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

ROBERT MASON PARKER — APPELLANT

On Review from the Court of Appeals
2010-CA-1215-MR

v.

Appeal from the Jefferson Circuit Court
Indictment No. 09-CR-1470

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY

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CERTIFICATE OF SERVICE

Undersigned does hereby certify that copies of this brief were served upon the following named individuals by delivery or by email by agreement on March 12, 2014: Hon. Mary Shaw, Judge, Jefferson Circuit Court, Division Six, 700 West Jefferson Street, Louisville, KY 40202; Hon. Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Bruce P. Hackett at bphackett@metrodefender.org; and Hon. Jack Conway, Attorney General, at heather.johnston@ag.ky.gov. Undersigned does also certify that the record on appeal was not checked out in preparation of this brief.

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STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that oral argument is unnecessary because the United States Supreme Court's recent opinion in *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), is directly on point and because the secondary procedural issue raised in this appeal is unpreserved and otherwise properly decided by the Court of Appeals on its merits. The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

COUNTERSTATEMENT OF THE CASE

Although Appellant has generally stated the facts of the case accurately, he has failed to give important details about the testimony at the suppression hearing. Therefore, the Commonwealth offers the following, more thorough recitation of the facts.

Appellant, who is charged with possession of a handgun by a convicted felon and other offenses, moved to suppress evidence obtained from the search of his car. TR 23-25. He requested an evidentiary hearing, and one was granted.

At the suppression hearing, Louisville Metro Police Officer Brian Reccius testified that he had received specialized training from the legal department at the police academy regarding search and seizure law. VR, CD 10-109, 01/28/10, 01:06:03. Reccius had made more than 400 felony arrests and performed searches incident to arrest on a regular basis. VR, CD 10-109, 01/28/10, 01:07:43; 01:08:44.

On January 12, 2009, Reccius stopped Appellant after seeing him leave a bar and cross the center line. VR, CD 10-109, 01/28/10, 01:09:40. After stopping him, Reccius discovered Appellant's license had been suspended. VR, CD 10-109, 01/28/10, 01:11:15. He asked Appellant to step out of the car, and Appellant moved to the back of the car and talked to Reccius there. Then Reccius' beat partner arrived. VR, CD 10-109, 01/28/10, 01:11:30. Reccius asked Appellant if there was anything illegal in the car. Appellant said no. VR, CD 10-109, 01/28/10, 01:11:38. Appellant stood by the bumper of his car with Reccius' beat partner while Reccius searched the car. VR, CD 10-109, 01/28/10, 01:11:38; 01:12:44. Appellant was not handcuffed at the time. VR, CD 10-109, 01/28/10, 01:12:22. Reccius found a loaded gun and some marijuana in the car. VR, CD 10-109, 01/28/10, 01:11:45.

Reccius testified that the search of Appellant's car comported with training he had received up until the time of the search and that the type of search he performed was common practice in the police department. VR, CD 10-109, 01/28/10, 01:14:14; 01:14:30. Reccius testified that since the time he conducted the search, he had been informed by the legal department and his superiors of the U.S. Supreme Court's decision in *Arizona v. Gant*. VR, CD 10-109, 01/28/10, 01:14:57; 01:15:35. He understood the case to limit searches incident to arrest. VR, CD 10-109, 01/28/10, 01:15:20. Reccius stated that the practices, procedures, and protocols within the police department have changed to comply with *Gant*. VR, CD 10-109, 01/28/10, 01:15:35. He further testified that if he had stopped Appellant after being told about *Gant*, he would have done things differently. VR, CD 10-109, 01/28/10, 01:18:15.

The Commonwealth argued orally and in its written response that although *Gant* rendered the search invalid, exclusion of the evidence was not warranted because Reccius had relied in good faith on the law regarding search incident to arrest as it existed at the time he conducted the search. VR, CD 10-109, 01/28/10, 01:26:22; TR 27-45. On March 19, 2010, the trial court issued its written ruling suppressing the evidence and holding that the good faith exception did not apply in this case. TR 26.

