Asst. Commonwealth's Attorney, 116 N. Upper Street, Lexington, KY 40508; and by hand delivery on that same date to Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and by state messenger mail on that same date to Hon. Gregory C. Fuchs, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.



LINDA ROBERTS HORSMAN

INTRODUCTION

Appellee, Nabryan Marshall pled guilty, conditionally, to Trafficking in a Controlled Substance in the First-degree and Bail Jumping in the First-degree and was sentenced to a term of six years' imprisonment, probated for five years. He appealed the trial court's ruling on his Motion to Suppress Evidence. The Court of Appeals reversed this ruling. The Commonwealth sought the review of this Court, which was granted. Mr. Marshall now responds to the Commonwealth's Brief.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Marshall respectfully requests that this Court hear oral arguments in this matter.

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STATEMENT OF THE CASE

Lexington Police Officer Robert Schwartz was patrolling the East Sector of the city on the evening of January 2, 2007. VR, 5/17/07, 9:46:10. While Schwartz was driving near Dalton Court, he saw the Appellee, Nabryan Marshall, walking out from behind an apartment building on Augusta Drive. VR, 5/17/07, 9:46:38. He had previously had "quite a bit of prior contact with" the Appellee and recognized him immediately. VR, 5/17/07, 9:46:53. He believed that Mr. Marshall had an outstanding warrant for his arrest, so when he saw Mr. Marshall enter a convenience store, he called for backup and kept an eye on the store entrance while he waited for backup to arrive. VR, 5/17/07, 9:46:59.

After backup arrived, the officers continued to surveil the convenience store entrance, but never observed Mr. Marshall leaving the store. VR, 5/17/07, 9:50:34. The two officers went into the convenience store and were told by the clerk that Mr. Marshall had left out the back of the store. VR, 5/17/07, 9:50:42. Officer Schwartz was aware that Mr. Marshall lived in an apartment in the vicinity, so the officers decided to drive around the neighborhood, hoping to run into him. VR, 5/17/07, 9:51:00.

While walking through the nearby apartment complex, Officer Schwartz and fellow officer Kelven Eden encountered a woman running from an apartment, screaming that Mr. Marshall and another man, later identified as Charles Harris, were involved in a disagreement. VR, 5/17/07, 9:51:58. Officer Eden and another officer ran in the front door of the apartment building, while Officer Schwartz went around the back to ensure no one would escape from that direction. VR, 5/17/07, 9:52:10. Officer Schwartz encountered two women attempting to climb out of one of the windows on the back side

and ordered them back inside. VR, 5/17/07, 9:52:16. Officer Schwartz then entered the apartment building from the front entrance. VR, 5/17/07, 9:52:36.

Upon entering the apartment and walking through it to a back bedroom, Officer Schwartz saw Mr. Marshall, with his back to the officer, with both of his hands down the front of his pants. VR, 5/17/07, 9:52:39. Officer Schwartz immediately handcuffed Mr. Marshall and frisked his person for weapons. VR, 5/17/07, 9:53:11. While frisking him, Officer Schwartz felt a "hard, rock-like substance" in Mr. Marshall's crotch. VR, 5/17/07, 9:54:05. As Mr. Marshall was being frisked by the police, Mr. Harris, the person with whom Mr. Marshall had been arguing, was shouting "it's in his crotch." VR, 5/17/07, 9:54:42.

Officer Schwartz, suspecting the rock-like object he had felt in Mr. Marshall's pants was cocaine, asked him if he had any drugs on him, which Mr. Marshall denied. VR, 5/17/07, 9:54:53. Officer Schwartz told Mr. Marshall he was going to visually inspect his crotch area. VR, 5/17/07, 9:54:59. With the bedroom door open and at least two women in adjacent rooms of the apartment, Officer Schwartz then lowered Mr. Marshall's pants and boxer shorts and observed a baggie containing a white substance "hanging" from Mr. Marshall's pubic region. VR, 5/17/07, 9:55:08; 9:57:20; 10:10:13.

