No. 07-1411

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

PERRY T. RYAN
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342

COUNSEL FOR RESPONDENT
COMMONWEALTH OF KENTUCKY

QUESTION PRESENTED

Whether this court should review the "automatic companion" rule, as adopted in some jurisdictions. The issue is not well presented in the present case, however, because there is an independent ground to justify the seizure of the drugs: The arresting officer had completed the *Terry* frisk, but Owens afterward voluntarily removed items from his pocket, and the drugs fell onto the ground, in plain view.

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STATEMENT OF THE CASE

On September 10, 2004, Officer Jermaine Kilgore was driving on North Columbia Street in Campbellsville, Kentucky, when he observed Chris Thornton walk out of his house and enter Keith Owens' vehicle, which was parked on House Street. (VR No. 1: 10/31/05; 10:17:00). Officer Kilgore suspected that Thornton's driver's license was suspended. (VR No. 1: 10/31/05; 10:19:32). Officer Kilgore followed him for awhile and radioed in for a check on Thornton's license. (VR No. 1: 10/31/05; 10:19:40). Upon learning that Thornton's license was suspended, Officer Kilgore activated the emergency equipment on his cruiser. (VR No. 1: 10/31/05; 10:20:46). Thornton stopped on North Columbia. (VR No. 1: 10/31/05; 10:20:46).

Upon approaching the vehicle, Thornton admitted that his license was suspended. (VR No. 1: 10/31/05; 10:21:45).

Officer Kilgore routinely performs a search incident to a lawful arrest. (VR No. 1: 10/31/05; 10:26:18). Thornton told Officer Kilgore that he had a crack pipe in his pocket. (VR No. 1: 10/31/05, 10:27:05). Thornton removed the crack pipe from inside his left front pocket and handed it to Officer Kilgore. (VR No. 1: 10/31/05, 10:27:10).

Officer Kilgore handcuffed Thornton and placed him into the rear of his cruiser. (VR No. 1: 10/31/05; 10:28:33).

Officer Kilgore then approached the passenger window where Owens was seated. (VR No. 1: 10/31/05; 10:29:36). Officer Kilgore had intended to search the entire vehicle as a "search incident to arrest," so he asked Owens to exit the vehicle. (VR No. 1: 10/31/05; 10:29:49). As Owens stepped out of the vehicle, Officer

Kilgore asked Owens whether he "had anything on him that shouldn't be on him." (VR No. 1: 10/31/05; 10:29:56). Owens stated that he "had nothing to hide." (VR No. 1: 10/31/05; 10:30:04). Without being asked to do so, Owens reached into his left front pocket and pulled out some money. (VR No. 1: 10/31/05; 10:30:05, 10:33:15). He then returned the money to his left front pocket. (VR No. 1: 10/31/05; 10:30:14). He then reached into his right front pocket and pulled out money. (VR No. 1: 10/31/05; 10:30:26). As he lifted his right hand, a small baggie containing three blue tablets and two green tablets fell onto the ground. (VR No. 1: 10/31/05; 10:30:28, 10:37:20). Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1: 10:31/05; 10:34:43). Officer Kilgore arrested Owens, charging him with possession of a controlled substance. (VR No. 1: 10/31/05; 10:41:08).

Det. Patricia Thompson, the evidence officer for the Campbellsville Police Department, delivered the contents of the small baggie to the Kentucky State Police Crime Laboratory in Frankfort, where it was examined by William E. Bowers, III, a forensic scientist specialist. (VR No. 1: 10/31/05; 11:52:18, 11:53:49, 12:04:20). Bowers determined that the blue tablets were, in fact, methamphetamine and that the green tablets were 3,4-methylenedioxymeth-amphetamine (also known as ecstacy), which under Kentucky law, are Schedule I and Schedule II controlled substances. (VR No. 1: 10/31/05; 12:18:04).

On November 5, 2004, the grand jury of the Taylor Circuit Court indicted Owens, charging him with (1) possession of a controlled substance in the first

degree; (2) possession of less than eight ounces of marijuana; and (3) being a persistent felony offender in the first degree. (T.R., p. 1). On October 31, 2005, Owens was tried before a jury of the Taylor Circuit Court, which found him guilty of all three charges. (T.R., pp. 85-93). On November 22, 2005, the Taylor Circuit Court entered judgment against Owens, sentencing him to imprisonment for a total of twenty years. (T.R., pp. 132-35). From these convictions, Owens appealed to the Kentucky Supreme Court, which affirmed his convictions on January 24, 2008. *Owens v. Commonwealth,* 244 S.W.3d 83 (2008).

