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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000673-MR

JEREMY SMITH

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT  
HON. BRIAN WIGGINS, JUDGE  
ACTION NO. 16-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2016-CA-000674-MR

DARRELL HANDLEY

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT  
HON. BRIAN WIGGINS, JUDGE  
ACTION NO. 16-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: Jeremy Smith and Darrell Handley appeal from their judgments and five-year sentences of imprisonment entered by the McLean Circuit Court on April 22, 2016. Smith and Handley were arrested following a police investigation into methamphetamine trafficking in McLean County, Kentucky. Following the circuit court's denial of a joint motion to suppress, the appellants entered conditional guilty pleas, reserving the right to appeal their suppression issues. After careful review of the record, we affirm.

On the morning of December 2, 2015, Detective Troy Gibson of the Pennyriple Narcotics Task Force was contacted by a confidential informant ("CI"). Detective Gibson had worked with this CI several times over the previous two years and had found her to be reliable. On this occasion, the CI related that she had been in contact with a woman named "Sara," who was willing to sell a quantity of methamphetamine valued at approximately \$150 to \$200. Detective Gibson instructed the CI to set up a transaction with Sara and to maintain contact with him. Over the course of that morning, the CI kept Detective Gibson apprised of the situation by cellphone conversations and text messages. The CI also provided Detective Gibson copies of the text messages she had exchanged with Sara. Later that morning, the CI notified Detective Gibson of the particulars regarding the impending drug transaction. The CI had arranged to meet Sara that

same day in the back seat of a maroon van which would be parked behind the Dairy Freeze restaurant in Island, Kentucky.

In the meantime, Detective Gibson contacted Chief Deputy Fred Coomes, of the McLean County Sheriff's Office, requesting assistance regarding a possible drug transaction. Deputy Coomes offered the assistance of himself and Deputy Roush. At some point between 11:00 a.m. and 12:00 p.m., the CI informed Detective Gibson that the maroon van was in the designated location. Detective Gibson asked the deputies to drive by and verify the information. The deputies confirmed the presence of a maroon van parked behind the Dairy Freeze. Detective Gibson then asked the deputies to "make contact" with the van and told them he was on his way.

Both deputies activated the lights on their cruisers as they pulled into the parking lot. Deputy Coomes placed his cruiser in front of the van, while Deputy Roush parked to the side of the vehicle. As he pulled in front of the van, Deputy Coomes observed the driver's eyes grow wide, then the driver dropped his right hand to the gear shift of the vehicle. Deputy Coomes believed the driver, later identified as Handley, was preparing to flee or ram his cruiser. Deputy Coomes drew his service weapon and told the driver to show his hands. The deputies ordered the driver and front seat passenger, later identified as Smith, to exit the van. The deputies also found a third person, a woman, sitting in the back seat. Deputy Coomes performed a patdown search of Handley and felt a hard object in Handley's side pocket, which he believed could be a weapon. The deputy

removed the object, a set of digital scales. Deputy Coomes detained Handley, placing him the back of his cruiser, then proceeded to assist Deputy Roush.

In the meantime, Detective Gibson had arrived and performed a patdown of Smith. He felt a hard, round object in Smith's front pants pocket and removed it. Detective Gibson would testify later that, prior to its removal, he could not identify the item. Upon its removal, the detective discovered a pill bottle containing a quantity of methamphetamine. Detective Gibson then questioned the third person in the van, who identified herself as Sara Willyard. Sara said she was there to help a friend and granted the detective access to her cellphone. Text messages sent from the cellphone identified her as the "Sara" who had been in contact with Detective Gibson's informant earlier that day.

At some point after discovering the digital scales, Deputy Coomes contacted dispatch regarding Handley and discovered Handley had an outstanding arrest warrant. However, Detective Gibson did not check for outstanding warrants on Smith because he thought it was unnecessary; he discovered methamphetamine during Smith's patdown, which he believed gave him probable cause to arrest. Several days after the incident, Detective Gibson learned there may have been an outstanding warrant for Smith's arrest as well.

Upon securing the three suspects, the officers searched the van and recovered a marijuana grinder from the glove box in the front passenger compartment. The officers performed a more thorough search of Handley at the scene and found three plastic bags of methamphetamine in his sock. All three

individuals were arrested as a result of the incident. Following his arrest, Smith was booked into the detention center where officers discovered another two bags of methamphetamine on his person.

