



**Commonwealth of Kentucky
Kentucky Supreme Court**

Case No. 2010-SC-000138-DG

KENNETH A. WILLIAMS

APPELLANT

v.

Appeal from Jefferson Circuit Court
Hon. Frederic Cowen, Judge
Indictment No. 2007-CR-2378

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by:

JACK CONWAY

Attorney General of Kentucky

M. BRANDON ROBERTS

Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Dr., Ste 200
Frankfort, Ky. 40601
(502) 696-5342
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage pre-paid this 24th day of March, 2011, to: Hon. Frederic Cowen, Judge, Jefferson Circuit Court, Division 13, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Ky. 40202; sent via e-mail to: Hon. Sam Floyd, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, Ky. 40202; and delivered via state messenger mail to: Hon. Bruce P. Hackett and Annie M. O'Connell, Counsel for Appellant, Office of Louisville Metro Public Defender, Advocacy Plaza, 717-719 W. Jefferson St., Louisville, Ky. 40202.

M. BRANDON ROBERTS
Assistant Attorney General

INTRODUCTION

Appellant entered a conditional guilty plea to possession of a handgun by a convicted felon, carrying a concealed deadly weapon and loitering. Pursuant to his plea, appellant reserved the right to appeal from the denial of his suppression motion.

ORAL ARGUMENT STATEMENT

The Commonwealth does not believe oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

ORAL ARGUMENT STATEMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 5

**APPELLANT FAILS TO SHOW THAT THE TRIAL COURT’S
DETERMINATION THAT THE OFFICERS HAD A SUFFICIENT BASIS
TO CONDUCT A TERRY STOP AND PAT-DOWN WAS CLEARLY
ERRONEOUS.** 5

Commonwealth v. Neal,
84 S.W.3d 920, 923 (Ky. App. 2002) 5

Owens-Corning Fiberglass Corp v. Golightly,
976 S.W.2d 409, 414 (Ky. 1998) 5

Ornelas v. United States,
517 U.S. 690, 697 (1996) 5

Henson v. Commonwealth,
20 S.W.3d 466, 469 (Ky. 1999) 6

RCr 9.78 6

Neal, 84 S.W.3d at 923 6

Harper v. Commonwealth,
696 S.W.2d 665, 668 (Ky. 1985) 6

Clark v. Commonwealth,
868 S.W.2d 101, 103 (Ky. App. 1993) 6

A. **The trial court’s findings of fact are based on substantial
evidence and, therefore are conclusive** 6

1.	<u>Substantial evidence supported the trial court’s finding that the nine individuals were a “distinct group”</u>	6
2.	<u>Substantive evidence supports the trial court’s finding that the individuals were “milling about or acting restless” when the officers made themselves known to the group</u>	7
B.	<u>The rule of law was not violated as applied to the facts of this case</u>	8
	<i>Adcock v. Commonwealth,</i> 967 S.W.2d 6, 8 (Ky. 1998), quoting <i>Ornelas v. United States, supra</i>	8
1.	<u>Reasonable Suspicion Existed</u>	8
	<i>Terry v. Ohio,</i> 392 U.S. 21 (1968)	8
	<i>Commonwealth v. Marr,</i> 250 S.W.3d 624, 627 (Ky. 2008)	8
	<i>Simpson v. Commonwealth,</i> 834 S.W.2d 686, 687 (Ky. App. 1992) citing <i>Terry</i> , 392 U.S. at 21	8
	<i>United States v. Cortez,</i> 449 U.S. 411, 417 (1981)	8, 9
	<i>United States v. Arvizu,</i> 534 U.S. 266, 272-77 (2002)	9
	<i>United States v. Martin,</i> 289 F.3d 392, 398 (6 th Cir. 2002)	9
	<i>United States v. Cortez, supra</i>	9
	<i>Marr,</i> 250 S.W.3d at 627 quoting <i>Arvizu</i> , 534 U.S. at 274	9

