RENDERED: OCTOBER 12, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000141-MR

TIMOTHY MONTAZ GENTRY — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CR-00410

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether a person enjoys a reasonable expectation of privacy in his or her license plate and, if so, whether a random check thereof constitutes an unreasonable search in violation of the Fourth Amendment. We answer both questions negatively and affirm the Fayette Circuit Court's August 24, 2010 order.

I. Facts and Procedure

In September 2009 while on routine patrol in Lexington, Kentucky, police officer Jason Newman spotted a red Dodge Charger with a University of Louisville logo on its license plate legally parked on Breckinridge Street. For no articulable reason, Officer Newman decided to run the vehicle's tags in the computer system in his patrol car. The search revealed the vehicle's owner, Dominick Evans,[1] had a suspended driver's license. Because Officer Newman never observed Evans in or around the vehicle, Officer Newman did not take any further action at that time.

A few weeks later, on October 3, 2009, at approximately 5:17 p.m., Officer Newman noticed a Dodge Charger driving north on Limestone Street. Officer Newman observed the vehicle matched the make, model, color, and Louisville license plate of the car previously spotted on Breckinridge Street. Officer Newman ran the vehicle's tags, which confirmed it was the same Charger belonging to Evans; Evans's driver's license was still suspended. Officer Newman also discovered Evans was a twenty-three-year old, six-foot-one black male weighing one hundred and seventy pounds.

As the Charger turned into a liquor store parking lot, Officer Newman observed a male matching Evans's description driving the vehicle. Officer Newman circled around the block, and upon returning to the vicinity, viewed the Charger leaving the liquor store parking lot. As the vehicle re-entered North

[1] The vehicle was in fact co-owned by Dominick and Stephanie Evans.

Limestone Street, Officer Newman again observed a young black male driving the Charger, confirming for the second time that the driver's description was consistent with that of Evans.

Officer Newman followed the Charger as it traveled down North Limestone Street and subsequently turned onto Rosemary Lane. At this point, Officer Newman activated his emergency lights and conducted a traffic stop. Officer Newman admitted, prior to pulling the Charger over, he did not observe any erratic or reckless driving, or other traffic violations.

Officer Newman approached the vehicle and requested the driver's proof of insurance, registration, and driver's license. Officer Newman quickly discovered the driver of the vehicle was not Evans, but instead was Appellant Timothy Gentry. Gentry readily admitted his driver's license was suspended. Officer Newman confirmed with police headquarters that Gentry's license was, in fact, suspended, but was unable to determine whether the suspension was DUI related. As a result, Officer Newman chose not to arrest Gentry, but instead issued him a citation for operating a vehicle on a suspended driver's license.[2]

On or about January 26, 2010, the Commonwealth amended the charge from operating a vehicle on a suspended license to third-offense driving on a DUI suspended license, a class D felony. On November 4, 2009, the Fayette County Grand Jury indicted Gentry on one count of third-offense driving on a DUI suspended license, and being a first-degree persistent felony offender. Shortly

[2] At the suppression hearing, Officer Newman also explained he decided not to arrest Gentry because Gentry had arrived at his claimed destination.

thereafter, Gentry filed a motion to suppress the traffic stop, claiming Officer Newman did not have probable cause to conduct the stop and contending the stop was a result of racial profiling. The circuit court conducted an evidentiary hearing on August 5, 2010, and ultimately overruled Gentry's motion, concluding "so long as [Officer Newman] had a right to be in a position to observe [Gentry's] license plate, any such information and corresponding use of the information on the plate does not violate the Fourth Amendment." (Cir. Ct. Op. 2)

On November 15, 2010, Gentry entered a conditional guilty plea to third-offense driving on a DUI suspended license and first-degree persistent felony offender. As part of his guilty plea, Gentry reserved the right to appeal the circuit court's denial of his suppression motion. This appeal followed.

II. Standard of Review

In determining whether the trial court properly denied a motion to suppress, this Court is presented with a mixed question of fact and law. Initially, we review the circuit court's findings of fact under the clearly erroneous standard. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). Those factual findings are deemed conclusive if they are supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78. Next, we undertake a *de novo* review to determine if the law was properly applied to the facts. *Copley v. Commonwealth*, 361 S.W.3d 902, 905 (Ky. 2012).

III. Analysis

Gentry contends Officer Newman's practice of randomly running license plate checks, in the absence of guiding police department policies and procedures, grants Officer Newman unfettered discretion in violation of Gentry's constitutional protections. Likewise, Gentry submits law enforcement must have an articulable reason or identified suspicion that criminal activity is afoot before running a vehicle's license plate information. Absent such circumstances, Gentry argues, the random running of car tags constitutes arbitrary action in violation of Section 2 of the Kentucky Constitution (Ky. Const.) We disagree.

Gentry grounds his argument primarily in Section 2 of the Kentucky Constitution. However, we do not believe Section 2 affords Gentry the relief he seeks.

Section 2 provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2; *Kentucky Milk Mktg. and Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). This section ensures citizens of this Commonwealth "shall be free of arbitrary state action." *Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997). Kentucky courts have interpreted Section 2's broad provisions as the state-level assurance – comparable to the 14th Amendment to the United States Constitution – of procedural due process and equal protection of the laws. *See Kroger Co.*, 691 S.W.2d at 899 ("Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law."). To that end, Section 2 is often invoked to curb arbitrary and capricious

agency action or economic legislation where no other section of the Kentucky Constitution provides direct relief. *See, e.g.*, *Bd. of Educ. of Ashland v. Jayne,* 812 S.W.2d 129, 132 (Ky. 1991) (finding a school board's personnel decisions did not violate Section 2 of Kentucky's Constitution); *Kroger Co.*, 691 S.W.2d at 899-900 (declaring Kentucky's Milk Marketing Law – described by the Court as a "minimum mark-up law" pertaining to the sale of milk and milk products – violated Section 2 of the Kentucky Constitution); *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964) (explaining Section 2 of the Kentucky Constitution prohibits an administrative agency from arbitrarily exercising its power).