Relevant to this appeal, the McLean County grand jury thereafter indicted Smith and Handley on the following charges: first-degree trafficking in a controlled substance; possession of drug paraphernalia; and for being first-degree persistent felony offenders (PFO). Smith faced an additional charge for first-degree possession of a controlled substance. The appellants filed a joint motion to suppress evidence as the fruit of an unlawful search, alleging that the officers lacked reasonable suspicion to stop the maroon van and improperly conducted their subsequent patdown searches. Following a hearing, the circuit court denied the suppression motion in a written order entered March 28, 2016.

Smith and Handley thereafter negotiated conditional guilty pleas with the Commonwealth, reserving the right to appeal their suppression issues. Under the negotiated pleas, identical for each appellant, the PFOs would be amended from first-degree to second-degree, and the appellants would each receive a concurrent sentence of four years' imprisonment on all charges, enhanced to five years by the PFO. The McLean Circuit Court entered final judgment pursuant to this plea agreement on April 22, 2016. This appeal follows.

The appellants' issues on appeal stem from the denial of their joint motion to suppress evidence as the result of an unlawful search.

In reviewing a trial court's ruling on a suppression motion, an appellate court must first determine if the trial court's factual findings are not clearly erroneous and are supported by substantial evidence. . . . A *de novo* review of the trial court's application of the law to the facts completes the analysis.

*Frazier v. Commonwealth*, 406 S.W.3d 448, 452-53 (Ky. 2013) (citations omitted).

As a preliminary matter, the Commonwealth urges this Court to adopt the holding of *State v. Walker-Stokes*, 903 N.E.2d 1277 (Ohio Ct. App. 2008), and find the appellants to be without standing to contest the search of their persons, because Smith and Handley had outstanding arrest warrants. In *Walker-Stokes*, the Court of Appeals of Ohio held that because “an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth Amendment protects, the exclusionary rule does not apply to a search and seizure of the subject that would otherwise be illegal because of a *Terry* violation.” *Id.* at 1282-83. However, “any question regarding a lack of standing is waived if not timely pled.” *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010) (footnote omitted). The Commonwealth does not identify where it addressed this issue before the circuit court and we did not find this argument in our examination of the record. We therefore find the standing issue to be waived and we need not consider it here.

Smith and Handley argue two core issues on appeal. The appellants first contend the evidence should have been suppressed because the officers lacked reasonable suspicion to stop the vehicle. Second, the appellants allege the

subsequent patdowns of Smith and Handley were not lawful frisks for weapons permitted under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny. The appellants contend these errors amounted to a violation of the constitutional protections against unreasonable search and seizure found in the Fourth Amendment of the United States Constitution, as well as in Section Ten of the Kentucky Constitution. Furthermore, the appellants assert the Commonwealth should not have been permitted to use any evidence obtained by a violation of their Fourth Amendment rights pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In its order denying the motion to suppress, the circuit court found the initial detention of the van and its occupants was justified, but the patdown and removal of contraband from the appellants violated their Fourth Amendment rights. However, the court also found the contraband would have been inevitably discovered because Handley would have been arrested in any event based on the outstanding warrant. The Commonwealth disagrees with the circuit court's findings regarding the patdown, but otherwise asks this Court to affirm.

The appellants first argue the investigatory stop of their vehicle was not justified. "In order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring." *Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky. 2004) (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979)). "The objective justification for the officer's actions must be measured in

light of the totality of the circumstances.” *Greene v. Commonwealth*, 244 S.W.3d 128, 133 (Ky. App. 2008) (citations omitted). Smith and Handley contend the tip from Detective Gibson’s confidential informant did not provide adequate indicia of reliability regarding the planned drug transaction. The appellants point out the text messages from Sara, forwarded by the CI to Detective Gibson, do not mention narcotics, an exchange, a purchase amount, or a time to meet. Nor did the CI inform Detective Gibson that anyone other than Sara would be inside the maroon van. Smith and Handley claim the total information presented here did not amount to sufficient reasonable suspicion justifying the stop.

