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JAN 3 1 2014
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SUPREME COURT

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-000820

PLEAS LUCIAN KAVANAUGH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 2010-CR-727

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, PLEAS LUCIAN KAVANAUGH

Submitted by:

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CERTIFICATE REQUIRED BY CR 76.12(6):

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Pamela R. Goodwine, Judge, 382 Robert F. Stephens Courthouse, 120 North Limestone, Lexington, Kentucky 40507; the Hon. Ray Larson, Commonwealth Attorney's Office, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; the Hon. Steven C. Butcher, Department of Public Advocacy, 163 West Short Street, Suite 210, Lexington, Kentucky 40507; and to served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on January 31, 2014. The record on appeal was not checked out for the purpose of this Reply Brief.

Robert C. Yang

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Purpose of Reply Brief

The purpose of this reply brief is to respond to arguments set forth in Appellee's brief. Any issue not specifically addressed herein should not be construed as an adoption of or concession to Appellee's position. Rather, Appellant believes his original brief has sufficiently and correctly addressed the matter.

The Commonwealth asserts the Court of Appeals conducted a proper *de novo* review because the court "cited the correct case, *Terry v. Ohio*, 392 U.S. 1, 19 (1968)[,] and conducted a more complete legal analysis pursuant to *Terry*." Brief for Appellee, 7. Plus the Court of Appeals cited to *Brendlin v. California*, 551 U.S. 249 (2007), a case "never cited by the trial court in the proceedings below." Citing to the right and different cases does not mean Mr. Kavanaugh's rights were not violated.

Even if the Court of Appeals did analyze the case under *Terry*, it is not permitted to conduct a *de novo* review of the facts. The Commonwealth concedes the trial court's findings of fact are reviewed for clear error. Brief for Appellant, 4. However, in this case, the Court of Appeals erred in changing material facts to support its conclusion.

The trial court believed Mr. Kavanaugh had his hands in his pockets and did not shuffle them. The trial court could have believed Officer Rice that Mr. Kavanaugh was reaching into his coat or digging in his pockets; however, the trial court believed Mr. Kavanaugh. The trial court's finding was supported by evidence – it was not clear error. The Court of Appeals made no attempt to discuss why such a finding was clear error or why it was not supported by evidence. The Court of Appeals simply adopted Officer Rice's version of events and changed the trial court's factual findings.

Whether your hands were: 1) in your pockets; or 2) digging into your pockets, are separate and distinct facts – not semantics. In the first instance,

having your hands in your pockets in freezing weather does not give rise to reasonable articulable suspicion. But when an officer sees you reaching into your pockets, he might reasonably suspect you have a weapon. That is why the Court of Appeals believed that the facts that Mr. Kavanaugh: 1) did not look at Officer Rice; 2) was digging in his pockets; and 3) refused to give his name, was sufficient reasonable suspicion for a *Terry* frisk. As explained in his original brief, the Court of Appeals was wrong on all three counts.

First, and as discussed above, the Court of Appeals disturbed a conclusive fact that Mr. Kavanaugh was not shuffling or digging in his pockets. Second, not looking at Officer Rice does not prove anything. In *United States v. Beauchamp*, 659 F.3d 560, 571 (6th. Cir. 2011), a case cited by the Commonwealth, the Sixth Circuit discussed why not looking at an officer is ambiguous and not articulable reasonable suspicion:

> Beauchamp also did not make eye contact with the officer. But what if he had and then looked away? His behavior may then have been described as "furtive" or "evasive." The ambiguity of Beauchamp's conduct may be susceptible to many different interpretations, but that does not render it suspicious. An inquiry into reasonable suspicion looks for the exact opposite of ambiguity: objective and particularized indicia of criminal activity. If cases are to be decided on reality and not on fiction, the facts of Beauchamp's response to the officer do not meet the constitutional standard. *See* [*Illinois v.*] *Wardlow*, 528 U.S. [119] 130–31 [(2000)], 120 S.Ct. 673 (noting that "avoid[ing] eye contact or even sneer[ing] at the sight of an officer" ... "would not justify a *Terry* stop or any sort of *per se* inference").

