COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2008-SC-861

ROBERT LAMONT PENNINGTON — **APPELLANT**

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HON. ROBERT J. HINES, JUDGE
INDICTMENT NO. 04-CR-149

COMMONWEALTH OF KENTUCKY — **APPELLEE**

BRIEF FOR APPELLANT, ROBERT LAMONT PENNINGTON

Submitted by:

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The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. Robert J. Hines, Judge, McCracken Circuit Court, 301 S. 6th Street, Paducah, Kentucky 42003; the Hon. Timothy Kaltenbach, Commonwealth's Attorney, Courthouse, 301 S. 6th Street, Paducah, Kentucky 42003; the Hon. Carlos Moran, Department Of Public Advocacy, 400 Park Avenue, Suite B, Paducah, Kentucky 42001; and to Hon. Gregory Stumbo, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on October 24, 2007. The record on appeal has been returned to the Kentucky Supreme Court.

Erin Hoffman Yang
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Introduction

Robert Pennington accepted a conditional guilty plea and was sentenced to twelve months for resisting arrest, ten years on first degree trafficking in a controlled substance, twelve months on use or possession of drug paraphernalia, and thirteen years on second degree persistent felony offender all to run concurrently for a total of thirteen years. He reserved the right to appeal the trial court's denial of his motion to suppress the evidence. The Court of Appeals affirmed the trial court's denial based on faulty reasoning. He comes before this Court on a grant of discretionary review.

Statement Regarding Oral Argument

Mr. Pennington requests oral argument.

Statement Regarding Cites to the Record

The record on appeal consists of two videotapes and one volume of record. The videotapes are marked tape 1 of 1 and tape 2 of 2. Only tape 1 of 1, which includes the suppression hearing, is cited on appeal. Cites to the record shall be as follows:

VR 1, Suppression, 2/28/05, hour, minute, second.

TR , page number.

Statement of Points and Authorities

Statement of the Case

On February 23, 2004, Officer Matthew Wentworth was patrolling a high crime area of Paducah known as "the Set." VR 1, Suppression Hearing, 2/28/05, 13:42:07-13:42:30. He noticed a man approach a white Chevy Caprice, give the driver an item and walk away. Id. at 13:42:50. He noticed that the Caprice had an expired tag and decided to pull it over. Id. at 13:43:10. According to Wentworth, he radioed dispatch with a description of the car, and was told by a Sergeant Barnhill to proceed with caution because the subject might be the Appellant, Robert Pennington. Id. 13:43:20-13:43:40.

Officer Wentworth never offered any reason why one needed to "proceed with caution" around Robert Pennington. Likewise, Sergeant Barnhill did not testify or make any statements on the record clarifying why he was concerned about Wentworth's encounter with Mr. Pennington. When Wentworth confronted the driver of the Caprice, the man did, in fact, identify himself as Robert Pennington. Id. Mr. Pennington denied having any drugs or guns in the car. Id. Wentworth noted that Pennington seemed extremely nervous. Id.

Wentworth testified that he called for backup because of Barnhill's vague warning to use caution around Pennington and because there had been two reports of shots fired that morning. Wentworth conceded that neither of the "shots fired" reports originated in the Set. Id. at 13:50:00. One of the shots fired reports came from Dudley Court, an area far away from the Set, and another from the downtown area. Id. at 13:50:30. In fact, Wenworth told grand jurors, "I don't know who fired the shots...separate calls that shots were fired and I really don't know. I don't think they found out who fired the shots." Id. at 13:54:30-13:55:00. By the time backup officers

Redmon and Hodge arrived, perhaps fourteen to seventeen minutes had elapsed. Id. at 13:51:00-13:51:30. Wentworth asked Pennington to step out of the car, issued him a citation, and explained to him how to correct his tags without incident. Id. at 13:44:30; 13:52:00.

Wentworth proceeded to ask Pennington for permission to search for weapons. Pennington answer was an emphatic "no," adding that he had been advised by counsel that he was not required to consent to a search. Id. at 13:44:30. Wentworth said that that was fine, but he could search him for weapons. Id. at 13:45:00. Pennington protested that Wentworth could not do so. Wentworth replied that he could and proceeded to search him for weapons. Id. Wentworth testified that during the search he was "squeezing" items. He said he squeezed a cigarette lighter in Pennington's pocket because he could differentiate a lighter from other items by squeezing them. Id. at 13:56:40-13:47:30. Curiously, Wentworth claimed that he immediately recognized drugs in Pennington's pocket by feel, however, rather than removing them immediately, as he was entitled to do with readily apparent contraband, he proceeded to squeeze and manipulate, and move items, because Pennington's jacket was so thick he wanted to make sure no weapons were in behind them. Id. at 13:56:40-13:47:30; 13:47:30.

