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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001499-MR

BRANDON SPANN — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 11-CR-00173

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Brandon Spann appeals from the circuit court's denial of his motion to suppress the evidence and the corresponding conditional guilty plea to possession of a controlled substance in the first degree, promoting contraband in the first degree, and possession of drug paraphernalia. He was sentenced to two years' imprisonment, two years' imprisonment, and six months' imprisonment

respectively for the offenses. All sentences were ordered to run concurrently and probated with conditions. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this matter were testified to at an evidentiary hearing on Spann's motion to suppress the evidence on December 8, 2011. Chief Deputy Ramage and Deputy Halsell of the Graves County Sheriff's Department went to a residence owned by Mr. Toomes looking for a third party. They contacted an unknown person at the residence, and the officers concluded that the unknown person lived there (hereinafter "Bernard)."[1] The officers based their conclusion on the fact that Bernard's demeanor appeared proper, and that he was washing dishes at the time. From the name he gave the officers they could find no criminal record. The officers left the residence feeling reasonably comfortable that he had permission to be there. However, within the hour the officers received a call that the residence was being burglarized. A neighbor had seen three individuals trying to enter the home.

The officers returned to the residence and found Bernard there with three additional people in the house. Bernard said that David Nemish was in the bathroom. Nemish is Toomes's grandson and was known to the officers. From the doorway Chief Deputy Ramage could see the other two persons, later identified as Karen Johnson and Spann, sitting on a couch in the living room. Bernard claimed that he did not know Spann and Johnson but he did know Nemish. Chief Deputy

[1] At the hearing, neither officer could remember this person's name; thus, for purposes of this opinion we have referred to him as Bernard.

Ramage kept talking to Bernard and Bernard invited him into the house. Ramage got on the radio and called Halsell to come to the front of the house.

The officers went into the house. Ramage went down the hall toward the bathroom to see if Nemish was really the person in the bathroom. Halsell stayed in the living room and questioned the man and woman on the couch. Halsell obtained identification from the man and woman and checked their background information through the Kentucky State Police database. The background check disclosed that Spann had a prior burglary in the first degree charge that involved a weapon and Johnson had previously been charged with a carrying concealed weapon violation. The two kept moving around, were nervous and "acted squirrely." Halsell believed them to be under the influence of some substance.

Halsell then conducted a pat down for weapons on Spann and Johnson. Halsell did not find anything during the frisk for weapons; nevertheless, he proceeded to handcuff both Spann and Johnson. Thereafter, Ramage and another deputy, Workman, arrived and searched the couch where Johnson and Spann had been sitting. This revealed a glass pipe that appeared to contain residue from a controlled substance. Neither Spann nor Johnson claimed possession of the pipe. Bernard also denied ownership of the pipe. Nemish came out of the bathroom at that time and declined ownership of the pipe as well.

The owner of the house, Toomes, arrived. Toomes told the deputies that his grandson had permission to be in his house. Toomes believed that Spann

and Johnson were with his grandson. Spann and Johnson were arrested and taken to jail.

As Spann was booked into jail, he was searched and a small bag containing four grams of methamphetamines was found hidden between the inner and outer part of his jacket.

Spann was indicted by the Graves County Grand Jury and charged with possession of a controlled substance in the first degree, first offense; promoting contraband in the first degree; possession of drug paraphernalia; and persistent felony offender in the second degree. He moved to suppress the evidence, alleging that the police had determined that the report of the burglary was incorrect, that the search of his person and the area around him was without probable cause and in violation of his constitutional rights.

The court made the following findings:

> In looking at the facts presented to the Court, it appears that the officers were satisfied upon their first visit that the resident was entitled to be there. However, their suspicions were heightened when within a relatively short time, they received a call indicating that a burglary was taking place. They were obligated to return to the premises and investigate that report. The only basis for them being satisfied at the time of their first trip was the resident's demeanor, and the fact that the name he gave did not show a criminal record, and that he appeared to be washing dishes. Those facts alone did not mean he was not a burglar, and it was only reasonable that the officers would make a further investigation. They were invited in by the resident they had initially met, and either he was properly entitled to be there and could give them permission to be there or he was indeed a burglar so the original entry would be proper. The question then