When Officers Schwartz and Eden saw the baggie, Mr. Marshall became resistant and forced both officers to the ground. VR, 5/17/07, 9:55:47. In the scuffle, Mr. Marshall ended up with the baggie in his hand, which he refused to release until Officer Schwartz threatened to fire his Taser at him. VR, 5/17/07, 9:55:54; 9:56:10. A subsequent search of Mr. Marshall's person revealed \$1,600 in twenty dollar bills in his left front pocket, \$240 in his right front pocket and \$39 in his back pocket. VR, 5/17/07,

9:56:27. He was arrested, both on the warrant and for trafficking in a controlled substance and tampering with physical evidence, and secured in Officer Schwartz's cruiser. VR, 5/17/07, 9:56:55; TR 13.

Trial counsel for Mr. Marshall filed a Motion to Suppress, citing the fact that the officers had strip searched him in violation of his rights pursuant to the Fourth Amendment to the United States Constitution and §10 of the Kentucky Constitution. TR 38. After the trial court overruled his motion, Mr. Marshall entered into a conditional guilty plea, reserving the right to appeal the trial court's suppression ruling. TR 115-118.

The Court of Appeals reversed the trial court's ruling on the Motion to Suppress and the Commonwealth sought this Court's review, which was granted. (Court of Appeals Opinion, in appendix at 1).

I. THE COURT OF APPEALS' OPINION CONCERNING THE VIOLATION OF MR. MARSHALL'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE WAS IN ACCORD WITH PRIOR HOLDINGS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

A. STANDARD OF REVIEW

The standard of review for an appellate court reviewing a trial court's ruling on a Motion to Suppress was articulated by this court in *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998), a case also involving discretionary review of a decision of the Court of Appeals:

As noted by the Court of Appeals, RCr 9.78 provides the procedure for conducting hearings on suppression motions, as well as the standard for appellate review of the trial court's determination. 'If supported by substantial evidence the factual findings of the trial court shall be conclusive.' RCr 9.78. When the findings of fact are supported by substantial evidence, as we conclude they are herein, the

question necessarily becomes, 'whether the rule of law as applied to the established facts is or is not violated.' *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19, 102 S.Ct. 1781, 1791, n. 19, 72 L.Ed.2d 66 (1982)).

B. Argument

The Commonwealth first complains that the Court of Appeals "ignored the testimony at the suppression hearing." (Commonwealth's Brief at 5). It must be remembered what transpired at the suppression hearing.

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 Mr. Marshall's crotch actually was, but believed it to be "possibly" a rock of crack cocaine. (VR No. 1, 5/17/07, 9:54:27). The Court of Appeals found that the *Terry* search of Mr. Marshall was proper, but that the manner in which it was conducted exceeded the permissible scope of a non-custodial pat-down. (Opinion of Court of Appeals at 6).

As the Court properly noted, the scope of a *Terry* search is necessarily limited to a pat-down for weapons, to ensure officer safety and that only items identified by "plain feel" as a weapon or contraband could properly be seized during such a search. [Opinion at 5, citing *Terry v. Ohio*, 392 U.S.1 (1968) and *Minnesota v. Dickerson*, 508 U.S. 366 (1993)]. Finding that since--according to the officer's own testimony elicited by the government--the nature of the item was not "immediately identifiable" upon plain-feel, the Court properly concluded that the officer's next actions of lowering Mr. Marshall's jeans and underpants violated his rights against unreasonable searches and seizures under both the Fourth Amendment to the United States Constitution and §10 of the Kentucky Constitution.

The Commonwealth now argues that the Court of Appeals was incorrect in determining that Officer Schwartz did not *know* the item to be crack cocaine because of his later testimony, on cross examination that based upon his experience, he knew the item was crack cocaine. However, Schwartz's own testimony on direct examination that the item was *possibly* crack cocaine supports the Court's conclusion that the facts established that the item was not "immediately identifiable" as contraband by touch alone. Officer Schwartz wrote and signed an offense report, which states, "I felt a hard rock like substance in his crotch." (TR 13). It did not state, "I felt a rock of crack cocaine in his crotch." The facts at the suppression hearing and in the record support the Court of Appeals' conclusion that the contraband was not immediately identifiable by touch alone as crack cocaine.