Officers Redmon and Hodge did not testify at the suppression hearing and their police reports substantially conformed to Wentworth's testimony. However, Officer Hodge reported that when Pennington objected to being searched Wentworth told him "that he searches (sic) everyone just to make sure there are no weapons." TR p. 30.

Mr. Pennington became very upset upon being subjected to a search. Wentworth told him the items he was squeezing felt like drugs. VR 1, Suppression Hearing, 2/28/05,

13:45:10-13:45:30. Pennington began to back away, telling the officers his rights were being violated and not to touch him. Id. at 13:45:30-13:45:45. Wentworth told Pennington to turn around and put his hands on the car. Id. at 13:45:46-13:46:00. Pennington would not comply, and harsh words were exchanged. Id. at 13:46:00-13:46:30. Wentworth claimed that Pennington was waving his arms and "took an aggressive stand," coming towards the officers and then backing away towards his car. Id. Mr. Pennington reiterated that he did not want to be touched. Id. Wentworth himself escalated the situation by calling Pennington a "son of a bitch." Id. at 13:53:20. Pennington retaliated, calling Wentworth a "motherfucker." Id.

Wentworth testified that because two men across the street were staring and pointing, he decided to arrest Mr. Pennington for disorderly conduct. Id. at 13:46:30-13:47:10. Mr. Pennington tried to flee the scene but was apprehended with 23 grams of cocaine and $1205 in cash on his person. Id. No weapons were found in Pennington's possession.

Pennington filed a motion to suppress the evidence, arguing that Officer Wentworth lacked reasonable suspicion to do a *Terry* frisk once the citation was issued. TR p. 24-28, Suppression Hearing, 13:42:07-13:42:30. Further, he argued that Wentworth went far beyond a *Terry* frisk by squeezing, moving, and manipulating items in his pockets.[1] After the motion was denied, he accepted a conditional guilty plea reserving the right to appeal the suppression issue. TR p. 46-49, 62-65. He was sentenced to twelve months for resisting arrest, ten years on first degree trafficking in a controlled substance, twelve months on use or possession of drug paraphernalia, and thirteen years on second degree persistent felony offender all to run concurrently for a

total of thirteen years. The Court of Appeals affirmed the trial court's ruling. Robert Pennington now comes before this Court on a grant of Discretionary Review.

Argument

I. Robert Pennington's Motion to Suppress Must Be Granted, Since He was Subjected to an Illegally Prolonged Detention and Search. The Court of Appeals Opinion Affirming Violated his Rights Under Section 10 of the Kentucky Constitution and the Fourth Amendment of the United States Constitution.

Standard of Review.

A lower court's ruling on a motion to suppress is reviewed *de novo*. *Ornelas v. United States*, 516 U.S. 690, 699(1996), *See also United States v. Roark*, 36 F.3d 14 (6th Cir. 1994), *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993).

Introduction.

A seizure that is undertaken solely to issue a citation to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. *Illinois v. Caballes*, 543 U.S. 405, 407 (U.S. 2005). The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Whren v. United States*, 517 U.S. 806, 810 (1996). The Supreme Court noted that a traffic stop is legal as long as there is probable cause to find that a traffic violation has occurred. *Id.* at 810. However, once the traffic stop is completed, the occupants of the car must be allowed to leave "unless something that occurred during the traffic stop generated the

[1] For reasons unclear to current appellate counsel the plain feel issue was not addressed on direct appeal.

necessary reasonable suspicion to justify a further detention." *Joshua* v. *Dewitt*, 341 F.3d 430, 443 (6th Cir. 2003), *citing United States v. Mesa*, 62 F.3d 159, 162 (6th Cir.1995).

In this case, it is clear that Wentworth lawfully stopped Robert Pennington based on a legitimate traffic violation, since Pennington was driving a car with expired tags. Likewise, it is clear that Wentworth made the stop hoping the encounter would generate reasonable suspicion to conduct a search. If Wentworth had a legitimate fear for his safety during the stop he should have performed a *Terry* frisk at its inception, especially after back up arrived. Instead, he let the encounter continue for several minutes. Mr. Pennington cooperated. The only additional factor he noted during the traffic stop to contribute to reasonable suspicion was Mr. Pennington's alleged nervousness. The law clearly states that a frisk is a tool to be used for officer safety, not a fishing expedition for evidence of a crime. *Terry v. Ohio*, 392 U.S. 1, 29 (1969).