The Commonwealth filed a motion for reconsideration, asking alternatively that the Circuit Court enter findings of fact and conclusions of law. TR 59-64. Appellant responded and cited the court to *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010),[1]

[1] In *King*, the Court rejected an argument that the good faith exception to the exclusionary rule applied because it found that exception clearly limited to circumstances where a warrant is invalidated for lack of probable cause. 302 S.W.3d at 657. That case was subsequently reversed by the United States Supreme Court, on other grounds. See *Kentucky v. King*, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). And the United States Supreme Court ultimately rejected *King*'s limitation of the good faith exception to the exclusionary rule. See *Davis v. United States*, 132 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

and the then non-final opinion in *Valesquez v. Commonwealth*, 2010 WL 567325 (Ky. App. Feb. 19, 2010).[2] On May 27, 2010, the Circuit Court denied the motion for reconsideration but issued an opinion and order on the suppression motion containing findings of fact and conclusions of law. TR 89-92. The Circuit Court relied on *King* in finding that the good faith exception to the exclusionary rule did not apply. TR 91.

On June 24, the Commonwealth filed notice of its intent "to perfect an appeal of the [ ] Order entered March 19, 2010, granting the defendant's Motion to suppress evidence and the [ ] Opinion and Order entered May 27, 2010, denying the Commonwealth's motion to reconsider, affirming the grant of defendant's motion to suppress evidence, and setting forth findings of fact and conclusions of law in support of that ruling." TR 93. In the Court of Appeals, the Commonwealth argued, as it had before the Circuit Court, that the exclusionary rule did not apply because police reasonably relied in good faith on the law as it was at the time of the search. Appellant argued that the Commonwealth's appeal was untimely and that the Circuit Court properly suppressed the evidence. The Commonwealth defended the timeliness of its appeal in reply. While the case was pending, the United States Supreme Court decided *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and the Commonwealth filed a motion to supplement its brief with that case. That motion was granted.

[2] When it first considered *Valesquez*, the Court of Appeals rejected a claim that the good faith exception to the exclusionary rule applied to prevent suppression of evidence obtained prior to *Gant* but in violation of it. This Court subsequently denied a motion for discretionary review. On petition for certiorari in the United States Supreme Court, that Court remanded for reconsideration in light of *Davis*. On remand, the Court found that "[b]ecause the officers conducted the search in reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Valesquez v. Commonwealth*, 362 S.W.3d 346, 351 (Ky. App. 2011).

On September 30, 2011, the Court of Appeals issued its seven page opinion reversing the Circuit Court's suppression of evidence.[3] The Court rejected Appellant's argument that the Commonwealth's appeal was untimely. Op. Pps. 3-4. It reversed the Circuit Court's suppression order, relying on *Davis* and holding that the exclusionary rule did not apply because police reasonably relied on the precedent that was in effect at the time of the search when they conducted the search. Op. Pps. 5-7.

Appellant sought discretionary review, and that motion was granted by this Court. For the reasons explained below, this Court should affirm the Court of Appeals.

ARGUMENT

I. The Commonwealth's appeal was timely, and the Court of Appeals properly rejected Appellant's invitation to dismiss the appeal.

In rejecting Appellant's first claim—that the Commonwealths' appeal was untimely and should have been dismissed—the Court of Appeals wrote:

> First before the Court is the issue of whether the Commonwealth's appeal was timely filed. The Commonwealth's notice of appeal was filed on May 27, 2010. Parker argues that the Commonwealth had until April 18, 2010, to file its appeal, because the March 19, 2010, order was not appropriate for CR 59.05 review, because it was not a "final" judgment as envisioned by statute. Therefore, Parker argues, the CR 59.05 motion, and resulting judgment thereupon, failed to toll the time for a timely appeal, making the Commonwealth's appeal untimely. We do not agree.
>
> 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." However, the Commonwealth has a statutory right of appeal of the March 19, 2010, order under KRS 22A.020. Further, "[a]ny order that is appealable has the status of a judgment under CR 54.01, and CR 59.05 limits to 10 days the period in which it can be reached by motion unless the grounds therefor[e] bring the motion within CR 60.02." *Mahon v. Buechel Sewer Const. Dist. # 1*, 355 S.W.2d 683, 684 (Ky. 1962). Thus, the running of the time to file an

[3] Senior Judge Ann O'Malley Shake, who was sitting as Special Judge, authored the opinion. It was joined by Judges Combs and Lambert. Judge Combs also filed a separate concurrence, which was joined by Judge Lambert.