<i>Kotila v. Commonwealth</i> , 114 S.W.3d 226, 232 (Ky. 2003)	9
<i>In Interest of S.J.</i> , 551 Pa. 637, 643, 713 A.2d 45 (1998)	9
<i>S.J.</i> 713 A.2d at 47-48	10
KRS 218A.1422	11
<i>Brown v. Texas</i> , 443 U.S.47 (1979)	12
<i>Terry</i> , 392 U.S. at 21	12
<i>Marr</i> , 250 S.W.3d at 627 quoting <i>Arvizu</i> , 534 U.S. at 274	12
<i>Brown</i> , 443 U.S. at 48	13
<i>Terry</i> , 392 U.S. 1	13
2. <u>Automatic Companion Rule</u>	13
<i>Noel v. Commonwealth</i> , 76 S.W.3d 923, 929 (Ky. 2002)	13
<i>Tamme v. Commonwealth</i> , 973 S.W.2d 13, 31 (Ky. 1998)	13
<i>United States v. Berryhill</i> , 445 F.2d 1189, 1193 (9 th Cir. 1971)	13
<i>Owens v. Commonwealth</i> , 244 S.W.3d 83 (Ky. 2008)	14
<i>Arizona v. Gant</i> , 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed 2d 485 (2009) .	14
<i>Owens v. Kentucky</i> , 129 S.Ct. 2155.	14

<i>United States v. Vigo</i> , 487 F.2d 295 (2 nd Cir. 1973)	14
<i>United States v. Poms</i> , 484 F.2d 919, 922 (4th Cir.1973)	14
<i>United States v. Tharpe</i> , 536 F.2d 1098 (5 th Cir. 1976) overruled on other grounds, <i>United States v. Causey</i> , 834 F.2d 1179 (5 th Cir. 1987)	14
<i>State v. Clevidence</i> , 153 Ariz. 295, 736 P.2d 379, 382 (1987) citing <i>Berryhill</i>	14
<i>People v. Myers</i> , 246 Ill.App.3d 542, 186 Ill.Dec. 443, 616 N.E.2d 633, 636 (1993) citing <i>Berryhill</i>	14
<i>State v. Moncrief</i> , 69 Ohio App.2d 51, 431 N.E.2d 336, 342 (Ohio App. 1980) citing <i>Berryhill</i>	15
<i>Lewis v. United States</i> , 399 A.2d 559, 562 (D.C.1979) citing <i>Berryhill</i>	15
<i>State v. Dougherty</i> , 8 Or.App. 267, 493 P.2d 1383 (Or. App. 1972)	15
<i>Perry v. State</i> , 927 P.2d 1158, 1163-64 (Wyo.1996) citing <i>Berryhill</i> ...	15
<i>Terry</i> , 392 U .S. at 23	15
<i>Berryhill</i> , 445 F.2d at 1193	16
CONCLUSION	17

COUNTERSTATEMENT OF THE CASE

On March 29, 2007, Louisville Metro Police Officer Chris Davis received a dispatch that several individuals were loitering and smoking drugs at 116 S. 43rd Street. (VR: 6/5/08, 9:56:50.) Officer Davis and his partner, Officer James Kaufling, were in the area in an unmarked police car. They responded to the call and approached the area via a nearby alley. (VR: 6/5/08, 9:57:27.) From their vantage point, the officers observed nine individuals congregated in front of a vacant house. Some of the individuals were standing on the sidewalk; some were sitting on a retaining wall and some were sitting on parked cars. (VR: 6/5/08, 9:59:10.) Because of the large number of people at the scene, Officer Davis radioed for backup. (VR: 6/5/08, 9:58:42.)

Officers Davis and Kaufling sat in the alley ten or 15 minutes observing the scene. Two or three of the individuals appeared to be smoking marijuana blunts. Officers David Haight and Darrin Balthrop arrived a few minutes later. (VR: 6/5/08, 9:59:35.)

The officers decided to approach the group from different angles. Officers Haight and Balthrop drove around and approached on one side while Officers Davis and Kaufling approached on foot from another side. (VR: 6/5/08, 10:00:27.) As Officers Haight and Balthrop drove up in their unmarked police car, Officer Davis heard some of the individuals in the group remark, "I think it's the police." (VR: 6/5/08, 10:01:00.)

The individuals who had been smoking the marijuana threw the blunts down upon the officers' arrival. (VR: 6/5/08, 10:00:21.) Officer Davis could smell burning marijuana as he approached. (VR: 6/5/08, 10:03:42.) Several of the individuals

tried to leave the scene. Officer Davis engaged a person who was attempting to back away up some steps to the house. He noticed Officer Haight approach an individual on a bicycle who was attempting to disengage himself from the group. Officer Caughlin was with another person who was trying to leave the scene. (VR: 6/5/08, 10:28:08.)

