COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2011-SC-000662-DG

ROBERT MASON PARKER — APPELLANT

On Review from the Court of Appeals
2010-CA-1215-MR
v. Jefferson Circuit Court
No. 09-CR-1470
Hon. Mary Shaw, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, ROBERT MASON PARKER

Submitted by:

BRUCE P. HACKETT
Chief Appellate Defender
Office of the Louisville Metro
Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, KY 40202
(502) 574-3800
Counsel for Appellant

Certificate of Service

This is to certify that a copy of the foregoing was mailed, first class postage prepaid, to Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division 5, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and to Hon. Jack Conway, Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and was delivered electronically, by agreement, to Hon. Dorislee Gilbert, Special Assistant Attorney General and Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, KY 40202, on March 26, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of this Court.

BRUCE P. HACKETT

PURPOSE OF THE BRIEF

This brief is filed in order to address the Commonwealth's claim that Mr. Parker's argument in the Court of Appeals that the Commonwealth's appeal should have been dismissed as untimely was not preserved for review because Mr. Parker failed to first present the argument in the trial court. Mr. Parker will also address the Commonwealth's argument that an interlocutory appeal under KRS 22A.020 is actually an appeal from a final judgment. On the merits of the suppression issue, Mr. Parker will respond to the Commonwealth's assertions that this Court should embrace *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and the Commonwealth's argument that Mr. Parker should be prohibited from urging this Court to abandon the view that Section 10 affords Kentucky citizens no greater protections than does the Fourth Amendment.

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ARGUMENT

I. The Commonwealth's appeal from the March 19, 2010 order granting the motion to suppress is not timely and must be dismissed.

In regard to whether the Commonwealth's appeal to the Court of Appeals was timely, in this Court the Commonwealth repeats some of the arguments that it made in the Court of Appeals and abandons others. The Commonwealth says that Mr. Parker's argument for dismissal based upon the untimely appeal was not "properly preserved" for review. The Commonwealth says that before raising the untimeliness of the appeal in the Court of Appeals, Mr. Parker was required to tell the Commonwealth and the circuit court that the filing of a motion under CR 59.05 would not toll the time to take an appeal, if indeed, an appeal was what the Commonwealth had in mind when it filed the CR 59.05 motion. (Brief for Commonwealth, pp. 6-7). Mr. Parker had no obligation to alert the Commonwealth about a potential untimely appeal.

If the Commonwealth's notice of appeal from the March 19, 2010, suppression order was not timely filed, dismissal of the appeal was mandatory. CR 73.02(2). The circuit court had no authority to dismiss an appeal that was pending in the Court of Appeals. The Court of Appeals was the proper forum to raise the issue, Mr. Parker raised the issue in the Court of Appeals and the Commonwealth's "preservation" argument is totally without merit.

In the Court of Appeals, Mr. Parker relied upon *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987), to support his argument that the Commonwealth's appeal was untimely. In *Cobb*, the Commonwealth had done precisely what the

Commonwealth did in Mr. Parker's case – the Commonwealth asked the circuit court for reconsideration of a suppression ruling before filing an untimely appeal. In the Court of Appeals, the Commonwealth argued that *Commonwealth v. Cobb* had relied upon *Commonwealth ex Rel. Mason v. Hughes*, 725 S.W.2d 865 (Ky. App. 1987), but *Hughes* had been overruled by *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995); therefore, *Cobb*, too, "might be overruled." (Reply Brief for Appellant, p. 1, fn. 1). The Court of Appeals apparently adopted the Commonwealth's view of *Hughes* and *Bates* (but without declaring that *Bates* had overruled *Cobb*) and ruled that Mr. Parker's reliance on *Cobb* was "misplaced." (Opinion, p. 4; App. A4).

This Court, in *Bates*, overruled that portion of *Commonwealth ex rel. Mason* that addressed the timeliness of a motion for discretionary review from a final circuit court judgment. Although this Court made specific mention of *Cobb*, it did not overrule *Cobb*. When the circuit court order being appealed is an interlocutory order, CR 59.05 does not apply and does not toll the time to take an appeal. "Although the Commonwealth may request the trial court to reconsider an adverse order, the motion does not toll the time for appealing the adverse order." *Id.* at 541.