Further, Wentworth failed to cite any evasive behavior on Pennington's part until after he was forced to submit to a warrantless search. Nonetheless, the Court of Appeals affirmed the trial court, holding the protracted detention and warrantless frisk was justified based on the totality of the circumstances. The Court of Appeals cited Wentworth's observation of someone giving an item to Pennington in the Set; the reports of shots fired in other parts of town; the warning to be cautious around Pennington; Pennington's nervous behavior; and his alleged "agitation" towards the officers as factors justifying the stop.

For the reasons set forth below, the Opinion Affirming was based on faulty reasoning and must be reversed.

The Court of Appeals erred by giving too much credence to Wentworth's testimony that Pennington was nervous during the traffic stop

The Court of Appeals' faulty reasoning.

The Court of Appeals relied on Wentworth's subjective assessment that Pennington was extremely nervous as a factor for reasonable suspicion:

> The officer's suspicions were reasonably aroused, and he was thus justified in detaining Pennington briefly beyond the issuance of the citation to attempt to find out if drug-related criminal activity was afoot. During that detention the officer's suspicions were further aroused by Pennington's demeanor. Although a person's mere nervousness when confronted by the police is normal and does not by itself suggest wrongdoing, excessive nervousness or evasive behavior, particularly in conjunction with other suspicious circumstances, such as Pennington's suspicious transaction here, is a pertinent factor in determining reasonable suspicion.

The Law.

To justify a *Terry* stop, an officer must "be able to point to specific and articulable facts" that support reasonable suspicion. *Joshua*, 341 F.3d at 443. However, nervousness is generally included as just one of *several* grounds for finding reasonable suspicion, since there is nothing inherently suspicious about being nervous during a traffic stop. *United States v. Smith*, 263 F.3d 71, 591 (6th Cir., 2001)[emphasis added]. It is not unusual for most citizens, whether innocent or guilty, to display signs of nervousness when confronted by law enforcement. *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997).

Rather, the United States Supreme Court has established that nervous, *evasive* behavior is the standard to justify reasonable suspicion, not nervousness or restlessness. *Joshua*, 341 F.3d at 445; *Illinois v. Wardlow*, 528 U.S. 119, 124, (2000) FN5 [emphasis added]. For this proposition, the Supreme Court cited several of its decisions involving evasive efforts to escape detection at

the Mexico border and airports. *Joshua, citing United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion."); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) ("[T]he three confederates ... had spoken furtively to one another. One was twice overheard urging the others to 'get out of here.' Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion...."); *United States v. Sokolow*, 490 U.S.1, 5, 8-9, (1989) (noting that "[Respondent] appeared to be very nervous and was looking all around the waiting area," but that "one taking an evasive path through an airport might be seeking to avoid a confrontation with an angry acquaintance or with a creditor").

By contrast, when an officer simply states a subject was nervous or engaged in furtive gestures, without pointing to specific, objective evidence of objective behavior, it is a characterization rather than a fact. *Joshua*, 341 F.3d at 443-44. An officer's statement that a subject appeared nervous and restless is of little value when that officer does not articulate what the defendant was actually doing to support that characterization. *Id.* at 444. An officer's mere perception of nervous behavior is not an objective fact. *Id.* at 445. Acceptance of an officer's conclusory remark of nervousness or restlessness, without more specific examples of evasive behavior, to establish reasonable suspicion, is contrary to *Terry* because to do so relies on an officer's hunches. *Id.* at 444.

In this case, Pennington's allegedly nervous reaction to being questioned about drugs by a law enforcement officer could be equally indicative of innocence or guilt. Officer Wentworth was unable to point to any evasive act or furtive gesture made by Pennington during the stop, his statement that he was extremely nervous was a conclusory remark and not an objective fact. While Pennington was allegedly nervous, as most citizens would be when confronted by a law

enforcement officer, he was compliant when Officer Wentworth issued the traffic citation. He provided Wentworth with his license and registration when asked, exited his car upon request, and listened when Wentworth instructed him on how to correct the problem. It is unclear when or how Pennington was evasive or agitated during the traffic stop. Pennington only became agitated and evasive *after* the purpose of the traffic stop was complete and his rights were violated when he refused to consent to a warrantless search.