Officer Davis noticed a large bulge in the pocket of the individual to whom he was talking. Officer Davis asked about the bulge. The man replied that he had a bag of marijuana. (VR: 6/5/08, 10:03:56.)

About that time, Officer Davis heard Officer Caughlin yell "gun," meaning that the officer had observed someone at the scene with a gun. At that point, Officer Davis saw Officer Caughlin removing a large handgun from an individual. (VR: 6/5/08, 10:04:18.) Officer Caughlin arrested the individual with the gun. (VR: 6/5/08, 10:05:15.)

Officer Haight then noticed that the individual on the bicycle also had a gun. (VR: 6/5/08, 10:05:15.) Out of a concern for the officers' safety, Officer Davis then drew his weapon and ordered all nine of the individuals to get down on the ground. (VR: 6/5/08, 10:06:27.)

All of the individuals complied with Officer Davis's request. Officer Davis then announced that if anyone else had a gun, they needed to let the officers know immediately. (VR: 6/5/08, 10:07:03.) No one came forward. (VR: 6/5/08, 10:07:15.)

Officer Davis proceeded to check everyone to make sure no other guns were on the scene. Appellant was laying on the ground with the other individuals. Officer Davis noticed a bulge in the center of appellant's back. Officer Davis

immediately recognized the bulge as being a gun. (VR: 6/5/08, 10:08:35.)

Officer Davis asked appellant why he had not responded when asked if anyone else had weapons. Appellant did not say anything. Officer Davis removed a loaded 9mm Smith and Wesson from appellant and arrested appellant for carrying a concealed deadly weapon. (VR: 6/5/08, 10:09:03.)

Appellant was subsequently indicted for possession of a handgun by a convicted felon, carrying a concealed deadly weapon and loitering. (Transcript of Record, hereinafter referred to as "TR" 1-3.)

Appellant filed a motion to suppress the gun seized from his person. (TR 43-46.) The trial court conducted a hearing on the motion. (VR: 6/5/08, 9:56:12.) Appellant contended the seizure of the gun was improper because the officers did not have any reason to suspect that appellant himself was engaged in any illegal activity at the time. The trial court overruled the suppression motion, holding that under the totality of the circumstances the officers' conduct was proper pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968). In rejecting appellant's contention that the officers had not personally observed any illegal activity on appellant's part before ordering the individuals on the ground, the trial court stated:

To require an officer, as the Defendant suggests, to classify each individual in a group as either 'armed and dangerous' or 'not armed and not dangerous,' without any investigation whatsoever - especially when some of the individuals are engaged in illegal behavior and at least two are carrying weapons - is a task that on the one hand requires clairvoyance and on the other hand clearly risks an officer's safety. At least in the circumstances here, such a requirement is impractical and unreasonable.

(TR 75-76.)

Appellant subsequently moved to enter a conditional guilty plea. (TR 79-82.) The trial court conducted a hearing on appellant's motion. The trial court accepted the guilty plea, finding that the plea was "intelligent, knowing and voluntary." (TR 83-85.) Pursuant to the plea agreement, appellant was sentenced to a total of five years imprisonment and a \$250 fine. (TR 90 -93.)

Pursuant to his conditional guilty plea, appellant appealed the trial court's order overruling his suppression motion. (TR 95.) Before the Kentucky Court of Appeals, the Commonwealth argued the "automatic companion rule,"¹ though never expressly adopted by Kentucky courts, should be applied and, as a result, the pat-down search should be held acceptable. In the alternative, the Commonwealth argued the search was permissible under a standard *Terry* analysis.

The Court of Appeals neither applied nor addressed the automatic companion rule. (See App. A4-9.) Instead, the court engaged in a standard *Terry* analysis. *Id.* First, the court found the trial court's findings of fact were supported by the record and were not clearly erroneous. (App. A4-5.) Thereafter, the court applied the reasonable suspicion standard and concluded that the officers had sufficient ground to execute an investigatory stop, and that the scope of the search was permissible under the circumstances. (App. A6-9.) As such, the Court of Appeals affirmed the ruling of the trial court. (App. A9.)