> becomes did they have the right to pat down the Defendant and examine the couch. The officers wanted more information to indicate that the parties were properly in the house. Something less than a copy of a deed, or a lease, or written permission from the owner would have been acceptable to them. Since they knew Mr. Nemish and he was the owner's grandson, his verification of the fact would have been acceptable. However, they had to wait for him to emerge from the bathroom before their investigation could be completed. They were entitled to do a *Terry* [2] frisk. It is done only for the purpose of locating a potential weapon, and only where there is a reasonable suspicion that there might be a weapon. Both persons frisked had previously had a weapons charge. They both were under the influence of some substance and were acting strangely. Pursuant to *Terry,* they have a right to search the area where individuals are located, *Iberra Miranda v. Commonwealth,* 2005 WL 791176 (Ky.App.). Even if the individuals were handcuffed, had they been able to access a handgun, the results, although they might not have been accurate, would have certainly been more interesting.

Trial court's order denying the motion to suppress December 14, 2011.

It is from this order that Spann now appeals.

On appeal Spann argues that the court erred in denying his motion to suppress as: (1) there was an unlawful entry into Charles Toomes's house; (2) there was an unlawful detention of Spann; (3) the police conducted an unlawful *Terry* frisk of Spann and the search of the couch; and (4) the arrest was unlawful following the search of the couch.

In response, the Commonwealth argues the trial court properly denied Spann's motion to suppress because: (1) the deputies were invited inside the

[2] *Terry V. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Toomes residence; (2) checking Spann's identification was not unlawful detention; (3) the *Terry* frisk and search of the couch were lawful; and (4) the arrest was proper.[3] With these arguments in mind we turn to the applicable standard of review.

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[3] The Commonwealth additionally argues that Spann's claim of an illegal arrest was not presented to the court below and, thus, is not preserved for our review. We believe that this argument was not preserved below and duly note that Spann has requested palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26. The Commonwealth argues that if we reviewed this unpreserved matter, the arrest was proper given Spann's constructive possession of the drug paraphernalia. We shall review this claimed error under RCr 10.26, which states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Thus, under RCr 10.26, we may grant relief for an unpreserved error only when the error is: (1) palpable; (2) affects the substantial rights of a party; and (3) has caused a manifest injustice. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). "Manifest injustice" requires showing a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law, i.e., the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 3-4 (Ky. 2006).

Further refining the parameters of RCr 10.26, the Kentucky Supreme Court in *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006), undertook an analysis of what constitutes a palpable error:

> For an error to be palpable, it must be easily perceptible, plain, obvious and readily noticeable. A palpable error must involve prejudice more egregious than that occurring in reversible error. A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error. If not, the error cannot be palpable.

Id. at 349 (citations omitted).

For purposes of Kentucky Revised Statutes (KRS) Chapter 218A, "possession" includes constructive possession as well as actual possession. *Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998) ("Kentucky courts have continued to utilize the constructive possession concept to connect defendants to illegal drugs and contraband."); *Franklin v. Commonwealth*,

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial evidence, then they are conclusive. RCr 9.78; *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky. App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell,* 3 S.W.3d 747, 751 (Ky. App. 1999)). We review *de novo* the issue of whether the court's decision is correct as a

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490 S.W.2d 148, 150 (Ky. 1972) ("Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession. It may be constructive as well as actual."). "To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control." *Pate v. Commonwealth*, 134 S.W.3d 593, 598–599 (Ky. 2004) (citing *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (Ky. 2000) (*overruled on other grounds* by *Travis v. Commonwealth*, 327 S.W.3d 456, 458 (Ky. 2010), and *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky.1986)).

We have found the evidence presented by the Commonwealth on constructive possession to be questionable as to whether or not Spann had the dominion and control necessary for constructive possession. Further, our jurisprudence appears not to support the argument that the drug paraphernalia hidden in the couch is sufficient to constitute constructive possession given the facts *sub judice*. *See Hayes v. Commonwealth,* 175 S.W.3d 574, 590 (Ky. 2005) (discussing mere presence at the scene of a crime), and *McCloud v. Commonwealth*, 286 S.W.3d 780, 790 (Ky. 2009) (discussing the nexus required for constructive possession of a hidden handgun in furtherance of a drug offense). We do not believe this error to have been easily perceptible, plain, obvious, and readily noticeable; thus, the error is not palpable entitling Spann to reversal.

Certainly, had this argument been presented below, an interesting issue would have arisen given the interplay between that dominion and control necessary to establish constructive possession in contrast to the expectation of privacy necessary for the assertion of Fourth Amendment rights under our Constitution. While two different concepts, there is yet a common thread between the two.