The Court of Appeals violated Pennington's rights under the United States and Kentucky Constitutions when they cited his unwillingness to consent to a search as a factor for reasonable suspicion. His refusal to consent to the search should not have been considered since it is every citizen's right to refuse.

The Court of Appeals' faulty reasoning:

The Court of Appeals engaged in circular reasoning, finding that Wentworth was justified in detaining and frisking Pennington because he was agitated. Yet Pennington only became hostile towards Wentworth upon being subjected to the prolonged detention and warrantless frisk.

> Pennington's excessive nervousness when asked about drugs and his belligerent attempts to distance himself from Officer Wentworth could reasonably be deemed suspicious, and so further justified Pennington's continued detention. Pennington's excessive nervousness when asked about drugs and his belligerent attempts to distance himself from Officer Wentworth could reasonably be deemed suspicious, and so further justified Pennington's continued detention.
>
> Pennington's unusual agitation, which was increasingly directed against the officer, all contributed to the officer's reasonable suspicion that Pennington was dangerous and might be armed.

The Law.

The Court of Appeals ignores the fact that Pennington only became "belligerent" **after** Wentworth had already illegally prolonged the detention and insisted on subjecting him to a warrantless search. Robert Pennington's objection to a warrantless search may

not be used against him. Our state and federal Constitutions give all citizens the right to object such an intrusion, and they do not require an individual to refuse politely. In fact, the *Terry* Court noted that a frisk is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." 392 U.S. at 16.

Robert Pennington's alleged "agitation" must be considered in light of the circumstances. He was stopped for a traffic violation. Wentworth did not observe any drugs or contraband and although Pennington appeared nervous, he could not and did not articulate any threatening moves made by Pennington during the exchange. The legal stop was over, Pennington wished to be on his way, and he had been correctly informed by counsel that he did not have to consent to searches of his vehicle or person. Rather than evading the officers, Pennington was exercising the right of every citizen to break off an encounter where the primary purpose had been completed. *Terry, supra* . Pennington became upset when he was detained after complying with the traffic stop and declining to give consent to a warrantless search. Officer Wentworth himself escalated the situation by calling Pennington a "son of a bitch." To hold Pennington's exertion of this right against him is a violation of his rights under the Fourth Amendment and Section 10 of the Constitution of Kentucky. *Deno v. Commonwealth*, 177 S.W.3d 753, 762 (Ky. 2005) *See also Illinois v. Wardlow*, 528 U.S. 119, 125(U.S. 2000) ; *Florida v. Bostick*, 501 U.S. 429, 437 (1991).

For example, in *Deno*, the defendant was asked to consent to a warrantless search and seizure of his bodily fluids. Id. at 761. Deno refused and the fact of his refusal was used against him at trial. *Id.* This Court noted that it would be improper to draw adverse

inferences from failure of the accused to consent to the seizure because to do so would penalize him for exercising his rights to refuse the test. *Id.*; *see also Smith*, 263 F.3d at 594 (failure to consent to a search is not a proper basis for reasonable suspicion). Similarly, Pennington cannot be penalized for invoking the right to refuse a warrantless search. Citing his refusal to consent and agitation at being subjected to such an intrusion was contrary to his Constitutional rights.

Neither Sergeant Barnhill's vague warning to be careful around Robert Pennington nor the fact that shots had been fired elsewhere in the city were articulable facts giving rise to reasonable suspicion

The Court of Appeals' faulty reasoning:

The Court of Appeals apparently considered the warnings that shots had been fired, as well as the vague, unrelated hearsay admonition to be careful around Pennington relevant in finding reasonable suspicion:

> Officer Wentworth testified that already that morning two shootings had been reported in Paducah, which, together with the warning to be cautious with Pennington and his awareness that drug dealers operating in the "Set" had at times engaged in violence, made him suspect that Pennington might be armed. We agree with Pennington that the shootings that morning, which occurred in other parts of the city and which the officer apparently had no reason to associate with Pennington, did not contribute to a reasonable suspicion that Pennington might have a weapon. Nevertheless, it is common knowledge that drug dealers are often armed, and officers are entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions.

The Law.

