Commonwealth of Kentucky
Supreme Court
2008-SC-000060-DG

Cassandra Smith — Appellant

On Discretionary Review from the Kentucky Court of Appeals
No. 2006-CA-002120-MR

V.

Appeal from the Jefferson Circuit Court
Action No. 04-CR-0637

Commonwealth of Kentucky — Appellee

Brief for Appellant, Cassandra Smith

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Certificate of Service

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to: Hon. Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Division Four, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Amanda Snider, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202; and Hon. Jeffrey A. Cross, Assistant Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204 on October 10, 2008. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.

Elizabeth B. McMahon
ELIZABETH B. McMAHON

INTRODUCTION

Following a jury trial in Division Four of the Jefferson Circuit Court, the appellant, Cassandra Smith, was convicted of possession of a controlled substance in the first degree (cocaine) and possession of drug paraphernalia and received concurrent sentences totaling three years, probated for a period of five years. The Kentucky Court of Appeals rendered an unpublished opinion affirming the judgment of conviction of sentence, and this Court granted Cassandra Smith's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The appellant believes that oral argument would be helpful to this Court because this case demonstrates the need for this Court to reconsider and overrule the case of Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), in order to bring Kentucky law in line with the majority of jurisdictions that have concluded that being placed in handcuffs constitutes being in custody within the meaning of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In addition, this case presents an issue concerning the proper application of the "public safety" exception created by New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), which has not expressly been adopted by this Court.

NOTICE TO CITATIONS

Citations to the record of the Jefferson Circuit Court Clerk are made (TR, volume number, page number). References to the Appendix to this brief are made (App., page number). References to the videotape of the proceedings are made in conformance with CR 98, as follows:

VR No. 1: 30-4-06-VCR-018-1, trial proceedings conducted on March 29, 2006;

VR No. 2: 30-4-06-VCR-018-2, trial proceedings conducted on March 30, 2006;

VR No. 3: 30-4-06-VCR-018-3, trial proceedings conducted on March 31, 2006;

VR No. 4: 30-4-06-VCR-018-4, trial proceedings conducted on April 3, 2006;

VR No. 5: 30-4-06-VCR-018-5, trial proceedings conducted on April 4, 2006;

VR No. 6: Pretrial proceedings conducted on various dates and final sentencing conducted on August 28, 2006.

STATEMENT OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

On February 24, 2004, the Jefferson County Grand Jury returned an indictment charging the appellant, Cassandra Smith, with trafficking in a controlled substance in the first degree (cocaine) and possession of drug paraphernalia. (TR I, 1). These charges resulted from the execution of a search warrant at 1154 South 15th Street, where police officers recovered four pieces of suspected crack cocaine from Cassandra's pants pocket. (TR I, 2; VR No. 3; 3/31/06; 11:38:14-11:39:12).

The case was assigned to former Division Five[1] of the Jefferson Circuit Court, and defense counsel filed several pretrial motions, including a motion to suppress statements allegedly made by Cassandra during the execution of the search warrant. (TR I, 78-81). The trial court conducted a hearing and eventually denied the motion. (TR II, 216; App. C1; VR No. 6; 3/20/06; 11:04:12-11:21:32, 11:32:05-12:10:53, VR No. 1; 3/29/06; 10:52:52-11:45:50, 13:07:22-14:27:26, 15:15:16-15:20:40, VR No. 2; 3/30/06; 10:24:51-10:29:09).

A jury trial was held in this case from March 29 through April 4, 2006. The Commonwealth presented testimony from the officers who executed the search warrant, including Sergeant Yvette Gentry (VR No. 3; 3/31/06; 11:29:53-12:05:02), Sergeant Andre Bottoms (VR No. 3; 3/31/06; 12:05:02-12:32:31), Detective Shara Parks (VR No. 3; 3/31/06; 13:45:46-14:11:12), and Detective

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[1] Because the divisions of the Jefferson Circuit Court were renumbered effective July 1, 2005, former Division Five is now Division Four.

Scott Gootee, who was the lead detective on the case (VR No. 3; 3/31/06; 14:16:18-16:09:38). In addition, Detective Todd Vittitow testified about transporting evidence. (VR No. 3; 3/31/06; 10:16:07-10:27:44). Terry Comstock, a chemist at the Kentucky State Police Jefferson Regional Laboratory, explained that he only tested one of the four pieces of suspected cocaine and that the item tested positive for cocaine. (VR No. 3; 3/31/06; 10:28:40-11:13:25). The Commonwealth also presented testimony from Robert O'Neil, a special agent with the Kentucky Bureau of Investigation, concerning his previous experience as a narcotics officer for the Louisville Police Department. (VR No. 4; 4/3/06; 11:30:48-12:55:45).

Cassandra Smith took the stand and testified concerning the events of April 24, 2003. (VR No. 4; 4/3/06; 16:03:46-16:46:10). At that time, she rented a house at 1154 South 15th Street and lived there with her four daughters. (VR No. 4; 4/3/06; 16:04:18, 16:10:01). Her husband, Armon Perry, was incarcerated at the Community Corrections Center (CCC) but would stop by the house sometimes while out on work release. (TR I, 129-143; VR No. 4; 4/3/06; 16:05:17-16:05:58, 16:13:03-16:15:38). Late in the afternoon on April 24, 2003, Armon stopped by in a car on his way back to CCC. Cassandra went outside and spoke to him for 5 to 15 minutes. (VR No. 4; 4/3/06; 16:13:03-16:14:24). As Cassandra leaned on the car window, Armon put something in her front pants pocket. Cassandra assumed it was money, as Armon had given her money on prior occasions, and did not bother to check her pocket. (VR No. 4; 4/3/06;

16:14:24-16:15:38). The police pulled the drugs out of her pocket later that evening while executing the search warrant. (VR No. 4; 4/3/06; 16:23:40-16:24:05).

The defense also presented testimony from investigator Rose Nunn concerning her interview of Armon Perry (VR No. 4; 4/3/06; 14:22:38-14:31:20) and introduced Mr. Perry's CCC and work release records through Jamie Allen, a classification coordinator at Louisville Metro Corrections (VR No. 4; 4/3/06; 14:31:25-14:38:20). Cassandra's daughters Acacia and Alexia, who were present during the execution of the search warrant, also testified. (VR No. 4; 4/3/06; 14:38:27-15:05:10, 15:05:16-15:24:21).

On April 4, 2006, the jury returned verdicts acquitting Cassandra Smith of trafficking in a controlled substance but finding her guilty of possession of a controlled substance in the first degree (cocaine) and possession of drug paraphernalia. (TR II, 197-199; VR No. 5; 4/4/06; 15:08:25-15:09:17). A penalty phase was not conducted. Instead, the parties entered the following sentencing agreement: three years for possession of a controlled substance and twelve months for possession of drug paraphernalia, to run concurrently for a total sentence of three years. (TR II, 216; App. D1-D2; VR No. 5; 4/4/06; 15:32:24-15:37:00). In addition, the Commonwealth agreed to not object to probation, and Cassandra retained the right to appeal her convictions. (TR II, 216; App. D1; VR No. 5; 4/4/06; 15:32:24-15:37:00).

On August 28, 2006, the trial court conducted final sentencing. (VR No. 6; 8/28/06; 14:49:03-14:55:50). The court granted Cassandra Smith's request for probation and imposed concurrent sentences totaling three years, probated for a period of five years. (TR II, 268-270; App. B1-B3; VR No. 6; 8/28/06; 14:49:03-14:55:50). The Judgment of Conviction and Sentence was entered on September 7, 2006, and Cassandra Smith filed a timely notice of appeal to the Kentucky Court of Appeals on October 6, 2006. (TR II, 268-270, 273; App. B1-B3).