Moreover, even if this error had been preserved, we are unsure whether the purpose of the exclusionary rule, i.e., to prevent police misconduct, would be furthered by excluding the evidence. *See Owens v. Commonwealth*, 291 S.W.3d 704, 711 (Ky. 2009)(discussing the purpose of the exclusionary rule).

matter of law. *Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky. App. 2000). With this in mind, we turn to the issues presented by the parties.

First, the parties disagree over whether the officers were properly invited into the home by Bernard. In *Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky. App. 2007), this Court discussed a warrantless entry into a person's home based on apparent authority:

> The Fourth Amendment of the United States Constitution generally prohibits warrantless entry into a person's home. However, an exception to the warrant requirement exists if valid consent has been obtained from a third party, generally one who shares common authority over the premises to be searched.
>
> > [D]etermination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises?
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> *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S.Ct. 2793, 2801, 111 L.Ed.2d 148 (1990), quoting *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). In analyzing the validity of a third-party consent, we must determine whether a police officer could reasonably believe from the context involved that the consenting party had common authority over the premises. *Commonwealth v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005). Good faith on the part of the officers may serve as a hedge against honest mistakes as to appearances.
>
> > The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though

> erroneously) believe they are in pursuit of a violent felon who is about to escape.
>
> *Rodriguez*, 497 U.S. at 186, 110 S.Ct. at 2800.

Perkins v. Commonwealth, 237 S.W.3d at 219.

We believe that *sub judice* a police officer could reasonably believe from the context involved that Bernard had common authority over the premises based on his multiple interactions with Bernard and his observations. Accordingly, we decline to reverse on this basis as we agree with the court below that the officers received consent to enter the residence.

Second, the parties present the issue of whether Spann was unlawfully detained when the officer requested his identification and subsequently ran this information through a state database, which resulted in the officer learning that Spann had a prior charge for burglary involving a weapon.

In *Commonwealth v. Sanders*, 332 S.W.3d 739, 740 (Ky. App. 2011), this Court addressed an arrest resulting from an officer's stop and demand for identification:

> The Supreme Court of the United States has discussed seizures for the purpose of identification in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). While probable cause of a suspect's participation in criminal activity is required for an arrest, the lesser standard of reasonable suspicion is a sufficient basis for a police officer to stop and question someone. *Id*. at 51, 2641. The Court also clarified the nature of a seizure, holding that it:
>
> > must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan

> embodying explicit, neutral limitations on the conduct of individual officers.
>
> *Id.* at 51, 2640. The Court concluded that "stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity" is not permitted by the Fourth Amendment. "When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." *Id*. at 52, 2641.

Commonwealth v. Sanders, 332 S.W.3d at 740.[4]

Ultimately, we do not believe that Spann is entitled to reversal on this basis because his arrest did not stem from the officer's request for identification.[5]

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[4] *Compare Botto v. Commonwealth*, 220 S.W.3d 282, 285-286 (Ky. App. 2006):

> In *United States v. Drayton*, 536 U.S. 194, 200, 122 S.Ct. 2105, 2110, 153 L.Ed.2d 242 (2002), the United States Supreme Court held that a law enforcement officer does not violate the Fourth Amendment's prohibition of unreasonable seizures "merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."
> ….
> The application of *Drayton* to the facts of this case is not an automatic *carte blanche* in support of the seizure issue.
>
> > Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage - provided they do not induce cooperation by coercive means. **If a reasonable person would feel free to terminate the encounter, then he or she has not been seized**. (Emphasis added.)
>
> *United States v. Drayton, supra*, 536 U.S. 194, 200–201, 122 S.Ct. 2105, 153 L.Ed.2d 242.

Botto v. Commonwealth, 220 S.W.3d at 285-286.

[5] We note that at this time Nemish had not emerged from the bathroom. It was reasonable for the officer to continue his investigation until the presence of Johnson and Spann in the house was determined to be lawful. Requesting identification from them was a logical progression of the investigation.

Therefore, we decline to address this matter further and instead turn our attention to the *Terry* frisk of Spann and the search of the couch.