'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence....' Rather, a protective search-permitted without a warrant and on the basis of reasonable suspicion less than probable cause-must be strictly '**limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.**' If 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.

Commonwealth v. Crowder, 884 S.W.2d 649, 651 (Ky.1994) (emphasis added, citations omitted).

It must be remembered that Officer Schwartz said at the suppression hearing that he did not think the object he felt in the Appellee's groin was a weapon. VR No. 1, 5/17/07, 10:04:00. Further, even after an intrusive search, the police did not find a weapon on the Appellee's person. VR No. 1, 5/17/07, 10:13:38. "If 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.” *Id.*

The officer also told the trial court that he conducted the pat-down the same as he would have any other citizen, basically testifying that Mr. Harris’ exhortations (“It’s in his crotch!”) were ignored. VR No. 1, 5/17/07, 10:23:44. That testimony makes the point: if the officer simply “believed” that what he felt in the Appellee’s crotch was cocaine, he had no right to continue the search.

Once having concluded that the suspect’s pocket contained no weapon, the officer had no basis for a continued exploration of the pocket. Although the officer was entitled to put his hand on the suspect’s pocket to feel for weapons, the officer’s own testimony demonstrated that he did not immediately recognize the substance in question as cocaine, and that he recognized it only after further exploration of the suspect’s pocket. This further exploration was not authorized by *Terry* or any other exception to the warrant requirement, and the seizure of the cocaine was therefore unconstitutional.

Id. at 652.

The testimony offered by Officer Schwartz was that the object he felt was “possibly” rock cocaine. (VR No. 1, 5/17/07, 9:54:32). Thus, the officer “engaged in further exploration” when he pulled down the Appellee’s pants and boxer shorts.

The Commonwealth also takes exception to the Court’s conclusion that the officer’s description of what he felt in Mr. Marshall’s crotch, while it might “possibly” have been contraband, was just as consistent with descriptions of many other innocuous items. (Commonwealth’s Brief at 7). The Commonwealth complains that there was no testimony at the suppression hearing about what other items this might properly describe and seems to suggest that the Court of Appeals, and therefore this

Court, could not employ common sense. In *Dickerson*, the United States Supreme Court made it abundantly clear that the scope of *Terry* pat-downs was to be limited and if contraband, the feel of which made the nature of the item apparent to the officer, was felt, it could be recovered without a warrant.

Included in such an analysis must be a consideration of the reasonableness of testimony concerning whether the nature of the item was "immediately apparent." The Supreme Court even discussed the accuracy of the sense of touch as compared with the sense of sight and the concern voiced by the Minnesota Supreme Court that touch was much less reliable than sight. An acknowledgement of this concern indicates the necessity of requiring reviewing courts to 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. The Court stated, "[e]ven if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures." *Id. at 376*.

Inherent in such a charge is a requirement to consider whether the feel of such an item, through a pair of baggy jeans, without manipulation could logically be concluded to be contraband through bare touch alone. In that consideration, jurists must employ their life experiences as sense-utilizing human beings so as to adequately evaluate the testimony requiring the sensations of others.

In its opinion, the Court of Appeals cited *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989). In *Bell*, the Supreme Court held, “[i]n each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. 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.” 441 U.S. at 559. The Court of Appeals made its decision in the present case consistent with this precedent. The Court later pointed out that there was nothing to prevent the officers from arresting Mr. Marshall on the outstanding warrant and then proceed to an intrusive search to discover what the felt object was in a controlled environment, not in the middle of an apartment where other people, including two women, were present. (Opinion at 10).

The Commonwealth even attempts to quibble with the Court’s conclusion that Mr. Marshall was embarrassed by the search. This quibble, however, is not pertinent to this Court’s review, nor the Court of Appeals’ determination. No precedent requires evidence of embarrassment when one’s underpants are pulled down and one’s backside and genitals are exposed. The Commonwealth cites no cases that so require.