On appeal, Cassandra Smith raised two issues: (1) that the trial court committed reversible error by failing to suppress the statements she allegedly made to police in the bedroom and in the living room because they were the products of custodial interrogation, and she had not been given Miranda warnings; and (2) that the trial committed reversible error by precluding her from introducing evidence concerning Armon Perry's felony drug convictions. On December 21, 2007, the Court of Appeals rendered an unpublished opinion affirming the Judgment of Conviction and Sentence. (App. A1-A15). All three members of the panel concluded that the statements allegedly made by Cassandra Smith in the living room were not the result of police interrogation and that the trial court properly ruled that Armon Perry's prior drug convictions were irrelevant and inadmissible. (App. A1-A11). Judge Howard, however, filed a concurring opinion (App. A11-A15), "reluctantly concur[ring] in the result of the majority opinion" with respect to the statement made by Ms. Smith in the bedroom because of the binding authority of this Court's opinion in Taylor v. Commonwealth, 182

S.W.3d 521 (Ky. 2006). (App. A15). Judge Howard disagreed with the Court's holding in Taylor and stated that he "would find Smith, once handcuffed, to have been in custody for purposes of Miranda, and order the statement made in her bedroom suppressed." (App. A15).

Cassandra Smith filed a timely motion for discretionary review, and on August 13, 2008, this Court entered an order granting the motion. Additional facts will be discussed as necessary in the arguments below.

ARGUMENT

I. The trial court committed reversible error by failing to suppress the statements allegedly made by Cassandra Smith. The statements were the products of custodial interrogation, and the police officers did not provide Miranda warnings.

A. Preservation

This issue was properly preserved for review by the appellant's motion to suppress the statements allegedly made by her during the search conducted on April 24, 2003, the suppression hearing, and her motion to renew her previous arguments when the trial court reconsidered its initial ruling. (TR I, 78-81; VR No. 6; 3/20/06; 11:04:12-11:21:32, 11:32:05-12:10:53, VR No. 1; 3/29/06; 10:52:52-11:45:50, 13:07:22-14:27:26, 15:15:16-15:20:40, VR No. 2; 3/30/06; 10:24:51-10:29:09).

B. Background

The following evidence was presented at the two-part suppression hearing conducted in this case on March 20 and March 29, 2006. (VR No. 6; 3/20/06; 11:04:12-11:21:32, 11:32:05-12:10:53, VR No. 1; 3/29/06; 10:52:52-11:45:50, 13:07:22-14:27:26). Officers with the Louisville Police Department's 2nd District Flex Unit executed a search warrant at 1154 South 15th Street, on April 24, 2003. (VR No. 6; 3/20/06; 11:36:07-11:37:40). The officers forced entry into the residence by ramming the front door open and then scattered throughout the house. (VR No. 6; 3/20/06; 11:38:02-11:39:25). Sergeant Yvette Gentry testified that she found Cassandra Smith in a bedroom and that she "secured" Cassandra by

placing her in handcuffs. (VR No. 1; 3/29/06; 10:57:35-10:58:45, 11:08:10-11:08:30). Sergeant Gentry denied that Cassandra was under arrest at that point, claiming that the officers were "just securing everybody to make sure the scene was rendered safe." (VR No. 1; 3/29/06; 10:58:04-10:58:45). Sergeant Gentry testified that she then asked Cassandra whether she had any drugs or weapons on her and that Cassandra indicated that she had drugs in her pocket. According to Sergeant Gentry, she then retrieved the drugs from Cassandra's front pants pocket and handed them to Detective Shara Parks. (VR No. 1; 3/29/06; 10:57:46-10:59:00). On cross-examination, Sergeant Gentry could not point to any documentation in the police file regarding the statement allegedly made by Cassandra concerning having drugs in her pocket and acknowledged that this statement was not disclosed in discovery until January 2006. (VR No. 1; 3/29/06; 11:04:53-11:07:39). Sergeant Gentry further admitted that she never advised Cassandra of her rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that she never witnessed any other officer advise Cassandra of her rights that evening. (VR No. 1; 3/29/06; 11:08:16-11:09:22).

Although no one else recalled Miranda rights being given that night, Detective Scott Gootee claimed that he read Cassandra her rights as part of the "normal routine" when Sergeant Gentry and Detective Parks brought her into the living room in handcuffs. (VR No. 6; 3/20/06; 11:41:04-11:42:12). According to Detective Gootee, Cassandra made statements while in the living room to the

effect that she knew this might happen one day, that she wasn't a big drug dealer, and that she just did it to get by. (VR No. 6; 3/20/06; 11:42:35-11:44:11). When asked by the prosecutor whether Cassandra had made these statements in response to any questioning, Detective Gootee replied as follows:

> Det. Gootee: I'm sure I did that led to it. What I exactly asked her, I don't remember. It was basically I, I don't know if it was like a question that would lead her in that direction. I don't know if it was just a blunt statement that she had made to herself. I just don't know what was said and, um, to tell you the truth, I can't recall if I asked her a question that led her to the statement or not.

(VR No. 6; 3/20/06; 11:42:58-11:43:40). On re-direct, Detective Gootee clarified the context in which these statements were allegedly made:

> Prosecutor: I want to go back to the statement about when she talks about "I knew this would happen, I've told them about it," speaking to her kids. Do you remember how her kids even came up?
>
> Det. Gootee: It may have been the fact that "we can't believe you're," and then again, this is, you know, I'm not 100% sure because it's been three years ago. Uh, but if I recall somewhat, I think it came up that "we can't believe that you're here doing, you know, you're selling drugs with your kids present, you know, putting them in that kind of danger." Basically the same statements that we make, you know, anytime kids are present at any...If I had to guess, that would, that would be how it would be brought up.

(VR No. 6; 3/20/06; 11:58:52-11:59:40). On cross-examination, Detective Gootee acknowledged that he had not documented the giving of Miranda warnings on the arrest citation. (VR No. 6; 3/20/06; 11:55:44-11:56:00).

The defense presented testimony from Cassandra Smith and two of her daughters, Acacia and Alexia, who were at home during the execution of the search warrant. Cassandra testified that she heard noises while lying down on her bed. When she opened the door to her bedroom, two police officers approached her and took her back into her bedroom. (VR No. 1; 3/29/06; 13:34:52-13:35:55). The officers handcuffed her and patted her down, but they did not find any drugs on her at that time. Contrary to the version of events presented by Sergeant Gentry, Cassandra testified that the officers asked her if she had any drugs, and she said "no." (VR No. 1; 3/29/06; 13:37:26-13:38:50). The officers then took Cassandra into the living room, where she remained in handcuffs. They eventually conducted a more thorough search and located drugs in her front pants pocket. (VR No. 1; 3/29/06; 13:37:56-13:39:55). According to Cassandra, no one informed her of her Miranda rights, and she did not feel free to leave. (VR No. 1; 3/29/06; 13:39:04-13:39:17).

