

COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
2008-SC-0567-DG  
on review from the  
Kentucky Court Of Appeals  
2007-CA-000869-MR

**FILED**  
JUN 22 2009  
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BRANDON LEON WATKINS

APPELLANT

v. APPEAL FROM THE TODD CIRCUIT COURT

ACTION NO. 06-CR-00103  
Honorable Tyler L. Gill

COMMONWEALTH OF KENTUCKY

APPELLEE

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**REPLY BRIEF FOR APPELLANT**

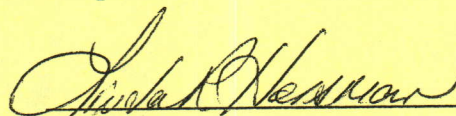
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first-class postage prepaid on June 22, 2009: Honorable Tyler L. Gill, Chief Circuit Judge, PO Box 667, 200 West Fourth Street, Russellville, KY 42276-0667; Hon. Gail Guiling, Commonwealth's Attorney, 210 Bethel Street, P.O. Box 1133, Russellville, KY 42276; Hon. Leilani K. M. Krashin, 1100 S. Main Street, Suite 22, Hopkinsville, KY 42240; and by state messenger mail to Hon. Heather Fryman, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

  
LINDA ROBERTS HORSMAN

**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 addressed in this reply brief.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellant desires oral argument in this case. This case involves an issue of constitutional concern and in an area of great flux in the law. If this Court believes that oral arguments might assist in deciding the case, the Appellant welcomes oral argument.

**STATEMENT OF POINTS AND AUTHORITIES**

**PURPOSE OF THE REPLY BRIEF**.....i

**STATEMENT CONCERNING ORAL ARGUMENT**.....i

**STATEMENT OF POINTS AND AUTHORITIES**.....i

**I. THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT MR. WATKINS ABANDONED THE VEHICLE. THEREFORE, ANY CONCLUSION THAT HE DID NOT HAVE STANDING TO CONTEST THE WARRANTLESS SEARCH WAS INCORRECT.**.....1

*State v. Crook*, 762 P.2d 1062 (Or. App. 1988) .....1

*United States v. Hastamorir*, 881 F.2d 1551 (11<sup>th</sup> Cir, 1989) .....1

*United States v. Quiroz-Hernandez*, 48 F.3d 858 (5<sup>th</sup> Cir, 1995).....1

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**I. THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT MR. WATKINS ABANDONED THE VEHICLE. THEREFORE, ANY CONCLUSION THAT HE DID NOT HAVE STANDING TO CONTEST THE WARRANTLESS SEARCH WAS INCORRECT.**

Mr. Watkins did not abandon his car. Wanting to run away and elude capture and making a conscious and objective choice to throw away valuable property are not one and the same.

This Court has never determined this question. However, the Court of Appeals of Oregon determined that an unoccupied car cannot be considered “abandoned” in *State v. Crook*, 762 P.2d 1062 (Or. App. 1988). Using common sense, the Court opined that there were no exigent circumstances associated with the unoccupied vehicle which had been implicated in a burglary and might well contain burgled items to justify the intrusion of privacy. *Id.* at 1064.

This finding comports with the decisions cited by Mr. Watkins in his appellate brief. Consistently the courts have found intent to abandon when a car is left running and in some cases, still moving. However, where, as here, the car is parked off the highway, is shut off and the doors are closed, the question is more difficult as the acts of pulling over the car and securing it evince a care for the item—the type of care only an owner would show. Some corroboration of the intent to abandon, for instance, a denial of the property, has been found to support a finding of abandonment. See *United States v. Hastamorir*, 881 F.2d 1551 (11<sup>th</sup> Cir, 1989). *United States v. Quiroz-Hernandez*, 48 F.3d 858 (5<sup>th</sup> Cir, 1995). Mr. Watkins never denied that the vehicle was his.