> appeal of any judgment is tolled by a timely filed Cr 59.05 motion. CR 73.02.
>
> Parker also cites to the case of *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987) as supportive of his argument that this appeal is untimely. This reliance, however, is misplaced. The case upon which *Cobb* rests its holding, *Commonwealth, ex rel. Mason v. Hughes*, 725 S.W.2d 865 (Ky. App. 1987), was overruled by *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995). The Kentucky Supreme Court in *Bates* held that "a judgment subject to a CR 59 motion cannot be final until the motion has been ruled on." *Bates*, 892 S.W.2d at 588. Although the facts of *Bates* pertain to a timely filed motion for discretionary review, the holding is still applicable to the facts at hand. It is not possible for this Court to obtain jurisdiction over a judgment which is still pending further review in a lower court. Accordingly we hold that the Commonwealth's notice of appeal was timely filed.

Op. Pps. 3-4.

Appellant contends the Court of Appeals got it wrong. He accuses the Court of "a fundamental misunderstanding about interlocutory appeals." App. Br. P. 9. He also claims the Court's opinion is contrary to *Ballard v. Commonwealth*, 320 S.W.3d 69, 71-72 (Ky. 2010); *Commonwealth v. Nichols*, 280 S.W.3d 39 (Ky. 2009), *Commonwealth v. Bailey*, 71 S.W.3d 73 (Ky. 2001), and *Eaton v. Commonwealth*, 562 S.W.2d 637 (Ky. 1978). App. Br. P. 9. He contends, as he did in the Court of Appeals, but never in the Circuit Court where the CR 59.05 motion was filed, that CR 59.05 did not apply to the Circuit Court's suppression order. App. Br. P. 9. He claims that the Commonwealth had the right to directly appeal from the order granting his motion to suppress evidence but failed to timely do so. App. Br. P. 11. Again, he relies on *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987). App. Br. Pps. 11-13. Appellant claims that the Commonwealth's request for findings of fact and conclusions of law, as required by RCr 9.78, did not toll the time for filing an appeal. App. Br. P. 13. Ultimately, Appellant claims the Court of Appeals was without jurisdiction to consider the Commonwealth's

appeal and should have dismissed the appeal. App. Br. P. 14. Appellant's arguments are not persuasive, and this Court should affirm the Court of Appeals.

A. Appellant did not properly preserve this claim.

As the Commonwealth pointed out in the Court of Appeals, Appellant never objected to the Commonwealth's CR 59.05 motion in the Circuit Court on the grounds that Cr 59.05 did not apply to interlocutory orders. Thus, his claim was not properly preserved and should not be considered. See *e.g.*, *Wood v. Commonwealth*, 178 S.W.3d 500, 511 (Ky. 2005) ("We cannot address the merits of this argument because it was not presented to the trial court for consideration and therefore is not preserved for appellate review.").

Appellant misunderstands the preservation problem when he retorts that "Mr. Parker had no way to argue in the circuit court that the appeal was untimely until the Commonwealth filed the notice of appeal." App. Br. P. 6. Of course he did not. But his claim that the appeal was untimely is based on his contention that CR 59.05 does not apply to interlocutory orders. The Commonwealth filed a motion pursuant to CR 59.05 in the Circuit Court; however, Appellant did not object to the applicability of CR 59.05 in the Circuit Court. Had he done so, the Circuit Court would have had an opportunity to determine whether the motion to reconsider was proper under CR 59.05. When no objection was made to the motion, it was treated as a CR 59.05 motion, and "[t]he running of time for appeal [was] terminated by [the] timely filed motion" and "the full time for appeal . . . commence[d] to run upon entry and service . . . of [the] order . . . denying [the] motion." CR 73.02(1)(e). Defendant should not be heard on appeal to complain about an issue that he failed to raise in the Circuit Court.

Alternatively, Appellant claims that any preservation error should be ignored because "as the appellee in the Court of Appeals, [he] was free to raise any and all reasons to support the circuit court decision." App. Br. P. 6. However, his argument that CR 59.05 does not apply to interlocutory orders was not made as a reason to support or affirm the Circuit Court's decision. Rather, it was made as a reason to dismiss the appeal without addressing its merits. Thus, this exception to the requirement that arguments on appeal be properly preserved does not apply.

B. CR 59.05 applied to the Circuit Court's suppression order, and the Commonwealth's motion tolled the time for filing an appeal, making the Commonwealth's appeal timely.

