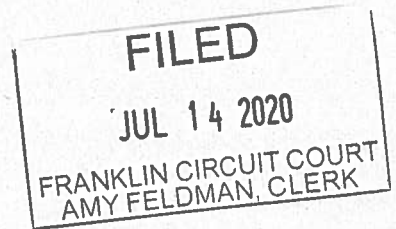


**COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY DISTRICT COURT
CASE NO. 19-M-00993**



COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

MOTION TO SUPPRESS AND DISMISS

ANTOINE ANDREWS

DEFENDANT

Comes the defendant, Antoine Andrews, through counsel, pursuant to the Fourth and Fourteenth Amendments to the U.S. Constitution, Section 10 of the Kentucky Constitution, and KRS 15A.195, and all other applicable statutes and case law, and respectfully moves this court to suppress the fruits of the unconstitutional seizure of Mr. Andrews on August 20, 2019 and dismiss the case. Mr. Andrews offers the following in support.

Statement of Facts

On the afternoon of August 20, 2019, Antoine Andrews's friend, Amir Owens, asked Antoine to join him inside the privacy of a parked car at Prince Hall Village. Once inside, Amir shared the news of his girlfriend's pregnancy, and the two men joined in a celebratory minute together. Moments later, a white male, wearing plain black clothing, jumped out of an unmarked car and pointed a gun in Antoine's face. The male screamed, "if you move I will blow your f***ing head off!" The white male was later identified as Detective Farmer.

Without moving an inch, Antoine began questioning why Detective Farmer was holding a gun on them. After a minute, Amir began crying and pleading with Detective Farmer. With tears in his eyes, Amir begged Detective Farmer to lower his gun because his mother was

recently shot and killed. After approximately 2 minutes of aiming the gun at Antoine and Amir, Detective Farmer lowered the gun and ordered the pair out of the car.

When backup finally arrived, Antoine began to question Detective Farmer. Detective Farmer informed Antoine that he approached them upon suspicion of loitering. Antoine asked whether it was necessary for Detective Farmer to point a gun in his face for loitering? Upon learning that Antoine was from Philadelphia, Detective Farmer said something along the lines of, “Good thing I had my gun out because where you’re from, they shoot cops.” Neither Antoine nor Amir were armed with any weapons. Eventually, Detective Farmer announced that Antoine and Amir were under arrest for public intoxication.

Legal Analysis

This is a case about police misconduct that could have led to a tragedy along the lines of Breonna Taylor, George Floyd, and numerous other racial injustices across the country. A message needs to be sent that this behavior will not be tolerated in Franklin county. All evidence obtained by Detective Farmer in this case must be suppressed by the court due to racial profiling, lack of reasonable suspicion upon seizure, and excessive force used in the course of seizure. The Commonwealth bears the burden to prove the reasonableness of searches and seizures under the Fourth Amendment. See, e.g., *Com. v. Erickson*, 132 S.W.3d 884, 887 (Ky. Ct. App. 2004) (“A warrantless search is presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirement.”); *Fla. v. Royer*, 460 U.S. 491, 500 (1983) (“It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.”).

- I. **Detective Farmer violated KRS 15A.195 and Franklin County Sheriff's Office racial profiling policy when he targeted Mr. Andrews for detention, made the discretionary decision to point a gun at Mr. Andrews' face, and arrest Mr. Andrews solely due to Mr. Andrews' race.**

"No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person." KRS 15A.195. The policy adopted by the Franklin County Sheriff's Office pursuant to the KRS 15A.195 defines profiling more broadly as the making of any discretionary decision in the course of duty on the basis of race. Franklin County Sheriff's Office Standard Operating Procedure Chapter 17.19.

An officer acting in compliance with the Franklin County Sheriff's Office racial profiling policy would not have targeted, made a discretionary decision to point a gun at Mr. Andrews, nor made the decision to arrest Mr. Andrews under these circumstances. This is a case about implicit bias, where Detective Farmer might not even realize how color-struck he is. Suspicion of loitering in a parked car is miles away from the conclusion that approaching with deadly force is necessary. However, we can see how Detective Farmer implicitly made those leaps from his statement that Mr. Andrews being a black man from Philadelphia somehow justifies that conduct. Ultimately, although the biases were implicit, the fact that decisions were made on the basis of race means that the evidence must be suppressed and case dismissed.

- II. **Detective Farmer seized Mr. Andrews without reasonable suspicion of criminal activity when he pointed a gun at Mr. Andrews and threatened to blow his head off if he moved after Detective Farmer might have seen Mr. Andrews smoking something in a parked car.**

"A person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ward v. Commonwealth*, 568 S.W.3d 824, 829 (Ky. 2019) (quoting *United*

States v. Mendenhall, 446 U.S. 544, 554 (1980)). Use of a tone or force that might compel compliance with the request of the police is a factor indicative of seizure. *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). When police officers in some way restrain the liberty of a citizen (by means of physical force or show of authority), a “seizure” of that person has occurred. *Strange v. Commonwealth*, 269 S.W.3d 87 (Ky. 2008).

When Detective Farmer pulled a gun from his holster, aimed it at Mr. Andrews’ face and screamed, “if you move, I will blow your f***ing head off,” Mr. Andrews was seized. The use of force accompanied with the expletive language and tone would have compelled a reasonable person to believe that they were not free to leave, or else they would be killed. Thus, for any of the subsequent observations to be admissible in court, the seizure must have been made upon probable cause or reasonable suspicion of criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (When an officer observes suspicious conduct that reasonably leads him to believe that criminal activity is occurring or about to occur, the officer may identify himself as a police officer and make an initial inquiry.).

Detective Farmer had no reasonable suspicion to believe that Mr. Andrews was involved in any criminal activity. Detective Farmer did not write this in his citation, but it is possible that he will testify that as he passed through Prince Hall Village, he observed from his vehicle Mr. Andrews passing a cigarette or cigar to Mr. Owens which he thought might be a marijuana blunt. First, it is unlikely that Detective Farmer could identify a blunt from the viewpoint of his car passing by on the streets. Second, even if Detective Farmer thought he witnessed Mr. Andrews passing a blunt, this is the type of ill-defined suspicion which is not reasonable. From Detective Farmer’s vantage point, the alleged blunt could have been a cigarette or non-controlled substance.

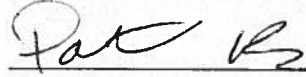
Moreover, smoking something in a parked car does not give rise to reasonable suspicion of public intoxication or loitering. Both offenses must be conducted in a “public place” which is defined in KRS 525.010 as an enumerated list of places or anywhere that “produces its offensive or proscribed consequences in a public place.” A parked car is not enumerated, and no published case defines it as a public place. A parked car was chosen by Mr. Owens and Mr. Andrews in this case for the purpose of privacy, and any smoking inside a parked car does not produce an offensive consequence in the surrounding area. Thus, for the fact that Detective Farmer did not witness with clarity any controlled substances nor a possible crime even if it was a controlled substance, he was not entitled to seize Mr. Andrews at first approach. Of course, Detective Farmer could have approached on foot for an attempted consensual encounter if he had wished, but he made the decision to approach with a gun drawn instead.

III. Suppression is warranted because the seizure was not reasonable under the Fourth Amendment, since it was excessively intrusive by approaching a suspected violation situation with life-threatening force.

The Fourth Amendment requires that all seizures must be reasonable. Courts have expanded this to mean that the scope of the seizure, even if warranted in the first place, must be limited. *See Commonwealth v. Marshall*, 319 S.W.3d 352 (Ky. 2010); *Florida v. Royer*, 460 U.S. 491, 500 (1983). It is counsel’s belief that no reasonable person would ever assert that sticking a gun in someone’s face upon suspicion of loitering or smoking marijuana is reasonable. The test in this regard is whether the scope of the intrusion is balanced by the governmental interest at play. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966). Additionally, this turns on the specific facts of the case. Here, the intrusion of being faced with a deadly weapon where one mistake can get one killed far exceeds the interest in stopping potential marijuana smoking inside a car that offended no one.

WHEREFORE, Mr. Andrews respectfully moves this Court to grant this motion to suppress and dismiss upon any or all of the above-discussed grounds.

Respectfully submitted,



Patrick Brennan
Counsel for the Defendant

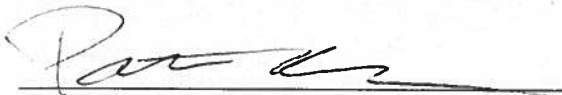
NOTICE AND CERTIFICATE OF SERVICE

Please take Notice that the foregoing Motion to Suppress has been filed with the Franklin District Court Clerk and will be heard on July 23rd, 2020, at 1:00 p.m. or at the convenience of the Court.

This certifies that a copy of this Motion to Suppress was served on the date filed.