Sergeant Barnhill's warning to use caution around Robert Pennington carries no weight in this case. It was never established what grounds Barnhill had for issuing the

warning, whether he suspected Pennington of any particular crime, or how he was familiar with Pennington, because the hearsay statement came through Wentworth. While Wentworth undoubtedly considered Sergeant Barnhill a reliable source of information, the United States Supreme Court noted that a source's basis of knowledge is "highly relevant in determining the value of his report." *Illinois v. Gates*, 462 U.S. 213, 230 (1983). In order to give rise to reasonable suspicion, a tip must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. *Florida v. J.L.*, 529 U.S. 66 (2000). To justify a stop based on second hand information provided by a fellow officer, the state must present proof that the officer who relayed that information had reasonable suspicion to do so for the stop to be admissible. *Joshua*, 341 F.3d at 445. For example, when an officer makes a *Terry* stop in objective reliance on a flyer or bulletin from a fellow member of law enforcement, the evidence uncovered in the course of the stop is only admissible if the agency which issued the bulletin possessed a reasonable suspicion justifying a stop. *United States v. Hensley*, 469 U.S. at 221, 233 (1985).

It is well-established that reasonable suspicion must be based on what an officer knew *before* initiating a stop. The Opinion Affirming assumes that Wentworth knew Pennington was a drug dealer before issuing the stop when there is little factual basis to establish this. Moreover, if Wentworth did legitimately believe that Pennington was an armed and dangerous drug dealer, his best avenue for ensuring his safety was to do a *Terry* frisk once back up arrived. Instead he chose to prolong the confrontation and subject Pennington to a seizure once the legal purpose of the traffic stop was complete.

It is not unusual for the Commonwealth to attempt to justify an officer's actions based on their heightened need for safety. *People v. Mendoza*, 846 N.E.2d 169, 184 (Ill. Ct. App. 2006). While the appellate courts must respect the need for officers to take precautions when dealing with suspicious individuals they encounter on the street:

> [T]his need alone cannot turn something that does not amount to reasonable suspicion into something that does. Nor can it justify an intrusion for which the police do not have a constitutional justification...If, in the name of safety, an officer chooses to take certain actions that amount to a seizure, that may be understandable under certain circumstances. However, if one of those actions are taken absent some justification for a seizure, the State is not entitled to utilize their fruits in a criminal prosecution. *Id.*

The Commonwealth never offered testimony by Sergeant Barnhill to establish reasonable suspicion. The Court of Appeals had no basis for suggesting Wentworth was entitled to search Pennington because he might have been a drug dealer who in turn might have been armed.

Likewise, the Court of Appeals improperly implied that the shots fired in other areas of the city somehow played a role in finding reasonable suspicion. The Fourth Amendment requires reasonable suspicion criminal activity is *currently* afoot. *Joshua*, 341 F.3d at 446, citing *Terry*, 392 U.S. at 30[emphasis in original]. Wentworth's awareness that shots were fired at some other place and time does not allow him to illegally extend a routine traffic stop in order to fish for reasonable suspicion.

Reliance on the mantra "totality of circumstances" cannot morph these facts into reasonable suspicion

The Court of Appeals' Faulty Reasoning:

The Court of Appeals concluded that Officer Wentworth's prolonged detention of Robert Pennington was justified under the totality of the circumstances.

The Law.

The Supreme Court noted in *Whren* that officers are allowed to stop vehicles for traffic violations without regard for their subjective motivation. *U.S. v. Hill*, 195 F.3d 258, 267 (6th Cir. Tenn. 1999) *citing* 517 U.S. 812-13. However, it is the duty of the courts to make sure that the police act properly and no do abuse this power by, among other things, carefully scrutinizing an officer's testimony as to the purpose of the initial traffic stop. *Id.*

The limitations which the Fourth Amendment places upon a protective seizure and search for weapons must be decided based on the concrete factual circumstances of individual cases. *Terry*, 392 U.S. at 29. Thus, the Court must look to factually comparable cases to determine whether reasonable suspicion existed in this instance. These cases demonstrate that Officer Wentworth lacked reasonable suspicion to support Pennington's continued detention and search once the purpose of the underlying traffic stop was complete.