Despite Appellant's failure to properly preserve his claim that CR 59.05 does not apply to interlocutory orders, the Court of Appeals considered the claim on its merits and found that the Circuit Court's order granting suppression, which was appealable by the Commonwealth under KRS 22A.020, is considered a judgment under CR 59.05. CR 59.05 permits "[a] motion to alter or amend a *judgment*." (Emphasis added). The rule also uses the phrase "final judgment" and seems to mix the two concepts unnecessarily. For purposes of this appeal, it is unnecessary to determine which term or phrase is controlling because whether the rule is interpreted to apply to all judgments or only to final judgments, it applies to the Circuit Court's suppression order. A "judgment" is as a written order adjudicating a claim or claims. CR 54.01. A final judgment, is the equivalent of an "appealable judgment." CR 54.01. As the Court of Appeals noted and Appellant concedes, the suppression order was appealable by the Commonwealth pursuant to KRS 22A.020. "Any order that is appealable has the status of a judgment under CR 54.01, and CR 59.05 limits to 10 days the period in which it can be reached by

motion." *Mahon v. Beuchel Sewer Const. Dist. #1,* 355 S.W.2d at 684; Op. P. 3. For purposes of CR 59.05—even if that rule is construed to apply only to "final judgments"—this makes the suppression order a "final judgment." Because the rule applies in criminal cases, *Mills v. Commonwealth*, 170 S.W.3d 310, 323 (Ky. 2005) overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), it applies to interlocutory orders appealable by the Commonwealth under KRS 22A.020. RCr 12.02 specifically makes the tolling provisions of CR 73.02(1)(e) applicable to criminal cases. Thus, the Commonwealth's notice of appeal was timely under the rules.

Perhaps the most obvious reason for rejecting Appellant's argument is that it would allow both the Circuit Court and an appellate court to have jurisdiction over the same issue at the same time. It would allow the Court of Appeals to consider the propriety of the suppression order while the Circuit Court's reconsideration of the same issue was ongoing. This is improper. "An interlocutory appeal . . . deprives the trial court of the authority to act further in the matter that is the subject of the appeal." *Bailey*, 71 S.W.3d at 74.

Moreover, if the Circuit Court is allowed to consider and rule on a pending motion to reconsider after an appeal has been filed from the original order for which reconsideration is sought, judicial economy suffers. If the Circuit Court reconsiders and vacates its original order, the appeal becomes moot and parties and the Circuit Clerk have wasted time preparing a case for appeal. If the Circuit Court reconsiders and affirms the original order and in doing so enters a more detailed order explaining the reasons for its initial ruling, a second appeal would need to be filed in order to get that order before the Court of Appeals. The Court of Appeals touched on these problems when it explained

that "[i]t is not possible for [the Court of Appeals] to obtain jurisdiction over a judgment which is still pending further review in a lower court." Op. P. 4.

C. The Court of Appeals properly rejected *Cobb* as authority supporting Appellant's request for dismissal of the appeal.

Appellant's continued reliance on *Cobb* is faulty, and the Court of Appeals properly rejected that case as a basis to dismiss the Commonwealth's appeal. In *Cobb*, 728 S.W.2d at 540, the Commonwealth appealed the denial of its motion to reconsider the trial court's suppression of statements made by a deceased police officer. The court held that the interlocutory appeal was untimely and noted that the Commonwealth's appeal needed to be taken within 10 days of the entry of the original order suppressing evidence, not the order denying reconsideration. *Id.* at 541. Importantly, the Court recognized that "[a]lthough the Commonwealth may request the trial court to reconsider an adverse order, the motion does not toll the time for appealing an adverse order." *Id.* *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. The conclusion that court reached is no longer supported by the rules. See also *Mills*, 170 S.W.3d at 323 ("we hold that until such time as the criminal or civil rules are amended, the filing of a CR 59.05 motion (after the finality of this opinion) will not suspend the running of the time for filing a notice of appeal in a criminal proceeding.").

Moreover, *Hughes*, 725 S.W.2d 865, the case cited in *Cobb* for the proposition that the motion to reconsider did not toll the time for filing an appeal, was overruled by *Bates v. Connelly*, 892 S.W.2d 586. When it overruled *Hughes*, the *Bates* court specifically referenced *Cobb*, implying that to the extent it held that the time for appeal was not tolled by motion to reconsider, that case too would be overruled.