Distribution to:

Chris Broaddus, Franklin County Attorney's Office



Patrick Brennan
Dept. of Public Advocacy

**COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY DISTRICT COURT
CASE NO. 20-M-00436
ELECTRONICALLY FILED**

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

MOTION TO SUPPRESS

DESAUD GILKEY

DEFENDANT

Comes the defendant, Desaud Gilkey, through counsel, pursuant to the Fourth and Fourteenth Amendments to the U.S. Constitution, Section 10 of the Kentucky Constitution, and all other applicable statutes and case law, and respectfully moves this court to suppress the fruits of the unconstitutional seizure of Mr. Gilkey on May 12th, 2020. Mr. Gilkey offers the following in support.

Statement of Facts

Around 11 a.m. on May 12th, 2020, Desaud Gilkey went to Kroger on the East Side. He saw an old acquaintance, David Wideman, inside the store. When he completed his shopping, Mr. Gilkey asked Mr. Wideman for a ride to his car, because the door restrictions (due to coronavirus protection procedures) at Kroger left Mr. Gilkey exiting Kroger far from his vehicle. Mr. Wideman picked up Mr. Gilkey and gave him a ride, parking in an open space in front of Mr. Gilkey's car. The pair talked in the vehicle for approximately 5 minutes before Detective Jeff Farmer from the Franklin County Sheriff's Office pulled up behind the vehicle. Detective Farmer and another deputy jumped out of their truck and approached both sides of the vehicle occupied by the two young black men, demanding them to put their hands on the dashboard.

Detective Farmer proceeded to pull both individuals out of the car and search it. Detective Farmer also took Mr. Gilkey's keys and searched his car in the adjacent space. Detective Farmer then arrested Mr. Wideman and Mr. Gilkey for loitering, possession of marijuana, and public intoxication. After transporting Mr. Gilkey to the jail, Detective Farmer returned to Kroger parking lot to search Mr. Gilkey's car again. He proceeded to tear out the center console and cause damage to the car. After numerous calls from Mr. Gilkey and his family requesting Mr. Gilkey's car keys, Detective Farmer returned to the Franklin County Sheriff's Office and left them on the sidewalk.

Legal Analysis

The Commonwealth bears the burden to prove the reasonableness of searches and seizures under the Fourth Amendment. See, e.g., *Com. v. Erickson*, 132 S.W.3d 884, 887 (Ky. Ct. App. 2004) ("A warrantless search is presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the exceptions to the warrant requirement."); *Fla. v. Royer*, 460 U.S. 491, 500 (1983) ("It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.").

I. Detective Farmer seized Mr. Gilkey without reasonable suspicion of criminal activity when he blocked the vehicle occupied by Mr. Gilkey and two officers approached, demanding that they place their hands on the dashboard, on suspicion that two black men were sitting together for too long in the Kroger parking lot.

"A person is seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ward v. Commonwealth*, 568 S.W.3d 824, 829 (Ky. 2019) (quoting *United*

States v. Mendenhall, 446 U.S. 544, 554 (1980)). Use of a tone or force that might compel compliance with the request of the police is a factor indicative of seizure. *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). When police officers in some way restrain the liberty of a citizen (by means of physical force or show of authority), a “seizure” of that person has occurred. *Strange v. Commonwealth*, 269 S.W.3d 87 (Ky. 2008).

When Detective Farmer blocked the vehicle occupied by Mr. Gilkey and two officers approached, demanding that Mr. Gilkey place his hands on the dashboard, he was seized. The police demand and vehicle blockade would compel a reasonable person to believe that they were not free to leave. Thus, for any of the subsequent observations to be admissible in court, the seizure must have been made upon probable cause or reasonable suspicion of criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (When an officer observes suspicious conduct that reasonably leads him to believe that criminal activity is occurring or about to occur, the officer may identify himself as a police officer and make an initial inquiry.).

Detective Farmer had no reasonable suspicion to believe that Mr. Gilkey was involved in any criminal activity. Detective Farmer told Mr. Gilkey that he approached them on suspicion of “loitering.” The loitering statute requires that the defendant loiters in a public place for the purpose of unlawfully using a controlled substance. KRS 525.090. Nothing indicates how Detective Farmer could have had any suspicion of controlled substance use; it appears that Detective Farmer approached the pair because they were sitting in the Kroger parking lot together for 5 minutes.

Moreover, being in a parked car does not give rise to reasonable suspicion of public intoxication or loitering. Both offenses must be conducted in a “public place” which is defined in KRS 525.010 as an enumerated list of places or anywhere that “produces its offensive or

proscribed consequences in a public place.” A parked car is not enumerated, and no published case defines it as a public place. Thus, for the fact that Detective Farmer did not witness any controlled substances nor a possible crime even if he did witness a controlled substance, he was not entitled to seize Mr. Gilkey at first approach. Of course, Detective Farmer could have approached on foot for an attempted consensual encounter if he had wished, but he made the decision to blockade the car and demand physical compliance.

II. Suppression is warranted because the seizure was not reasonable under the Fourth Amendment, since it was excessively intrusive by a 45 minute public arrest based on a suspicionless approach.

The Fourth Amendment requires that all seizures must be reasonable. Courts have expanded this to mean that the scope of the seizure, even if warranted in the first place, must be limited. *See Commonwealth v. Marshall*, 319 S.W.3d 352 (Ky. 2010); *Florida v. Royer*, 460 U.S. 491, 500 (1983). This interaction with Detective Farmer included multiple cars being searched, arrests, and a 45 minute humiliating exposure in the Kroger parking lot upon a suspicionless seizure that led to suspicion of marijuana possession/use. The test in this regard is whether the scope of the intrusion is balanced by the governmental interest at play. *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966). Additionally, this turns on the specific facts of the case. Here, the intrusion far exceeds the interest in stopping potential marijuana smoking inside a car that offended no one.

WHEREFORE, Mr. Gilkey respectfully moves this Court to conduct a hearing and grant this motion to suppress upon any or all of the above-discussed grounds.

Respectfully submitted,

/s/ Patrick Brennan

Patrick Brennan
Counsel for Defendant
Assistant Public Advocate
221 St. Clair Street
Frankfort, Kentucky 40601
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Fax: (502)564-1527
patrick.brennan@ky.gov

NOTICE AND CERTIFICATE OF SERVICE

Please take Notice that the foregoing Motion to Suppress has been filed with the Franklin District Court Clerk and will be heard at the convenience of the Court.

This certifies that a copy of this Motion to Suppress was served on the date filed.

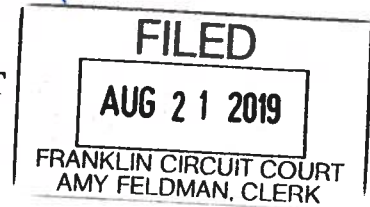
Distribution to:

Rick Sparks, Franklin County Attorney's Office

/s/ Patrick Brennan

Patrick Brennan
Dept. of Public Advocacy

COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY CIRCUIT COURT
CASE NO. 19-CR-00227
DIVISION II



COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

MOTION TO SUPPRESS

JOSEPH MOON

DEFENDANT

Comes the defendant, Mr. Joseph Moon, through counsel, pursuant to Rule 9.78 of the Kentucky Rules of Criminal Procedure; the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States; Section 10 and 11 of the Constitution of Kentucky; and all applicable statutes, rules, and laws of the Commonwealth of Kentucky, and respectfully moves this Court to suppress the unlawful stop and subsequent arrest of Mr. Moon.

Brief Summary of the Facts

On June 11, 2019, Mr. Moon was driving a red Chevy pickup truck through Prince Hall Village. Police citation 9DC09886-1 (hereinafter "Citation"). Officer Farmer stated that he recognized Mr. Moon on sight, and knew that Mr. Moon did not have a license. *Id.* Officer Farmer was not listed as complaining witness on any of Mr. Moon's recent prior charges (5/4/19 – Franklin County, 6/7/19 – Fayette County) for operating on a suspended license. See Courtnet. Also, Mr. Moon was driving a different car each time that he was cited with operating on a suspended license. *Id.* Mr. Moon's most recent conviction for driving on a suspended license was September 2018, about 9 months prior. *Id.* Thus, it is unclear how Officer Farmer acquired the information, but he pulled Mr. Moon over because he believed he recognized the man driving the red truck to have been "cited numerous times for driving on suspended license." Citation.

Upon stopping Mr. Moon, Officer Farmer stated that he “arrested Moon for driving on suspended... As I was searching him incident to arrest, he tried to pull away from me and I felt something in his groin area that was not part of his anatomy.” *Id.* Mr. Moon was later strip searched and a quantity of drugs were recovered. *Id.*

Argument

I. Officer Farmer did not have reasonable suspicion to stop the red Chevy.

“In order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity.” *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998).