For example, in *State v. Neal*, 164 P.3d 57 (2007), the evidence gleaned from a stop was properly suppressed based on similar facts. An officer observed a truck in front of a house that was under investigation for drug activity. *Id.* at 60. The defendant was in

the driver's seat and a man was leaning into the truck through the driver's side window. *Id.* The officer did not recognize either individual, but knew that several people with criminal backgrounds were known to frequent the house. *Id.* The officer believed that he had witnessed a drug transaction, although he could not see what was in the individual's hands or hear what they were saying. *Id.* Before the officer could approach the two men for questioning, the man leaning into the truck went back into the house and the defendant drove away. *Id.*

The officer proceeded to follow the driver and noted that he had a cracked windshield. *Id.* He initiated a traffic stop for obstruction of the driver's view/vehicle in unsafe condition. *Id.* When the officer approached the truck he recognized the defendant, whom he knew had prior drug and assault convictions. *Id.* The officer obtained the defendant's license, registration, and insurance and ran a warrant check. *Id.* He was advised to proceed with caution because the defendant might be armed and dangerous, and a back-up officer was dispatched to the scene. *Id.*

The officer questioned the defendant about the man seen leaning into his truck earlier and learned it was man named Horton, who was under investigation for drugs. *Id.* He claimed the defendant was nervous, fidgety, and avoided eye contact. *Id.* When the defendant refused to consent to a search of his truck, he was told that his truck would be held until a drug dog arrived to perform a "perimeter sniff" of it. *Id.* The defendant left to find a pay phone. *Id.* Within ten minutes, a fellow officer arrived with a drug dog. The dog alerted to the presence of drugs without entering the vehicle and then jumped into the open window of the truck, apparently due to the strong odor of drugs. *Id.*

The New Mexico Supreme Court held that reasonable suspicion to detain the truck was lacking. *Id.* at 65. The Court addressed the factors which the officer relied on in finding reasonable suspicion to detain the truck: the defendant's stopping in front of a house under investigation; the fact that a convicted felon under investigation for drugs was leaning inside his truck; becoming nervous when stopped; wishing to leave; and denying consent to search the truck. *Id.*

The Court noted that New Mexico had never adopted a "rule equating simple nervousness with reasonable suspicion." *Id.* The defendant's refusal to consent to a search was not a probative fact of guilt, suspicion, or dangerousness, but rather a "neutral act which neither inculpated or exculpated him," and did not factor into a reasonable suspicion analysis. *Id.* at 66.

Further, it was not reasonable for the officer to infer that the defendant had been involved in a drug transaction. *Id.* "[I]t is not illegal to lean in a vehicle, and there may be many innocent reasons to do so." *Id.* at 61. The officer could only see that an occupant of the house under investigation was leaning into the defendant's truck. *Id.* He could not see what, if anything they were doing. *Id.* The factual inferences drawn by the officer, including his knowledge of the defendant's criminal history, did not constitute the type of individualized, specific, articulable circumstances necessary to create reasonable suspicion he was engaged in criminal activity. *Id.* at 66. The officer could not use a valid traffic stop as a reason to detain the truck longer than necessary so he could fish for evidence of a drug transaction. *Id.* at 65. Likewise, Wentworth could not infer that a crime was afoot simply because someone handed Pennington and item and he was told to use caution around Pennington.

Also, in *United States v. Williams*, 114 F.Supp. 2d 629 (E.D. Mich 2000) a motion to suppress was granted based on similar facts to the case at hand. In *Williams*, an officer patrolling the area for drug activity had seen the defendant commit several traffic violations. *Id.* at 631. When he stopped the vehicle and obtained the defendant's license and registration, he recognized his name as someone being identified by a confidential informant as a drug dealer known to carry a gun. *Id.* The officer wrote the defendant a ticket, completing the stop. *Id.* However, he continued to detain the defendant for five to ten minutes so that a canine unit could come and sniff his vehicle for drugs. *Id.* The defendant denied having drugs or weapons in his vehicle and refused to consent to a search. *Id.* The defendant appeared nervous and the officer ordered him and a passenger out of the car for a *Terry* frisk. *Id.* As both men were being frisked, officers discovered a handgun under the seat and a firearm magazine on the defendant's person. *Id.*

The defendant moved to suppress the evidence. During the evidentiary hearing, the government argued that various factors taken as a whole provided reasonable suspicion: the defendant's driving; defendant's nervousness; and the information from the confidential informant alleging the defendant was an armed drug dealer. *Id.* at 632. However, the information provided by the informant was generalized, not detailed. *Id.* at 633. That, combined with the defendant's apparent nervousness, did not form the basis for reasonable suspicion. *Id.* The continued detention of the defendant and his vehicle after the initial traffic stop had terminated violated the Fourth Amendment. *Id.* Since the police would not have found the gun or ammunition without the illegal detention, they were excluded as the fruits of an illegal search. *Id.*