D. The Court of Appeals' opinion is not inconsistent with *Ballard, Nichols, Bailey, or Eaton.*

The Court of Appeals' opinion does not reflect a misunderstanding of interlocutory appeals. It is not inconsistent with *Ballard*, *Nichols*, *Bailey*, or *Eaton*. Those cases affirmed the Commonwealth's right to appeal interlocutory orders. They did not address reconsideration of those orders by the trial court or how such reconsideration would affect the time for filing an appeal. CR. 73.02(1)(e), which is made specifically applicable to criminal proceedings by RCr 12.02, addresses the issue and explains that the time for filing a notice of appeal is tolled by a timely CR 59.05 motion.

E. Even 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's motion to reconsider alternatively sought findings of fact and conclusions of law as required under RCr 9.78. Thus, even if CR 59.05 did not apply, the Court of Appeals did not err in rejecting Defendant's claim that it lacked jurisdiction to hear the Commonwealth's appeal. While RCr 9.78 does not require that a party affirmatively request that a trial court make factual findings, that rule should not be read in a vacuum. And, in fact, it has not been. The failure to file such a motion can be fatal to an appeal. See *e.g.*, *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky. App. 2005); *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). It cannot be said that the failure to request specific findings of fact prevents an appeal but that an order following such a request is not appealable. Where the order significantly expounds on the facts and the reasons for the original order—as it does in this case—consideration of the second order is necessary to a proper and thorough review of the original order. It was proper for the Commonwealth to wait to appeal until there was an order meeting the requirements of

RCr 9.78 that would allow the Court of Appeals to fully consider the reasons behind the Circuit Court's suppression order.

F. <u>Even if the Commonwealth's appeal of the original suppression ruling was untimely, its appeal of the denial of its motion to reconsider was not.</u>

Appellant is correct that the Commonwealth had the right under KRS 22A.020 to file an appeal from the order granting suppression. However, the Commonwealth also had a right to file a motion to alter or amend the judgment of suppression under CR 59.05. RCr 12.02, with its application of CR 73.02(1)(e) to criminal cases, tolled the time for appealing the original suppression order, but even if it did not, KRS 22A.020 authorized the Commonwealth's appeal from the denial of the motion to reconsider. Thus, even if Appellant's arguments were correct and that portion of the Commonwealth's appeal asking the Court of Appeals to review the original order granting suppression was improper, the Commonwealth's interlocutory appeal of the order denying the motion for reconsideration and providing more detailed reasons for the Circuit Court's original order of suppression, would persist. A successful appeal of the denial of the motion to reconsider would result in reconsideration of the original suppression order and its reversal in the same way the current appeal—styled as an appeal from both the original suppression order and the order denying the motion to reconsider—did in the Court of Appeals .

II. <u>The Court of Appeals properly found that the exclusionary rule did not apply.</u>

The Court of Appeals properly relied on *Davis v. United States*, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), and held that the exclusionary rule should not be applied to suppress the evidence obtained in the search of the car in which Appellant rode. In

Davis, the Supreme Court considered whether the exclusionary rule applied to bar use of evidence obtained in a search that was conducted two years prior to the rule announced in *Gant* when the search was conducted with "objectively reasonable reliance on binding appellate precedent" that read *Belton* "to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants." *Id.* at 2423-2424, 2426. In reaching its decision, the *Davis* court considered the purposes of the exclusionary rule:

> Exclusion is "not a personal constitutional right," nor is it designed to "redress the injury" occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule's operation to situations in which this purpose is "thought most efficaciously served." Where suppression fails to yield "appreciable deterrence," exclusion is "clearly . . . unwarranted."
>
> Real deterrent value is a "necessary condition for exclusion," but it is not "a sufficient" one. The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Id. at 2426-2427 (internal citations omitted). The Court found that the officers who conducted the search in *Davis* "did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence." *Id.* at 2428. Rather, "[t]he police acted in strict compliance with binding precedent, and their behavior was not wrongful." *Id.* at 2428-2429. Under those circumstances, the Court found that the deterrent purposes of the exclusionary rule would not be served by its application. It held that "[e]vidence

obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 2429.

The Court of Appeals has applied *Davis* in three additional published cases, finding that evidence obtained from searches rendered unconstitutional by *Gant* need not be suppressed because officers reasonably relied upon binding precedent in conducting the searches. In *Boyd v. Commonwealth*, 357 S.W.3d 216, 221 (Ky. App. 2011), the Court relied on *Davis* and held:

> In the present case, the trial court found that the search of the vehicle was authorized under *Belton*, binding precedent at the time of the search. The record does not suggest that the officer's conduct in searching the vehicle was in any way culpable. Accordingly, though the search may have been unconstitutional under *Gant*, application of the exclusionary rule would not deter deliberate and culpable police practices and thus, Boyd's motion to suppress was properly denied.

