

FILED  
JAN 28 2008  
CLERK  
SUPREME COURT

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

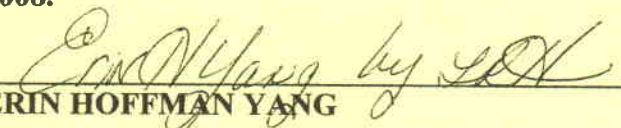
REPLY BRIEF FOR APPELLANT, ROBERT L. PENNINGTON

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. 6<sup>th</sup> Street, Paducah, Kentucky 42003; the Hon. Timothy Kaltenbach, Commonwealth's Attorney, Courthouse, 301 S. 6<sup>th</sup> Street, Paducah, Kentucky 42003; the Hon. Carlos Moran, Department Of Public Advocacy, 400 Park Avenue, Suite B, Paducah, Kentucky 42001; and to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on January 28, 2008.

  
ERIN HOFFMAN YANG

### **PURPOSE OF THE REPLY BRIEF**

The purpose of this reply brief is to address only those matters presented in Appellee's brief that the Appellant believes deserve further comment or citation of additional authorities beyond that presented in the previously filed Brief for Appellant. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues which have been address in this reply brief.

### **STATEMENT CONCERNING ORAL ARGUMENT**

Appellant desires oral argument in this case.

**I. THE COMMONWEALTH FAILS TO ADDRESS MR. PENNINGTON'S ARGUMENTS AND INSTEAD SIMPLY REPEATS THAT THE OFFICER HAD A RIGHT TO DETAIN AND SEARCH MR. PENNINGTON.**

**A. Mr. Pennington did not consent to the search.**

The Commonwealth seems to be under the impression that because Mr. Pennington submitted to an illegal search, he consented to it. Nothing could be further from the truth. Clearly, Mr. Pennington asserted his right not to be searched. (VR 1, 2/28/05, 13:44:30-13:45:00). Apparently, according to the Commonwealth, once a citizen has plainly and clearly told an officer that the citizen will not consent to a search, the citizen must not submit to the officer's authority, but must do something more affirmative to display non-consent. However, the Commonwealth has no suggestion as to what more a citizen must do to object to an illegal search. If the citizen runs away, he or she will be charged with Fleeing and Evading a police officer. If the citizen attempts to protect his person by fording off the officer's hands, he will be accused of assault. A citizen has no other option, when faced with an illegal search, than to submit, as Mr. Pennington was forced to do.

Mr. Pennington's first reaction was to refuse the Officer Wentworth's request to search. After that, any search was non-consensual and therefore must fall under one of the exceptions to the warrant requirement. This search does not fall under any such exception and thus was illegal.

**B. Officer Wentworth did not have reasonable suspicion.**

It is well-settled that prior to conducting a warrantless search, an officer must have reasonable suspicion that criminal activity is underfoot. *Terry v. Ohio*, 392 U.S.1, 9

(1968). The Courts have recognized that police interference with free will and the action of patting down a citizen's person are meaningful limitations on freedom that shouldn't be taken lightly. "Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It 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." *Id.* at 16-17. The Court of Appeals' Opinion took the intrusion into Mr. Pennington's liberty by the officer lightly and the Commonwealth's responsive brief does as well. The officer's action was a serious intrusion into Mr. Pennington's liberty and the search was illegal and unfounded.

The Commonwealth's own brief cites *Terry's* holding that an officer, before limiting a citizen's freedom and subjecting the citizen's person to a search, must have "more than an inchoate and unparticularized suspicion or hunch of criminal activity." What exactly supported the officer's decision to search? At the time he began the seizure of Mr. Pennington and the search of his person, he knew only that the temporary tag on the automobile was expired and that he had seen Mr. Pennington be approached by a person walking down the street. Apparently, the officer was not so concerned that Mr. Pennington had conducted an illegal transaction with the man on the street as the officer made no attempt to stop the man, but instead stopped Mr. Pennington. The officer's stated reason for stopping Mr. Pennington was the expired temporary tag. (VR 1, 2/28.05, 13:43:10). Therefore, unless something else occurred during the stop to imbue the officer with reasonable suspicion, the stop should have concluded with Mr. Pennington receiving a ticket for having expired tags.