Acacia Smith, who was twelve-years old at the time of the search, was present when her mother was brought into the living room in handcuffs. (VR No. 1; 3/29/06; 13:09:29-13:09:53, 13:12:48). Acacia never heard any of the officers read her mother Miranda warnings. (VR No. 1; 3/29/06; 13:11:02-13:11:15). Acacia further testified that she saw a police officer pull something out of her mother's pocket while in the living room and that her mother was then taken to jail. (VR No. 1; 3/29/06; 13:11:15-13:12:00). Alexia Smith, who was eleven-years-old at the time of the search, testified that her mother and sister were al-

ready in the living room when the officers brought her to that room and that her mother was in handcuffs. (VR No. 1; 3/29/06; 13:23:00-13:24:03, 13:25:08, 13:26:05). She did not hear any of the officers advise her mother about Miranda warnings. (VR No. 1; 3/29/06; 13:24:03). Alexia testified that her mother said that dealing with the wrong people could lead to certain situations and that the police had come into the house like she was some kind of notorious drug dealer when that was not the case at all. (VR No. 1; 3/29/06; 13:31:46-13:32:40). Alexia further testified that an officer pulled the drugs out of her mother's pocket while in the living room. (VR No. 1; 3/29/06; 13:24:23-13:24:58).

The Commonwealth called Detective Shara Parks as a rebuttal witness. Detective Parks testified that she was present in the bedroom when Sergeant Gentry retrieved the drugs from Cassandra's pants pocket, but Detective Parks did not mention any statement being made by Cassandra regarding the drugs in her pocket. (VR No. 1; 3/29/06; 13:50:34-13:51:19). Detective Parks further testified that when officers asked Cassandra if there was somewhere the children could go while the search warrant was being executed that "she made a statement, something to the effect of 'I've talked to my kids, they know what's going on, they knew it was a possibility that, that you all would be here,' something to that effect." (VR No. 1; 3/29/06; 13:53:39-13:54:19). However, Detective Parks acknowledged that she did not hear any officer read Miranda rights to Cassandra. (VR No. 1; 3/29/06; 13:52:56, 13:58:22).

The trial court initially issued a ruling suppressing Cassandra Smith's statements, finding that it was not convinced that Miranda rights had actually been given. (VR No. 1; 3/29/06; 15:19:18-15:20:10). The next day, the Commonwealth filed a motion requesting that the court reconsider its ruling. (TR II, 176-180). The trial court then reversed its ruling. Finding the case of Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), to be "specifically on point," the trial court concluded that Cassandra was not in custody for Miranda purposes at the time she made the alleged statement in the bedroom concerning the drugs being in her pocket even though she was in handcuffs. (VR No. 2; 3/30/06; 10:24:51-10:27:38). The trial court also determined that Cassandra's later statements, allegedly made in the living room, were not made in response to any police interrogation. (VR No. 2; 3/30/06; 10:27:38-10:29:09). The trial court, therefore, denied the motion to suppress Cassandra's statements. (TR II, 230; App. C1; VR No. 2; 3/30/06; 10:24:51-10:29:09).

On appeal, all three members of the Court of Appeals panel concluded that the statements allegedly made by Cassandra Smith in the living room were not the result of police interrogation. (App. A1-A11). Two of the three judges also held that the police were not required to give Cassandra Smith Miranda warnings before asking her questions in the bedroom, as "Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation." (App. A5). Judge Howard, however, "reluctantly concur[red] in the result of the majority opinion" with respect to the statement

made by Ms. Smith in the bedroom because of the binding authority of this Court's opinion in Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006). (App. A15). In his concurring opinion, Judge Howard disagreed with the Court's holding in Taylor and stated that unlike the majority opinion, he "would find Smith, once handcuffed, to have been in custody for purposes of Miranda, and order the statement made in her bedroom suppressed." (App. A15).

C. Legal Analysis

The Fifth Amendment to the United States Constitution provides that, "[n]o person...shall be compelled in any criminal case to be a witness against himself...." U.S. Const. Amend. V. This constitutional provision governs state as well as federal criminal proceedings. Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). In addition, Section Eleven of the Kentucky Constitution mandates that "[i]n all criminal prosecutions the accused...cannot be compelled to give evidence against himself...." Therefore, both the state and federal constitutions guarantee the privilege against self-incrimination to criminal defendants.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court recognized that compulsion is inherent in custodial settings and that special safeguards are necessary to protect against "incommunicado interrogation of individuals in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." Miranda, 384 U.S. at 445, 458, 86 S.Ct. at 1612, 1619, 16 L.Ed.2d at

707, 714. The Supreme Court, therefore, set forth procedural rules that police must follow when conducting custodial interrogations in order to protect a person's Fifth Amendment privilege against self-incrimination:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda, 384 U.S. at 478-479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. A person subjected to custodial interrogation is entitled to the benefit of these procedural safeguards "regardless of the nature or severity of the offense for which he is suspected or for which he was arrested." Berkemer v. McCarty, 468 U.S. 420, 434, 104 S.Ct. 3138, 3147, 82 L.Ed.2d 317 (1984). Further, Miranda "requires the express declaration of a defendant's rights prior to custodial interrogation. Otherwise suppression is the remedy." Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995), citing Miranda, 384 U.S. at 479, 16 L.Ed.2d at 726.

The review of a circuit court's ruling on a suppression motion is two-fold: "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a de novo review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky. App. 2000). See also RCr 9.78. This Court "has used a de novo standard of review in deciding whether the Fifth Amendment protection against self-incrimination is applicable to a particular situation." Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006), citing Welch v. Commonwealth, 149 S.W.3d 407 (Ky. 2004).

In the case at bar, the appellant sought to suppress the following statements: (1) the statement "in my pocket," which was supposedly made by Cassandra in the bedroom after Sergeant Gentry handcuffed her and asked her whether she had any drugs or weapons, and (2) several statements allegedly made by Cassandra in the living room after being officially placed under arrest, to the effect that she had told her children this might happen, that she was not a big time drug dealer, and that she only sold small amounts. As demonstrated below, the statements in both instances were the products of custodial interrogation that violated Cassandra Smith's constitutional privilege against compelled self-incrimination.

1. The statement made in the bedroom

a. Cassandra Smith was "in custody" for Miranda purposes.

"Miranda warnings are required only where there has been such a restriction on the freedom of an individual as to render him in custody." Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006), citing Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The Miranda Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 706 (1966). In further interpreting the custodial component of Miranda, the United States Supreme Court has held that "[a]lthough the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275, 1279 (1983), citing Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). In Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984), the Court explained that the relevant inquiry for determining whether the interrogation is custodial is "how a reasonable man in the suspect's position would have understood his situation." On appeal, the

question of whether a defendant is in custody for Miranda purposes is to be reviewed de novo. Lucas, 195 S.W.3d at 405.

In the case at hand, the trial court concluded that Cassandra was not in custody at the time Sergeant Gentry asked her whether she had drugs or weapons. (VR No. 2; 3/30/06; 10:24:51-10:29:09). Relying on this Court's decision in Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), the trial court determined that although Cassandra had been secured in handcuffs for safety reasons, she was not actually in custody for purposes of Miranda when she responded, "In my pocket." (VR No. 2; 3/30/06; 10:24:51-10:27:38). The Court of Appeals, in its majority opinion, also cited to Taylor v. Commonwealth, 182 S.W.3d 521 (Ky. 2006), as well as the case of United States v. Foster, 376 F.3d 577 (6th Cir. 2004), in holding that "Smith was not in police custody simply because she was placed in handcuffs while the officers completed their search and investigation" and concluded that "[t]herefore, no Miranda warnings were necessary...." (App. A5). The reliance by these courts on the Taylor case, however, is misplaced for several reasons.

In Taylor, police received a tip from a reliable confidential informant that the defendant was in possession of crack cocaine. The informant provided a detailed description of the suspect and his whereabouts. Taylor, 182 S.W.3d at 522. The police went to that location, saw the defendant, and determined that he matched the description. Id. at 522. As the police approached, the defendant "moved in the opposite direction" and made "furtive glances at the officers." Id.

at 522. The officers eventually confronted the defendant and handcuffed him "because they feared he was a flight risk." Id. at 522. The officers advised the defendant that he was not under arrest but that they had been told he possessed drugs. The defendant then admitted he had cocaine and marijuana in his pockets. Id. at 522. At that point, the police officially arrested the defendant, searched him, and found the drugs on his person. Id. at 522.