Likewise, in *Smith, supra*, the defendant's nervous demeanor, combined with other factors, did not give an officer reasonable suspicion to detain him and his passenger after a traffic stop. 263 F.3d 571. Smith was pulled over when an officer observed them speeding and failing to stay in a lane while driving a rental car. *Id.* at 575. The officer noted the passenger appeared to be "stoned," lethargic, had white mucus around his lips, and spoke with a "real thick tongue." *Id.* The driver quickly provided the rental car agreement and the officer noted neither the driver nor the passenger were listed as authorized drivers. *Id.* The driver said they had rented the car to drive to Arkansas and look at equipment for an employer. *Id.* The officer prepared a warning citation for the failure to maintain lane control. *Id.*

After issuing the citation, the officer asked the men if there were any weapons or narcotics in the car. *Id.* at 576. According to the officer, the driver seemed nervous and would not look at him when answering. *Id.* He denied having drugs or weapons and refused to consent to a search of the car. *Id.* At this point, the officer detained both men and had a drug dog sniff the car. *Id.* Drugs and weapons were found inside the vehicle. *Id.*

The evidence taken from the stop was suppressed, as the officer lacked reasonable suspicion to detain the men after the citation was issued. Four of the factors offered by the government related to the driver's nervousness during the traffic stop. *Id.* at 591. The government argued that as his vehicle passed the officer's, the driver spotted the officer and appeared to be scared. *Id.* The driver presented the rental agreement to the officer before asked to do so, and he was nervous when handing it over. *Id.* Moreover, he would not look directly at officer when answering questions about drugs and weapons,

as he had done when answering other questions, and he became nervous and stammered when asked for consent to search the vehicle. *Id.*

Since it is not unusual for a citizen to be nervous when confronted by a law enforcement officer, the driver's initial nervousness and his manner of presenting the rental agreement to the officer was given little weight in the appellate court's analysis. *Id.* at 592. His change in demeanor and alleged nervousness during the questioning about drugs and guns carried greater weight in their analysis, given the context in which they arose. *Id.*

The government argued that the fact that neither the driver or the passenger was listed on the rental agreement as an authorized driver was a factor for reasonable suspicion. *Id.* Although under different circumstances this may be a critical factor, in this case, the officer seemed satisfied that the person who rented the vehicle had granted them permission to use it. *Id.* The officer asked no further questions concerning their use of the vehicle, and did not verify the information which he had received. *Id.* Clearly, this factor generated little, if any, suspicion in the officer's mind at the time, and was considered accordingly. *Id.* The officer asked no further questions regarding their travel plans, destination or business. *Id.*

The government noted that in addition to the passenger's stoned appearance, the officer noticed an odor emanating from the vehicle as though the men had not bathed during the duration of their trip and that the car was heavily littered with trash and food wrappers. *Id.* at 593. The government apparently wanted the Court to consider the body odor emanating from the vehicle in conjunction with the condition of the vehicle's interior and conclude that the officer had a reasonable articulable suspicion that the

defendants had maintained a continuous presence in the vehicle, and therefore were engaged in illegal activity. *Id.*

The Court noted that under the totality of the circumstances test it is possible that "objective facts, meaningless to the untrained" can provide the basis for reasonable suspicion. However, some factors may be dismissed outright, because they are "so susceptible to varying interpretations as to be innocuous." *Id.* at 594.

Although the government presented several factors which could, under different circumstances, and in combination with other factors, support a finding of reasonable suspicion, under the facts of the case, they merited little weight. *Id.* Even considering the totality of the circumstances, the Court held the officer did not possess a reasonable, articulable suspicion that criminal activity was afoot. *Id.* Rather, it appeared that the officer, whose primary duty was drug interdiction, may have identified a vehicle and occupants which fit a profile, and based on that, detained the men after the completion of the traffic stop without developing a reasonable, articulable suspicion of criminal activity. *Id.* "**In fact, it seems that it was the driver's refusal of consent to search which triggered Officer Fulcher's decision to use the narcotics dog. That refusal is clearly not an appropriate basis for reasonable suspicion.**" *Id.*

In *Wood, supra*, an officer searched a defendant based on his nervousness, unusual travel plans, and prior drug convictions. The defendant was stopped on the highway for speeding. 106 F.3d 942, 944. The state trooper noticed that the defendant was "extremely nervous;" he was breathing rapidly, his hands were trembling, and he repeatedly cleared his throat. *Id.* The defendant told the trooper he had rented the car in San Fransisco, while the rental papers reflected the car was rented in Sacramento. *Id.*

