SUPREME COURT OF KENTUCKY

2008-SC-965

MICHAEL SHAWN PAYTON — **APPELLANT**

v.

Appeal from Grayson Circuit Court
Hon. Robert A. Miller, Judge
Indictment No. 05-CR-216

COMMONWEALTH OF KENTUCKY — **APPELLEE**

REPLY BRIEF FOR PAYTON

Submitted by:

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Certificate required by CR 76.12(b):

I certify that this reply brief was served by U.S. mail, postage prepaid, on the Hon. Robert A. Miller, Judge, Grayson Circuit Court, P. O. Box 147 Hardinsburg, Kentucky, 40143; the Hon. Jessica Brown, Assistant Commonwealth's Attorney, P.O. Box 249, Brandenburg, Kentucky 40108; the Hon. Phillip W. Smith, 127 White Oak Street, Leitchfield, Kentucky 42754; and the Hon. Joshua D. Farley, Assistant Attorney General, 1024 Capital Center Drive, Frankfort Kentucky 40601-8204 on August 10, 2010. The record was not withdrawn.

Susan Jackson Balliet

PURPOSE OF BRIEF

This brief responds to selected Appellee arguments. As to any argument not here addressed, Appellant stands on his opening brief.

ISSUES

1. **Did Appellant rescind his wife's consent to search?**
2. **Did the police then coerce Appellant into cooperating with the search by effectively falsely informing him he had no right to resist?**

ARGUMENT

1. Under *Georgia v. Randolph*, Appellant rescinded any consent to search previously granted by his wife.

This Court has to decide 1) whether the wife's consent to a search of the residence was subtly coerced under all the circumstances; 2) if she did voluntarily consent, whether under *Georgia v. Randolph* Appellant's demand for a search warrant effectively rescinded his wife's consent; and 3) whether Appellant's ultimate submission and cooperation in the search was subtly coerced under all the circumstances.

Nothing was found until after Appellant demanded a warrant and the police falsely informed him that they didn't need one, due to his wife's consent. In order to uphold suppression of any item that was found, the Court must answer all three of the questions above.

Nothing was in plain view

Appellee claims that drug evidence found in an ashtray after Appellant's submission to the search "would have" been found in "plain view." This is speculation. The record reflects that this item of evidence was not seen or found until after Appellant submitted to the search. Whether it would have been seen or found is not a proper subject of this appeal.

Wife's consent was involuntary

Appellant urges that his wife's consent was involuntary due to that fact that the police knew she was not simply under the influence, but in fact "tore up" on drugs, due to the intimidating presence of multiple police cars, multiple police officers, *plus* a child protective services worker, all seeking entry to her home, and subtly threatening --by implication—to take her children. The fact that Appellant's wife had every reason to be intimidated is borne out by the fact that –indeed-- she and Appellant did lose their children over this incident. There is no evidence these parents were abusing or neglecting their children, apart from harboring drugs in the home. There is no evidence Appellant or his wife had ever allowed their children to see the drugs, or to see their parents using drugs. There is no evidence that Appellant or his wife ever mistreated or neglected their children while under the influence of any drugs.

Because Appellant's wife's consent was involuntary, the entire search was involuntary, including the initial brief visual inspection of the living room.

Appellant's rescinding of consent to search occurred immediately, not "long after" his wife's coerced consent.

If this Court finds that Appellant's wife's consent to search was voluntary, it must determine whether the Court of Appeals erred with regard to Appellant's demand for a warrant. Appellee claims that Appellant's warrant demand did not occur until "long after" his wife's consent, and did not occur until "his situation had materially worsened (i.e., the imminent discovery of evidence of methamphetamine in the bedroom)." The record does not reflect how long the police stayed in the living room. It appears, however, that the officers briefly looked around in the living room, and proceeded immediately to the bedroom, without any appreciable time lapse. No time lapse is

mentioned.

Appellee's claim that Appellant realized that his situation had "materially worsened" is also unsupported. There is no evidence Appellant knew the police were in his home until the police entered his bedroom. Then the first words out of Appellant's mouth were "Where is your warrant?" These words have been recognized as an unequivocal objection to a warrantless search. *Shepard v. Davis*, 300 Fed.Appx. 832 (11th Cir. 2008) (cited in Appellant's opening brief); see also *People v. Frank*, 37 Cal.Rptr. 202 (1964) (held: the words "Where is your warrant?" would sustain an inference that the speaker did not consent to a search).

Because Appellant rescinded his wife's consent, and did not voluntarily consent to any search, the fruits of the search should be suppressed as to Appellant.

2. The police coerced Appellant into cooperating with the search by effectively and falsely informing him that he had no right to resist.

Telling Appellant (in direct response to his demand for a warrant) that his wife had consented to a search of the residence was the same as telling Appellant that based on the wife's consent, no warrant was needed, and because of his wife's consent, Appellant had no right to resist the search. But when police falsely inform an occupant of a residence that he has no right to resist a search, that is coercion:

> 'When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion- albeit colorably lawful coercion. Where there is coercion there cannot be consent.'

Bumper v. North Carolina, 391 U.S. 543, 550 (1968)

In *Bumper* the police erroneously claimed they had a warrant when they had no warrant. Here the police erroneously claimed Appellant had no right to demand a

warrant, when in fact Appellant had the complete, independent right to demand a warrant and end the search, under *Georgia v. Randolph*. 547 U.S. 103, 126 S.Ct. 1515 (2006). The instant police action was arguably at least "colorably" lawful, as in *Bumper*. But –as in *Bumper*—this police action (effectively) falsely informed Appellant that he had no right to resist the search. The instant situation was "instinct with coercion" like the situation in *Bumper*.

CONCLUSION

The evidence against Appellant was obtained in violation of his rights under the 4th, 5th, and 14th Amendments of the United States Constitution and under §§ 1, 2 and 10 of the Kentucky Constitution. The circuit court order denying suppression of the evidence should be reversed, and this case should be remanded with directions that all evidence obtained from the search must be suppressed as to Appellant. Appellant should be offered an opportunity to withdraw his guilty plea, and re-negotiate a settlement, or proceed to trial.

Respectfully submitted,

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Counsel for Michael Shawn Payton

August 10, 2010