After the circuit court denied the defendant's motion to suppress, the defendant entered a conditional plea of guilty. Taylor, 182 S.W.3d at 523. The Court of Appeals affirmed the judgment of conviction, and this Court accepted discretionary review. Id. at 523. In concluding that the suppression motion had been correctly denied, this Court determined that no custodial interrogation occurred because "the statements made by Taylor were not in response to any police statement reasonably calculated to elicit an incriminating response." Id. at 523. Instead, "Taylor spontaneously interrupted [the police officer by] stating that he had crack cocaine and marijuana in his pockets." Id. at 523. This Court also held that the defendant was not in custody for Miranda purposes:

> Taylor was handcuffed to allow officers to conduct an investigative stop in an area which they knew had multiple escape routes. The handcuffs were used only as a means of reducing the mobility of Taylor. The circumstances of the furtive glances given by Taylor as he walked away from the officers, as well as the escape route possibilities, caused them to consider him a serious flight risk. He was not placed in custody as that phrase has been generally used in the context of Miranda cases.

Id. at 523. As recognized by Judge Howard in the case at hand, however, "the law set out [in Taylor] should be changed." (App. A12).

In his concurring opinion, Judge Howard notes that the holding in Taylor, i.e., that being placed in handcuffs does not constitute "custody" so as to make Miranda applicable, actually conflicts with "the majority of authorities from other jurisdictions." (App. A12). According to the criminal procedure treatise of Professor Wayne R. LeFave, et al, "[a] court...is likely to find custody if there was physical restraint such as handcuffing...." LeFave, et al, Criminal Procedure, Vol. 2, Section 6.6(f), pp. 749-750 (3rd ed. 2007). In the Iowa case of State v. Miranda, for example, police officers knocked at an apartment while investigating a loud party and smelled marijuana when a woman opened the door. State v. Miranda, 672 N.W.2d 753, 756 (Iowa 2003). The police asked to come inside, and the woman consented. Id. at 756. After entering the apartment, the officers found the defendant and some marijuana in one of the bedrooms. Id. at 756. The officers handcuffed the defendant, brought him into the living room where other people were present, and asked if the marijuana found in the bedroom and in the living room belonged to him without providing Miranda warnings. The defendant admitted that the marijuana belonged to him and was placed under arrest. Id. at 756, 759. The Supreme Court of Iowa held that the defendant's statement was the result of custodial interrogation and had to be suppressed. Id. at 761. In determining that the defendant was in custody for Miranda purposes, the court emphasized that "[c]ritically, the fact that [the defendant] was handcuffed strongly indicates he was not free to leave" and that "[t]o hold otherwise would

wrongly suggest [the defendant] was free to leave while securely anchored to police property." Id. at 760.

In the case of United States v. Henley, the Ninth Circuit "had no trouble concluding that [the defendant] 'ha[d] been taken into custody or otherwise deprived of his freedom of action in [a] significant way'" where the defendant was "being questioned by an FBI agent while sitting handcuffed in the back of a police car" before formally being placed under arrest. United States v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993), quoting Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Similarly, in the case of State v. Lescard, the Supreme Court of New Hampshire found that "[t]here is no question that the defendant was in custody at the time the statements were made" where "[h]e had been handcuffed at the scene of the accident and was attended by a police officer while at the hospital." State v. Lescard, 517 A.2d 1158, 1159 (N.H. 1986).

The Seventh Circuit in the case of United States v. Smith also had "no difficulty in concluding that [the defendant's] freedom of action was curtailed in a very significant way" where the defendant "had been frisked, placed in handcuffs and told to sit at a specific place on the grass by the side of the road" after the taxi he was riding in had been stopped. United States v. Smith, 3 F.3d 1088, 1097 (7th Cir. 1993). See also Commonwealth v. Medley, 612 A.2d 430, 433 (Pa. 1992) ("[I]t would be difficult to imagine a situation more likely to produce a belief that one's freedom of movement is restricted than that of being frisked, handcuffed, and transported to a police station."); People v. Mangum, 48 P.3d

568, 572 (Colo. 2002) ("We agree that police interrogation of the defendant after he was handcuffed in this case was custodial...."); and Dixon v. Commonwealth, 613 S.E.2d 398, 400 (Va. 2005) (The court's conclusion that the defendant was in custody for purposes of Miranda when questioned by the police about a vehicle accident was "influenced most strongly by the combined factors of [the defendant] being restrained in handcuffs and being locked in a police patrol car."). In Taylor, the fact that the police officers handcuffed the defendant because they considered him "a serious flight risk" demonstrates that the police had no intention of letting him leave. Taylor, 182 S.W.3d at 523. A reasonable person in the defendant's position would certainly not have believed he was free to leave. See California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275, 1279 (1983), and Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

In addition, as Judge Howard explained in his concurring opinion in the case at hand, the Taylor opinion is mistakenly premised on United States v. Foster, 376 F.3d 577 (6th Cir. 2004):

> Nonetheless, the law in Kentucky is set out in Taylor, which holds that a suspect is not in custody, for Miranda purposes, even if handcuffed, apparently unless he or she is placed under arrest. [Footnote omitted.] The only authority cited for this proposition is United States v. Foster, 376 F.3d 577 (6th Cir. 2004). However, Foster did not deal with Miranda rights at all. It merely held that handcuffing a subject was not necessarily inconsistent with a brief, investigatory stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); that is, it does not automatically transform a Terry stop into an arrest. But it is well established that a Terry stop may rise to the level of "custody," for purposes of Miranda, without constituting an arrest. [Citations omitted.]

(App. A13). As other jurisdictions have clarified, a court's "inquiry into the circumstances for a Fifth and Sixth Amendment Miranda analysis requires a different focus than that for a Fourth Amendment Terry stop." United States v. Smith, 3 F.3d 1088, 1096 (7th Cir. 1993). In United States v. Smith, for example, the Seventh Circuit determined that the Terry stop of the taxi in which the defendants were riding was justified and that the handcuffing of the defendants did not transform the investigative stop into an unreasonable seizure for Fourth Amendment purposes. United States v. Smith, 3 F.3d at 1096. But the court still found that the defendant was in custody for Miranda purposes:

> The purpose of permitting a temporary detention without probable cause or a warrant is to protect police officers and the general public....
>
> The purpose of the Miranda rule, however, is not to protect the police or the public. "[T]he basis for the decision was the need to protect the fairness of the trial...," and "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights secured under the Fourth Amendment." Schneckloth v. Bustamonte, 412 U.S. 218, 240-241, 93 S.Ct. 2041, 2054-2055, 36 L.Ed.2d 854 (1973)...Accordingly, a completely different analysis of the circumstances is required.
>
> ...
>
> The Supreme Court has instructed us that when a temporary detention takes place, Miranda becomes applicable whenever "'a person has been taken into custody *or otherwise deprived of his freedom in any significant way....*'" Berkemer v. McCarty, 468 U.S. 420, 435, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317 (1984) (quoting Miranda, 384 U.S. at 444, 86 S.Ct. at 1612). Berkemer thus underscores that Fifth and Sixth Amendment rights are implicated before a defendant has been arrested.
>
> ...
>
> Prior to Officer Twing's questioning, Stewart had been frisked, placed in handcuffs and told to sit at a specific place on the grass by the side of the road. At that time, the defendants were

> outnumbered by the police officers. Stewart was not free to go anywhere. His movement was curtailed as if he were handcuffed to a chair in a detective's office or placed in a holding pen in a station house or put behind bars. We have no difficulty in concluding that Stewart's freedom of action was curtailed in a very significant way.