The circuit court, however, found the police lawfully detained the appellants’ vehicle. We agree. The CI informed Detective Gibson in cellphone conversations, not just forwarded text messages, indicating Sara was willing to exchange drugs for money. The CI provided specific information about the location and description of the vehicle in which Sara would make the transaction. Despite the appellants’ argument to the contrary, the CI also provided an accurate description of the time of the meeting, by indicating *when* the vehicle would be at the agreed-upon location. Deputy Coomes corroborated this information when he verified a vehicle matching the description was parked at the named location at the given time. Quoting *Taylor v. Commonwealth*, the circuit court found there was enough information to justify an investigatory stop of the vehicle because police had “a reasonable articulable suspicion that the persons in the vehicle are, *or are*



*about to become involved in criminal activity.*” 987 S.W.2d 302, 305 (Ky. 1998) (emphasis added by circuit court).

In addition, the circuit court recognized that the CI was a known and reliable informant. This is an important distinction from cases in which an *anonymous* informant provides information leading to an investigatory stop:

Complications arise when . . . the information serving as the sole basis of the officer’s suspicion is provided by an anonymous informant, whose veracity, reputation, and basis of knowledge cannot be readily assessed. In situations such as these, we are required to examine the totality of the circumstances, and to determine whether the tip, once suitably corroborated, provides sufficient indicia of reliability to justify an investigatory stop.

*Collins*, 142 S.W.3d at 115 (citation omitted). “In cases involving identifiable informants who could be subject to criminal liability if it is discovered that the tip is unfounded or fabricated, such tips are entitled to a greater ‘presumption of reliability’ as opposed to the tips of unknown ‘anonymous’ informants (who theoretically have ‘nothing to lose’).” *Commonwealth v. Kelly*, 180 S.W.3d 474, 477 (Ky. 2005) (citations omitted). Here, police received information from a known, reliable informant regarding an imminent criminal act. Deputy Coomes corroborated the information provided by the CI, observing the described vehicle at the time and place given for the transaction. We find no error in the trial court’s determination that reasonable suspicion justified an investigatory stop of the vehicle.

The appellants' second set of issues stem from the patdown of their persons following the investigatory stop of the vehicle. "*Terry* [*v. Ohio*] authorized only a limited pat-down search of the person for purposes of uncovering potential weapons regardless of probable cause." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538 (Ky. App. 2003) (footnote omitted). Police are permitted to recover other contraband, under the "plain feel" rule, if its incriminating character is immediately apparent during the patdown. *Minnesota v. Dickerson*, 508 U.S. 366, 375 113 S.Ct. 2130, 2136-37, 124 L.Ed.2d 334 (1993); accord *Commonwealth v. Crowder*, 884 S.W.2d 649, 651 (Ky. 1994). Upon determining a suspect's pocket does not contain a weapon, an "officer [has] no basis for a continued exploration of the pocket." *Crowder*, 884 S.W.2d at 652. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Dickerson*, 508 U.S. at 373, 113 S.Ct. at 2136 (citation omitted).

Based on these principles, the circuit court correctly found the patdown of Smith to have been in violation of his Fourth Amendment rights. Detective Gibson admitted on cross-examination that he did not know what the object in Smith's pocket was until he removed it. The item's incriminating character could not have been "immediately apparent" if the detective did not know what the object was prior to its removal. Removing the pill bottle from Smith's pocket was therefore not authorized under the plain feel rule.

Handley's patdown presents a more difficult question. Deputy Coomes testified he felt a hard object in Handley's pocket and he believed the object could be a weapon. He then removed a set of digital scales from Handley's pocket. Quoting *Commonwealth v. Whitmore*, 92 S.W.3d 76, 80 (Ky. 2002), the circuit court found this removal to be unreasonable, as in Smith's patdown, because "nonthreatening contraband [must be] immediately apparent from a sense of touch."

At this point, however, we must distinguish Smith's case from Handley's based on the facts. In Smith's patdown, the investigating officer did not have any idea what the object may have been, whereas in Handley's patdown, the investigating officer believed the object could be a weapon. Federal court analysis of the issue is appropriate here, because "Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." *Chavies v. Commonwealth*, 354 S.W.3d 103, 107 (Ky. 2011) (citation and internal quotation marks omitted). "Seizure of items during a patdown is warranted if the officer reasonably believe[s] that the [concealed item] could be a weapon." *United States v. Garcia*, 496 F.3d 495, 505 (6th Cir. 2007) (citation and internal quotation marks omitted). In *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), a police officer felt a bulge in the defendant's pocket, which the officer believed could be a weapon. When the officer removed the items making up the bulge, he instead discovered cocaine and money inside a money clip. Nonetheless, the Sixth Circuit found the officer's removal of the items proper because the size and rigidity of the

bulge gave the officer a reasonable belief regarding the possibility of a weapon.