Owens now seeks a writ of *certiorari* from this court.

REASONS FOR DENYING THE WRIT

I.

OFFICER KILGORE HAD SUFFICIENT "REASONABLE SUSPICION" TO STOP THORNTON, AND HE PROPERLY SEIZED THE DRUGS WHICH FELL ONTO THE GROUND WHEN OWENS VOLUNTARILY EMPTIED HIS POCKETS.

As his only ground for seeking *certiorari,* Owens argues that the Kentucky courts erred by overruling his motion to suppress evidence as the police did not have reasonable suspicion to stop and frisk him. The Commonwealth disagrees because some of the federal circuit courts of appeal have ruled that the very nature of drug activity inherently gives police officers a reasonable concern for their personal safety, and the

pat down search of passenger Owens was constitutionally justifiable. Perhaps more importantly, Officer Kilgore did not discover the drugs during the pat down but, instead, observed them fall from Owens' pocket onto the ground.

On December 29, 2004, Owens filed a motion to suppress evidence, arguing that the police did not have reasonable suspicion to stop him. (T.R., pp. 30-31). On May 3, 2005, the trial court conducted a hearing on the motion to suppress. (VR No. 1, 05/03/05; 13:26:52 through 13:42:37).

During the hearing, Officer Kilgore testified that he stopped Thornton after verifying with his radio dispatcher that Thornton's driver's license was suspended for a DUI conviction. (VR No. 1, 05/03/05; 13:27:42). After Thornton produced a crack pipe, Officer Kilgore arrested him. (VR No. 1, 05/03/05; 13:27:50). Officer Kilgore placed Thornton in the rear of his cruiser. (VR No. 1, 05/03/05; 13:29:42). When Officer Kilgore decided to search the car, incident to the arrest, he asked Owens to exit the car, "I just told him I wanted to talk to him, and he stepped out." (VR No. 1, 05/03/05; 13:28:15, 13:30:48, 13:33:45). Officer Kilgore asked Owens whether he had any weapons on him. (VR No. 1, 05/03/05; 13:28:20). Officer Kilgore then performed a *Terry* pat down search of Owens, who said that he had nothing to hide. (VR No. 1, 05/03/05; 13:28:23). Officer Kilgore testified that Owens was not under arrest at the time. (VR No. 1, 05/03/05; 13:31:13). During the pat down, with his back toward Kilgore, Owens removed money out of his left pocket, then with his left hand returned the money to his left pocket. (VR No. 1, 05/03/05;

13:28:34). With his right hand, Owens then removed money from his right pocket. (VR No. 1, 05/03/05; 13:28:38). Significantly, the following testimony was adduced at the suppression hearing:

> Prosecutor: Was he [Owens] emptying his pockets at your request?
>
> Officer Kilgore: No, sir, he did them on his own.
>
> Prosecutor: Okay. Had you already done the *Terry* frisk?
>
> Officer Kilgore: Yes, sir.

(VR No. 1, 05/03/05, 13:30:07 through 13:30:16). While removing items from his right pocket, the baggie containing drugs fell out onto the ground. (VR No. 1, 05/03/05; 13:28:42). Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1, 05/03/05; 13:28:48).

Owens testified in his own behalf and agreed with most of Officer Kilgore's testimony. (VR No. 1, 05/03/05; 13:38:20). Owens denied that he had removed items from his own pockets and, instead, claimed that Officer Kilgore reached into his pockets. (VR No. 1, 05/03/05; 13:38:47, 13:40:30). Owens claimed that no pills came from his pocket. (VR No. 1, 05/03/05; 13:40:48).

At the conclusion of the hearing, the trial judge denied the motion to suppress. (VR No. 1, 05/03/05; 13:42:37). The trial judge specifically ruled that the stop was valid and that the other issues were up to the jury to decide. (VR No. 1, 05/03/05; 13:41:33).

1. In his petition, Owens appears to concede Officer Kilgore had reasonable suspicion to stop the vehicle

which Thornton was driving because Officer Kilgore recognized Thornton and confirmed his suspicion, through a radio check, that Thornton's driver's license was suspended. In *Terry v. Ohio,* 392 U.S. 1 (1968), this court defined "reasonable suspicion" as follows:

> We merely hold today that where a police officer observes **unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot** and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id., 392 U.S. at 30-31, emphasis added. This court further stated:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with

> rational inferences from those facts, reasonably warrant that intrusion.
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> * * *
>
> And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Id., 392 U.S. at 21-22.