Id. at 1097 (emphasis in original).

In People v. Mangum, the Colorado Supreme Court recognized that although handcuffs may be a necessary safety precaution under certain circumstances, the coercive nature of that restraint must still be considered in a Fifth Amendment analysis:

> While exhibiting guns or using handcuffs may at times amount to reasonable safety precautions that do not necessarily elevate a seizure based on less than probable cause to a full arrest, *Fifth Amendment protections are concerned with the likely coercive effect of this degree of force on a reasonable person in the suspect's position. Neither the reasonableness of the force nor its legal justification alters its likely coercive effect.* Where it would appear to a reasonable person in the defendant's position that his freedom of action or movement had been curtailed to a degree associated with a formal arrest, in terms of both severity and duration, he is entitled to a Miranda advisement before being interrogated. Miranda never bars interrogation itself no matter how coercive the environment; it merely ensures that a defendant's statements made during custodial interrogation may not be used in the case against him unless he was adequately warned of, and waived, his right not to make them. The defendant was neither warned of his Miranda rights nor released from custody at any time prior to being placed in jail.

People v. Mangum, 48 P.3d 568, 572 (Colo. 2002) (emphasis added). Similarly, the Supreme Court of Virginia has recognized that although "persons temporarily detained pursuant to [traffic stops and Terry stops] generally are not 'in custody' for purposes of the Miranda rule....a suspect may be 'in custody' for purposes of Miranda before he actually has been arrested...." Dixon v. Commonwealth, 613

S.E.2d 398, 401 (Va. 2005) (internal citation omitted). The court in Dixon, therefore, "consider[ed] the circumstances of [the defendant's] detention under the test stated by the Supreme Court in Berkemer to determine whether a reasonable person in Dixon's position would have concluded that his freedom was being curtailed to a degree associated with formal arrest." Dixon v. Commonwealth, 613 S.E.2d at 401.

The Taylor case is out of line with the majority of jurisdictions that have concluded that being placed in handcuffs can constitute being "in custody" for Miranda purposes even though a formal arrest has not been made. In addition, the Taylor opinion appears to confuse what should have been a Fifth Amendment Miranda analysis with a Fourth Amendment Terry analysis on the issue of custody:

> Taylor was handcuffed to allow officers to conduct an investigative stop in an area which they knew had multiple escape routes. The handcuffs were used only as a means of reducing the mobility of Taylor. The circumstances of the furtive glances given by Taylor as he walked away from the officers, as well as the escape route possibilities, caused them to consider him a serious flight risk. He was not placed in custody as that phrase has been generally used in the context of Miranda cases.
>
> ...
>
> Taylor was not in custody for Miranda purposes simply because he was handcuffed and detained in order to prevent his flight until the investigation was completed.

Taylor, 182 S.W.3d at 523, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and United States v. Foster, 376 F.3d 577 (6th Cir. 2004). Although handcuffing the defendant may have been reasonable under the circumstances, the Court in Taylor did not consider the coercive effect of this force

and whether a reasonable person in the defendant's circumstances would have felt free to leave. Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). For these reasons, the appellant respectfully submits that Taylor should be overruled.

Even if this Court is not willing to completely overrule Taylor, this Court should, at a minimum, clarify that a person can be "in custody" for purposes of Miranda without being under arrest. In fact, the Court in Taylor could have recognized that the defendant was in custody for Miranda purposes but nevertheless reached the same result because no interrogation occurred:

> As the officer began to tell Taylor why he was being stopped, Taylor spontaneously interrupted him stating that he had crack cocaine and marijuana in his pockets.
>
> ...
>
> The evidence indicates that the statements made by Taylor were not in response to any police statement reasonably calculated to elicit an incriminating response. Miranda requires an individual who is stopped to be apprised of his\her rights only in the context of a custodial interrogation. Here, there was no custodial interrogation.

Taylor, 182 S.W.3d at 523. See also State v. Lescard, 517 A.2d 1158, 1159 (N.H. 1986) (finding that there was no interrogation for purposes of Miranda even though "[t]here is no question that the defendant was in custody at the time the statements were made" because "[t]he nature of the exchange...was in no way calculated to produce an incriminating response.").

Like the Taylor opinion, the majority opinion of the Court of Appeals in this case appears to engage in a Fourth Amendment analysis on the issue of custody rather than a Fifth Amendment Miranda analysis. The court cites to the case

of United States v. Foster, 376 F.3d 577 (6th Cir. 2004), for the proposition that "Miranda does not preclude questions regarding the location of contraband, especially in situations such as the case *sub judice* where a suspect is detained but not in custody." (App. A6). As noted by Judge Howard in his concurring opinion and discussed above, "Foster did not deal with Miranda rights at all. It merely held that handcuffing a subject was not necessarily inconsistent with a brief, investigatory stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); that is, it does not automatically transform a Terry stop into an arrest." (App. A13).

Along the same lines, the Court of Appeals relies on the case of United States v. Erwin, 155 F.3d 818, 823 (6th Cir. 1998), to support its contention that "[i]t would have been plainly unreasonable, if not inept police work, for the officers herein to have simply allowed Smith to wander about without at least cursory questioning regarding contraband considering the circumstances under which the officers came to be present in her home, that is, in order to execute a search warrant." (App. A6-A7). However, the Erwin case can easily be distinguished from the case at hand. First, the issue in Erwin was "whether the search of Erwin's vehicle was reasonable under the Fourth Amendment." To determine that issue, the Sixth Circuit had to answer two questions: (1) whether the police officers had a reasonable articulable suspicion that Erwin was engaged in other criminal activity in order to justify his continued detainment after determining he was not intoxicated; and (2) whether the defendant's consent to search the car

was voluntary. Id. at 820. No Fifth Amendment issue was raised, and no Fifth Amendment analysis was conducted. Second, an important factual distinction exists: the defendant in Erwin was not placed in handcuffs until *after* he consented to a search of the car and the officers found a package of cocaine. Only then was the defendant "arrested, cuffed, and placed...in the patrol car." Erwin, 155 F.3d at 822. In contrast, Sergeant Gentry testified that she handcuffed Cassandra Smith and then asked Cassandra whether she had any drugs or weapons on her. (VR No. 1; 3/29/06; 10:57:46-10:59:00). The decisions in Foster and Erwin have no bearing on whether custodial interrogation took place in this case.

Under Miranda and its progeny, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 422, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Police officers forced entry into Cassandra Smith's house by ramming the front door open and scattered throughout the house. (VR No. 6; 3/20/06; 11:38:02-11:39:25). Sergeant Yvette Gentry went into Cassandra Smith's bedroom, handcuffed her, and asked Cassandra whether she had any drugs or weapons on her without advising Cassandra of her Miranda rights. (VR No. 1; 3/29/06; 10:57:35-10:59:00, 11:08:10-11:09:22). Sergeant Gentry's claims, that the officers were "just securing everybody to make sure the scene was rendered safe" and that it is "typical" for the police to "secure people" with handcuffs, are immaterial to the issue of whether custodial interrogation occurred. (VR No. 1; 3/29/06; 10:58:04-10:58:45). Under these circumstances, a reasonable person

in Cassandra's situation would not have believed she was free to leave. As Judge Howard opined in his concurring opinion:

> Would the suspect, Smith in this case, reasonably have believed she was in custody, or that she was free to leave? It is hard to imagine a situation in which a subject, placed in police handcuffs, could reasonably believe she was free to go. Would she also be free to take with her the handcuffs, which were police property?