The Commonwealth uses the same flawed logic as the Court to declare that an interlocutory suppression order must be a "final judgment," because if such an order is not a final judgment, it cannot be appealed, and a suppression order can be appealed by the Commonwealth under KRS 22A.020. (Brief for Commonwealth, pp. 6-7; Opinion, p. 3; App. A3). The Court of Appeals and the Commonwealth ignore or overlook that some interlocutory orders may be appealed despite their non-final status and KRS 22A.020 allows appeals from interlocutory orders.

The Court of Appeals explained its ruling as follows: "If we were to follow Parker's reasoning regarding the March 19, 2010, order, then the order would not be appealable at all, because it would not be considered a 'final judgment.'" (Opinion, p. 3; App. A3). It is essential to the Commonwealth's argument and the Court of Appeals' ruling that the interlocutory suppression order be a "final judgment" because CR 59.05 applies only to "final judgments." Thus, if the suppression order is not a final judgment, then CR 59.05 does not apply to that order and the Commonwealth's CR 59.05 motion did not stay the time in which to appeal the suppression order.

The Commonwealth and the Court of Appeals rely on the following logic:

(1) Only final judgments may be appealed;
(2) A suppression order may be appealed under KRS 22A.020;
(3) Therefore, a suppression order is a final judgment.

The flaw in the logic is in premise (1). Final judgments **and** certain interlocutory orders may be appealed. A suppression order in a criminal case is an interlocutory order that may be appealed by the Commonwealth as authorized by KRS 22A.020. *See Commonwealth v. West*, 147 S.W.3d 72, 73 (Ky. App. 2004) ("Thus, an interlocutory appeal, under KRS 22A.020, must be taken within 30 days from the date of notation of service of the judgment or order appealed. *See Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky.App. 1987).").

On page 9 of its brief, the Commonwealth argues that "*Cobb* was decided before the amendments to RCr 12.02 that make the time tolling provisions of CR 73.02(1)(e) applicable to criminal cases." In 2006, this Court adopted an amendment (effective 1/1/2007) to RCr 12.02 that added CR 73.02(1)(e) to the list of civil rules

that apply in criminal actions, which clarified that CR 59.05 did apply in criminal cases. But that amendment did not change the fact that CR 59.05 applies only to final judgments, not interlocutory orders. Since CR 59.05 does not apply to interlocutory orders, CR 59.05 cannot toll the time to take an appeal from an interlocutory order. "A CR 59.05 motion may only be utilized to seek reconsideration of a 'final judgment.'" *Pursley v. Pursley*, 242 S.W.3d 346, 347 (Ky. App. 2007). The Commonwealth's appeal in Mr. Parker's case was from an interlocutory order. "By its enactment of KRS 22A.020(4), the General Assembly has exercised the authority granted by Section 111(2) and created a statutory matter-of-right appeal from interlocutory orders." *Ballard v. Commonwealth*, 320 S.W.3d 69, 73 (Ky. 2010).

On page 8 of its brief, the Commonwealth says that if a CR 59.05 motion did not stay an appeal from a suppression order, the circuit court and the appellate court would both have jurisdiction over the same issue at the same time and that "judicial economy suffers." But this Court and the Court of Appeals have allowed appeals to proceed from orders denying relief along with orders denying CR 59.05 motions in criminal cases. *See Sims v. Commonwealth*, 233 S.W.3d 731, 734 (Ky. App. 2007) ("The Orders of the McCracken Circuit Court denying Sims' motions for a new sentencing hearing pursuant to CR 60.02 and RCr 11.42, and denying his motion to alter, amend or vacate that order pursuant to CR 59.05, are affirmed."); *Halvorsen v. Commonwealth*, 258 S.W.3d 1, 3 (Ky. 2007) ("Appellant filed a post-conviction motion pursuant to RCr 11.42 asserting various claims of ineffective assistance of counsel. After an evidentiary hearing on specified claims, the trial court denied the RCr 11.42 motion as well as his subsequent motion under RCr 59.05. It is from the

denial of these post-conviction motions that Appellant now seeks relief in this Court."). See also *Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002), and *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2001). The jurisdiction and judicial economy arguments are unpersuasive.

On pages 10 and 11 of its brief, the Commonwealth argues that "[e]ven if CR 59.05 did not apply, the appeal was timely because the Commonwealth also sought findings of fact and conclusions of law under RCr 9.78." The Commonwealth says that if it had failed to ask for factual findings and conclusions of law, that failure could have been fatal to the appeal.