In *Commonwealth v. Gonsalves*, the Massachusetts Supreme Judicial Court held that traffic stops should be concluded expeditiously, absent suspicious activity. 711 N.E.2d 108 (Mass. 1999).

“A routine traffic stop, like the one in this case, presents a situation where citizens, both the vehicle's driver and any passenger or passengers in the vehicle, expect a police officer to get the government's business done quickly, so those detained can go on their way. This expectation is a reasonable one... Citizens do not expect that police officers handling a routine traffic violation will engage, in the absence of justification, in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime”

*Id.* at 112.

Thus, because Officer Wentworth testified that he stopped Mr. Pennington, not because he saw what could have been a drug transaction and not because shots had been fired in other areas of Paducah that morning, but because he had expired tags, Officer Wentworth must have formed reasonable suspicion *during* the stop, but before the search. Officer Wentworth provided no testimony that would support a finding that after stopping Mr. Pennington and before searching him, something occurred which gave him the basis to form reasonable suspicion. The only thing that Wentworth testified to concerning the stop before the search was that Mr. Pennington appeared nervous. However, most citizens are nervous when stopped by the police and nervousness alone cannot establish reasonable suspicion. See *Joshua v. Dewitt*, 341 F.3d 159 (6<sup>th</sup> Cir. 2003). The “warning” that Officer Wentworth received over the radio to be “careful” in dealing with Pennington cannot be considered. Wentworth initiated contact with Mr. Pennington while alone and did not wait for other officers to arrive to initiate the contact, so he

cannot now claim that the warning was effective. Further, the fact that the Commonwealth never offered any evidence, nay the testimony of the officer who issued the warning, to support the warning, should be considered.

The Court of Appeals erred in holding that Mr. Pennington's agitated state, once the illegal search began, supported Officer Wentworth's suspicion. (Slip Opinion at 8). The Court specifically cited "Pennington's unusual agitation." *Id.* However, a citizen's insistence that his Constitutional rights be respected and upheld should never be considered by any Court as anything other than positive. In *Deno v. Commonwealth*, this Court stated,

"In the case at bar, at the time the detectives requested the specimen, the Appellant was not under arrest. Upon his refusal to comply with the officers' request, a search warrant was obtained and the specimen collected the next day. Nevertheless, the fact of Appellant's initial refusal was presented as evidence of his guilt and argued as such by the Commonwealth. We believe this to be a violation of Appellant's rights under the Fourth Amendment and Section 10 of the Constitution of Kentucky, and upon retrial, an objection to the use of such evidence and argument should be sustained."

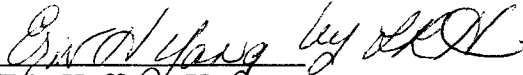
*Id.* at 762.

It was unfair to use Mr. Pennington's guarding of his Constitutional rights against him and the Court of Appeals Opinion was erroneous. The Court stated that "[a]lthough 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..." (Slip Opinion at 7). Therefore, the Court admitted that nervousness alone cannot be relied upon to create reasonable suspicion. However, the Court's citing the

“suspicious transaction” is curious as the transaction was not considered suspicious by Officer Wentworth as he did not attempt to stop the man who approached Mr. Pennington’s car or Mr. Pennington based upon the alleged transaction. If the alleged transaction was not suspicious enough to warrant a reason for a stop, it cannot now be cited as reason for the continued detention of Mr. Pennington.

The actions of the Paducah Police violated Mr. Pennington’s rights under the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and §10 of the Kentucky Constitution. Reversal of the Court of Appeals’ Opinion and remand to the Circuit Court are required in the interests of justice.

Respectfully submitted,

  
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