(App. A15). Cassandra Smith was in custody for Miranda purposes when Sergeant Gentry asked whether she had any drugs or weapons.

b. The public safety exception does not apply.

Citing the case of New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), the Court of Appeals, in its majority opinion, invoked the "public safety" exception to support its contention that "when officers ask questions intended to secure their own safety or that of the public which are not solely intended to elicit incriminating statements, Miranda warnings are unnecessary." (App. 6). However, the Court of Appeals failed to explain how the public safety exception actually applied in this case.

In Quarles, a woman told police that she had been raped, the man had a gun, and he just went into a supermarket. The woman also gave a detailed description of the man and his clothing. Quarles, 467 U.S. at 651-652, 104 S.Ct. at 2629. An officer entered the store and saw the defendant, who matched the description given by the woman. Id. 467 U.S. at 652, 104 S.Ct. at 2629. The officer pursued the defendant as he ran toward the rear of the store but briefly lost sight of him. Id. 467 U.S. at 652, 104 S.Ct. at 2629. The officer caught up with

the defendant, immediately frisked him, saw that he had an empty holster, and asked him where the gun was. Id. 467 U.S. at 652, 104 S.Ct. at 2629. The man nodded at some boxes and said, "The gun is over there." Id. 467 U.S. at 652, 104 S.Ct. at 2629. After the gun was found, the officer then formally arrested the man and read him his Miranda rights. The man agreed to talk and made other admissions about the gun. Id. 467 U.S. at 652, 104 S.Ct. at 2629.

The majority opinion in Quarles agreed that the defendant was in police custody when he was asked where the gun was located, noting that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest'". Quarles, 467 U.S. at 655, 104 S.Ct. at 2631, quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3519, 77 L.Ed.2d 1275 (1983). The majority, however, held "that on these facts there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence...." Quarles, 467 U.S. at 655, 104 S.Ct. at 2631. The Supreme Court recognized it as "a narrow exception to the Miranda rule" and relied upon the following facts:

> The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

Id. at 467 U.S. at 657, 658, 104 S.Ct. at 2632.

In contrast to the facts relied upon by the majority in Quarles, the police were not "confronted with the immediate necessity of ascertaining the whereabouts of a gun" when they burst into Cassandra Smith's house, and they had no information or indication that a gun was concealed on Cassandra. Although Sergeant Gentry claimed that they were "securing everybody to make sure the scene was rendered safe," she did not testify that she believed her own safety or the safety of the public was in jeopardy after Cassandra was placed in handcuffs. (VR No. 1; 3/29/06; 10:58:04-10:58:45). Yet, that is when Sergeant Gentry asked Cassandra whether she had any drugs or weapons on her – after Cassandra was handcuffed. Although Sergeant Gentry denied that Cassandra was under arrest at that point, she could have patted Cassandra down if she believed Cassandra was armed. See Terry v. Ohio, 392 U.S. 1, 29-30, 88 S.Ct. 1868, 1884-1885, 20 L.Ed.2d 889 (1968). However, where Sergeant Gentry was present to execute a search warrant based on alleged drug activity at that address, asking Cassandra Smith whether she had drugs or weapons was clearly "designed solely to elicit testimonial evidence from a suspect" and was not justified under the public safety exception. Quarles, 467 U.S. at 658-659, 104 S.Ct. at 2633.

It is also important to note that neither this Court nor the Kentucky Court of Appeals has expressly adopted the public safety exception that the United States Supreme Court created in Quarles. "[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this [United States Supreme] Court holds to be necessary upon federal constitutional stan-

dards." Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575 (1975) (emphasis added). The appellant, therefore, would urge this Court to reject the majority opinion in Quarles and to instead adopt the sounder approach taken by Justice Marshall in his dissenting opinion or by Justice O'Connor in her concurring and dissenting opinion.[2] The dissent points out that the statements made by the person in custody are still coerced statements, even if the police are acting out of a perceived need to protect the public. Quarles, 467 U.S. at 684-685, 104 S.Ct. at 2647 (Marshall, J., dissenting). The dissent also questions whether the safety of the public was in jeopardy when the officer in Quarles began questioning the defendant. He was handcuffed, and the officers felt secure enough to put away their guns because the situation was under control. Id. 467 U.S. at 675-676, 104 S.Ct. 2642 (Marshall, J., dissenting). "The police could easily have cordoned off the store and searched for the missing gun." Id. 467 U.S. at 676, 104 S.Ct. at 2642 (Marshall, J., dissenting). In Cassandra Smith's case, Sergeant Gentry had already handcuffed her before asking whether she had drugs or weapons on her. There was simply no reason to interrogate Ms. Smith when Sergeant Gentry could have simply patted her down for weapons.

Justice O'Connor's concurring and dissenting opinion in Quarles is also more practical and sensible than the majority opinion. Justice O'Connor recogniz-

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[2] This issue is currently pending before this Court in the case of Kareem Ali Henry v. Commonwealth, No. 2006-SC-000767-DG. The Court heard arguments in that case on May 16, 2008, but an opinion had not been issued at the time the appellant filed her brief in this case.

es that "there is nothing about exigency that makes custodial interrogation any less compelling...." Quarles, 467 U.S. at 665, 104 S.Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor, therefore, advocates that while the police officer should make the decision whether public safety considerations in a particular situation demand bypassing Miranda, the officer would do so with the understanding that any statement by the person in custody would be inadmissible at trial. Quarles, 467 U.S. at 660, 664, 104 S.Ct. at 2634, 2636 (O'Connor, J., concurring in part and dissenting in part). But Justice O'Connor would not require the suppression of any physical evidence discovered as a result of unwarned statements made by the person in custody. Id.

The appellant does not urge this Court to reject the majority opinion of Quarles merely because this Court has the power to do so. Rather, this Court should rely upon long-standing principles of Kentucky law. In Parks v. Commonwealth, 192 S.W.3d 318 (Ky. 2006), this Court noted that "[t]he exclusionary rule is designed to deter police misconduct...." Parks, 192 S.W.3d at 335, citing United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). But as explained in Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860 (1920), the deterrent effect is not the basis for the Kentucky exclusionary rule. Rather, Kentucky courts will not allow the use at trial of illegally obtained evidence because the Court of Justice should not be a party to unconstitutional actions by state actors:

> It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely

> create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of those rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified.

Youman, 224 S.W. at 866.

Other states have rejected United States Supreme Court decisions when those states have determined that their citizens are entitled to greater protections than the United States Supreme Court is willing to recognize. In particular, the Supreme Court of Hawaii, in State v. Kane, 951 P.2d 934 (Hawaii 1998), specifically rejected the adoption of the Quarles public safety exception to Miranda. The court did so on the basis of Article One, Section Ten of the Hawaii Constitution (which, in relevant part, states "[N]or shall any person be compelled in any criminal case to be a witness against oneself."). State v. Kane, 951 P.2d at 942. The corresponding part of Section Eleven of the Kentucky Constitution says, "He cannot be compelled to give evidence against himself...." The Court of Special Appeals of Maryland suggested that the logic underlying the dissenting opinion in Quarles, which would encourage the police to interrogate unwarned suspects in order to save lives but would not allow the suspect's statements to be used to prosecute him, is sound logic. Thomas v. State, 737 A.2d 622, 632 (Md. App.