In *Delaware v. Prouse,* 440 U.S. 648 (1970), this court specifically held that a police officer may stop a vehicle:

> [I]n those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law.

Id., 440 U.S. at 663, emphasis added.

2. In his petition, Owens also appears to concede that, once Thornton produced the crack cocaine pipe, Officer Kilgore had probable cause to arrest Thornton after seeing the pipe, which at that point, was in "plain view." *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

3. In his petition, Owens also appears to concede that once Officer Kilgore had arrested Thornton,

Officer Kilgore had the authority to search Thornton's entire vehicle, incident to the lawful arrest. In *New York v. Belton,* 453 U.S. 454 (1981), this court ruled, "when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest." *Belton,* 453 U.S. 623-24. In *Thornton v. United States,* 541 U.S. 615 (2004), this court ruled that an officer can search the passenger compartment of a vehicle incident to a lawful arrest of a "recent occupant," acknowledging this to be a natural extension of *Belton. Thornton,* 517 U.S at 617.

4. Officer Kilgore testified that he simply told Owens that he needed to talk with him and then asked Owens to step outside of the vehicle. (VR No. 1, 05/03/05; 13:33:46). In his petition, Owens appears to concede that Officer Kilgore had the authority to order Owens out of the vehicle. In *Maryland v. Wilson,* 519 U.S. 408 (1997), this court ruled as follows:

> In summary, danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.

Id. 519 at 414.

5. The only issue raised in Owens' petition is whether Officer Kilgore had the lawful authority to perform a pat down search to protect his own safety, once Owens exited the vehicle. In his petition, Owens appears to acquiesce that Officer Kilgore had reasonable suspicion to stop the vehicle and to arrest Thornton. Owens' only complaint is that the police officer did not have reasonable suspicion to stop and frisk him. (Petition, pp. 6-10). During the suppression hearing, Officer Kilgore explained why he performed the pat down search, as follows:

> Officer Kilgore: As I went around to his side of the door [sic], he stepped out. As he was getting out of the car, I asked Keith [Owens] whether he had any weapons on him, whether he had anything on him, and he said no. So I asked him to turn around, and I patted him down, *Terry* frisk. As I was patting him down, Keith said that he had nothing to hide. So he started pulling — He pulled a large amount of money out of his left pocket. As he got that out, he pulled a large amount of money from his right pocket. As he was pulling that money out, a small baggie fell on the ground.

(VR No. 1, 05/03/05; 13:28:14 through 13:28:42).

The *New York v. Belton* exception to the search warrant requirement permits a police officer to search the entire contents of a vehicle, incident to a lawful arrest. In *United States v. Di Re,* 332 U.S. 581 (1948), this court ruled that officers may not search the persons of occupants of a vehicle, incident to the arrest

of the driver. However, an important distinction must be drawn, because the federal courts have so far permitted a police officer to perform a *Terry v. Ohio* frisk of passengers for weapons, for the purpose of protecting his own safety. In *Maryland v. Wilson,* this court, relying on the same public interest in police safety, held that police officers making lawful traffic stops could require passengers to step out of the vehicle as a matter of course, stating that the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Id.* 519 U.S. at 413-14.

The precise question presented in the present appeal was addressed in *United States v. Sakyi,* 160 F.3d 164 (4th Cir. 1998), wherein the Fourth Circuit ruled as follows:

> We must now decide, in light of these authorities, what justification a police officer must have to conduct a 'pat-down' for weapons of a passenger in a lawfully stopped vehicle.
>
> * * *
>
> The holdings in *Terry* and *Long* permitted frisks only when the officer perceived an appropriate level of suspicion of criminal activity and apprehension of danger, and we conclude that such a showing is necessary here. That showing, however, may be satisfied by an officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops. Moreover, when drugs are suspected in a

> vehicle and the suspicion is not readily attributable to any particular person in the vehicle, it is reasonable to conclude that all occupants of the vehicle are suspect. They are in the restricted space of the vehicle presumably by choice and presumably on a common mission. Furthermore, as we have previously noted, guns often accompany drugs. *See Stanfield,* 109 F.3d at 984; *United States v. Perrin,* 45 F.3d 869, 873 (4th Cir.1995) (noting that 'it is certainly reasonable for an officer to believe that a person engaged in selling of crack cocaine may be carrying a weapon for protection'). In the absence of ameliorating factors, the risk of danger to an officer from any occupant of a vehicle he has stopped, when the presence of drugs is reasonably suspected but probable cause for arrest does not exist, is readily apparent.
>
> *Accordingly, we hold that in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.*

