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FILE NO. 2011-SC-283-DG

THOMAS C. FRAZIER APPELLANT

v. APPEAL FROM BOONE CIRUIT COURT
HON. ANTHONY W. FROHLICH, JUDGE
CASE NO. 08-CR-349

COMMONWEALTH OF KENTUCKY APPELLEE

REPLY BRIEF FOR APPELLANT, THOMAS C. FRAZIER

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CERTIFICATE REQUIRED BY CR 76.12(6):

The Undersigned does hereby certify that copies of this reply brief were served upon the following named individuals by U.S. Mail, first class postage prepaid, on August 20, 2012: Hon. Anthony W. Frohlich, Judge, 6025 Rogers Lane, Suite 444, Burlington, KY 41005; Hon. Linda Tally Smith, Commonwealth's Attorney, 2995 Washington Street, P.O. Box 168, Burlington, Kentucky 41005; and by state messenger mail to Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204. The undersigned does also certify that the record on appeal was not removed from the office of the Clerk of the Supreme Court of Kentucky for preparation of this brief.

Thomas M. Ransdell

THOMAS M. RANSDELL

PURPOSE

The purpose of this reply brief is to address the arguments in the Brief for Appellee that appellant believes warrant a reply. Appellant does not intend to simply repeat arguments that were previously made in the original Brief for Appellant. This Court should assume that every argument made in the appellee's brief is controverted. If an argument is not specifically addressed in this reply brief, appellant will stand on the argument that has been made in the Brief for Appellant.

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ARGUMENT

I.

THE FAILURE TO SUPPRESS THE FRUITS OF THE ILLEGAL SEARCH OF THOMAS FRAZIER'S PERSON.

The title for the second issue in the Brief for Appellant in the Court of Appeals of Kentucky was, "The trial court erred in failing to suppress the illegal search of Thomas Frazier's person." The issue was broadly stated and it incorporated the search of Mr. Frazier's pocket because that was the only place the police located anything illegal. It is inaccurate for appellee to suggest that appellant objected to the frisk, but not the search of his pocket. First, the title complained of an illegal search, not merely an illegal frisk. In addition, appellant's argument contains this sentence, "Boggs' ***search*** of Frazier was not reasonable based on the facts that the officers articulated." Court of Appeals Brief for Appellant at 12 (emphasis added). The issue raised by appellant covered the illegal search of Mr. Frazier's entire person, including the search of his pants pocket.

The police did not have a reasonable suspicion to believe Mr. Frazier was armed or dangerous. Appellee states over and over, *ad nauseam*, that Mr. Frazier was uncooperative. The truth is, Mr. Frazier gave the police his license and insurance when they pulled him over. (VR 9: 1/26/09; 11:22:41). He told them where he was going and who he was with. (VR 9: 1/26/09; 11:23:07). Before he was ordered out of the vehicle he told Deputy Moore that he was going to a concert and the two men in his car were friends of his son. (*Id.*). He exited the car when he was asked to exit. (VR 9: 1/26/09; 11:23:57). He walked to the rear of the vehicle when he was asked to do so. Mr. Frazier was totally cooperative. He questioned the authority of the police officer to ask him

questions completely unrelated to the traffic stop, which was ostensibly for littering in the parking lot of a fast food restaurant, and for not using a turn signal while turning with a green arrow from a left turn only lane. (VR 9: 1/26/09; 11:24:15). In fact, Officer Moore had no authority to ask Mr. Frazier questions unrelated to the traffic stop, and Mr. Frazier had every right not to answer those questions. As explained in Appellant's original brief before this Court, Mr. Frazier's initial refusal to answer questions the police officer had no right to ask cannot furnish the reasonable suspicion necessary for a *Terry*[1] patdown. This point was argued extensively in the Brief for Appellant at 7-9, and will not be repeated here.

Appellee's claim is that Deputy Boggs' search of the pocket was based on a reasonable belief that the pocket contained a weapon, and, therefore, it was part of the original *Terry* patdown. Under *Terry*, a police officer may conduct a limited search if "a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The officer's belief must be founded on specific and articulable facts rather than on a mere suspicion or "hunch." *Id.* As was previously argued in the Brief for Appellant, Boggs never articulated facts that justified the search of Mr. Frazier's pocket. Brief for Appellant at 7-8.

These officers never showed any interest in issuing a citation for failure to use a turn signal or for littering after pulling Mr. Frazier over. Instead they immediately started asking questions about where the three men were going. Just as quickly, they got Mr. Frazier out of his vehicle and started rummaging through his pockets. This type of "general, exploratory rummaging in a person's belongings" is one of the two "specific

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

evil[s]" the warrant requirement of the Fourth Amendment was intended to protect against. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). This was not a search for "officer safety." It was a shakedown without probable cause, which is not allowed by the Fourth Amendment.