1999). In addition, Delaware is among those states that have refused to follow the United States Supreme Court rule in California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), concerning the point at which a police seizure of a citizen has taken place. See Jones v. State, 745 A.2d 856 (Del. Supr. 1999).

Recently, in Danforth v. Minnesota, __ U.S. __, 128 S.Ct. 1029, 1042, 169 L.Ed.2d 859 (2008), the United States Supreme Court decided that a state court was "free to give broader effect to new rules of criminal procedure" than the Supreme Court itself gave. In Danforth, the Supreme Court decided that the State of Minnesota was well within its power and jurisdiction to apply the case of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), retroactively in post-conviction proceedings, even though the Supreme Court had determined, as a matter of federal law, that Crawford would not be applied retroactively to cases already final on direct review. Danforth, 128 S.Ct. at 1042. Similarly, this Court is free to reject the public safety exception contained in the Quarles majority opinion.

The Court of Appeals also cites the case of United States v. Talley, 275 F.3d 560 (6th Cir. 2001), as support for the public safety exception. (App. A6). But in Talley, the Sixth Circuit noted that the Supreme Court decision in Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), seemed to contradict language in Quarles. Talley, 275 F.3d at 564. While the public safety exception created by the majority opinion in Quarles was based

upon the characterization of Miranda as a case involving "prophylactic" measures rather than constitutional rights, the Court in Dickerson held that the right to Miranda warnings is constitutionally based. Talley, 275 F.3d at 564. The Sixth Circuit, nevertheless, concluded that it was without the power to overrule Quarles. Talley, 275 F.3d at 565. But as previously discussed, "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this [United States Supreme] Court holds to be necessary upon federal constitutional standards." Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 575 (1975) (emphasis added). See also Danforth v. Minnesota, __ U.S. __, 128 S.Ct. 1029, 1042, 169 L.Ed.2d 859 (2008) (recognizing that a state court is "free to give broader effect to new rules of criminal procedure" than the Supreme Court, itself, gave). Therefore, this Court is free to adopt the reasoning of the concurring or dissenting opinions in Quarles or to implement its own approach to the issue.

Even if the public safety exception created by the majority opinion in Quarles is recognized by this Court, the questioning of Cassandra concerning whether she had drugs in her possession did not fit within that exception. Although the Court of Appeals cites the case of United States v. Luker, 395 F.3d 830 (8th Cir. 2005), for the proposition that the "'safety exception' to Miranda has been extended to include questioning about illegal drugs..." (App. A6), Luker only involved concerns about needles or substances associated with methampheta-

mine use. In contrast, the instant case involved suspected trafficking in crack cocaine, not drugs involving needles or volatile chemicals.

Under the circumstances presented in this case, Cassandra Smith was subjected to custodial interrogation in her bedroom. After the police rammed in her front door, entered her bedroom, and placed her in handcuffs, a reasonable person in Cassandra's situation would not have believed she was free to leave. Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). In addition, Sergeant Gentry's questioning of Cassandra Smith concerning whether she had weapons or drugs on her person was reasonably likely to elicit an incriminating response and was not justified under the Quarles public safety exception. Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Because both the trial court and Court of Appeals erred in concluding that Cassandra was not in custody and that Sergeant Gentry was not obligated to advise her of the Miranda warnings before asking her questions, this Court should reverse Cassandra Smith's convictions, order the trial court to suppress her statement, and remand her case for a new trial.

2. The statements made in the living room

The United States Supreme Court has specified "that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64

L.Ed.2d 297 (1980). However, the Miranda safeguards come into play not only when a person is subjected to express questioning but also when a person is subjected to its "functional equivalent":

> That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 300-301, 100 S.Ct. at 1689-1690.

According to Sergeant Gentry, Cassandra Smith was placed under arrest after the cocaine was retrieved from her pocket. (VR No. 1; 3/29/06; 10:59:11). Therefore, she was in custody when she was brought into the living room. Although Detective Gootee claimed that he advised Cassandra of her Miranda rights at that point, no other witness could corroborate that claim, and the trial court remained unconvinced that those rights were given. (VR No. 1; 3/29/06; 15:19:18-15:20:04). See RCr 9.78 ("If supported by substantial evidence the factual findings of the trial court shall be conclusive."); see also Commonwealth v. Lucas, 195 S.W.3d 403, 405 (Ky. 2006).

Although the trial court did not believe that Cassandra had been given her Miranda rights, the court concluded that an interrogation had not occurred and that the statements made by Cassandra in the living room (i.e., that she knew this might happen one day, that she wasn't a big drug dealer, and that she just did it to get by) were "not given in response to any police inquiry." (VR No. 1; 3/29/06; 15:19:18-15:20:04, VR No. 2; 3/30/06; 10:27:38-10:28:59). The Court

of Appeals found that Cassandra was in custody by the time she was brought into the living room but, like the trial court, concluded that Cassandra was not subjected to interrogation:

> Det. Gootee testified Smith's statements were in response to his inquiry as to whether there was a different location her children could be taken during the execution of the search warrant. In no way can we perceive how such an innocuous question could be interpreted as an attempt to elicit an incriminating response.

(App. A8). But the record indicates that Detective Gootee's comments to Cassandra were anything but innocuous.

When asked by the prosecutor whether Cassandra had made these statements in response to any questioning, Detective Gootee replied as follows:

> Det. Gootee: I'm sure I did that led to it. What I exactly asked her, I don't remember. It was basically I, I don't know if it was like a question that would lead her in that direction. I don't know if it was just a blunt statement that she had made to herself. I just don't know what was said and, um, to tell you the truth, I can't recall if I asked her a question that led her to the statement or not.

(VR No. 6; 3/20/06; 11:42:58-11:43:40). Although he quickly went from certainty ("I'm sure I did...") to uncertainty ("I can't recall...") at that point in his testimony, Detective Gootee later clarified the context in which these statements were allegedly made:

> Prosecutor: I want to go back to the statement about when she talks about "I knew this would happen, I've told them about it," speaking to her kids. Do you remember how her kids even came up?
>
> Det. Gootee: It may have been the fact that "we can't believe you're," and then again, this is, you know, I'm not

> 100% sure because it's been three years ago. Uh, but if I recall somewhat, I think it came up that "we can't believe that you're here doing, you know, you're selling drugs with your kids present, you know, putting them in that kind of danger." Basically the same statements that we make anytime, you know, kids are present at any...If I had to guess, that would, that would be how it would be brought up.

(VR No. 6; 3/20/06; 11:58:52-11:59:40). Under these circumstances, Detective Gootee should have known that his comments were likely to elicit an incriminating response from Cassandra, especially since he routinely made these same remarks concerning the danger of drug dealing in every case where children were present. Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Although Detective Parks testified that when officers asked Cassandra if there was somewhere the children could go while the search warrant was being executed "she made a statement, something to the effect of 'I've talked to my kids, they know what's going on, they knew it was a possibility that, that you all would be here,' something to that effect" (VR No. 1; 3/29/06; 13:53:39-13:54:19), Detective Gootee acknowledged that it was his actions that probably led Cassandra to make such statements (VR No. 6; 3/20/06; 11:42:58-11:43:40).