Officer Schwartz testified at the suppression hearing that he didn’t think anyone else could see into the bedroom, but Schwartz also testified he was unsure who else was even in the apartment, indicating he was scarcely aware of who might have been able to see into the room. VR, 5/17/07, 10:10:45; 10:10:13. Contrary to the trial court’s holding that the search was not intended to embarrass Mr. Marshall, the officer took no measures whatsoever to protect his privacy while engaging in the search. The search did embarrass Mr. Marshall.

The Commonwealth argues that the Court of Appeals misstated the facts of *Williams v. Commonwealth* by stating that the door to the bathroom where the search was conducted was closed when it was not. 147 S.W.3d 1 (2004). However, a close reading does not show that the appellant in the *Williams* case argued that the search violated his rights to privacy, as Mr. Marshall, has, but instead, argued that there was not probable cause to support the search. *Id.* at 8. Thus, whether Mr. Williams' privacy was protected by the officers during the search was not a focus of the Court. It also cannot be concluded that this Court, in deciding *Williams*, intended to communicate that officers may conduct strip searches without so much as a nod toward the privacy rights of the citizen.

The Commonwealth next suggests that because Mr. Marshall had a warrant outstanding for his arrest, any illegality that might have occurred during the search (performed pre-arrest) was cured by the fact that he could have been properly searched incident to the arrest on the outstanding warrant. (Commonwealth's Brief at 9). This is simply not true.

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. . . 'a search may be made of the person of the arrestee by virtue of the lawful arrest.' *U.S. v. Robinson*, 414 U.S. 218, 224 (1973). '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. . . .' 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.

Chimel v. California, 395 U.S. 752, 762-763 (1969).

Remembering again that the Court of Appeals determined, consistent with Officer Schwartz's testimony at the suppression hearing, that Mr. Marshall was not under arrest

at the time of the strip search. VR 1, 5/17/07, 9:53:31. However, even if the Court had concluded that the search was incident to arrest, when the police subjected Mr. Marshall to a strip search by pulling down his pants and boxer shorts, exposing his genitals, that search exceeded the acceptable scope of a lawful search incident to arrest.

In *Robinson, supra*, the police officer conducted a pat down of the defendant after arresting him. During the pat down, the officer felt an object in the left breast pocket of the defendant's coat pocket; he "couldn't tell what it was" and "couldn't actually tell the size of it." 414 U.S. at 223. The officer pulled the object—a crumpled cigarette packet—out of the defendant's coat pocket, opened the packet and found 14 capsules of heroin. In holding that the search did not exceed the parameters of a lawful search incident to arrest, the Court noted, "[w]hile thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin v. California*, 342 U.S. 165 (1952)." *Robinson*, 414 U.S. at 236.

Thus, while *Robinson* does hold a lawful search incident to an arrest can involve a search more probing than a cursory weapons inspection, it also establishes there are limits to such a search. In *U.S. v. Edwards*, 415 U.S. 800 (1974), the Court, in upholding the seizure of a defendant's clothing a day after his arrest, also held there were limits to a search incident to an arrest: "[i]n upholding this search and seizure, we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to postarrest seizures of the effects of an arrestee. . . [we] have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might 'violate the dictates of reason either because of their number or their manner

of perpetration.” Id., 415 U.S. at 808, quoting *Charles v. U.S.*, 278 F.2d 386, 389, cert. denied 364 U.S. 831 (9th Cir. 1960). *Edwards* referenced *Rochin, supra*, as well as *Schmerber v. California*, 384 U.S. 757 (1966).

In *Rochin*, police officers watched Rochin stuff two capsules in his mouth and then tried to physically extract the capsules from Rochin’s mouth to no avail. They then handcuffed him and transported him to a hospital where an officer directed a physician to pump his stomach. In the vomit were the capsules that were subsequently found to contain morphine. The Court held that the evidence should have been suppressed: “[t]his is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.” *Rochin*, 342 U.S. at 172.