A. Officer Farmer lacked reasonable suspicion because he could not recognize the driver of the truck to be Mr. Moon.

Officer Farmer gave no evidence in the citation for how he was able to see Mr. Moon while he was driving. The red truck that Mr. Moon was driving had tinted windows, so Officer Farmer’s view of the cabin would have been severely restricted. Officer Farmer stated that he pulled over the red truck because he believed that the driver – Mr. Moon – did not have a license. However, it is unclear how Officer Farmer could have seen or recognized the driver to be Mr. Moon. Consequently, Officer Farmer could not have maintained reasonable articulable suspicion that the driver of the truck was involved in criminal activity.

B. Officer Farmer lacked reasonable suspicion because he merely had second-hand knowledge that Mr. Moon had been charged for driving on a suspended license.

A police officer’s knowledge that a driver’s license was suspended at some “relatively recent time” is sufficient to create reasonable suspicion of unlawful activity and support an investigatory stop. *Deboy v. Commonwealth*, 214 S.W.3d 926, 929 (Ky. App. 2007). “Mere

charges do not constitute a ‘criminal history’ upon which one might reasonably suspect future criminal behavior.” *Moberly v. Commonwealth*, 551 S.W.3d 26 (Ky. 2018).

This case differs from *Deboy* because Officer Farmer did not have knowledge that Mr. Moon’s license was suspended at some “relatively recent time.” He wrote in the police citation that he merely knew that “Moon has been cited numerous times for driving on suspended license.” The two previous citations from May 4 and June 7 had not yet been adjudicated in court, giving Mr. Moon the opportunity to perhaps present a valid license or other defense. Officer Farmer based his stop on just prior charges, which does not provide evidence of future criminal behavior. Thus, based off of mere prior charges, Officer Farmer lacked reasonable suspicion based on articulable facts that Mr. Moon was presently engaged in criminal activity.

Officer Farmer gave no indication that he knew Mr. Moon had been convicted in September, 2018 for operating on a suspended license. However, even if he did know about this conviction, the length of time since the conviction makes the information stale. In *Deboy*, the court decided that a relatively recent time for knowledge of suspended license is sufficient to create reasonable suspicion to stop and investigate. The court did not define what a “relatively recent time” is, but it held that an amount of time “less than several months” before the stop at issue was sufficient. *Id.* Thus, at some amount of time outside of several months, the information pertaining to a suspended license is too stale to justify a stop. Here, the conviction was 9 months prior to the stop; since 9 months is much greater than “less than several months”, the information is deemed stale and cannot support reasonable suspicion to stop the car.

II. The fruits of the arrest of Mr. Moon must be suppressed because the arrest violates Mr. Moon’s Constitutional right to privacy and the statutory right per KRS 430.015 that Mr. Moon must not be arrested for misdemeanor offense.

A. The arrest of Mr. Moon was invalid.

The statute at issue here, KRS 431.015(1)(a) (emphasis added), provides:

(1) (a) KRS 431.005 to the contrary notwithstanding, and except as provided in paragraphs (b), (c), and (d) of this subsection, a peace officer shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, *if there are reasonable grounds to believe that the person being cited will appear to answer the charge.*

Mr. Moon was arrested in violation of KRS 431.015. He was arrested for operating on a suspended license, which is a class B misdemeanor. KRS 186.620(2); KRS 186.990(3). There are reasonable grounds to believe that Mr. Moon would appear to answer the charge because he was charged by citation with operating on a suspended license on 5/4/19 in Franklin County and showed up to his arraignment on 5/30/19. There are is likely no better reason to give that Mr. Moon would appear to answer to the charge in this case than that he did so for the same charges just twelve days prior. At the time Officer Farmer arrested Mr. Moon, Mr. Moon had no recent failure to appears in any court. Thus, according to KRS 431.015(1)(a), Officer Farmer was required to cite Mr. Moon instead of arresting him for operating on a suspended license.

B. Kentuckians have a reasonable expectation of privacy that their person will not be seized upon violation of a misdemeanor offense due to KRS 430.015.

The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure. Ky. Const. § 10. A warrantless arrest for any misdemeanor is a reasonable seizure under the Fourth Amendment, even if a state statute proscribes the use of a citation instead of arrest. *See Virginia v. Moore*, 553 U.S. 164, 173 (2008). Section 10 of the Kentucky Constitution is normally analyzed in tandem with the Fourth Amendment, except when there is “imperative for departure.” *Parker v. Com.*, 440 S.W.3d 381, 387 (Ky. 2014).

[W]e stress that when interpreting our own Kentucky Constitution, this Court is not tethered to the decisions of the U.S. Supreme Court or the reasoning upon which those decisions are founded. Although the weight of our modern search and seizure precedent comports with federal law, we are not beholden to interpreting every provision of the Kentucky Constitution as identical to its analogous federal counterpart.

Id. at 388.

This case does provide an imperative for departure. Notably, in *Parker*, the Court recognized that their decision “does not condone erroneous policies and procedures or compel judicial enforcement of an officer's mistake of law” since the policy was believed to be within the law at the time. *Id.* at 387. Here, however, not suppressing the evidence would amount to condoning erroneous policies or judicial enforcement of an officer's mistake of law. When Officer Farmer arrested Mr. Moon in violation of KRS 431.015, he must have believed that he was following the law, or else he knew that he was intentionally breaking the law to gain the advantage of a search incident to arrest.

Furthermore, the expectation of privacy that the Court examined in *Parker* was the expectation to not have one's car searched incident to arrest while the person is already properly seized and restrained. *Id.* Here, the subject matter of the expectation is much more fundamental – it deals with the expectation of one's own liberty interest. Any reasonable Kentuckian would assume and expect that they will not be seized by the police in violation of the law, despite their own commission of a misdemeanor. In sum, the imperative to separate Section 10 of the Kentucky Constitution from Fourth Amendment jurisprudence exists here because this court must not condone erroneous policies and procedures, this court must not compel judicial

enforcement of an officer's mistake of law, the privacy interest is significant, and the reasonable expectation of privacy is clear and obvious.

C. The fruits of a violation of KRS 430.015 must be suppressed under the Copley suppression rule because Mr. Moon was prejudiced by the violation and the violation was intentional.

If the Court is not inclined to suppress the evidence based on the Kentucky Constitution, then the Court should suppress the evidence due to Kentucky case law. In *Copley v. Commonwealth*, the Supreme Court of Kentucky laid out the basis to suppress for police misconduct that does not rise to the level of constitutional violation. 361 S.W.3d 902 (Ky. 2012).

We now explicitly state that which was implied in earlier Kentucky cases, that is, when a criminal procedure rule is violated but the defendant's constitutional rights are not affected, suppression may still be warranted if there is (1) prejudice to the defendant, in the sense that the search might not have occurred or been so abusive if the rule had been followed or (2) if there is evidence of deliberate disregard of the rule.

Id. at 907.

Pursuant to the logic of *Commonwealth v. Bedway*, the Copley suppression rule extends to violations of KRS 431.015. 466 S.W.3d 468, 477 (Ky. 2015). Under the Copley suppression rule, a finding of prejudice is warranted if, “the search might not have occurred or been so abusive if the rule had been followed.” 361 S.W.3d at 907. Here, there is clearly prejudice to the defendant because if 430.015 had been followed, then Mr. Moon would not have been searched. Mr. Moon was unlawfully arrested, a quantity of drugs was recovered upon search incident to arrest. If the rule had been followed such that Mr. Moon was not unlawfully arrested, then the search incident to arrest would not have happened. Thus, Mr. Moon was prejudiced by violation of 430.015.

In addition, there is reason to believe that the violation of KRS 430.015 was intentional. Officer Farmer stated that he began following Mr. Moon because he saw him driving and “knew that his license was suspended.” Officer Farmer then immediately arrested Mr. Moon and attempted to search him. Officer Farmer stated that he searched around Mr. Moons genitals, at which time Mr. Moon jumped back. Thus, within minutes of seeing Mr. Moon, Officer Farmer is fishing around inside Mr. Moon’s pants for drugs, based upon an unlawful arrest. It is clear from the circumstances that Officer Farmer had a singularly minded and predetermined mission to search Mr. Moon. Officer Farmer thus intentionally disregarded the law by not taking his time to determine, acknowledge, or follow the legal steps.

Conclusion

WHEREFORE, Mr. Moon respectfully moves this Court to grant this motion to suppress the evidence and any fruits thereof resulting from the unlawful seizure and search that violated Mr. Moon’s Constitutional and statutory rights.

Respectfully submitted,

Cheyla Bush
Counsel for the Defendant
Dept. of Public Advocacy

NOTICE AND CERTIFICATE OF SERVICE

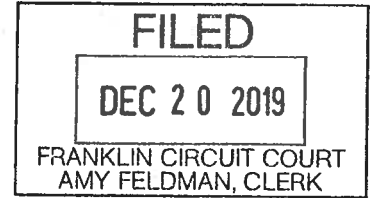
Please take Notice that the foregoing Motion to Suppress has been filed with the Franklin Circuit Court Clerk and will be heard on _____, at _____ or at the convenience of the Court.