In United States v. Henley, 984 F.2d 1040 (9th Cir. 1993), the Ninth Circuit recognized that "[w]hen a police officer has reason to know that a suspect's answer may incriminate him...even routine questioning may amount to interrogation." Henley, 984 F.2d at 1042. The court determined that the police officer's

inquiry regarding the defendant's ownership of a car constituted interrogation under the circumstances presented in that case:

> The police had identified Henley's car as the one used in the bank robbery that morning...The FBI agent obviously hoped to find evidence in the car incriminating Henley; that's why he wanted to search it. Evidently the agent knew before approaching Henley that there was some doubt about who owned the vehicle...; he asked Henley "if he was purchasing" the car or was in the process of doing so... An officer investigating a bank robbery who has the getaway car but isn't sure who owns it should well know that asking a suspect if he's the owner of the vehicle is reasonably likely to elicit an incriminating answer. 'In light of both the context of the questioning and the content of the question,' [United States v. Disla, 805 F.2d 1340 (9th Cir. 1986)] we conclude that Henley was subjected to interrogation within the meaning of Miranda.

Henley, 984 F.2d at 1043. Similarly, Detective Gootee should have known that his questions were likely to elicit an incriminating response from Cassandra given the context and content of his commentary. He routinely made these same remarks concerning the danger of drug dealing in every case where children were present and was obviously attempting to elicit some type of admission or explanation from the parents he was arresting.

Under the circumstances presented in this case, Cassandra Smith was subjected to custodial interrogation in the living room. She was in custody at the time she made the alleged statements as she had been placed under arrest. See California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275, 1279 (1983), and Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). In addition, Detective Gootee's questions or comments concerning the dangers of drug dealing were reasonably likely to elicit an incriminat-

ing response. Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980). Because both the trial court and the Court of Appeals erred in concluding that Cassandra was not subjected to interrogation in the living room within the meaning of Miranda, this Court should reverse Cassandra Smith's convictions, order the trial court to suppress her statement, and remand her case for a new trial.

II. The trial court committed reversible error by precluding Cassandra Smith from introducing evidence concerning Armon Perry's felony drug convictions.

A. Preservation

This issue was properly preserved for review by the appellant's motion to introduce evidence of Armon Perry's prior drug-related convictions and the presentation of avowal testimony concerning details of those convictions. (VR No. 4; 4/3/06; 15:31:03-15:37:31, 15:59:16-15:59:49, 16:01:17; VR No. 5; 4/4/06; 14:52:32-15:02:42).

B. Background

In preparing this case for trial, defense counsel requested that Cassandra Smith's husband, Armon Perry, be interviewed. Investigator Rose Nunn contacted Mr. Perry at the Marion County Adjustment Center, where he was incarcerated on different charges, and conducted the interview over the telephone. (TR I, Exhibits Envelope, Investigative Interview). The day before the jury was selected, Mr. Perry invoked his Fifth Amendment privilege, and the trial court de-

clared him an unavailable witness. (VR No. 1; 3/29/06; 15:05:45-15:09:29, 15:21:22-15:45:55). Defense counsel was permitted to introduce portions of Mr. Perry's interview at trial through Rose Nunn, including the fact that he had been granted work release while incarcerated at the Community Corrections Center (CCC) and that he had stopped outside Cassandra's house on the day she was arrested. (VR No. No. 4; 4/3/06; 14:22:38-14:31:20).

Defense counsel also made a motion to introduce evidence of Armon Perry's three prior drug-related convictions under KRE 404(b). Defense counsel argued that this evidence would demonstrate Mr. Perry's motive, intent, and plan to deal drugs and would support the defense theory that Mr. Perry had slipped the cocaine into Cassandra's pocket, without her knowledge, when he stopped by her house before returning to CCC. (VR No. 4; 4/3/06; 15:31:03-15:37:31). The trial court denied the motion, finding that the evidence was not relevant or proper for the jury to consider. (VR No. 4; 4/3/06; 15:59:16-15:59:49).

For purposes of the avowal, Kathy Tinsley, a bench clerk for the Jefferson Circuit Court, testified that Armon Perry had been convicted of one count of possession of a controlled substance in the first degree under indictment number 97-CR-1478, one count of possession of a controlled substance in the first degree under indictment number 99-CR-0851, and one count of trafficking in a controlled substance in the first degree, one count of possession of a controlled substance in the first degree, and one count of possession of drug paraphernalia under indictment number 04-CR-2484. (VR No. 5; 4/4/06; 14:52:32-15:02:42).

C. Legal Analysis

Although normally used "to assess evidence of crimes or bad acts committed by a criminal defendant," KRE 404(b) "is applicable to crimes, wrongs or acts committed by persons other than a criminal defendant." R. Lawson, The Kentucky Evidence Law Handbook, Section 2.25(2), pp. 125-126 (4th ed. 2003). Moreover, "[b]ecause the other crimes evidence in this situation creates lesser concern about prejudice (than when evidence is offered against an accused), admissibility should depend upon whether the evidence is relevant and whether admission would have the effect of unduly proliferating the issues." R. Lawson, The Kentucky Evidence Law Handbook, Section 2.25(8), pp. 158 (4th ed. 2003).

The Court of Appeals concluded that the trial court did not err in excluding evidence of Armon Perry's prior drug convictions, finding that Cassandra Smith did not "present sufficient evidence of a direct or circumstantial link between Perry's presence at her residence and her possession of narcotics which would permit introduction of the proffered KRE 404(b) evidence." (App. A10). However, evidence that Armon Perry had previously been convicted of trafficking in a controlled substance and possession of a controlled substance was relevant to show that he was involved in the drug trade, making it likely that he could obtain illegal drugs while out on work release and making it more probable than not that he put the cocaine into Cassandra's pocket, without her knowledge, before returning to jail.

In Harris v. Commonwealth, 134 S.W.3d 603, 607 (Ky. 2004), this Court explained the meaning of "relevant evidence" under Kentucky law:

> Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevant evidence in a criminal case is any evidence that tends to prove or disprove an element of the offense. Commonwealth v. Mattingly, 98 S.W.3d 865, 869 (Ky. App. 2003) (other citations omitted). To satisfy the test of relevance, only a slight increase in probability must be shown. Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999). Furthermore: "An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not....It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable." Turner v. Commonwealth, 914 S.W.2d 343, 346 (Ky. 1996) (other citations omitted).

This Court also specifically recognized the right of a defendant to introduce evidence to support a defense that someone other than the accused committed the crime:

> The Due Process Clause affords a criminal defendant the fundamental right to a fair opportunity to present a defense. Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 2146-47, 90 L.Ed.2d 636 (1986); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); Beaty v. Commonwealth, 125 S.W.3d 196, 206 (Ky. 2003). The exclusion of evidence violates that constitutional right when it "significantly undermine[s] fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998). This includes the right to introduce evidence that someone other than the accused, *i.e.,* an alleged alternative perpetrator ("aaltperp") committed the crime. Beaty, supra, at 207; Harvey v. Commonwealth, 266 Ky. 789, 100 S.W.2d 829, 830 (1937).

Harris, 134 S.W.3d at 608 (Ky. 2004). Evidence that Armon Perry had previously been convicted of drug offenses was relevant to support Cassandra Smith's defense that Armon Perry placed the drugs in her pocket without her knowledge and tended to disprove one of the elements of possession of a controlled substance (i.e., knowledge). Moreover, the prosecution opened the door to the admission of this evidence by cross-examining Acacia Smith concerning prior experiences involving Armon Perry and the police and the fact that Armon was in prison for "some of those experiences [she] viewed." (VR No. 4; 4/3/06; 14:54:55-14:58:25).

The trial court's rulings, which excluded relevant evidence concerning Armon Perry's felony drug convictions, deprived Cassandra Smith of her rights to due process, to a fair trial, and to present a defense, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992). Therefore, her convictions must be reversed and her case remanded for a new trial.

CONCLUSION

For the foregoing reasons, the appellant, Cassandra Smith, by counsel, respectfully submits that her convictions must be reversed and her case remanded for a new trial.

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