In its motion for reconsideration, the Commonwealth asked, alternatively, for findings of fact and conclusions of law, citing RCr 9.78. (TR 59). In the Court of Appeals, part of the Commonwealth's argument concerning its request for findings was that CR 52.04 required that it bring the matter of findings to the trial court's attention. (Reply Brief for Appellant, p. 3). Before this Court, the Commonwealth has abandoned that argument, and with good reason. In *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005), the Court of Appeals suggested that CR 52.04 applies in criminal cases through RCr 13.04. But CR 52.04 is no help to the Commonwealth, since "a request made pursuant to CR 52.04 does not stop the running of time to appeal." *Burchell v. Burchell*, 684 S.W.2d 296, 299 (Ky. App. 1984). The same must be true of a request made pursuant to RCr 9.78, which does not even address motions for findings. While the Commonwealth was free to ask the circuit court to reconsider its ruling or to issue additional findings, that request "[did] not stop the running of time to appeal."

The Commonwealth's final argument is, "Even if the Commonwealth's appeal of the original suppression ruling was untimely, its appeal of the denial of it motion to reconsider was not." (Brief for Commonwealth, p. 11). But while the notice of appeal filed on June 24, 2010, may have been timely from the May 27, 2010, order denying reconsideration, that appeal presented only one issue for the Court of Appeals – did the circuit court abuse its discretion in denying the motion to reconsider? "[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Meyers v. Commonwealth*, 381 S.W.3d 280, 285 (Ky. 2012) (Quoting *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000). Given this Court's admonition to litigants regarding the filing of motions to reconsider interlocutory orders in *Moore v. Commonwealth*, 357 S.W.3d 470, 496-497 (Ky. 2011), Judge Shaw's denial of reconsideration in this case cannot be deemed an abuse of discretion.

II. The circuit court order granting the motion to suppress must be affirmed.

The Commonwealth argues that the Court of Appeals reached the correct result in reversing the circuit court by relying upon *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and by refusing to apply the exclusionary rule to the unconstitutional search. (Brief for Commonwealth, pp. 11-16). The Commonwealth cites three recent Court of Appeals decisions as support for its argument: *Boyd v. Commonwealth*, 357 S.W.3d 216 (Ky. App. 2011), *Valesquez v. Commonwealth*, 362 S.W.3d 346 (Ky. App. 2011), and *Artis v. Commonwealth*, 360 S.W.3d 771 (Ky. App. 2012). (Brief for Commonwealth, p. 13).

In each of the three Court of Appeals cases, the unconstitutional search of a vehicle incident to arrest was upheld because each of the searches was conducted before *Gant* was decided[1] and in each case the Court of Appeals relied on *Davis* to rule that *Gant* would not be applied retroactively and that the exclusionary rule would not apply. Each of the three Court of Appeals decisions was rendered after this Court's decision in *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010) [rendered on September 10, 2010], wherein this Court first applied the reasoning of *Gant* to invalidate the search of a car incident to arrest and to order exclusion of the evidence recovered as a result of the illegal search. The search in *Rose* occurred on November 19, 2003, more than six years before *Gant* was decided. *Rose v. Commonwealth*, 322 S.W.3d at 77.

In *Boyd v. Commonwealth*, the suppression issue was raised as palpable error and the Court of Appeals made no mention of *Rose*; nor did that Court make any reference to Section 10 of the Kentucky Constitution. 357 S.W.3d at 219-221. The Court of Appeals decision in *Valesquez v. Commonwealth*, also did not cite *Rose* and made only a passing reference to Section 10 for the proposition that Section 10 protects against unreasonable warrantless searches and seizures. 362 S.W.3d at 348-351. In *Artis v. Commonwealth*, once again the Court of Appeals made no reference to *Rose*. The Court did address the argument that Artis made in his reply brief that the search should be found unconstitutional on state law grounds. 360 S.W.3d at 773. But citing this Court's decisions in *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky.

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[1] *Gant* was rendered on April 21, 2009. The search in *Boyd* took place on July 8, 2007, the search in *Valesquez* occurred on August 17, 2008, and the search in *Artis* was conducted on May 20, 2008. *Boyd*, 357 S.W.3d at 219; *Valesquez* , 362 S.W.3d at 347; *Artis*, 360 S.W.3d at 772.

1996), and *Petitioner F v. Brown*, 306 S.W.3d 80 (Ky. 2010), the Court of Appeals concluded that our Constitution offers no greater protections to its citizens than does the Fourth Amendment. *Artis v. Commonwealth* , 360 S.W.3d at 773-774.