In *Valesquez v. Commonwealth*, 362 S.W.3d 346, 348-349, 351 (Ky. App. 2011),[4] the Court, which had previously "rejected the Commonwealth's argument that the good faith exception to the exclusionary rule . . . applied to justify the search," applied *Davis* and found that "[b]ecause the officers conducted the search in reasonable reliance on binding appellate precedent, the exclusionary rule does not apply in this case and the evidence obtained in the search should not have been suppressed." In *Artis v. Commonwealth*, 360 S.W.3d 771, 773 (Ky. App. 2012), the Court likewise applied *Davis* and held that because police reasonably relied on binding precedent, the exclusionary rule did not apply. In *Artis*, the Court also rejected the defendant's claim that the Kentucky Constitution provided more protection than the federal Constitution and required application of the exclusionary rule.

[4] This is the ultimate appellate court conclusion of the Valesquez case that Appellant cited in the Circuit Court and the Court of Appeals.

As in those cases, the Court of Appeals properly applied and followed *Davis* in this case. Officer Reccius' testimony revealed no intentional wrongdoing. Rather, it showed conscientious police work based upon his education about the law. His testimony also revealed that application of the exclusionary rule is not necessary to deter any future misconduct because police changed their policies almost immediately in response to *Gant*.

Appellant makes three arguments as to why the Court of Appeals erred in relying on *Davis*. First, he seems to contend that Officer Reccius did not reasonably rely on binding precedent in searching Appellant's car. Second, he claims that the purposes behind Kentucky's exclusionary rule are different from the purposes of the exclusionary rule discussed in *Davis*. Third, he claims that Section Ten of the Kentucky Constitution provides greater protections than the Fourth Amendment to the United States Constitution. None of these arguments is persuasive.

A. Officer Reccius reasonably and in good faith relied on binding precedent in conducting the search.

Before April 21, 2009, when the United States Supreme Court issued its opinion in *Arizona v. Gant*, 129 S.Ct. 1710, 1718, 173 L.Ed.2d 485 (2009), the United States Supreme Court's 1981 decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 280, 69 L.Ed.2d 768, was widely understood to permit police to search a vehicle incident to the arrest of a recent occupant, even if the occupant could not gain access to the vehicle at the time of the search. Kentucky law was no different. On January 12, 2009, when the search at issue in this case was conducted, the law in Kentucky was that "once an officer lawfully arrests an automobile's 'recent occupant,' the officer may search the automobile's passenger compartment as a search incident to arrest," even if the defendant

"was secured in the back of the police cruiser and could not reach into his vehicle either to arm himself or to destroy evidence." *Henry v. Commonwealth*, 275 S.W.3d 194, 200-201 (Ky. 2008) (internal citations omitted). This was the law for at least two and a half years before the search conducted in this case. See *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006).

In determining whether suppression was proper in this case, it makes no difference that Kentucky law may have previously been different. See *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993). Nor does it make any difference that Kentucky law subsequently overruled *Henry* based on *Gant*. See *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). Police cannot be expected to anticipate future changes in the law; nor should they second guess the highest courts of this state and nation. They should be encouraged to know and follow the law from both the United States Supreme Court and the Kentucky Supreme Court. What matters is what the law was on the date of the search and whether police reasonably relied on it.

In this case, Officer Reccius did nothing wrong. In fact, according to the law at the time, he did everything right. Under these kinds of circumstances, the *Davis* court explained:

> About all that exclusion would deter . . . is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "'ac[t] as a reasonable officer would and should act'" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "'do[ing] his duty.'"

Davis, 131 S.Ct. at 2429. Appellant should not be allowed to escape consequences for his obviously illegal behavior because of objectively reasonable behavior by police that was consistent with binding precedent at the time of the search. The Court of Appeals should be affirmed.

B. <u>The purposes behind the exclusionary rule in Kentucky support affirming the Court of Appeals.</u>

Appellant next claims the Court of Appeals erred in finding that the exclusionary rule did not apply because, he contends, "[t]he rule was not created for the purpose of deterring police misconduct. Rather, it exists to avoid having the Court of Justice become complicit in constitutional violations, which would lead to the citizens of the Commonwealth losing respect for the judicial branch of government." App Br. P. 16. Appellant cites *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (Ky. 1920), for this proposition.