The trooper asked more questions and the defendant's travel plans seemed odd. He was suspicious that the defendant said he flew to California but wanted to drive back to Kansas to enjoy the scenery and that he could afford such a trip since he admitted to being unemployed. *Id.* A computer check revealed that the defendant had a narcotics history. *Id.* The trooper issued a ticket and asked the defendant if he had drugs or guns. *Id.* The defendant said no. *Id.* He was asked to consent to a search and refused. *Id.* The trooper then detained his car for a canine search. *Id.* Narcotics were found in the car and the defendant moved to suppress. *Id.* The motion was denied and the defendant appealed. *Id.*

The appellate court examined, both individually and in the aggregate, the factors found by the trooper and the district court to give rise to reasonable suspicion to detain the defendant's car. *Id.* at 946. The Court disagreed with the district court's legal conclusion that the defendant's travel plans were the sort of unusual plans which give rise to reasonable suspicion of criminal activity. *Id.*

A factor which figured prominently in the district court's determination that there was reasonable suspicion to prolong the detention was the trooper's subjective assessment of the defendant as being extremely nervous during the traffic stop. *Id.* at 948. The Court reiterated that most citizens are nervous when confronted by a law enforcement officer regardless of guilt or innocence. *Id.* "We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on nervousness as a basis for reasonable suspicion must be treated with caution." *Id.*(internal citations omitted). Thus, Mr. Wood's demeanor during the detention must be discounted given the generic claim of nervousness. *Id.*

The remaining factor relied upon by the district court was the defendant's prior drug convictions. At the time the trooper detained the defendant he knew only that he had a narcotics record. *Id.* The Court cautioned that prior criminal involvement alone does not give rise to the necessary reasonable suspicion to justify shifting the focus of an investigative detention from a traffic stop to a narcotics or weapons investigation. *Id.* "If the law were otherwise, any person with any sort of criminal record ... could be subjected to a Terry-type investigative stop by a law enforcement officer at any time without the need for any other justification at all." *Id.*

Thus, the factors relied upon by the district court were insufficient to support a finding that reasonable suspicion existed on the facts of this case. To sanction a finding that the Fourth Amendment permits a seizure based on such a weak foundation, a defendant's nervousness and prior drug involvement "would be tantamount to subjecting the traveling public to virtually random seizures, inquisitions to obtain information which could then be used to suggest reasonable suspicion, and arbitrary exercises of police power." *Id.* The appellate court held that the defendant was detained without reasonable suspicion, thus the evidence of narcotics discovered in his trunk must be suppressed. *Id.*

Officer Wentworth lacked reasonable suspicion to prolong Pennington's detention. Reasonable suspicion must be based on specific, articulable facts. The fact that someone gave Pennington an item could be equally indicative of guilt or innocence. Wentworth did not testify as to what the item given to Pennington looked like. He did not testify to seeing cash change hands or any items being exchanged.

The fact that shots were fired that day is irrelevant. Wentworth had no reason to believe that Pennington was involved in the shooting and they did not occur near the Set.

The Commonwealth never established why Wentworth was admonished to be cautious around Pennington. It was second hand information and we never found out why Barnhill made such a statement. Even if this warning were based on some prior crime committed by Pennington, reasonable suspicion must be based on suspicion that a crime is currently afoot. Likewise, Wentworth's generic accusation that Pennington was nervous holds no weight. The Court of Appeals' Opinion Affirming relies heavily on Pennington's actions after he refused to consent to a search and protested to being subjected to an illegal search in order to justify Wentworth's actions. Yet his attempts to assert his constitutional rights cannot provide a basis for reasonable suspicion.

Conclusion

Robert Pennington's motion to suppress must be granted, since he was illegally detained, despite complying with Officer Wentworth through out the traffic stop, so that Wentworth could fish for evidence of a crime. Although Wentworth claimed to fear for his safety, he completed the citation without incident and did not choose to do a frisk until it had ended.

Since Pennington's arrest stemmed from the improper, prolonged detention and search, the arrest and any evidence gleaned from it must be suppressed as fruits of the poisonous tree. The United States Supreme Court has noted that "justify[ing] the arrest by the search and at the same time ... the search by the arrest," just "will not do." *Smith v. Ohio*, 494 U.S. 541, 543, *citing Johnson v. United States*, 333 U.S. 10, 16-17. "[I]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Id.* Pennington's rights under Section ten of the Kentucky Constitution and the Fourth Amendment of the United States Constitution were violated and reversal is warranted.

Respectfully submitted,

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