*Black's Law Dictionary* defines "abandonment" as when the owner or possessor has "relinquished all right, title, claim, and possession, with intention of not reclaiming it or resuming its ownership, possession or enjoyment," 13 (rev. 4th ed. 1968).

Understanding that there is no caselaw supportive of its position, the Commonwealth cites to this Court cases involving the question of whether garbage placed a curb for pickup has been abandoned. While interesting, these cases are actually supportive of Mr. Watkins' insistence that he maintained a privacy right in his property—even as he ran from it to elude capture. Had Mr. Watkins denied ownership in the car to the officers, such could be cited by the Commonwealth as supportive of its position that the vehicle was abandoned. However, Mr. Watkins made no such pronouncement and no such corroboration is available to the Commonwealth.

As it did in the Court of Appeals, the Commonwealth continues to contend that the automobile was left running by Mr. Watkins even though a fair viewing of the videotape from the dashcam of Chief Marklin's squad car shows that he did not have to turn the car off once he caught up to it on the side of the road. (VR No. 2, 11/18/06, 1:35:29). Further, there was no finding by the trial court that he did so, and it must be remembered that the Commonwealth had the burden to show that the search was constitutional. If this fact is so integral to this Court's decision as the Commonwealth would apparently deem it to be, then it is a fact which must be decided against them as they failed to make a proper record.

The Commonwealth also seems to suggest to this Court that it cannot endeavor to fully review the decisions of the lower courts in this case. While not citing any authority for such a proposition, the Commonwealth argues, “even it were now proper to review this evidence” referring to the dashcam tape of the incident and suggesting that this Court is without power to review the decisions of the trial court and the affirmance by the Court of Appeals. As this Court is well aware, a trial court’s findings of fact are conclusive if supported by substantial evidence. The suppression issue itself is a mixed question of fact and law and therefore, reviewed *de novo*. *Commonwealth v. Banks*, 68 S.W.3d 347 (Ky. 2001).

The Commonwealth cites *Hunt v. Commonwealth* as supportive of its position that one has no privacy rights in property which he or she has abandoned. 488 S.W.2d 692 (Ky. 1972). However, the Commonwealth fails to point out that the Supreme Court gave great consideration to the facts in *Hunt* before concluding that Hunt had abandoned the automobile. In *Hunt*, an officer noticed three people standing next to a parked car in a public park. *Id.* at 693. As the officer drove towards the three men, they fled into the woods, leaving the car. *Id.* After observing the vehicle for **four** hours, the police concluded that it had been abandoned and it was towed away. *Id.* at 694. The Court stated,

“In our opinion, the trial court did not err in finding that the vehicle had been abandoned. The state trooper saw the car parked at a public roadside park. When the trooper approached the appellants and their companion fled to the nearby woods. Hunt was seen running from the scene and did not return to lay claim to the car during the four hours the police kept the vehicle under surveillance. Hunt did not appear and assert any possessory interest in the car after it had been taken by the police officers to Vanceburg. These facts, coupled with other information known to the investigating officers, gave the

officers the right to treat the car as abandoned and amply supported the trial court's decision in so finding." *Id.*

Hunt abandoned his car for over four hours. In the present case, the time between Mr. Watkins' fleeing from the car and the subsequent search was approximately one-half hour.

Next, the Commonwealth cites the Court of Appeals' unpublished decision in *Blackford v. Commonwealth*, 2006 WL 202339 (2006). While in *Blackford*, the Court did discuss abandoned property and the resultant loss of privacy in that property, that question was not before the Court as the trial court had not found the property abandoned. The trial court had not concluded that the car had been abandoned and it was mere dicta that the Commonwealth cited in its brief.

The Commonwealth next suggests that Mr. Watkins has abandoned his reliance on *Joseph v. Commonwealth*, 324 S.W.2d 126 (Ky. 1959). The Appellant cited this case in his brief to the Court of Appeals and still believes it supportive of his position and trusts that this Court will decide his way, thus affirming the *Joseph* decision. However, because the Court of Appeals' Opinion has intervened and this Court's grant of discretionary review has sharpened the questions presented by the case, the undersigned chose not to wholly file again the briefs first forwarded to the Court of Appeals, but has endeavored to craft a brief befitting the grant of review.