¹ The term "automatic companion rule" is defined and discussed in the Argument section of this brief.

This Court granted Appellant's Motion for Discretionary Review on October 13, 2010.

ARGUMENT

APPELLANT FAILS TO SHOW THAT THE TRIAL COURT'S DETERMINATION THAT THE OFFICERS HAD A SUFFICIENT BASIS TO CONDUCT A TERRY STOP AND PAT-DOWN WAS CLEARLY ERRONEOUS.

Appellant contends the trial court erred in denying his motion to suppress because the officers had no reasonable suspicion that appellant was committing any criminal offense, therefore they had no reason to detain him and to conduct a *Terry* pat-down. As noted, the trial court found that the officers stated a reasonable and articulable suspicion to both detain appellant and to conduct a *Terry* pat-down. As such, the trial court denied the motion to suppress.

A trial court's decision on a motion to suppress requires that the appellate court first determine whether the trial court's findings of fact are supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). Substantial evidence is evidence of substance and relevant consequences having the fitness to induce conviction in the minds of reasonable men. *Owens-Corning Fiberglass Corp v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In *Ornelas v. United States*, 517 U.S. 690, 697 (1996), the United States Supreme Court cautioned that a reviewing court should "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." 116 S.C. at 1663. Furthermore, at a suppression hearing the trial

judge is the sole trier of fact and the sole judge of credibility of the witnesses. *Henson v. Commonwealth*, 20 S.W.3d 466, 469 (Ky. 1999).

If the facts are supported by substantial evidence, they are conclusive.

RCr 9.78. Based in those findings of fact, the court must then conduct a de novo review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law. *Neal*, 84 S.W.3d at 923. Appellant has the burden of showing that the trial court's ruling was clearly erroneous. *Harper v. Commonwealth*, 696 S.W.2d 665, 668 (Ky. 1985); *Clark v. Commonwealth*, 868 S.W.2d 101, 103 (Ky. App. 1993).

A. **The trial court's findings of fact are based on substantial evidence and, therefore are conclusive.**

Appellant first maintains that "[s]everal of the circuit court's findings of fact are not supported by substantial evidence." (Appellant's brief page 6.) Specifically, appellant challenges the trial court's findings that: (1) the nine individuals were a "distinct group"; and (2) that the individuals were "milling about or acting restless" when the officers made themselves known to the group. (Appellant's brief page 6-7.)

However, a review of the record indicates that the trial court's findings on these two matters are indeed supported by substantial evidence.

1. **Substantial evidence supported the trial court's finding that the nine individuals were a "distinct group."**

In its order, the trial court stated, "[h]ere we have a case where four officers approached a distinct group of nine individuals." (TR 73.) This finding is supported by Officer Davis' testimony at the suppression hearing. Officer Davis testified

that he received a dispatch that several individuals were loitering and smoking drugs at 116 S. 43rd Street. (VR: 6/5/08, 9:56:50.) Officer Davis stated that upon arriving at the scene, the officers observed nine individuals standing in front of a vacant house. Officer Davis specifically stated that when the officers approached, he “observed several of them conversing with each other” and that they were “all in a group together talking and carrying on.” (VR: 6/5/08, 10:19:05.) Thus, the trial court’s finding that the individuals were a “distinct group” is supported by direct evidence from the suppression hearing.

2. **Substantive evidence supports the trial court’s finding that the individuals were “milling about or acting restless” when the officers made themselves known to the group.**

In its order, the trial court also found that “the officers were clearly outnumbered and some of the suspects had been milling about and acting restless.” (TR 74.) This finding is also supported by Officer Davis’ testimony at the suppression hearing. As stated, Officer Davis described how the nine individuals were observed walking around, sitting and talking before the officers made their presence known. Two or three of the individuals were seen smoking marijuana. (VR: 6/5/08, 9:59:35.)

The group’s behavior changed upon the officers’ approach. As the officers approached, some of the individuals remarked, “I think it’s the police.” (VR: 6/5/08, 10:01:00.) The individuals who had been smoking marijuana threw their blunts down on the ground. (VR: 6/5/08, 10:03:21.) Several of the individuals indeed became “restless” and attempted to leave the scene. One person attempted to back away up some steps to the vacant house. Another individual who had been on a bicycle attempted to leave. Another person simply tried to walk away. (VR: 6/5/08, 10:28:08.) Thus, the trial

court's finding that the individuals in the group were "milling about or acting restless" was supported by direct evidence from the suppression hearing.

