COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-000138-DG

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Pursuant to Court order.

KENNETH A. WILLIAMS — APPELLANT

v.

Court of Appeals
No. 2008-CA-002057-MR
Appeal from Jefferson Circuit Court
Action No. 07-CR-2378
Hon. Frederic Cowen, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, KENNETH A. WILLIAMS

Submitted by:

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Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Frederic Cowen, Judge, Jefferson Circuit Court, Division 13, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and to Hon. M. Brandon Roberts, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and sent electronically to Hon. Samuel Floyd, Jr., Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY, 40202, on April 25, 2011. I further certify that the record on appeal was not withdrawn from the office of the Clerk of this Court.

BRUCE P. HACKETT

Purpose of the Brief

This brief is filed in order to address and distinguish the authorities cited by the appellee, especially those relating to the automatic companion rule. It is also filed to point out that the appellee incorrectly asks this Court to apply the "clearly erroneous" standard of review to the trial court's finding of "reasonable suspicion."

Table of Points and Authorities

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Argument

I. The trial court erred in refusing to suppress the fruits of an unconstitutional detention and search.

According to the caption of its argument, the appellee's position is that Mr, Williams has failed to demonstrate "that the trial court's determination that the officers had a sufficient basis to conduct a *Terry* stop and pat-down was clearly erroneous." But the "sufficient basis" to justify a *Terry* stop and pat down must be either probable cause or a reasonable suspicion to believe two things – that Mr. Williams was engaged in or about to engage in criminal conduct and that he was armed and dangerous. A finding of probable cause or reasonable suspicion by a trial court is not reviewed under a "clearly erroneous" standard. Rather, this Court reviews such findings *de novo*. "[D]eterminations of reasonable suspicion and probable cause are mixed questions of law and fact and are, therefore, subject to *de novo* review." *Bauder v. Commonwealth*, 299 S.W.3d 588, 590 - 591 (Ky. 2009), citing *Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

In the Brief for Appellant, on pages 7-10, Mr. Williams argued that several important findings of fact by the circuit court were unsupported by substantial evidence and were, therefore, clearly erroneous. Regarding the circuit court fact finding, Mr. Williams will continue to rely on the arguments made in his original brief.

On pages 13-16 of the Brief for Commonwealth, the appellee discusses the "automatic companion rule." In footnote 2 on page 14 of the Commonwealth's brief, the appellee, cites this Court's decision in *Owens v. Commonwealth*, 244 S.W.3d 83 (Ky. 2008), where this Court adopted the automatic companion rule. As the appellee notes, the judgment in *Owens* was vacated by the United States Supreme Court and the case

remanded "for further consideration in light of *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)." *Owens v. Kentucky*, 129 S.Ct. 2155. Upon remand, this Court applied *Gant*, but reached the same result, once again adopting the automatic companion rule. *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009). But in doing so, the Court stated that the rule was "designed to apply only in situations in which the driver of the vehicle has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle." *Owens*, *supra*, 291 S.W.3d at 712. The automatic companion rule, as defined by this Court, simply does not apply to Mr. Williams, who was not a passenger in a vehicle at the time that the driver of the vehicle was lawfully arrested.

The appellee relies upon *United States v. Berryhill*, 445 F.2d. 1189 (9th Cir. 1971), for a definition of the automatic companion rule: "All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurances that they are unarmed." *Berryhill*, *supra*, 445 F. 2d at 1193. (Brief for Commonwealth, pp. 13-14). But like the defendant in *Owens*, the person who was searched in Berryhill was also a passenger in an automobile. She was the wife of the driver, who was arrested by the police prior to the search of the handbag held by his wife. *Berryhill*, *supra*, 445 F. 2d at 1192. In *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985), the Sixth Circuit considered and rejected *Berryhill*'s automatic companion rule: "As to the propriety of the "automatic companion" rule, we do not believe that the *Terry* requirement of reasonable suspicion under the circumstances, 392 U.S. at 27, 88 S.Ct. at 1883, has been eroded to the point that an individual may be frisked based upon nothing

more than an unfortunate choice of associates."

The other decisions cited by the appellee in support of the automatic companion rule are easily distinguishable from the facts in Mr. Williams's case. (Brief for Commonwealth, pp. 13-15). *United States v. Vigo*, 487 F.2d 295 (2nd Cir. 1973), was another automobile case. The passenger whose purse was searched in *Vigo* was one of four people arrested after the car was stopped by the police. *Vigo*, 487 F.2d at 298. In *United States v. Poms*, 484 F.2d 919 (4th Cir. 1973), the police were executing a search warrant at the apartment of Mr. Bobrow, a drug dealer, when Poms, an associate of Bobrow, arrived. The court explained why the *Terry* search of Poms's shoulder bag was permissible:

> Here, the officers had received information from a reliable informant that Poms *always* carried a weapon in his shoulder bag. The source had provided an accurate description of the bag's appearance and color. Poms was known to be an associate of Bobrow and they were sharing an apartment according to the information furnished the agents.

United States v. Poms, 484 F.2d at 921 (Footnote omitted, emphasis in original). In contrast, Mr. Williams was not known by the police to be involved in the drug trade with any of the other people who were searched, and the police certainly had no information that Mr. Williams was always armed. They did not know who he was prior to the arrest. Also, in *United States v. Bell, supra*, 762 F.2d at 498, the Sixth Circuit declined to follow the automatic companion reasoning of *Poms*.