> The *Youman* court was concerned that
>
> > notwithstanding [ ] general knowledge of the prohibition against unlawful search, it is not an uncommon thing in this state, for officers of the law, urged in some cases by popular clamor, in others by the advice of persons in a position to exert influence, and in yet others by an exaggerated notion of their power and the pride of exploiting it, to disregard the law upon the assumption that the end sought to be accomplished will justify the means, and therefore no attention need be given to constitutional authority, when public approval will commend the unlawful conduct.

Id. at 862. In deciding for the first time that evidence unlawfully seized in violation of constitutional protections against warrantless searches could be excluded at trial, the court in *Youman* wrote:

> Returning now, for a moment, to the facts of this case, for the purpose of making plain our position, it stands admitted that the evidence offered on the trial, and to the introduction of which objection was then made, was obtained in an unlawful way by a county officer charged with the duty of

> giving complete obedience to the Constitution and laws of the state. This officer, in violation of the Constitution and in disregard of the statute pointing out the way in which premises might be searched, *took the law into his own hands*, invaded the premises of and went into the buildings of the suspected offender, and without asking for or obtaining his consent proceeded to and did search for and find the liquor that was seized. On these facts the question presented is: Will courts, established to administer justice and enforce the laws of the state receive, over the objection of the accused, evidence offered by the prosecution that was *admittedly obtained by a public officer in deliberate disregard of law for the purpose of securing the conviction of an alleged offender*? In other words, *will courts authorize and encourage public officers to violate the law*, and close their eyes to methods that must inevitably bring the law into disrepute in order that an accused may be found guilty? Will a high court of the state say in effect to one of its officers that the Constitution of the state prohibits a search of the premises of a person without a search warrant, but if you can obtain evidence against the accused by doing so you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and the court will permit the evidence so secured to go to the jury to secure his conviction?
>
> It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished.

Id. at 866 (emphasis added).

Assuming for the sake of argument that *Youman* does accurately describe the policies underlying Kentucky's application of the exclusionary rule, this case would not be the type of case where the rule should be applied. The *Youman* court was concerned about obviously illegal conduct on the part of police, conduct that intentionally violated citizens' constitutional rights, conduct that was contrary to all pronouncements of the courts. In this case, police did not intentionally violate Appellant's constitutional rights. Had any court reviewed the search at the time it was conducted, that court would have found the search completely in line with its precedent. There is no risk in this case that the court would be accused of approving police conduct that intentionally violated a

citizen's constitutional rights in order to obtain a conviction. The failure to exclude the evidence because of reasonable reliance on binding precedent will not encourage further violations of the law. The administration of justice is not in jeopardy if the evidence in this case is not excluded.

That said *Youman* does not fully articulate the purposes behind application of the exclusionary rule in Kentucky. *Youman* was decided more than 60 years before the United States Supreme Court's decision in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), wherein the Court first recognized a "good faith" exception to the exclusionary rule. Following that decision, the Kentucky Supreme Court revisited Kentucky law to "determine whether Section 10 of the Constitution of Kentucky mandates suppression for every violation." See *Crayton v. Commonwealth*, 846 S.W.2d 685, 685 (Ky. 1992). The Court in that case specifically considered "whether the Constitution of Kentucky requires suppression of evidence when, in the absence of police misconduct, the search warrant was erroneously issued by a judicial officer." *Id.* at 686. The *Crayton* court recognized:

> the federal nor state constitution contains any mention of suppression of evidence as a possible remedy for a search and seizure violation. Suppression is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Id. at 687 quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The *Crayton* court acknowledged *Youman* and its apparent grounding "in prevention of harm to the administration of justice and prevention of disrespect for the constitution or laws", but went on to "review the remedy judicially created to determine whether its overriding purpose of deterring police misconduct is

served by suppression of evidence when the affidavit in support of the search warrant is later determined to be insufficient." *Id.* The Court reviewed *Leon* and concluded:

> Try as we may and with due respect for the prior decisions of this and other courts, we are unable to discover any deterrent effect in the suppression of evidence obtained pursuant to a search warrant when the police have acted in good faith. In some circumstances, the officer's affidavit may disclose all the information then possessed or, for reasons of investigative confidentiality, may disclose only a portion of the information. In either instance, the judicial officer to whom the affidavit is presented must determine whether the instrument is sufficient on its face to establish probable cause. On a determination of probable cause and issuance of a warrant, the transaction has been subjected to judicial scrutiny and the instrument which commands the search is on authority of the court and not the police. On a subsequent determination pursuant to a suppression motion that the affidavit was insufficient, the blame for the error falls on the judge. As the responsibility for determining whether a search warrant should issue rests with the judicial officer to whom the affidavit is presented, suppression of the evidence thereafter can have no deterrent effect upon police misconduct.