Id. at 168-69, emphasis added. *See also United States v. Anderson,* 859 F.2d 1171, 1177 (3d Cir.1988) (holding that an officer's pat-down search of the occupants of a car was reasonable after the officer observed large amounts of money on the front seat,

became suspicious that it might be drug money, and was concerned for his safety "because persons involved with drugs often carry weapons"); *United States v. Johnson,* 364 F.3d 1185, 1194- 95 (10th Cir.2004) (concluding that a weapons frisk was permissible "[b]ecause [the officer] reasonably suspected that Johnson might be involved in drug dealing, kidnapping, or prostitution," which are crimes "typically associated with some sort of weapon, often guns"); *State v. Butler,* 353 S.C. 383, 577 S.E.2d 498 (S.C.App. 2003) (citing *Sakyi* for the same proposition); and *Lowe v. Commonwealth,* 33 Va.App. 656, 536 S.E.2d 454 (2000) (citing *Sakyi* for the same proposition.

6. Regardless of any other consideration, it is not entirely clear from the evidence that the pat down search caused the discovery of the baggie of drugs. Completely omitted from Owens' petition is the fact that Officer Kilgore did not discover the drugs during the frisk. Instead, he saw the baggie in plain view after it fell from Owens' pocket. Owens has not shown causation by establishing that the police officer's discovery of the drugs resulted from the *Terry* frisk, as shown by the officer's testimony:

> Prosecutor: Was he [Owens] emptying his pockets at your request?
>
> Officer Kilgore: No, sir, he did them on his own.
>
> Prosecutor: Okay. **Had you already done the *Terry* frisk**?
>
> Officer Kilgore: **Yes, sir.**

(VR No. 1, 05/03/05, 13:30:07 through 13:30:16, emphasis added). From Officer Kilgore's testimony, the baggie was not discovered because of the pat down search but simply because the baggie fell onto the ground while Owens was voluntarily emptying his pockets. The *Terry* frisk was complete at the time. Without showing some causal link or nexus between the *Terry* frisk and the discovery of the drugs, Owens' argument must fail. As such, Officer Kilgore properly arrested Owens after seeing the baggie in "plain view." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

In the case at bar, Officer Kilgore testified that he arrested the driver, Thornton, for possession of a crack cocaine pipe and that he performed a pat down search of Owens, the passenger, to ensure that he had no weapons. During the pat down search, Owens removed money from his pockets and, apparently accidentally, dropped the baggie of drugs. Officer Kilgore properly arrested Owens after seeing the baggie of drugs on the ground, which at that point, was in "plain view." *Coolidge v. New Hampshire.*

II. AND III.

THE ISSUE IS NOT "WELL PRESENTED" IN THIS CASE.

In his petition, Owens argues, "The issue in conflict is well presented by this case." (Petition, p. 17). There is no doubt that the various jurisdictions have conflicting views of the "automatic companion" rule. However, the Commonwealth disagrees with Owens' argument that the issue is "well presented" in this case

because Officer Kilgore observed the drugs fall on the ground, despite whether the stop and frisk was proper. Officer Kilgore testified that, after he had completed the *Terry* frisk, Owens then reached into his right front pocket and pulled out money. (VR No. 1: 10/31/05; 10:30:26). As he lifted his right hand, a small baggie containing three blue tablets and two green tablets fell onto the ground. (VR No. 1: 10/31/05; 10:30:28, 10:37:20). Thus, Officer Kilgore observed the drugs in plain view, and independent of the *Terry* frisk. Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1: 10:31/05; 10:34:43). This case also involves the application of the plain view exception to the warrant requirement.

Stated differently, the present case does not present a "clean" use of the "automatic companion" rule, because there was at least one independent ground (i.e. the plain view exception to the warrant requirement) upon which the seizure of the baggie of drugs could have been based. If this court were to grant *certiorari*, the Commonwealth will argue that, regardless of the question as to whether the stop and frisk was constitutional, the police officer did not discover the drugs during the frisk. Instead, Owens himself dropped the baggie onto the ground, and Officer Kilgore observed the baggie in plain view. In *Thigpin v. Roberts,* 468 U.S. 27, 29-30 (1984), this court ruled, "Although the court below and the petition for *certiorari* addressed only the double jeopardy issue, we may affirm *on any ground that the law and the record permit* and that will not expand the relief granted below." (emphasis added) *quoting United States v. New York Telephone Co.,* 434 U.S. 159, n. 8, (1977).

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to deny the petition for writ of *certiorari.*

JACK CONWAY
ATTORNEY GENERAL OF KENTUCKY

PERRY T. RYAN
ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342