*Id.* at 158.

In the case *sub judice*, Handley's patdown resembles the situation in *Strahan*. The size and rigidity of the digital scales could reasonably indicate to an investigating officer that he may be dealing with a potential weapon. The circuit court properly articulated the plain feel rule, that *nonthreatening* contraband must be immediately apparent, but then improperly applied the "immediately apparent" requirement to an item perceived to be a potential threat. Handley's patdown did not violate his Fourth Amendment rights. Nonetheless, our disagreement with the circuit court on this point does not change the result.

Even though the circuit court erroneously found a Fourth Amendment violation in Handley's patdown, the circuit court also found the contraband in this case would have been inevitably discovered. We agree. "Under the inevitable discovery rule, it is permissible to admit evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means." *Carter v. Commonwealth*, 449 S.W.3d 771, 776 (Ky. App. 2014) (citations and internal quotation marks omitted). "The rationale behind the rule is that it does not put the police in a better position than they would have been absent the error, but only puts them in the same position as if there had been no unlawful search." *Commonwealth v. Elliott*, 714 S.W.2d 494, 496 (Ky. App. 1986) (citing *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387 (1984)); *see also Hughes v. Commonwealth*, 87 S.W.3d

850, 853 (Ky. 2002) (“[T]he prosecution should not be put in a worse position than if no police error or misconduct had occurred.”).

Here, even if we assume both patdowns of Smith and Handley were violative of their Fourth Amendment rights, Deputy Coomes testified he ran a check of Handley’s information at the scene and learned he had an outstanding bench warrant. Handley would have been arrested based upon the warrant and officers would thereafter conduct a search incident to arrest. A search incident to arrest is an exception to the warrant requirement. *McCloud v. Commonwealth*, 286 S.W.3d 780, 785 (Ky. 2009). This search would have revealed the digital scales in his pocket and the plastic bags of methamphetamine in his sock.

The circuit court found that the deputy’s discovery of the scale and methamphetamine, combined with the information provided by the CI, would have given probable cause to also charge Handley with felony drug trafficking. Deputy Coomes would then have had the authority to search the passenger compartment of the maroon van for further evidence of drug trafficking. “[P]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest.*” *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 351, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009) (emphasis added and internal quotation marks and footnote omitted). Our courts have repeatedly applied this second part of *Gant*’s holding to cases in which drugs are discovered on a suspect. *See, e.g., Robbins v. Commonwealth*, 336 S.W.3d 60

(Ky. 2011); *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009); and *McCloud*, *supra*. The circuit court's reasoning on this point is sound.

Following a search of the maroon van pursuant to *Gant*, the circuit court found that officers would have discovered the marijuana grinder in the glove compartment, "an area within Smith's immediate vicinity and control." We infer from the court's language that, at this point, the deputy would have probable cause to arrest Smith for constructive possession of drug paraphernalia. We agree. An officer may arrest a vehicle's passenger for constructive possession of drug paraphernalia found in an area within his immediate control, particularly when the officer can make a reasonable inference that the vehicle's occupants were engaged in a common enterprise. *Commonwealth v. Mobley*, 160 S.W.3d 783, 787 (Ky. 2005).

Additionally, the circuit court found it significant that Smith also had an outstanding warrant for his arrest at the time of this incident. Detective Gibson testified if he did not already have probable cause to arrest Smith, he would have performed a check for outstanding warrants. This would have provided yet another basis for Smith's arrest. A search incident to arrest would have then revealed the methamphetamine on his person. We agree with the circuit court's finding that inevitable discovery applies to the evidence in this case. We find no error in the circuit court's denial of the joint motion to suppress.

For the foregoing reasons, we affirm the McLean Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT  
JEREMY SMITH:

Julia K. Pearson  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEFS FOR APPELLANT  
DARRELL HANDLEY:

Shannon Dupree  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

James Havey  
Assistant Attorney General  
Frankfort, Kentucky