In the present case, Mr. Marshall was subjected to an invasion of his privacy that was unwarranted and unnecessary. There was no compelling or exigent reason for the officers not have ensured that Mr. Marshall’s genitals would not be viewed by the other occupants of the apartment or, better yet, have conducted the search in a more appropriate arena, such as the jail.

In *Schmerber v. California, supra*, the Court held there was no Fourth Amendment violation where a defendant was arrested for driving under the influence, and a police officer directed a physician to take a blood sample from the defendant for blood-alcohol analysis. The Court noted that when analyzing compelled intrusions into the body, “the Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or

which are made in an improper manner. In other words, the questions we must decide. . . are whether the police were justified in requiring petitioner to submit [to the bodily intrusion], and whether the means and procedures employed [in the bodily intrusion] respected relevant Fourth Amendment standards of reasonableness.” *Id.*, 384 U.S. at 768.

While the *Schmerber* Court held that taking the defendant’s blood in that particular case was a reasonable search incident to an arrest, the Court was careful to emphasize that the holding was “**only on the facts of the present record**. The integrity of an individual’s person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual’s body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.” *Id.*, 384 U.S. at 772; (emphasis added).

Finally, in *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983), the Court noted that searches performed at the scene of arrest are quite different from those conducted at a police station or detention center:

[T]he scope of a stationhouse search will often vary from that made at the time of arrest. Police conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and privately—be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner’s clothing before confining him, although that step would be rare.

Professor LaFave, in *Search and Seizure: a Treatise on the Fourth Amendment*, § 5.3(c), p. 135 (3rd Ed.), states “it seems clear from the *Schmerber* case that a more demanding test must be met when the search incident to an arrest involves the taking of a blood sample or the making of some other intrusion into the body. Specifically, such a

warrantless search will be upheld only if (i) reasonable methods were used, (ii) there was probable cause that evidence would be found, and (iii) there were exigent circumstances making it impracticable to obtain a search warrant first.” Applying the *Schmerber* test to the case at bar results in the conclusion that the officers were under a duty to secure a search warrant before performing such an intrusive search on Mr. Marshall, and that reasonable methods--methods that protected Mr. Marshall’s privacy—were not employed. *See Illinois v. Lafayette, supra*.

As the *Schmerber* Court observed, search warrants are preferred “where intrusions into the human body are concerned. . . The importance of informed, detached, and deliberate determinations [by a judge] of the issue whether or not to invade another’s body in search of evidence of guilt is indisputable and great.” *Schmerber*, 384 U.S. at 770.

Finally, there were absolutely no exigent circumstances. Mr. Marshall was already handcuffed. The crack cocaine was going nowhere. Even though Mr. Marshall was somehow able to get the baggie into his hands, those hands were handcuffed behind his back. There was no fear that Mr. Marshall might attempt to ingest the baggie or otherwise dispose of it. Mr. Marshall had already been searched for weapons, and none were recovered, so concern for police officers’ safety could not have been the justification for the highly intrusive search.

To justify the officer’s actions, the Commonwealth cites to *United States v. Walker*, 181 F.3d 774 (6th Cir. 1999). However, what the Commonwealth fails to tell this Court about the holding in *Walker* is that the Sixth Circuit specifically found, unlike the Court of Appeals did here, that the officer immediately identified the object he felt during

the pat-down as contraband. The Court specifically cited the officer's six years experience as a narcotics officer. *Id.* at 779. The record in the present case supports only that Officer Schwartz was a routine patrol officer with five years experience. VR, 5/17/07, 9:45:40.

The Commonwealth has the audacity to argue that the circumstances in the case of *Whitmore v. Commonwealth* are analogous to the case at bar. 92 S.W.3d 76 (Ky. 2003). They are not.

In *Whitmore*, the subject was patted-down and the officer felt, though his thin, nylon jacket, a hard substance she **immediately identified** as crack cocaine. *Id.* at 78; (emphasis added). The substance was removed from the jacket pocket. *Id.* at 78. That search was not nearly as intrusive as the strip search conducted in the present case. While the actions of the officer in *Whitmore* may have been deemed reasonable by this Court, the actions of the officer in the present case are much more violative of Mr. Marshall's human dignity and his privacy rights and demand a different result.