B. The rule of law was not violated as applied to the facts of this case.

As set forth in *Neal, supra*, the question now becomes whether the rule of law as applied to the established facts was violated. *See also: Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998), quoting *Ornelas v. United States, supra*. As stated, appellant contends the officers had no reasonable suspicion that he was committing any criminal offense, therefore, no reason existed to detain him and to conduct a *Terry* pat-down. However, the officers' conduct was proper under both under the reasonable suspicion guidelines set forth in *Terry* and the automatic companion rule.

1. Reasonable Suspicion Existed.

The limited search in this case is valid under a *Terry* reasonable suspicion standard. Pursuant to *Terry*, a police officer may briefly detain an individual in a public place, even though there is no probable cause to arrest him, if there is a reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 21 (1968); *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008). "[A] police officer can subject anyone to an investigatory stop if he is able to point to some specific and articulable fact which, together with rational inferences from those facts, support a 'reasonable and articulable suspicion' that the person in question is engaged in illegal activity." *Simpson v. Commonwealth*, 834 S.W.2d 686, 687 (Ky. App. 1992) citing *Terry*, 392 U.S. at 21. The objective justification for the officer's actions must be measured in light of the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417

(1981). A reviewing court is not to view the factors relied upon by the officer in isolation, but it must consider all of the officer's observations and it must give due weight to the inferences and deductions drawn by a trained law enforcement officer. *United States v. Arvizu*, 534 U.S. 266, 272-77 (2002); *United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002). The court's determination is to be based upon common sense judgments and inferences about human behavior, as understood by those versed in the field of law enforcement. *United States v. Cortez*, *supra*.

“While a ‘mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.’” *Marr*, 250 S.W.3d at 627 *quoting Arvizu*, 534 U.S. at 274 (internal citations omitted). The presence or absence of reasonable suspicion is a question of law to be determined on appeal under a *de novo* standard of review. *Kotila v. Commonwealth*, 114 S.W.3d 226, 232 (Ky. 2003).

The courts have found that an arrestee's companion may be stopped and frisked when there is reasonable suspicion that the companion is armed and dangerous. The facts and holding of *In Interest of S.J.*, 551 Pa. 637, 643, 713 A.2d 45 (1998), illustrate that Officer Davis had a reasonable suspicion to conduct a *Terry* stop in the instant case. In *S.J.*, a police officer noticed a group of twelve males standing on a street corner. The officer detected an odor of marijuana emanating from their location. *S.J.* 713 A.2d at 46. Upon getting closer to the group, the officer observed several individuals actually smoking marijuana. As the officer approached, the group attempted to disperse.

The officer stopped S.J. and frisked him. Thirty-six plastic bags of cocaine were discovered on S.J. *Id.*

The Pennsylvania Supreme Court found that these circumstances constituted reasonable suspicion for the officer to stop S.J. *S.J.* 713 A.2d at 47-48.

However, the Court did hold that the subsequent frisk of S.J. was unlawful. The Court held:

The record herein is devoid of any evidence that [the officer] 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 [the officer's] suspicions that Appellant was armed and dangerous.

Id.

The Pennsylvania court's rationale supports both the initial stop and the ensuing patdown of appellant in the instant case. Here, based on the totality of the circumstances, Officer Davis had reason to believe other members of the group – including appellant – might be armed and dangerous. Appellant and eight other individuals were congregated in front of a vacant house. There is no indication on the record that Appellant's presence as a part of the group was in some way transient or temporary.

Several individuals in the group were observed smoking marijuana. (VR: 6/5/08, 9:59:35.) As the officers walked up to the group, Officer Davis could smell the odor of burning marijuana. (VR: 6/5/08, 10:03:42.) The individuals who had been smoking, threw their blunts down upon the officers' arrival. (VR: 6/5/08, 10:03:42.)

Further, Officer Davis noticed a large bulge in the pocket of an individual. When asked what the bulge was, the individual replied that he had a bag of marijuana. (VR: 6/5/08, 10:03:56.) Since possession of marijuana is illegal in Kentucky, a misdemeanor had already been committed in the officers' presence. KRS 218A.1422.