Applicable to the case *sub judice,* "There are three types of interaction between police and citizens: consensual encounters, temporary detentions generally referred to as *Terry* stops, and arrests." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

Since the decision in *Terry*, it has been well established that a brief detention by a police officer may constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution, and thus may properly be undertaken only if the police officer has a reasonable suspicion based upon objective, articulable facts that criminal activity is afoot. *See Henson v. Commonwealth*, 245 S.W.3d 745 (Ky. 2008); *Fletcher v. Commonwealth*, 182 S.W.3d 556 (Ky. App. 2005); *Docksteader v. Commonwealth*, 802 S.W.2d 149, 150 (Ky. App. 1991). "The court must consider the totality of the circumstances in determining whether a police officer had a particularized and objective basis for suspecting that a person stopped may be involved in criminal activity." *Bauder v. Commonwealth*, 299 S.W.3d 588, 591 (Ky. 2009) (citing *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

"Whether a seizure is reasonable requires a review of the totality of the circumstances, taking into consideration the level of police intrusion into the private matters of citizens and balancing it against the justification for such

action." *Baker v. Commonwealth*, 5 S.W.3d 142, 145 (Ky. 1999). A seizure does not require a showing of probable cause that a crime was committed. *Nichols v. Commonwealth,* 186 S.W.3d 761, 763 (Ky. App. 2005). Furthermore, "the level of articulable suspicion necessary to justify a stop is considerably less than proof of wrongdoing by preponderance of the evidence." *Commonwealth v. Banks*, 68 S.W.3d 347, 351 (Ky. 2001). In order to justify a stop, police must only have reasonable suspicion of criminal activity afoot. *Terry,* 392 U.S. at 30, 88 S.Ct. at 1885. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Kotila v. Commonwealth*, 114 S.W.3d 226, 232 (Ky. 2003)(*abrogated on other grounds by Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006)), citing *Terry v. Ohio*, 392 U.S. at 16, 88 S.Ct. at 1877.

"When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Terry,* 392 U.S. at 24, 88 S.Ct. at 1881–82. However, the protective pat down is not automatic after a *Terry* stop. Instead, "in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327, 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009). Nervousness alone is insufficient to justify detention,

although it can be an important factor in the analysis. *Adkins v. Commonwealth*, 96 S.W.3d 779, 788 (Ky. 2003).

Sub judice, the officer based his decision to perform a *Terry* pat down for weapons on Spann and Johnson as both were acting peculiarly, both appeared to be under the influence of some substance and, of importance, both had a prior weapons charge.[6] We agree with the trial court that the officer was justified in conducting a *Terry* frisk under these circumstances. Accordingly, we decline to reverse on this ground. We now turn to the dispositive issue, specifically the search of the area of the residence in the immediate vicinity of Spann.

Our jurisprudence permits the search of the immediate vicinity of someone in a limited number of situations. First, an officer may search incident to arrest:

> Police may search a person fully and the area under his immediate control as a search incident to arrest while a search based on reasonable suspicion is limited to a pat-down search for weapons. *See, e.g., United States v. Childs,* 277 F.3d 947 (7th Cir.2002). A search incident to arrest includes not only the purpose of safety of the police but also the preservation of evidence. *See, e.g., United States v. Robinson,* 414 U.S. 218, 234, 94 S.Ct. 467, 476, 38 L.Ed.2d 427 (1973); *United States v. McKissick*, 204 F.3d 1282, 1296 (10th Cir.2000). Moreover, the fact that Baltimore was not technically placed under arrest prior to the search is not determinative of its validity. A warrantless search preceding an arrest is a valid search incident to arrest as long as a legitimate basis existed before the search and the arrest followed shortly after the search. *See, e.g., Rawlings v. Kentucky,* 448 U.S. 98, 111, 100 S.Ct. 2556,

[6] The combination of actions of the suspect combined with prior weapons charges alleviates the concern of a pat-down search based on mere nervousness. *See Adkins*.

> 2564, 65 L.Ed.2d 633 (1980); *United States v. Goddard*, 312 F.3d 1360, 1364 (11th Cir.2002); *United States v. Bizier*, 111 F.3d 214, 217 (1st Cir.1997).

Baltimore v. Commonwealth, 119 S.W.3d at 541, n.36. We note that prior to the search of the couch, no evidence supported an arrest of Spann; thus any search other than a pat-down search for weapons was without support from *Baltimore*.