This certifies that a copy of this Motion to Suppress was served by the following methods on the date filed.

Distribution to:
Hon. Larry Cleveland
Commonwealth Attorney

Cheyla Bush
Dept. of Public Advocacy

COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY CIRCUIT COURT
CASE NO. 19-CR-00227
DIVISION II



COMMONWEALTH OF KENTUCKY

PLAINTIFF

v. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

JOSEPH MOON

DEFENDANT

Proposed Findings of Fact

- I. Defendant's Arrest
 - a. Detective Farmer effectuated an arrest on Joseph Moon solely for operating on a suspended license. Suppression Hearing, December 2nd 2019 at 10:13:45 a.m.
 - b. Detective Farmer knew that Mr. Moon had shown up for arraignment twelve days earlier in Franklin County for driving on a suspended license. *Id.* at 10:34:15; 10:40:40.
 - c. Detective Farmer believes people have a duty to show up to court. *Id.* at 10:29:00.
 - d. Detective Farmer believes people show up to court because they want their voice to be heard. *Id.* at 10:29:15.
 - e. Detective Farmer believes people show up to court because they do not want a bench warrant. *Id.* at 10:29:18.
 - f. Detective Farmer believes people show up to resolve class B misdemeanors, because the penalty is not that stiff. *Id.* at 10:29:18.
 - g. Detective Farmer believes that people usually show up to court. *Id.* at 10:29:25.

- h. Detective Farmer knew that Mr. Moon did not try to run, drive away, or make any other evasive maneuvers. *Id.* at 10:30:00.
- i. Detective Farmer was told that Mr. Moon was going to get his license back the next day (June 12th, 2019). *Id.* at 10:45:30.
- j. There was a passenger in Mr. Moon's car that could have driven them away from the scene. *Id.* at 10:25:17; 10:47:50.
- k. Detective Farmer wished to arrest and search Mr. Moon because Detective Farmer had a hunch that Mr. Moon was engaging in drug trafficking activity. *Id.* at 10:11:00; 10:13:30.

II. Prior to the Stop

- a. Detective Farmer had not seen Mr. Moon for close to a year prior to June 11th, 2019. *Id.* at 10:18:15.
- b. Detective Farmer saw who appeared to be Mr. Moon through a moving vehicle with tinted windows. *Id.* at 10:10:20; 10:19:10.
- c. Detective Farmer was not familiar with the vehicle. *Id.* at 10:17:30.
- d. Detective Farmer did not have any knowledge of Mr. Moon's license being suspended upon seeing who he thought was Joseph Moon. *Id.* at 10:19:25.
- e. Detective Farmer ran a CourtNet search for Joseph Moon because he knew of Mr. Moon's history for drug trafficking. *Id.* at 10:19:55.
- f. Detective Farmer saw on CourtNet that Joseph Moon had open charges for operating on a suspended license. *Id.* at 10:20:00.
- g. Detective Farmer paged dispatch to request Joseph Moon's driving status. *Id.* at 10:20:20.

- h. Dispatch's response indicated that they did not have enough information to find an operator's license for Joseph Moon. *Id.* at 10:22:20.
- i. Detective Farmer had knowledge of Mr. Moon's prior arrest for drug trafficking. *Id.* at 10:10:40.
- j. Detective Farmer did not witness anything that indicated drug trafficking by Mr. Moon except for being in a high crime area. *Id.* at 10:35:25.

III. The Roadside Stop

- a. Detective Farmer gathered Mr. Moon's identification and other documents. *Id.* at 10:13:20; 10:24:50.
- b. Detective Farmer went back to his car to call for backup. *Id.* at 10:25:40.
- c. Detective Farmer opened the door of Mr. Moon's truck. *Id.* at 10:26:15.
- d. Detective Farmer handcuffed Mr. Moon while seated in the truck. *Id.* at 10:26:30.
- e. Detective Farmer viewed scales in Mr. Moon's truck while he was effecting the arrest for operating on a suspended license. *Id.* at 10:35:40.
- f. Detective Farmer pulled Mr. Moon out and began searching him incident to arrest. *Id.* at 10:14:10.
- g. Detective Farmer pulled at the back of Mr. Moon's pants; he then shifted to the front, pulling at the seam and attempting to put his hand down Mr. Moon's pants. *Id.* at 10:46:25.
- h. Detective Farmer claims he felt a hard object in Mr. Moon's pants. *Id.* at 10:27:00.
- i. Detective Farmer placed Mr. Moon in the back of his car. *Id.* at 10:35:50; 10:37:25.

- j. Detective Farmer searched the vehicle while Mr. Moon was placed in the back of his car. *Id.* at 10:35:50.
- k. Detective Farmer located digital scales in the vehicle during the search. *Id.* at 10:36:20.

Proposed Conclusions of Law

- I. Evidence resulting from the pretextual, illegal arrest must be suppressed.
 - a. The arrest was illegal per KRS 431.015. KRS 431.015 states that the defendant shall not be arrested for a misdemeanor if there are reasonable grounds to believe he will show up to court. Thus, the statute does not by its terms proscribe a totality of the circumstances test nor a negative “reason to believe he will not show up in court” test. By the testimony elicited at the suppression hearing, Detective Farmer did have reasonable grounds to believe that Mr. Moon would show up in court. See Proposed Findings of Fact, I.b–I.j *supra*.
 - b. The arrest was pretextual, since Detective Farmer testified that he had a hunch that Mr. Moon was presently carrying drugs. It is clear from the record that this was the real reason that Mr. Moon was arrested, since Detective Farmer had little reason otherwise to arrest Mr. Moon as well as ample reason to believe Mr. Moon would show up in court.
 - c. Due to the conclusion that the arrest was both pretextual and illegal, along with consideration of the totality of the circumstances, the arrest was unreasonable under the Fourth Amendment. *See Mickey v. Com.*, No. 2012-CA-000723-MR, 2014 WL 1268690 (Ky. Ct. App. Mar. 28, 2014).

- d. Due to the conclusion that the arrest was both pretextual and illegal, along with consideration of the totality of the circumstances, the arrest was unreasonable under Section 10 of the Kentucky Constitution. In addition, an imperative exists to separate Section 10 jurisprudence from Fourth Amendment jurisprudence because of the significant interests of liberty and freedom for wrongful arrests at play. *See Parker v. Com.*, 440 S.W.3d 381, 387 (Ky. 2014).
 - e. Due to a violation of Section 2 of the Kentucky Constitution, the evidence must be suppressed.
 - f. Due to the violation of KRS 431.015, which is effectively a rule of criminal procedure, the suppression rule from *Copley v. Commonwealth*, 361 S.W.3d 902 (Ky. 2012) applies. Suppression is therefore warranted since there was prejudice to the defendant – where the search would not have occurred but for the violation of KRS 431.015 – and suppression is warranted since there was evidence of deliberate disregard of KRS 431.015 by the pretextual nature of the arrest.
 - g. Detective Farmer did not have reasonable suspicion of criminal activity sufficient to frisk Mr. Moon.
- II. Detective Farmer’s statement about feeling a hard object in Mr. Moon’s pants must be suppressed.
- a. The statement was a product of an exceptionally invasive search – reaching into Mr. Moon’s pants on the side of the road – disregarding Mr. Moon’s right to privacy. *See Commonwealth v. Marshall*, 319 S.W.3d 352 (Ky.2010).
- III. The search of Mr. Moon’s car must be suppressed.

- a. Detective Farmer stated that he searched the car based upon plain view of small digital scales. *Id.* at 10:37:20.
- b. Plain view of scales does not indicate criminality sufficient to rise to the level of probable cause to search a car. *See Commonwealth v. Hatcher*, 199 S.W.3d 124 (Ky. 2006).

IV. Evidence resulting from prolongation of the stop must be suppressed.

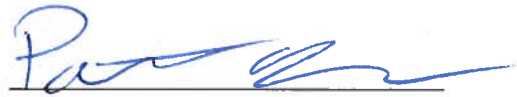
- a. There is no de minimis exception to prolongation of a traffic stop. *Davis v. Commonwealth*, 484 S.W.3d 288, 293 (Ky. 2016).
- b. Detective Farmer called for backup to assist on a stop for operating on suspended license. This prolonged the stop unnecessarily.