Most importantly, Officer Caughlin noticed that one of the people in the group had a gun. Officer Davis saw Officer Caughlin remove a large handgun from this individual. (VR: 6/5/08, 10:05:15.) Officer Haight then noticed another gun in the possession of a second individual. (VR: 6/5/08, 10:05:15.) Further, as pointed out by the trial court, the officers were outnumbered 9-3 by the individuals. (TR 74.) Based on the fact that drugs were involved, that the officers were outnumbered and that two of the individuals had already been found carrying guns, Officer Davis proceeded to check everyone else to make sure no other guns were on the scene. As pointed out earlier, Officer Davis testified at the suppression hearing that he was "absolutely" concerned for the officers' safety at this point. (VR: 6/5/08, 10:08:35.) As aptly put by the trial court in its order overruling the suppression motion:

The discovery of weapons on two of the suspects dramatically elevates the justification of Officer Davis' actions. Undoubtedly, from Officer Davis' point of view the scene was already a tense one as they were faced with nine criminal suspects, some of whom were undoubtedly unhappy about the fact they were about to be charged with criminal offenses. When Davis learned that other suspects had weapons, it was only prudent of him to order the others to the ground so that, first, he and the other officers would not misconstrue any of the suspects' subsequent movements and, second, so that the suspects would not be caught in any crossfire or become involved in any struggle that might ensue. In light of the circumstances, Officer

Davis' actions were minimally intrusive as he touched none of the suspects before asking them to give up any weapons they may possess. In fact, Davis did not touch the Defendant's person until he noticed the bulging weapon tucked in the small of his back.

(TR 74.)

Thus, the patdown in the instant case was proper for the very reason that the Pennsylvania Supreme Court disapproved of the patdown in *S.J.*

Appellant relies on the United States Supreme Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979) as support for his assertion that his proximity to lawbreakers cannot lead to a conclusion that he was breaking the law himself. In *Brown*, the Court stated, "[t]he 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." *Id.* at 52.

First, it is not necessary to conclude that Appellant was actually breaking any law in order to render a *Terry* stop permissible. The standard in this instance is a reasonable suspicion that criminal activity is afoot, not actual proof that a crime is, in fact, occurring. *Terry*, 392 U.S. at 21. As stated above, "...the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Marr*, 250 S.W.3d at 627 quoting *Arvizu*, 534 U.S. at 274 (internal citations omitted). Thus, Appellant's contentions in that regard are misplaced.

Furthermore, the Commonwealth is not suggesting that Appellant's mere presence in a neighborhood generated the reasonable suspicion that criminal activity was

afoot. In *Brown*, the officers merely “...believed [Appellant and another man] had been together or were about to meet until the patrol car appeared.” *Brown*, 443 U.S. at 48. In this case, Appellant was “directly engaged” with a group of individuals who possessed concealed firearms and were smoking marijuana openly. (App. A7.) Clearly Appellant was more than simply present in the same neighborhood as those breaking the law.

Given all the circumstances, Officer Davis was justified in conducting an investigatory stop and pat-down of appellant to minimize the risk of harm to himself and the other officers. *Terry*, 392 U.S. 1.

2. **Automatic Companion Rule.**

Neither the trial court nor the Court of Appeals applied or addressed the automatic companion rule in their respective rulings. However, this Court can affirm the trial court’s decision on that ground if it so chooses. *See e.g.: Noel v. Commonwealth*, 76 S.W.3d 923, 929 (Ky. 2002) (“We conclude that the trial judge’s decision to admit this evidence was correct even though for the wrong reason.”); *Tamme v. Commonwealth*, 973 S.W.2d 13, 31 (Ky. 1998) (“Nor is it of any consequence that the trial judge reached the correct result for the wrong reason.”) Thus, should the Court disagree with the lower courts’ application of *Terry*, this Court is nonetheless free to consider the adoption of the automatic companion rule.