The issue in *Petitioner F v. Brown*, 306 S.W.3d 80 (Ky. 2010), was whether the state could collect DNA samples from juveniles. In deciding the issue, this Court, citing *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996),[2] said that in the case before it, the Court saw "no reason to interpret Section 10 differently from the Fourth Amendment." *Petitioner F v. Brown*, 306 S.W.3d at 91. On pages 17-24 of his initial brief filed in this Court, Mr. Parker has presented his arguments about the problems generated by *LaFollette* and will not repeat them here.

Mr. Parker has likewise, on pages 17-24 of his initial brief, presented his arguments about the reasons why we have an exclusionary rule in Kentucky as explained by the Court in the *Youman*[3] case. Mr. Parker will rely upon those arguments to refute the Commonwealth's discussion of the exclusionary rule on pages 16-21 of the Commonwealth's brief.

Citing the "can of worms" case – *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976), overruled by *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010), – the Commonwealth says that Mr. Parker's arguments regarding Section 10 are not properly preserved for review because the arguments were not made in the Court of

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[2] The Court did acknowledge, without comment, Justice Roach's criticism of the Court's use of *LaFollette* as authority for the proposition that Section 10 and the Fourth Amendment have the same meaning and offer citizens the exact same protections from intrusions by the government. *Petitioner F. v. Brown*, 306 S.W.3d at 91.

[3] *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920).

Appeals or circuit court. (Brief for Commonwealth, pp. 19-20). But, as the Commonwealth's own argument demonstrates, particularly on page 20 of the Commonwealth's brief, this Court is the only Court with the power to address the issue about whether Section 10 affords greater protections than the Fourth Amendment.

What is very revealing about the Commonwealth's arguments urging this Court to embrace the United States Supreme Court's view of the exclusionary rule found in *Davis v. United States*, 564 U.S. ___, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), is the failure of the Commonwealth to address this Court's decisions in *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010), and *Frazier v. Commonwealth*, 406 S.W.3d 448 (Ky. 2013). In those cases, the searches incident to arrest were both conducted **before** *Gant* was decided (just like the search in *Davis v. United States*). Yet, this Court applied the exclusionary rule and ordered suppression of the evidence, rejecting the argument that because *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed2d 768 (1981), was the law at the time of the searches, the "good faith" exception validated the otherwise unconstitutional searches.

Most telling is the Commonwealth's silence about the *Frazier* case, decided in August 2013, wherein the Commonwealth cited *Davis v. United States* and urged this Court to follow the United States Supreme Court's lead and refuse to apply the exclusionary rule. (*Frazier v. Commonwealth*, No. 2011-SC-000283-DG, Brief for Commonwealth, pp. 18-19).[4] In *Frazier*, this Court stated:

[4]Commonwealth's brief found at: http://chaselaw.nku.edu/documents/kysctbriefs/oral/Frazier%20v.%20Commonwealth_2011-SC-0283_applee.pdf. (visited on January 7, 2014).

> The *Gant* decision was rendered in April, 2009. 556 U.S. at 332, 129 S.Ct. 1710. The order denying Frazier's motion to suppress was entered two months earlier in February, 2009. Nevertheless, we have previously held that *Gant* may apply retroactively. *See Rose v. Commonwealth,* 322 S.W.3d 76, 79 (Ky.2010); *United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (cases involving changes in the interpretation of the Fourth Amendment should be applied retroactively to those cases upon which a decision had not been rendered at the time of the new decision).

Frazier v. Commonwealth, 406 S.W.3d at 458, fn 9. In Mr. Parker's case, the circuit court correctly found that the unconstitutional warrantless search of Mr. Parker's vehicle required suppression of the evidence. Mr. Parker urges this Court to uphold that decision.

CONCLUSION

For the foregoing reasons, the appellant, Robert Parker, respectfully requests that the Court of Appeals be reversed and that the March 19, 2010 order of the Jefferson Circuit Court be affirmed.

Bruce P. Hackett
Chief Appellate Defender
Office of the Louisville
Metro Public Defender
Advocacy Plaza
717-719 West Jefferson Street
Louisville, Kentucky 40202
(502) 574-3800
Counsel for Appellant

Daniel T. Goyette
Louisville Metro Public Defender
Of counsel