V. Evidence resulting from the stop of Mr. Moon's car must be suppressed.

- a. Detective Farmer had no knowledge or reason to be suspicious that Mr. Moon's license was suspended. However, Detective Farmer went fishing on CourtNet to try to find a reason to pull Mr. Moon over and go fishing in his pants for drugs. This is an improper use of CourtNet, and the only effective deterrence for this sort of misconduct is suppression.
- b. Detective Farmer did not have reasonable suspicion to stop Mr. Moon when he saw CourtNet charges for operating on suspended license and dispatch told Detective Farmer that they do not have enough information to find an operator's license for Joseph Moon. Detective Farmer never had actual knowledge of Mr. Moon's license being suspended. Mere charges do not support reasonable suspicion of present criminal activity. *See Deboy v. Commonwealth*, 214 S.W.3d

926, 929 (Ky. App. 2007); *Moberly v. Commonwealth*, 551 S.W.3d 26 (Ky. 2018).

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Patrick Brennan', is written over a horizontal line.

Patrick Brennan

Counsel for the Defendant

NOTICE AND CERTIFICATE OF SERVICE

Please take Notice that the foregoing Proposed Findings of Fact and Conclusions of Law has been filed with the Franklin Circuit Court Clerk.

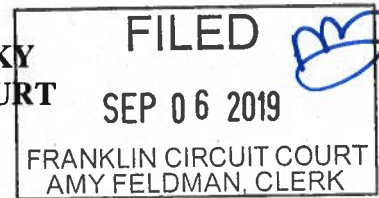
This certifies that a copy of this Proposed Findings of Fact and Conclusions of Law was served by the following methods on the date filed.

Distribution to:
Hon. Larry Cleveland
Commonwealth Attorney

A handwritten signature in blue ink, appearing to read "Patrick Brennan", is written over a horizontal line.

Patrick Brennan
Dept. of Public Advocacy

COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY CIRCUIT COURT
CASE NO. 19-CR-00246
DIVISION II



COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

MOTION TO SUPPRESS AND SET HEARING PURSUANT TO
FRANKS V. DELAWARE

KYIRA JAMES GLOVER

DEFENDANT

Comes the defendant, Kyira Glover, through counsel, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); the Fourth and Fourteenth Amendments to the Constitution of the United States; Section 10 and 11 of the Constitution of Kentucky; and all applicable statutes, rules, and laws of the Commonwealth of Kentucky, and respectfully moves this Court to suppress the fruits of the July 1, 2019 search warrant that was based upon information that was knowingly false or given with reckless disregard to the truth.

Statement of the Facts

On July 1, 2019 at approximately 11:30 a.m., a search warrant was executed at 1085 Green Wilson Road Apt. #3 in Frankfort. The affidavit for the warrant was written by Officer Jeff Farmer with the Frankfort Police Department. See Exhibit A. The affidavit contains the following information:

(1) Officer Farmer received an anonymous tip that Leonard J. Glover, who was recently arrested for drug trafficking, is the brother of Kyira "KJ" Glover.

According to this tip, after Leonard was arrested, Kyira took over the business of selling methamphetamine and heroin for Leonard.

- (2) Crystal Wallace rents the apartment at 1085 Green Wilson Road.
- (3) Kyira Glover is the live-in girlfriend of Crystal Wallace.
- (4) During the execution of a search warrant at 1309 Powhattan Trail on March 2, 2018, "Wallace admitted to me that Glover use [sic] her apartment to sell and store heroin."
- (5) Mr. Glover had an active arrest warrant in Franklin Circuit Case 17-CR-00473 issued on June 20, 2019.
- (6) A blue 2019 Hyundai rental car with Ms. Wallace listed as insured driver was parked at 1085 Green Wilson Road on June 29, 2019.
- (7) On June 30, 2019, a black male "that very clearly appeared to be Kyira J. Glover" drove the blue rental car into the parking lot at the residence and backed into the spot normally utilized by Crystal Wallace. "The black male subject got out of the vehicle and walked up the stairs and went inside the residence numbered as 3."
- (8) Mr. Glover has a record of drug possession and trafficking, notably "Glover had plead guilty to attempted trafficking in a controlled substance 2nd or greater offense of less than 4 grams of cocaine, and possession of drug paraphernalia in Franklin District case number 18-F-00153", a 2016 Fayette county trafficking case, a 2013 Mercer county possession case, and a 2013 Franklin county trafficking case.
- (9) "July 1, 2019 at approximately 0915 hours your affiant observed the 2019 Hyundai rental car arrive back at 1085 Green Wilson Road. A black male wearing white clothing got out of the driver's seat and went inside 1085 Green Wilson

Road #3. This black male was identifiable by your affiant as being Kyira “KJ” Glover.”

- (10) A handwritten, unsigned, and uninitialed statement at the end of the affidavit reads: “saw 3 transactions this morning”.

The affidavit says it was subscribed and sworn via oral communication in the presence of Judge Thomas Wingate on July 1, 2019, and it fails to state the time that it was subscribed and sworn. The warrant was then executed “at approximately 1129 hours” at 1085 Green Wilson Road. Mr. Glover was not present, but he showed up sometime during the execution of the warrant. A gun was found in a dresser drawer with women’s clothing in it in Crystal’s bedroom. Ultimately, Mr. Glover was charged with possession of this firearm by convicted felon, receiving stolen property, and possession of drug paraphernalia (scales) based upon execution of the search warrant.

Applicable Law

Information in an affidavit for a search warrant that was (1) knowingly false, (2) given with reckless disregard to the truth, and (3) stale must be removed from consideration of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 171–72 (1978); *United States v. Hython*, 443 F.3d 480, 486–87 (6th Cir. 2006). Then, probable cause must be reconsidered, along with the inclusion of any material facts that were omitted from the affidavit with intent to deceive. *Commonwealth v. Smith*, 898 S.W.2d 496 (Ky. App. Ct. 1995). A hearing is warranted pursuant to *Franks* if the defendant makes a substantial preliminary showing of information in the affidavit that is knowingly false or given with reckless disregard to the truth, and the basis for probable cause is thereby undermined. *See Franks*, 438 U.S. at 171–72; *Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998).

Contested Facts

For sake of clarity, the 10 numbered “facts” from the affidavit, *supra*, are considered in order.

- (1) Officer Farmer received an anonymous tip that Leonard J. Glover, who was recently arrested for drug trafficking, is the brother of Kyira “KJ” Glover. According to this tip, after Leonard was arrested, Kyira took over the business of selling methamphetamine and heroin for Leonard.

This cannot be factored into the calculation of probable cause because it contains false information that was given with reckless disregard to the truth, and it is an anonymous tip with no indication of reliability. While it may be true that Officer Farmer received this anonymous tip, it is absolutely untrue that Kyira Glover has a brother named Leonard J. Glover. In fact, Kyira Glover’s sister, La’Quida Smith (an instructor at KSU), would testify at the Franks hearing to the fact that Kyira Glover does not have any brothers. Kyira Glover only has two sisters. Due to the ease of verifying this information, and the fact that it was false, Officer Farmer gave it with reckless disregard to the truth.

In addition, for the purposes of a search warrant affidavit, anonymous tips must be supported, within the four corners of the affidavit, with information demonstrating the veracity, reliability, and basis of knowledge of the tipster. See *Illinois v. Gates*, 462 U.S. 213, 227-230 (1983); *U.S. v. Hines*, 885 F.3d 919, 922-925 (6th Cir. 2018). Here, Officer Farmer did not include anything in the affidavit about the reliability of the tipster who wished to remain anonymous. Moreover, any attempt to corroborate the tip would have revealed that it was baseless and false.

- (2) Crystal Wallace rents the apartment at 1085 Green Wilson Road.

This is true and uncontested.

- (3) Kyira Glover is the live-in girlfriend of Crystal Wallace.

This cannot be factored into the calculation of probable cause because it is either stale or given with reckless disregard to the truth. Crystal Wallace stated in an affidavit that she has never been in a relationship with Mr. Glover. See Exhibit B. In addition, Ms. Wallace stated that Kyira Glover was not her live-in boyfriend around the date of July 1, 2019. *Id.* Officer Farmer stated that he knew Ms. Wallace and Mr. Glover were in a long term relationship because he executed a search warrant on March 2, 2018, and at that time he believed the apartment was being shared by Ms. Wallace and Mr. Glover. This information is arguably stale; just because two people seemed to be in a relationship over a year prior does not mean that they are still in a long-term relationship. If the Court is not inclined to agree that the information was stale, it will be confronted with the issue of this information being given with reckless disregard to the truth.

Officer Farmer could have attempted to corroborate his suspicions that Mr. Glover was the live-in boyfriend of Ms. Wallace in a number of ways. He could have asked Ms. Wallace herself, who would have informed Officer Farmer that they are not in a relationship. He could have observed the residence overnight to see Mr. Glover stay the night, but there is no allegation that this ever happened. Officer Farmer also could have called Mr. Glover's probation officer to confirm his listed address. If he had done this, Officer Farmer would have found that Mr. Glover had his own residence. Instead of taking any steps to try to determine if Mr. Glover was currently the live-in boyfriend of Ms. Wallace, Officer Farmer merely relied on his hunch based on information over a year old. He then stated this stale information in the warrant affidavit as if it were a fact; this is a model case of information given with reckless disregard to the truth.