The automatic companion rule holds that “[a]ll 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 assurance that they are unarmed.” *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th

Cir. 1971). In *Berryhill*, the Court held that while the arrest of a suspect cannot legalize a personal search of a companion for evidence simply because the companion is there, “*Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen’s personal privacy extends to a criminal’s companions at the time of arrest.” Numerous state and federal courts have adopted this rule.² See e.g.: *United States v. Vigo*, 487 F.2d 295 (2nd Cir. 1973) (holding a search of the purse of a companion of the arrested person is reasonable.); *United States v. Poms*, 484 F.2d 919, 922 (4th Cir.1973) (voicing agreement with *Berryhill*); *United States v. Tharpe*, 536 F.2d 1098 (5th Cir. 1976) overruled on other grounds, *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987)(upholding a weapons frisk of two passengers in the vehicle driven by the person arrested.); *State v. Clevidence*, 153 Ariz. 295, 736 P.2d 379, 382 (1987) (citing *Berryhill* with approval for proposition that “[t]he right to a limited search for weapons extends to a suspected criminal’s companions at the time of arrest.”); *People v. Myers*, 246 Ill.App.3d 542, 186 Ill.Dec. 443, 616 N.E.2d 633, 636 (1993) (citing *Berryhill* with approval and

² In *Owens v. Commonwealth*, 244 S.W.3d 83 (Ky. 2008), the Kentucky Supreme Court adopted the automatic companion rule. In *Owens*, the Court held that under the automatic companion rule, a police officer could conduct a pat down of a vehicle’s passenger for weapons. However, the United States Supreme Court granted certiorari in *Owens* and vacated the judgment “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. In *Gant*, the United States Supreme Court limited the scope of searches incident to arrest when those searches involved vehicles. The Commonwealth recognizes that *Owens* is not controlling precedent in light of the United States Supreme Court’s action. However, the present case does not involve a search incident to arrest nor does it involve a passenger of a vehicle. *Owens* is cited merely to highlight the Kentucky Supreme Court’s view of the automatic companion rule as a general proposition of law.

holding that “[w]hile a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others.”); *State v. Moncrief*, 69 Ohio App.2d 51, 431 N.E.2d 336, 342 (Ohio App. 1980) (citing *Berryhill* with approval); *Lewis v. United States*, 399 A.2d 559, 562 (D.C.1979) (citing *Berryhill* with approval); *State v. Dougherty*, 8 Or.App. 267, 493 P.2d 1383 (Or. App. 1972) (allowing weapons search of companions pursuant to an arrest in a hotel room.); *Perry v. State*, 927 P.2d 1158, 1163-64 (Wyo.1996) (citing *Berryhill* with approval and adopting automatic companion rule).

In the instant case, appellant was the companion of two individuals at the scene with weapons on their person. At the suppression hearing, Officer Davis testified that after these two weapons were discovered, he was “absolutely” concerned for the officers’ safety because he could not be sure who else in the group might be armed. (VR: 6/5/08, 10:06:27; 10:07:15; 10:18:30.) In *Terry*, the United States Supreme Court reiterated the necessity to preserve officer safety in potentially dangerous situations such as this:

In addition [to the government’s interest in investigating crime], there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

Terry, 392 U.S. at 23.

Appellant attempts to diminish the possible danger by asserting that “being in the presence of marijuana users cannot be the reason” for a *Terry* stop. To begin with,

appellant was in the presence of more than just marijuana users -- he was in the presence of two individuals who had been found to possess weapons. Furthermore, the *Berryhill* court aptly dispensed with such misplaced logic. The Court noted that an officer effectuating an arrest should not have to "expose himself to a shot in the back from the defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance." *Berryhill*, 445 F.2d at 1193.

The same rationale applies in the instant case. Officer Davis acted as a reasonably prudent police officer when he asked the individuals to lie on the ground and then, upon noticing the bulge on appellant, to conduct a pat-down. Officer Davis was attempting to preserve his safety and that of the other two officers present at the scene. Thus, Officer Davis was entitled to detain appellant and conduct a *Terry* pat-down under the automatic companion rule.

CONCLUSION

For the above-stated reasons, the Commonwealth requests the order of the Jefferson Circuit Court overruling appellant's motion to suppress be affirmed.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

A handwritten signature in black ink, appearing to read 'M. Brandon Roberts', written in a cursive style.

M. BRANDON ROBERTS
Assistant Attorney General
Office of Criminal Appeals
Attorney General's Office
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502)696-5342

Counsel for Commonwealth