C. CONCLUSION

"The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." *Schmerber v. California*, 384 U.S. 757, 769-770 (1966).

The officers should not have conducted the strip search in the apartment in full view of anyone in the line of sight of the bedroom and should have waited to conduct the

search at the jail or police station, or better yet, after securing a search warrant. Mr. Marshall's due process rights to be free for unreasonable searches and seizures was violated in this case. 4, 5, 6 & 14 Amends., U.S. Const. §§ 2, 3, 10, & 11 Ky. Const. This case must be remanded to the trial court with instructions to suppress the cocaine seized from Mr. Marshall in an unlawful search.

II. THE SEARCH OF MR. MARSHALL VIOLATED HIS RIGHTS AND NO EXEMPTION FROM THE WARRANT REQUIREMENT CAN EXCUSE THE GOVERNMENT'S CONDUCT.

After determining that the search was a proper *Terry* pat-down, but plain-feel did not entitle the officer to continue the search because the nature of the item was not immediately apparent, the Court determined that the officer's action of pulling down Mr. Marshall's jeans and underwear was unreasonable. (Opinion at 8).

The Commonwealth attempts to find excuses for the inappropriate and unlawful search, attempting to characterize it as brief and did not expose Mr. Marshall to "any undignified, humiliating, or terrifying touching or trauma." (Commonwealth's Brief at 14). However, the Court of Appeals cited many instances where searches of the body are strictly regulated and codified, so as to minimize the intrusion into the privacy of the individual and preserve as much human dignity as possible. As the Court cited in its Opinion, "a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience." *Hunter v. Auger*, 672 F/2d 668, 674 (8th Cir. 1982). (Opinion at 8).

The Court of Appeals cited to statutes of sister states which "require strip searches to be conducted in sanitary premises where the search *cannot* be observed by anyone not necessarily involved in the procedure; it must be approved in writing by a supervisor."

(Opinion at 9, citing to Fla. Stat. Ann. § 901.211, Conn. Gen. Stat. Ann. § 54-331, N.J. Stat. Ann. §2A:161A-4).

The Court applied a test pursuant to the case of *Bell v. Wolfish*, in which Fourth Amendment reasonableness requirements are balanced with the need for government investigation. "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." 441 U.S. 520, 559 (1979). The Court concluded that since Mr. Marshall was handcuffed and could not destroy the evidence, because the identity of the object was not immediately apparent and because of the manner and place of the search, it was clearly unreasonable and necessitated exclusion of the seized evidence. (Opinion at 10-11).

The Court cited *Illinois v. Lafayette* and its acknowledgement that some investigative measures that might be too intrusive in the field can be more properly conducted at the police station and its questioning of whether any search incident to arrest could justify a disrobing "on the street." 462 U.S. 640 (1983). The Court of Appeals made the proper determination. It employed the proper test and came to a proper conclusion. The Commonwealth can cite no precedent which demands a different determination.

CONCLUSION

The trial court erred when it held that a conducting an intrusive search like the one in the case at bar was a reasonable search incident to an arrest and the Court of Appeals' Opinion reversing that decision must stand.

The intrusive search in the case at bar implicates the *Schmerber* Court's concerns about unreasonable searches incident to an arrest: "The interests in human dignity and

privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.” Id., 384 U.S. 769-770. Officers should not have conducted the strip search in the apartment in full view of anyone in the line of sight of the bedroom and should have waited to conduct the search at the jail or police station, or better yet, after securing a search warrant.

Mr. Marshall’s due process rights to be free for unreasonable searches and seizures was violated in this case. 4, 5, 6 & 14 Amends., U.S. Const. § § 2, 3, 10, & 11 Ky. Const. This Court must affirm the Court of Appeals’ Opinion and remand this matter to the trial court for dismissal.

Respectfully Submitted,



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