In *Beauchamp*, the court held that avoiding eye contact was not sufficient for reasonable suspicion. *Id.*

Third, the Commonwealth incorrectly states that "*Hiibel* stands for the proposition that Kavanaugh was required to disclose his name in the course of a *Terry* stop." Brief for Appellee, 19. *Hiibel* "permit[s] a State to require a suspect to disclose his name in the course of a *Terry* stop." 542 U.S. at 187. As discussed in his original brief, Kentucky does not require a suspect to disclose his name in the course of a *Terry* stop. Brief for Appellant, 17-18.

The cases cited by the Commonwealth falls short of supporting its position. In *U.S. v. Mouscardy*, 722 F.3d 68, 70 (1st. Cir 2013), the suspect matched the description from a 911 call that alerted police to the defendant viciously beating up his girlfriend or wife. The court held a *Terry* frisk was proper because this was a domestic violence situation and the officer had a reasonable suspicion that a crime of violence occurred. *Id.* at 75. In contrast, Officer Rice did not have reasonable suspicion that Mr. Kavanaugh committed or was about to commit a crime of violence.

And in *U.S. v. Campbell*, 549 F.3d 364 (6th. Cir. 2008), it was more than the passenger's failure to provide identification, "possibly to conceal his identity,' that was used as a factor to justify the *Terry* frisk. First, the officers checked the vehicle's the license tags and determined the tags were not on file, meaning the car might have been stolen. *Id.* at 372. In contrast, Officer Rice did not have any of those same circumstances. Yes, Officer Rice did not know whether the car was stolen or not. But that was due to his failure to wait for dispatch to confirm the car was not stolen. And once Officer Rice

shone the squad car's spot light into the car, he was able to see there was no drug transaction, nor prostitution taking place.

There was no attenuation in this case. Officer Rice was not attempting to frisk Mr. Kavanaugh when the menancing occurred. Officer Rice was digging through his wallet in violation of his Fourth Amendment rights. The officer should not be allowed to goad a suspect into committing a new and distinct crime to remove the taint of the illegal search.

Further, Mr. Kavanaugh believes the issues with the illegal wallet search and the requirement for a suspect to provide a name during a *Terry* stop is properly before this Court. In the initial motion to suppress, trial counsel discussed the fact that Officer Rice took Mr. Kavanaugh's wallet. TR 29. The trial court was on notice that the arrest and the finding of contraband fell under the fruit of the poisonous tree doctrine. TR 30. In his motion for discretionary review, Mr. Kavanaugh discussed how Officer Rice exceeded the scope of a *Terry* frisk by removing Mr. Kavanaugh's wallet, not for officer safety, but for identification. Appellant's Original Brief, Appendix, Tab 3, page 9. And this Court reviews the lower courts' application of law *de novo*.

If this Court believes the wallet search or the requirement to provide identification to a police officer issues are somehow unpreserved, Mr. Kavanaugh requests palpable error review under Rules of Criminal Procedure (RCr) 10.26. If this Court believes the wallet search exceeds a *Terry* frisk or that Kentucky does not require a suspect to provide

identification, it would be judicially intolerable – a manifest injustice – for a conviction to stand on either of those constitutional violations.

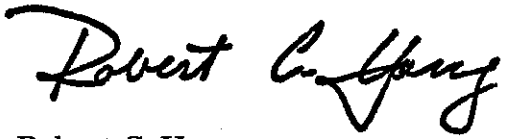
Indeed, a *Terry* frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly." *Terry*, 392 U.S. at 17. *Terry* cautioned that "field interrogations are a major source of friction between the police and minority groups." *Id.* at 14, n. 11, (internal citation omitted). Further, "the friction caused by '[m]isuse of field interrogations' increases 'as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.'" *Id.*, (internal citation omitted).

In this case, Mr. Kavanaugh knew he did not need to provide identification. He submitted to a *Terry* frisk. But when Officer Rice exceeded the search for a dangerous weapon to look through his wallet, Mr. Kavanaugh's rights were violated.

Conclusion

The trial court and the Court of Appeals erred in denying Mr. Kavanaugh's motion to suppress. Reversal is required.

Respectfully submitted,



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