II.

THE FAILURE TO SUPPRESS THE FRUITS OF THE ILLEGAL SEARCH OF THOMAS FRAZIER'S VEHICLE.

The offense Mr. Frazier was arrested for committing was possession of marijuana. The marijuana offense was complete once the police found marijuana in his pocket. Appellee supplies a list of facts it claims supports a reasonable belief that evidence of the marijuana possession offense could be found in Mr. Frazier's vehicle, none of which actually support that argument. Appellee does not even make an effort to tie those facts into its argument in any logical way. Nervousness does not provide a basis for a search. Neither does an alleged failure to make eye contact. Those are both just the same old subjective "facts" that can neither be proven or disproven that the police trot out every time they conduct a warrantless search. *See Adkins v. Commonwealth*, 96 S.W.3d 779, 788 (Ky. 2003). Nor does asking an officer why he is asking questions that have no connection with the traffic stop provide a basis for believing there is marijuana in the car. Mr. Frazier had a right not to answer those questions, and his failure to do so cannot furnish reasonable grounds for a search or seizure. *See Florida v. Royer*, 460 U.S. 491 (1983). Refusing to admit there was marijuana in the jeans pocket did not give the police any more of a basis to search the vehicle than admitting there was marijuana in the jeans pocket would have provided. Mr. Frazier had a constitutional right not to give evidence

against himself. §11, Ky. Const.: 5th Amend. U. S. Const. The exercise of that constitutional right cannot be used as an excuse for searching his vehicle. *Florida v. Royer*, *supra*.

The facts of *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009), are easily distinguishable because the police officer observed the occupants of the vehicle in *McCloud* handling what appeared to be crack cocaine while they were still in the vehicle, and cocaine fell from the defendant's pants as he exited the vehicle. *Id.*, at 783. Those circumstances created a reasonable probability that some crack cocaine might still be in the vehicle even after the defendant had exited. Probable cause would allow the police to search an automobile based simply on the automobile exception. *Carroll v. United States*, 267 U.S. 132 (1925). No one in Mr. Frazier's vehicle was seen handling marijuana at any time, so there was no probable cause for the automobile search in Mr. Frazier's case.

It seems clear that in rendering *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court intended to limit the search incident to arrest exception to the warrant requirement to the basic parameters established in *Chimel v. California*, 395 U.S. 752 (1969). The Court surely would not have included such sharp criticism of post-*Belton* extensions of the *Chimel* exception if it had only intended to roll back those extensions for minor traffic offenses. *Gant*, *supra*, 556 U.S. at 342-344. To the extent that the Kentucky cases cited by appellee would allow a search of a vehicle following the arrest and removal of the occupant from the vicinity of the vehicle, with no probable cause to believe that evidence of a crime would be found in the vehicle, they should be overruled.

Indeed, the language used in *Gant* shows that the search for evidence of the crime of arrest must be based on an objective standard of reasonable belief that evidence will be found. The opinion in *Gant* states, "we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Arizona v. Gant*, 556 U.S. 332, 343 (2009). Whether the "reasonable belief" standard from *Gant* is different than the "probable cause" standard for searching an automobile used in *Carroll*, *supra*, is an open question. However, a search for evidence is fundamentally different than a protective sweep for weapons, and heretofore, a search for evidence has always required probable cause, and usually requires a search warrant.

Thomas Frazier was not arrested for a broad category of crimes like "possessing or trafficking in drugs." He was pulled over for not using a turn signal and he was arrested for having a personal use quantity of marijuana in his pocket after he was already outside the vehicle. That was the "crime of arrest," as that term is used in *Gant*. There was no odor of marijuana emanating from the car, no visible drug paraphernalia in the car, and, in fact, no other drugs or drug paraphernalia were located in the vehicle when it was searched. The police had neither probable cause nor a reasonable belief that the search his vehicle would turn up any evidence to support the crime of arrest. Nor were there any known facts to support a reasonable belief there were any additional drugs, of any kind, in his vehicle.

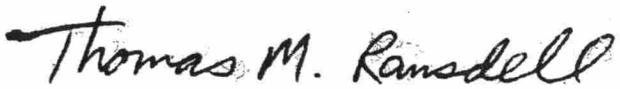
Arizona v. Gant, *supra*, did not adopt an exception to the Fourth Amendment's probable cause requirement for investigations of possible drug offenses, and this Court

should not extend the *Gant* decision in this manner. On the contrary, this Court should require probable cause for searches such as the one at issue in this case.

CONCLUSION

This Court should reverse Thomas Frazier's convictions.

Respectfully submitted,



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