- (4) During the execution of a search warrant at 1309 Powhattan Trail on March 2, 2018, "Wallace admitted to me that Glover use [sic] her apartment to sell and store heroin."

This cannot be factored into the calculation of probable cause because it was knowingly false, and it materially omitted information with the intent to deceive the warrant-issuing judge.

Ms. Wallace stated in an affidavit that when Officer Farmer searched her residence on March 2, 2018, she did not make any statements to the effect that Kyira Glover uses her apartment to sell and store heroin. Again, she is willing to testify to this at the Franks hearing. In the uniform citation written in association with the 2018 search, Officer Farmer did not include any statements from Ms. Wallace. From this, we can infer that Officer Farmer wrote this statement knowing that it was false.

In addition, the warrant affidavit states that Ms. Wallace “went as far as to show me where Glover stored heroin in a wall plug in their living room.” Again, this is not included in the uniform citation. This statement in the affidavit makes it seem like Officer Farmer found heroin during the 2018 search. Actually, Officer Farmer did not recover any heroin during the 2018 search, and the implication that he did, without further clarification, is a material omission with intent to deceive the warrant-issuing judge. Moreover, what Officer Farmer actually found during the 2018 search was a tablet of Benadryl, charged as possession of cocaine, and some scales. We grant that an officer writing an affidavit need not include every single fact known to them. However, Officer Farmer’s account of the March 2, 2018 search should not have implied that drugs were found without a clarification that no illicit drugs were recovered. Thus, Farmer wrote this portion omitting material information with the intent to deceive the warrant-issuing judge.

-
- (5) Mr. Glover had an active arrest warrant in Franklin Circuit Case 17-CR-00473 issued on June 20, 2019.

This is true and uncontested.

- (6) A blue 2019 Hyundai rental car with Ms. Wallace listed as insured driver was parked at 1085 Green Wilson Road on June 29, 2019.

This is true and uncontested.

- (7) On June 30, 2019, a black male “that very clearly appeared to be Kyira J. Glover” drove the blue rental car into the parking lot at the residence and backed into the spot normally utilized by Crystal Wallace. “The black male subject got out of the vehicle and walked up the stairs and went inside the residence numbered as 3.”

This is uncontested. Despite the foreboding connotation due to the way Officer Farmer conducted his predetermined investigation, it states totally innocent behavior. Being unessential to the determination of probable cause, Mr. Glover does not contest this allegation.

- (8) Mr. Glover has a record of drug possession and trafficking, notably “Glover had plead guilty to attempted trafficking in a controlled substance 2nd or greater offense of less than 4 grams of cocaine, and possession of drug paraphernalia in Franklin District case number 18-F-00153”, a 2016 Fayette county trafficking case, a 2013 Mercer county possession case, and a 2013 Franklin county trafficking case.

This cannot be factored into the calculation of probable cause because it omitted material information with intent to deceive the warrant-issuing judge. Mr. Glover acknowledges that a recent conviction for drug trafficking may be factored into the totality of the circumstances analysis for probable cause. However, the 2018 felony conviction was an Alford Plea, and this is readily apparent upon view of CourtNet, which Officer Farmer says was the basis for his knowledge. Also, Officer Farmer would know why it was an Alford Plea – the alleged drugs that he personally recovered were actually Benadryl. Officer Farmer twisted this factually innocent situation for which he had actual knowledge into “Glover had plead guilty to attempted trafficking in a controlled substance 2nd or greater offense of less than 4 grams of cocaine, and possession of drug paraphernalia in Franklin District case number 18-F-00153.” As this portion intended to demonstrate recent involvement in drug trafficking, it omitted material information demonstrating innocent behavior with intent to deceive the warrant-issuing judge.

- (9) “July 1, 2019 at approximately 0915 hours your affiant observed the 2019 Hyundai rental car arrive back at 1085 Green Wilson Road. A black male wearing white clothing got out of the driver’s seat and went inside 1085 Green Wilson Road #3. This black male was identifiable by your affiant as being Kyira “KJ” Glover.”

This cannot be factored into the calculation of probable cause because it was knowingly false. Ms. Wallace stated in the affidavit that she drove the blue 2019 Hyundai Elantra rental car to work at the Toyota Factory in Georgetown around 5:00 a.m. on July 1, 2019. It was parked there all day until Ms. Wallace left around 1:35 p.m. She states that Kyira Glover never once got inside the 2019 Hyundai Elantra while she was in possession of it. Ms. Wallace is willing to testify to all of this at the Franks hearing. Mr. Glover intends to further demonstrate the falsity of Officer Farmer's statement by subpoenaing GPS records from Enterprise and surveillance video from the Toyota Factory in Georgetown. Both companies will not release the information without subpoena, and after a Franks hearing is set, subpoenas will be issued with return set for the time of the Franks hearing.

Officer Farmer must have known that this was false. In the affidavit, Officer Farmer took great pains to try to create a nexus between Mr. Glover, drug dealing, and the blue rental car. Officer Farmer stated that based on his training and experience, drug traffickers often use rental vehicles in this manner. Officer Farmer then stated that he saw Mr. Glover driving the blue rental car and pulling in the apartment on July 1, 2019, just hours before applying for a warrant. As subscribed and sworn by Ms. Wallace, and will be further proved at the Franks hearing, the blue rental car was not at the apartment at the time that Officer Farmer said he saw Kyira Glover drive up in it.

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- (10) A handwritten, unsigned, and uninitialed statement at the end of the affidavit reads: "saw 3 transactions this morning".

This cannot be factored into the calculation of probable cause because it does not provide sufficient details to form a nexus between criminal activity, Mr. Glover, and the apartment, and even if the inference is warranted, the close connection between this statement and the knowingly false statement in (9) means that this statement must be false.

An affidavit for a search warrant must “state sufficient facts to establish probable cause for the search of the property or premises.” *Guth v. Commonwealth*, 29 S.W.3d 809, 811 (Ky. App. Ct. 2000) (citing *Coker v. Commonwealth*, 811 S.W.2d 8, 9 (Ky. App. Ct. 1991)). In *Guth*, the Court held that a conclusory statement about viewing a drug transaction, without detail about where or how the transaction occurred, misled the judge. The same is true for this case. The handwritten statement says “saw 3 transactions this morning.” It does not give any detail about where the transactions occurred, what a “transaction” means (drugs? guns? food?), or what Officer Farmer actually saw. Moreover, there is no indication of when Officer Farmer added this to the search warrant affidavit – was it before the issuing judge signed it or after? Without “sufficient facts”, this is a mere conclusory statement that – on its own – does not allege criminal conduct, a connection to Mr. Glover, or a connection to the apartment.

In addition, if the Court is inclined to infer that “saw 3 transactions this morning” means that Officer Farmer fully witnessed three drug deals the morning of July 1, 2019 at the apartment at 1085 Green Wilson Road, then the Court should recognize that this statement is knowingly false. Officer Farmer stated that he saw Kyira Glover arrive in the blue rental car that morning. The blue rental car was not and could not have been at the apartment at that time. Thus, it strains reason how Officer Farmer could have then witnessed Mr. Glover proceed to conduct three drug transactions.

Application

After removing information that was (1) knowingly false, (2) given with reckless disregard to the truth, and (3) stale, and including material omissions, the Court must determine if, under the totality of the circumstances, the warrant still contains probable cause. The remaining information demonstrates that Ms. Wallace rents an apartment and has a rental car,


and that Mr. Glover once visited Ms. Wallace at her residence. Mr. Glover also had a history and an active warrant for his arrest. This does not amount to probable cause. *See U.S. v. Schultz*, 14 F.3d 1093, 1097-1098 (6th Cir. 1994). The real key to a finding of probable cause when the warrant was issued was Officer Farmer's claim that he saw Mr. Glover arrive in a blue rental car on July 1, 2019 then conduct three transactions. This cannot be true, since the rental car was sitting at the Toyota Factory in Georgetown. Hence, the basis for probable cause is undermined, and suppression is warranted.

Conclusion

Officer Farmer set out to conduct a search on anything related to Mr. Glover, without having any actual knowledge of criminal activity or a nexus between Mr. Glover and the places to be searched. Officer Farmer then wrote out an affidavit for a search warrant riddled with knowingly false information, information given with reckless disregard to the truth, stale information, and material omissions with intent to deceive the warrant-issuing judge. It is no wonder that again, as was the case in the 2018 search, no drugs were recovered. The only items found were scales, which are normal household items, and a gun found in the bedroom belonging to Crystal Wallace, in a dresser full of women's clothes. The exclusionary rule is intended to deter police misconduct, and it is warranted here to deter Officer Farmer from making false statements in an affidavit for a search warrant.

WHEREFORE, the Defendant prays this Court will set a hearing pursuant to *Franks v. Delaware* and suppress the fruits of the July 1, 2019 search warrant that was based upon information that was knowingly false or given with reckless disregard to the truth.