United States v. Tharpe, 536 F.2d 1098 (4th Cir. 1973), overruled on other grounds, *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987), *State v. Clevidence*, 153 Ariz. 295, 736 P.2d 379 (1987), and *State v. Moncrief*, 69 Ohio App.2d 51, 431 N.E.2d 336 (Ohio App. 1980), cited by the appellee, were cases where an automobile passenger

was searched after the driver was arrested. (Brief for Commonwealth, pp. 14-15). In *People v. Myers*, 246 Ill. App. 3d 542, 186 Ill. Dec. 443, 616 N.E.2d 633 (1993), the defendant told the police investigating the burglary of a truck that he was there to assist the person arrested for the burglary. The defendant was definitely a companion of the arrested person, who had a handgun in his car and who struggled with the police as he tried to reach the car. *Myers*, *supra*, 616 N.E.2d at 635. *Lewis v. United States*, 399 A.2d 559 (D. C. 1979), was a case in which the companion of the defendant was in possession of a handgun. In upholding the pat down of the defendant, the court found that it was obvious (to the police and the defendant) that the companion had the gun, the defendant and the companion were more than just casual acquaintances, and the defendant appeared to be nervous and looked like he was going to run. *Lewis*, 399 A.2d at 561. In *State v. Dougherty*, 8 Or. App. 267, 493 P.2d 1383 (Or. App. 1972), the argument made by the defendant that was rejected by the court was that the search of her purse was a search for drugs and not part of a pat down for weapons. *Dougherty*, 493 P.2d at 270, fn 1. The court in *Perry v. State*, 927 P.2d 1158 (Wyo. 1996), citing *Berryhill* and other cases, applied the automatic companion rule but found that the defendant had "voluntarily approached" the place where his son and another were being arrested and "interjected himself into the scenario." *Perry*, 927 P.2d at 1163-1164.

It is important to note that the vast majority of the cases cited by the appellee, including *Berryhill*, were decided before the United States Supreme Court decided *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). A comparison of Mr. Williams's case to *Ybarra* demonstrates why the automatic companion rule should not be applied to citizens in a public setting. In *Ybarra*, the police were armed with a

search warrant issued by a magistrate who had determined that there was probable cause to believe that there were illegal drugs in the possession of the bartender ("Greg") at a particular bar. In Mr. Williams's case, the police had probable cause to believe that several people were smoking marijuana. In *Ybarra*, the police patted down all of the patrons of the bar, including Mr. Ybarra, who was found to be in possession of several packets of heroin. The United States Supreme Court found the pat down unconstitutional. The idea that persons could be patted down by the police because they were in close proximity to other people who were engaging in criminal activity was rejected by the Court in *Ybarra*:

> Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.

Ybarra v. Illinois, *supra*, 444 U.S. at 91-92. In the case of Mr. Williams, before the police could pat him down, the police had to be aware of facts that caused them to have a particular belief that he was armed and dangerous. "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra v. Illinois*, *supra*, 444 U.S. at 94.

On page 9 of the Brief for Commonwealth, the appellee asks this Court to apply the facts and holding of *In the Interest of S.J.*, 551 Pa. 637, 713 A.2d 45 (1998), to Mr. Williams's case. *S.J.* was a case that involved an officer's observation of a group of twelve males on a street corner; some in the group were smoking marijuana. While these facts are similar to the facts in Mr. Williams's case, other important distinguishing facts are left out of the appellee's brief. While the officer could not say whether S.J. was one of the people smoking marijuana, the officer singled him out for an investigative stop because S.J. tried to hide when the police approached. The Supreme Court of Pennsylvania found S.J.'s "suspicious behavior" to be significant, and upheld the detention of S.J. 713 A.2d at 48. But the Court further found that the subsequent pat down of S.J. was unconstitutional:

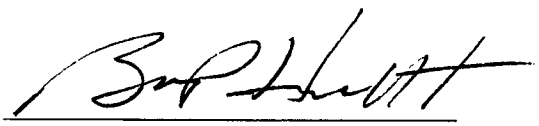
> The record herein is devoid of any evidence indicating that Officer Kelly had reason to believe Appellant was armed and dangerous. There was no testimony that Appellant's clothing had any unusual bulges or any testimony that Appellant made any furtive movements giving rise to Officer Kelly's suspicions that Appellant was armed and dangerous. The Officer's statement that he patted Appellant down for his own safety does not rise to the level of particularized or reasonable suspicion that the Appellant was armed and dangerous. The absence of any specific, articulable facts establishing that Appellant was armed and dangerous renders the frisk unlawful.

In the Interest of S.J., supra, 713 A.2d at 48. In Mr. Williams's case, Officer Davis testified that Mr. Williams was not one of the people smoking marijuana. Mr. Williams was leaning against a car parked in the street, holding his crutches. (VR 1, 6/5/08, 10:08:00). Officer Davis never testified that he had any reason to believe that Mr. Williams was armed and dangerous before ordering him to the ground.

The United States Supreme Court has never adopted the automatic companion rule. This Court limited the rule to passengers who were expelled from a vehicle in preparation for a search incident to the driver's arrest. *Owens*, *supra*, 291 S.W.3d at 712. Mr. Williams was not a passenger in a car. The police observed him in the presence of others who were using marijuana in a public place. "The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Sibron v. New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968). "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 264, 61 L.Ed.2d 357 (1979). The seizure and search of Kenneth Williams was in violation of his rights under the Fourth Amendment and Section 10.

Conclusion

For the foregoing reasons, the appellant, Kenneth Williams, respectfully requests that the judgment be reversed and remanded with directions that the evidence obtained in the illegal search be suppressed and that Mr. Williams be permitted to withdraw his plea of guilty if he wishes to do so.



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