Next, the United States Supreme Court in *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201 (1983), found permissible a *Terry* search for weapons inside the passenger compartment of a vehicle:

> [R]oadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032 at 1049, 103 S. Ct. 3469 at 3481)(internal footnotes omitted). Of import is the fact that Spann was in a home and not a vehicle; thus *Michigan v. Long* does not provide support for the search of the couch.

Sub judice, neither a search incident to arrest nor a search of a passenger compartment of a vehicle was applicable.[7] *Katz v. United States,* 389

[7] Similarly, a protective sweep would also not justify the search of the couch given that there was no indication that the police were concerned about finding another individual secreting himself or herself within the couch. Recently, our Sixth Circuit addressed the use of a protective sweep:

U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), establishes that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." *Katz* at 357, 88 S.Ct. 507. Thus, any warrantless search by law enforcement must fit within an exception when the Fourth Amendment applies.

We reiterate that a search based on reasonable suspicion is limited to a pat-down search for weapons. *See Baltimore* at 541, n.36. "The purpose of the limited *Terry* search is not to discover evidence of a crime, but rather to allow the officer to pursue the investigation without fear of violence or physical harm." *Baltimore* at 538 (internal footnote omitted).

We are unaware of any jurisprudence which would permit the officer to extend the search to the area of the residence in the immediate vicinity of Spann, especially when no weapon was found on Spann.[8] However, our analysis does not

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> The police can search a home pursuant to arresting someone there if there are "articulable facts" that would "warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The sweep must last no longer than necessary to "dispel the reasonable suspicion of danger" and include only "spaces where a person may be found." *Id*. at 335–36, 110 S.Ct. 1093.

United States v. Taylor, 666 F.3d 406, 409 (6th Cir. 2012).

The court in *Taylor* found the search of a couch, while not a part of a protective sweep, to be reasonable given that a person within the house stated that a gun was in the couch. This is markedly different from the facts *sub judice* where no one in the house stated that a weapon was hidden in the couch. *See Taylor* at 410.

[8] *See also Docksteader v. Commonwealth*, 802 S.W.2d 149 at 150, wherein this Court noted that possession of a weapon would increase the probability of additional weapons:

end here; specifically, we must analyze whether Spann had an expectation of privacy in the place that was searched. If he did have an expectation of privacy, then he would have been entitled to object to the search; if he did not have an expectation of privacy, then his complaint falls upon deaf ears for lack of constitutional protection. Indeed, "a court must determine whether a defendant… 'had an actual, subjective expectation of privacy, and second, whether that expectation was a legitimate, objectively reasonable expectation.'" *McCloud v. Commonwealth*, 286 S.W.3d 780, 784 n.4 (Ky. 2009), citing *United States v. Smith*, 263 F.3d 571, 582 (6th Cir. 2001).

> Our United States Supreme Court has stated:
>
> Since the decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it has been the law that "capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). A subjective expectation of privacy is legitimate if it is " 'one that society is prepared to recognize as "reasonable," ' " *id*., at 143–144, n. 12, 99 S.Ct., at 430, n. 12, quoting *Katz, supra*, at 361, 88 S.Ct., at 516 (Harlan, J., concurring).

> In *Brock v. Commonwealth*, Ky.App., 627 S.W.2d 39 (1981), we held that once an officer sees a weapon on a suspect, he is clearly justified under *Terry* to perform a pat-down search of the suspect's person. Once a suspect is found to have one weapon, the probability of another one on or about his person heightens.

Docksteader at 150.

We note that both *Docksteader* and *Brock* involved searches of vehicles.

Minnesota v. Olson, 495 U.S. 91, 95-96, 110 S. Ct. 1684, 1687, 109 L. Ed. 2d 85 (1990).

In conducting our analysis we turn to *Minnesota v. Carter*, 525 U.S. 83, 90, 119 S. Ct. 469, 473, 142 L. Ed. 2d 373 (1998), wherein the Court held "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." In so holding, the Court elucidated:

> If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

Carter 525 U.S. 83 at 91, 119 S. Ct. 469 at 474.

In light of the facts presented, Spann appears to be nothing more than a person with permission to be on the premises. We conclude that Spann was not the type of guest envisioned in *Carter* and, therefore, not one who was entitled to claim the protection of the Fourth Amendment in the home of another. Thus, we are compelled to disagree with Spann that the court below erred in denying his motion to suppress the evidence concealed in the couch. Accordingly, we affirm.

In light of the aforementioned, we affirm.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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