Respectfully submitted,

A handwritten signature in blue ink, reading "Kara Nipper", is written over a horizontal line.

Kara Nipper, Attorney for the Defendant

NOTICE AND CERTIFICATE OF SERVICE

Please take Notice that the foregoing Motion has been filed with the Franklin Circuit Court Clerk and will be heard on _____, at _____ or at the convenience of the Court.

I hereby certify that I have caused a true and correct of the foregoing Motion to be delivered to as follows:



Distribution to:
Hon. Larry Cleveland
Commonwealth Attorney

Hon. Kara Nipper
Dept. of Public Advocacy
221 St. Clair Street
Frankfort, KY 40601

EXHIBIT

tabbies

A

 <p>AOC – 335 Doc 1-19</p> <p>Commonwealth of Kentucky</p> <p>Court of Justice</p> <p>Ky. Const. §10; RCr 13.10</p>	 <p>AFFIDAVIT FOR SEARCH WARRANT</p>	<p>Case No.</p> <p>Court</p> <p>County</p>
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The affiant Jeff Farmer a peace officer of Franklin County Sheriff's Office, Franklin County, Kentucky being first duly sworn, states that he/she has, and there is reasonable and probable grounds to believe, and affiant does believe, that there is now on the premises known and numbered as:

1085 Green Wilson Road #3
Frankfort, Ky. 40601

and more particularly described as follows:

A 2 story building constructed of tan vinyl siding and a dark shingle roof. The building contains 4 individual apartments. There is a wooden porch that has steps from the ground level to the second floor. Apartment 3 is the top left apartment if you are facing the building from Green Wilson Road. Each apartment is numbered individually 1-4.

and/or in a vehicle or vehicles described as:

2019 Hyundai Elantra bearing Louisiana registration plate of N531671 registered to EAN holdings of Metairie, LA.

and/or on the person or persons of:

Kyira J. Glover DOB:01/22/1992, Crystal Wallace (AKA Crystal Achata) DOB: 07/19/1989 and anyone else located in the home at the time of the search warrant execution.

the following described personal property, to wit:

Controlled substances as defined by KRS 218A specifically, but not limited to, heroin, crystal methamphetamine, notes, letters, documents, recordings, records, cellular telephones, computers, data storage devices, safes, firearms, monies, and or any drug paraphernalia which tend to indicate the illegal possession of, illegal use of and/or the illegal trafficking in a controlled substance as defined by KRS 218A.

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate boxes):

☐ stolen or embezzled property;

☐ property or things used as the means of committing a crime;

☐ property or things in the possession of a person who intends to use it as a means of committing a crime;

☐ property or things in the possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;



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Affidavit for Search Warrant

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property of things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime;

Other:

Affiant has been an officer in the aforementioned agency for a period of 6 years and 8 months and has a total of 17 years of law enforcement experience. The information and observations contained herein were received and made in his/her capacity as an officer thereof.

On the 20 day of June, 2019, at approximately 1040 hours, affiant received information from/observed:

While your affiant was assisting Frankfort Police Department on an unrelated incident, I received a tip from a subject whom wanted to remain anonymous but told me that they heard about a recent arrest of Leonard J. Glover for drug trafficking. The tipster told me that KJ Glover had taken over the business of selling methamphetamine and heroin for Leonard J. Glover. The tipster went on to advise me that they thought the two of them were brothers and that they were from Detroit.

Your affiant is familiar with both Leonard "LJ" Glover and Kyira "KJ" Glover through numerous drug trafficking complaints and investigations on both subjects in Franklin County. I would be able to recognize either subject on sight. I have arrested them both for drug trafficking offenses in Franklin County.

Previous to this information your affiant had located a Nissan Titan truck and a Toyota Camry that I personally know belong to Crystal Achata AKA Crystal Wallace, the live-in girlfriend of Kyira Glover. The vehicles were parked at 1085 Green Wilson Road in Frankfort, Ky. I was also able to find a citation that Glover received while driving the white Camry on May 11, 2019 at 0229 hours in Frankfort, Ky. Glover was arrested or driving under the influence, operating on suspended license and speeding. The citation was issued by D. Quire of the Frankfort City Police. Further, I found that Crystal Wallace had a reported address on her driver's license as 1085 Green Wilson Road #3 in Frankfort, Ky. Your affiant knows that Crystal Wallace-Achata and Glover are in a long term relationship because on or about March 2, 2018 your affiant served a search warrant at 1309 Powhattan Trail in Frankfort, Ky. This apartment was being shared by both Glover and Wallace. During the search warrant, evidence of drug trafficking was obtained. Wallace admitted to me that Glover use her apartment to sell and store heroin. Wallace-Achata went as far as to show me where Glover stored heroin in a wall plug in their living room.

June 20, 2019 at approximately 1300 hours your affiant found that Glover had an active arrest warrant for him for a felon in possession of handgun and possession of marijuana in Franklin Circuit Case 17-CR-00473. Your affiant also assisted in this 2017 arrest as well.

June 29, 2019 at approximately 1700 hours Deputy Wilburn was able to drive by the residence at 1085 Green Wilson Road and get a plate number off a vehicle parked there. The vehicle appeared to be a rental car and had a Louisiana license plate on it. The license plate information was gathered and a records check was conducted. It was found that the vehicle was owned by EAN Holdings, otherwise known as Enterprise Rental Car. The vehicle was rented by Edgar Pulliam of Frankfort, Ky. Pulliam lives at 116 Ravenwood Drive which is in a nearby neighborhood from 1085 Green Wilson. The rental agreement specifically lists Crystal Achata as an insured driver of the vehicle. Achata is known to your affiant as being a long term, live-in girlfriend of Glover.

Based on your affiant's training and experience in narcotics investigations, it is very common for drug traffickers to rent vehicles in other persons' name(s) in order to use the vehicle during clandestine operations concerning illegal sale of narcotics.

June 30, 2019 at approximately 1055 hours your affiant was able to establish surveillance on the residence and I observed a black male wearing light colored clothing that very clearly appeared to be Kyira J. Glover drive into the parking lot in the blue 2019 Hyundai passenger car. The car backed into the spot normally utilized by Crystal Wallace. The black male subject got out of the vehicle and walked up the stairs and went inside the residence numbered as 3.

June 30, 2019 at 1550 a Ky Courtnet was conducted on Kyira J Glover. Your affiant found that in addition to the case in which there is a warrant for his arrest, Glover had plead guilty to attempted trafficking in a controlled substance 2nd



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Affidavit for Search Warrant

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or greater offense of less than 4 grams of cocaine, and possession of drug paraphernalia in Franklin District case number 18-F-00153. Glover also pled guilty to trafficking in less than 4 grams of cocaine, trafficking in less than 2 grams of heroin, trafficking in controlled substance 3rd degree, trafficking in marijuana less than 8 ounces, and possession of drug paraphernalia in Fayette Circuit Case number 16-CR-00003. In 2013 Glover pled guilty to possession of controlled substance 1st degree of heroin in Mercer County case 13-CR-00101. Again, Glover pled guilty in 2013 in Franklin Circuit Case number 13-CR-00156 for two counts of trafficking in controlled substance 1st degree less than 2 grams of heroin.

July 1, 2019 at approximately 0915 hours your affiant observed the 2019 Hyundai rental car arrive back at 1085 Green Wilson Road. A black male wearing white clothing got out of the driver's seat and went inside 1085 Green Wilson Road #3. This black male was identifiable by your affiant as being Kyira "KJ" Glover.

saw 3 transactions this morning

Based on all information received and the investigation conducted by the affiant, the affiant believes that evidence of narcotics use, possession or trafficking will be located upon the search of 1085 Green Wilson Road #3 Frankfort, Ky. 40601. Also, your affiant believes that a search of this residence will lead to the apprehension of Kyira J Glover and the execution of his outstanding arrest warrants in Franklin County.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a Search Warrant, based on the aforementioned facts, information and circumstances and prays a Search Warrant be issued, that the property (or any part thereof) be seized and brought before any court and/or retained subject to order of said court.

Officer

Subscribed and sworn to before me in my presence via oral communication on this the 15th day of July, 2019, at a.m. p.m.

Judge or Official authorized to administer oaths pursuant to RCr 2.02 for the swearing of Complaints

Franklin Circuit Ct
Title (If a Notary Public, my Commission expires):

Affidavit

tabbies

B

On July 1, 2019, around 5:00 a.m., I drove a blue 2019 Hyundai Elantra rental car to work at the Toyota Factory in Georgetown. My shift started at 5:45 a.m. and ended at 1:35 p.m. The car did not move at all during the entire time that I was at the factory for my shift. There is no possible way that Kyira Glover could have driven my car from 4:40 a.m. to 2:15 p.m. on July 1, 2019. Kyira Glover never once got inside the 2019 Hyundai Elantra rental car while I was in possession of it.