## **II. THE SEARCH DID NOT FALL UNDER AN EXCEPTION TO THE WARRANT REQUIREMENT.**

It must be remembered that the officer noted on the citation that the search of the trunk of the vehicle was done as an "inventory search." (TR 36, 40).

This Court must steer clear of the Commonwealth's suggestion that citizens in rural areas necessarily are entitled to less procedure because the rural police forces do not have their own towing vehicles or impound lots and must rely upon private companies. The Fourth Amendment does not differentiate between whether the actor who violates rights is himself an employee of the state or is a subcontractor for the state. If the vehicle is towed at state behest, all protections available under the Fourth Amendment remain intact, even if towed by a private entity.

While the trial court might have found Chief Markin's explanation for not having kept a copy of the two slip credible, this Court cannot so find. The caselaw concerning inventory searches is rife with procedure—written policies are preferred, and documentation is necessary to establish that the items found were found before the vehicle was towed by a private entity. Chief Marklin's down home assurance that he could get copies of the slips is engaging, but unpersuasive. Again, the burden was on the Commonwealth to show compliance with regular procedures and the time to produce all evidence was during the suppression hearing. Failure to enter into evidence any documentation concerning the tow should be considered against the Commonwealth.

Interestingly, the Commonwealth cannot cite to any caselaw that uniformly allows authorities to impound arrestee's vehicles. As stated in *Wagner v. Commonwealth*, the police may impound a car without a warrant only when the owner or user consents, the vehicle presents a danger and the owner cannot arrange for removal, the police have probable cause to believe that the vehicle is evidence or that the vehicle contains evidence. 582 S.W.2d 352, 356 (Ky. 1979), *overruled in part by Estep v.*

*Commonwealth*, 663 S.W.2d 213 (Ky. 1983). The Supreme Court has never overruled these requirements in *Wagner*.

The police, at the time the search began, had no reason to believe that the automobile was or contained evidence of a crime. Mr. Watkins had been speeding. All evidence that the police needed to support a charge of speeding was contained on the officer's dashboard camera. It would be ludicrous to suggest that had he been ticketed for speeding, the car would have been impounded as evidence of an instrumentality of crime. There was no legitimate reason for the tow. The car was impounded so that police could search it, as they admitted. (VR No. 1, 2/27/07, 9:51:XX).

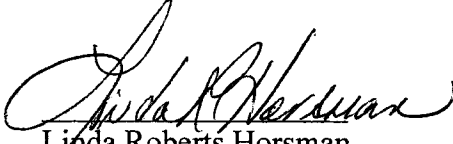
The Commonwealth complains that Mr. Watkins did not preserve for review his complaints about the seizure of the vehicle and its impound. However, the trial court found that the car had been properly impounded and Mr. Watkins appealed from that Order. The first opportunity he had to quibble with the trial court's finding, he did so. If the Commonwealth's argument is correct, then it should not argue that the inventory search was proper or the search was properly considered incident to arrest, as the Court of Appeals failed to address those arguments in its Opinion.

The Commonwealth next suggests that this Court's decision in *Wagner v. Commonwealth*, is no longer valid. 581 S.W.2d 352 (Ky. 1979). However, that simply is not true. *Wagner* is still good law concerning inventory searches and the procedural requirements for them. *Wagner* was not overruled as is holding concerning inventory searches and is still good law.

CONCLUSION

The last line of argument in the Commonwealth's Brief is telling: "Eventually, the officers would have lawfully searched the trunk of the vehicle and discovered the evidence." (Commonwealth's Brief at 24). This line is important, as the Commonwealth all but admits that the search conducted was illegal. This Court must reverse the Court of Appeals and remand this matter with instructions to dismiss all charges.

Respectfully submitted,

  
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