Id. at 688.

Contrary to Appellant's assertions, *Crayton* reveals that there is a history in Kentucky of using the exclusionary rule as a deterrent to future police misconduct. *Crayton* also highlights the ineffectiveness of excluding evidence where the error resulting in the constitutional violation was judicial as it was in this case (namely, the interpretation of *Belton*, which was later determined to be erroneous). The Court of Appeals properly relied on *Davis* and its analysis of whether exclusion of the evidence would serve any deterrent effect on future police misconduct.

C. The Kentucky Constitution provides no greater protection than the United States Constitution.

Finally, Appellant contends that the Court of Appeals erred in relying on *Davis* because Section Ten of the Kentucky Constitution provides (or at least should be construed to provide) greater protection than does the Fourth Amendment to the United

States Constitution. This argument was not made in the Court of Appeals or the Circuit Court and should be rejected. See *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Nevertheless, despite Appellant's claim that certain past members of this Court have rejected a claim that prior Kentucky cases establish that Section Ten provides no greater protection than the Fourth Amendment (App. Br. P. 21), this Court and the Court of Appeals have continued to recognize that Section Ten provides no greater protection than the Fourth Amendment. See *e.g.*, *Dunn v. Commonwealth*, 360 S.W.3d 751, 758 (Ky. 2012) ("this Court has consistently held that the protections of Section 10 of the Kentucky Constitution are no greater than those of the federal Fourth Amendment"); *Williams v. Commonwealth*, 364 S.W.3d 65, 68 (Ky. 2011) ("'Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment.'"); *Chavies v. Commonwealth*, 354 S.W.3d 103, 107 (Ky. 2011); *Ashlock v. Commonwealth*, 403 S.W.3d 79, 80 (Ky. App. 2013) ("The Supreme Court of Kentucky has held that Section 10 of the Kentucky Constitution does not provide greater protection than the Fourth Amendment of the United States Constitution."); *Artis v. Commonwealth*, 360 S.W.3d 771, 773-774 (Ky. App. 2012) ("our Supreme Court has stated that 'Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment.'"); *Lukjan v. Commonwealth*, 358 S.W.3d 33, 44, fn. 14 (Ky. App. 2012) (noting that "[b]ecause 'Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment[,]' [the court] need perform only one [search and seizure]

analysis"). Appellant has provided no persuasive reason to depart from this rule. The Court of Appeals should be affirmed.

CONCLUSION

The Commonwealth properly and timely appealed the interlocutory order of the Circuit Court that granted Appellant's motion to suppress and the later order that denied the Commonwealth's motion to reconsider and described in greater detail the reasons for the suppression of evidence. Appellant did not object to the applicability of CR 59.05 in the Circuit Court and should not be heard to now complain that it does not apply. It applies and RCr 12.02 makes the tolling provisions of CR 73.02(1)(e) applicable to criminal cases. The Court of Appeals had jurisdiction to consider the Commonwealth's appeal, and its rejection of Appellant's invitation to dismiss the appeal for lack of jurisdiction should be **affirmed.**

On January 12, 2009, Officer Brian Reccius followed Kentucky law when he searched Appellant's car. A subsequent decision of the United States Supreme Court changed the law. Police have changed their policies and procedures to comport with the new law. There would be no deterrent effect to excluding the evidence obtained in the search. Rather, Appellant would walk away from his crimes with no penalty when police did everything in accordance with the law as it existed at the time of Appellant's crimes. The Court of Appeals properly applied the United States' Supreme Court's opinion in *Davis* and held that the exclusionary rule should not be applied to suppress the evidence under the circumstances of this case. The Court of Appeals' opinion reversing suppression of the evidence should be **affirmed** by this Court.

Respectfully submitted,

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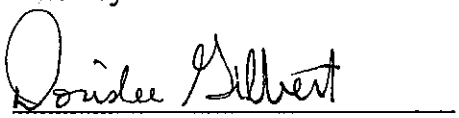

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