When Officer Farmer searched my residence on March 2, 2018, I did not make any statements that Kyira Glover uses my apartment to sell and store heroin.

Kyira Glover was not my live-in boyfriend around the date of July 1, 2019. Kyira Glover and I have never had a relationship.

I, Crystal R Wallace, personally appeared before the undersigned notary public, and make the above statement under oath or affirmation.

Crystal R Wallace
Signature of Affiant

Date: 8/27/19

Subscribed and sworn to before me this 27th day of August, 2019.

Summer Clark
Signature

Notary Public #623223
Title

My Commission Expires: 05/13/23

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CASE NO. _____
FILED ELECTRONICALLY

TRAVIS CURTSINGER

PLAINTIFF

v.

VERIFIED COMPLAINT

THE CITY OF FRANKFORT

DEFENDANT

Serve: Mayor William May
The City of Frankfort
315 West Second Street
Frankfort, Kentucky 40601

* * * * *

The Plaintiff, Travis Curtsinger, by counsel, for his Verified Complaint against Defendant,
states the following:

PARTIES AND JURISDICTION

1. Plaintiff, Travis Curtsinger was at all times relevant hereto, an individual residing in Franklin County, Kentucky, and was employed as a Police Officer with the Frankfort Police Department for the City of Frankfort.
2. Defendant, the City of Frankfort, through the Frankfort Police Department, was Plaintiff's employer.
3. Jurisdiction and venue are proper in this Court as the amount in controversy exceeds the jurisdictional minimums of this Court, and the events described herein took place in Franklin County, Kentucky.

FACTS

4. Plaintiff, Travis Curtsinger (hereafter “Curtsinger”) is a Sergeant in the Frankfort Police Department and has served the City of Frankfort for approximately fourteen (14) years.

5. On or about August 4, 2016, Plaintiff Curtsinger responded to Detective Jeff Farmer’s, of the Franklin County Sherriff’s Department, radio request for assistance in performing a traffic stop.

6. On or about August 4, 2016, Lieutenant Aubrey, Plaintiff’s superior officer, sent Plaintiff a message on his onboard computer instructing Plaintiff not to stop the vehicle in question without independent probable cause to do so.

7. Lieutenant Aubrey later told Plaintiff Curtsinger that he should have driven the other way when the Sheriff’s deputy asked for assistance.

8. On or about August 4, 2016, Plaintiff Curtsinger provided assistance to Detective Farmer with the traffic stop by being present in a marked police cruiser while Detective Farmer conducted the traffic stop in an unmarked car and while wearing plain clothes.

9. Plaintiff Curtsinger quickly cleared the scene shortly after the traffic stop was effectuated.

10. On or about August 4, 2016, after the above incident occurred, Lieutenant Aubrey verbally reprimanded Plaintiff Curtsinger for providing assistance to the Franklin County Sherriff’s Department.

11. Plaintiff Curtsinger recorded the conversation with Lieutenant Aubrey on his phone.

12. On or about August 4, 2016, Plaintiff Curtsinger met with Commonwealth’s Attorney, Larry Cleveland, and Assistant Commonwealth Attorney, Zach Becker, and informed

them that he was instructed by his superior officer not to provide assistance to the Franklin County Sheriff's Department and that he was verbally reprimanded for doing so.

13. At that meeting, Plaintiff Curtsinger disclosed information by allowing the prosecutors to listen to the audio recording of the conversation between Plaintiff Curtsinger and Lieutenant Aubrey.

14. On or about August 5, 2016, the Commonwealth Attorney's Office issued a Grand Jury Subpoena on the Frankfort Police Department seeking copies of the in-car audio of Plaintiff Curtsinger's police cruiser and the MDT messages from the onboard computer, which contained communications between Plaintiff and Lieutenant Aubrey referenced above.

15. On or about August 22, 2016, Plaintiff Curtsinger received a Notice of Pre-Disciplinary Action for recording the conversation he had with Lieutenant Aubrey on his phone without her knowledge.

16. On or about August 28, 2016, Plaintiff Curtsinger was allowed to view his mid-year evaluation that was conducted by Lieutenant Aubrey for the first time.

17. In August of 2016, Plaintiff Curtsinger expressed concerns about the potential of being retaliated against for disclosing the audio recording and information regarding Lieutenant Aubrey to the Commonwealth's Attorney's Office to Captain Adams of the Frankfort Police Department.

18. During that same conversation in August, Plaintiff Curtsinger requested to be transferred to the night-shift so that he would no longer be under the direct supervision of Lieutenant Aubrey.

19. Chief Abrams denied Plaintiff Curtsinger's request to be transferred.

20. On September 19, 2016, Plaintiff Curtsinger reported instances of retaliation he was experiencing to Captain Adams in a phone conversation.

21. During the conversation, Captain Adams stated to Plaintiff Curtsinger that Plaintiff obviously did not understand what Plaintiff Curtsinger had put Lieutenant Aubrey through as a result of disclosing Plaintiff's and Aubrey's conversation to the Commonwealth's Attorney's Office.

22. Captain Adams went on to state that Plaintiff Curtsinger had made a mistake because Lieutenant Aubrey potentially faced criminal charges as a result of the disclosure.

23. Captain Adams also stated that Plaintiff Curtsinger would have to wait to be transferred to a different shift until a bid was open, and that he would have to do what Lieutenant Aubrey said to do until then.

24. In January of 2017, Plaintiff Curtsinger was transferred to the night-shift as a result of Plaintiff Curtsinger's bid for that position to get out from under Lieutenant Aubrey's supervision.

25. In April of 2017, Lieutenant Aubrey conducted a yearly evaluation of Plaintiff Curtsinger's performance and gave him the lowest score in the department, an eleven (11).

26. As a result, Plaintiff Curtsinger cannot maintain seniority pay.

27. On April 21, 2017, Plaintiff Curtsinger filed a grievance within the Frankfort Police Department for the poor performance evaluation and the retaliation he had experienced after making a protected disclosure earlier in the year.

28. On May 2, 2017, Captain Hopkins of the Frankfort Police Department denied Plaintiff's grievance.

29. On May 9, 2017, Major Warfel of the Frankfort Police Department denied Plaintiff's grievance.

30. On May 12, 2017, Chief Abrams of the Frankfort Police Department denied Plaintiff's grievance.

31. On June 13, 2017, the City of Frankfort Board of Commissioners voted not to conduct a hearing regarding Plaintiff Curtsinger's grievance.

COUNT I
REPRISAL AGAINST PUBLIC EMPLOYEE
Frankfort Code of Ordinances § 39.26, *et seq.*

34. Plaintiff incorporates each and every allegation set forth in the paragraphs above as if fully stated herein.

35. Defendant's actions against Plaintiff resulted in injuries pursuant to § 39.26, *et seq.*, which provides, generally, protections from reprisal and/or retaliation to public employees who, in good faith, reports any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety.

36. Plaintiff Curtsinger was at all times relevant hereto an "employee" within the scope of the definition set forth in the Frankfort Code of Ordinances § 39.25.

37. During his employment by Defendant, Plaintiff made a good faith report of facts and information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, and/or a substantial and specific danger to public health or safety by his report and disclosure to the Franklin County Commonwealth's Attorney's Office regarding Lieutenant Aubrey's statements to him.

38. Plaintiff's report and disclosures were a contributing factor in the retaliation and reprisal in the form of adverse employment actions and reduction in seniority pay.

39. The aforementioned conduct of the Defendant was committed in violation of the Frankfort City Ordinance § 39.26, *et seq.*

40. As a direct and proximate result of the aforementioned conduct, Plaintiff has suffered wage loss.

WHEREFORE, the Plaintiff, Travis Curtsinger, demands the following:

1. That he be awarded general and compensatory damages, including prejudgment interest, in an amount according to proof at trial;
2. For injunctive relief;
3. That he be awarded punitive damages in an amount according to proof at trial;
4. For his costs herein incurred, including his reasonable attorney's fees;
5. For a trial by jury on all issues so triable; and
6. For such other relief as he may appear entitled.

Respectfully submitted,

/s/ Thomas E. Clay
THOMAS E. CLAY, P.S.C.
CLAY DANIEL WALTON & ADAMS PLC
101 Meidinger Tower
462 South Fourth Street
Louisville, KY 40202
Counsel for Plaintiff

VERIFICATION


I, Travis Curtsinger, state that I have read the foregoing Verified Complaint and the statements contained therein are true to the best of my knowledge and belief.

Travis Curtsinger
Travis Curtsinger

COMMONWEALTH OF KENTUCKY)
) ss:
COUNTY OF JEFFERSON)

SUBSCRIBED AND SWORN TO before me by Travis Curtsinger this 12th day of July 2017.

My commission expires: 12/1/18



Notary Public, State-at-Large, Kentucky