By contrast, the protections sought by Gentry are specifically embodied in Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution (U.S. Const.), both of which protect against unreasonable searches and seizures. U.S. Const. amend. IV; Ky. Const. § 10; *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). Accordingly, while Gentry's reliance in Section 2 is not entirely misplaced, the jurisprudence under that section will, at best, simply guide us to the more specific Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution. Therefore, those constitutional provisions are the focus of our analysis.

As referenced above, both the Kentucky and United States Constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend.

IV; Ky. Const. § 10. However, these protections only extend "to areas searched wherein the defendant possesses a 'reasonable expectation of privacy.'" *Blades v. Commonwealth,* 339 S.W.3d 450, 453 (Ky. 2011) (quoting *Rawlings v. Kentucky,* 448 U.S. 98, 104, 100 S. Ct. 2556, 2561, 65 L. Ed. 2d 633 (1980)). Stated otherwise, under these provisions, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); *Colbert v. Commonwealth,* 43 S.W.3d 777, 783 (Ky. 2001).

Society – via the courts – has acknowledged that there are certain areas in which a person does not retain an expectation of privacy, and searches of these areas fall outside the protections of the Fourth Amendment. *See, e.g., California v. Greenwood,* 486 U.S. 35, 39-42, 108 S. Ct. 1625, 1629-30, 100 L. Ed. 2d 30 (1988) (explaining a person does not have an expectation of privacy in trash placed outside the curtilage of his home for collection because society is unwilling to consider this expectation reasonable); *Blades,* 339 S.W.3d at 454 (holding a person does not enjoy a "reasonable expectation of privacy in [a] hotel room [if] the search [is] conducted after the checkout time [has] elapsed"); *Williams v. Commonwealth,* 213 S.W.3d 671, 683 (Ky. 2006) (finding "citizens have no expectation of privacy in information that is contained on the outside of one's mail" or financial information voluntarily conveyed to banks and their employees).

Underlying each of these cases is the premise that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511; *United States v. Ellison*, 462 F.3d 557, 561 (6th Cir. 2006) ("A tenet of constitutional jurisprudence is that the Fourth Amendment protects only what an individual seeks to keep private.").

As alluded to previously, Gentry takes issue with Officer Newman's policy of randomly running vehicles' license plate information without a reasonable suspicion that criminal activity may be or is occurring. This "search," Gentry argues, is unreasonable and arbitrary, and therefore runs afoul of his constitutional guarantees. The parties do not cite, nor does our research reveal, Kentucky case law that directly addresses the question of whether a person enjoys a reasonable expectation of privacy in his or her license plate and, if so, whether a random search thereof constitutes an unreasonable search in violation of the Fourth Amendment. This appears to be an issue of first impression in this Commonwealth. Accordingly, we consider the experience of other jurisdictions that have addressed the issue.

The Sixth Circuit's decision in *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006), while not controlling, provides valuable guidance. In *Ellison*, a police officer noticed a van which the officer thought was illegally parked. While observing the van, the police officer ran the van's license plate information through his patrol car's computer database. The search revealed the vehicle's registered

owner, Ellison, had an outstanding felony warrant. The police officer conducted a traffic stop and subsequently arrested Ellison. During the arrest, the police officer discovered Ellison was improperly in possession of multiple firearms. Prior to trial, Ellison moved to suppress the firearms as the fruit of an illegal search. The trial court granted Ellison's motion, finding the van was, in fact, not parked illegally and, therefore, the police officer did not have probable cause to run the computer check of Ellison's license plate.[3]

The Sixth Circuit, in reversing the trial court's ruling, addressed whether "the Fourth Amendment is implicated when a police officer investigates an automobile license plate number using a law enforcement computer database." *Id.* at 559. The court reasoned that "[n]o argument can be made that a motorist seeks to keep the information on his license plate private" because the "very purpose of a license plate number . . . is to provide identifying information to law enforcement officials and others." *Id.* at 561. "[B]ecause of the important role played by the [license plate] in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the [license plate] is placed in plain view, a motorist can have no reasonable expectation of privacy in the information contained on it." *Id.* (citation and internal quotation marks omitted).

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[3] Gentry attempts to distinguish *Ellison* on the ground that, in *Ellison*, the van at issue was parked illegally, thus giving the police officer reasonable grounds to believe criminal activity may be occurring while, here, Gentry did not engage in any illegal maneuvers justifying Officer Newman's decision to check the Charger's license plate information. However, the Sixth Circuit clearly stated "[t]he district court's finding that the van was not parked illegally is . . . irrelevant – such a finding goes only to probable cause, which is not necessary absent a Fourth Amendment privacy interest." *Ellison,* 462 F.3d at 563. Gentry's attempt to distinguish *Ellison* on these grounds is unavailing.

As a result, no search occurred "for Fourth Amendment purposes" and, "so long as the officer had a right to be in a position to observe the defendant's license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment." *Id.* at 563.

We find *Ellison* persuasive. First, it comports with United States Supreme Court, and in turn Kentucky, jurisprudence which holds that persons do not enjoy a reasonable expectation of privacy in the exterior portions of their automobiles. *See, e.g., Cardwell v. Lewis,* 417 U.S. 583, 591, 94 S. Ct. 2464, 2470, 41 L. Ed. 2d (1974) (plurality) (explaining when a search is limited to the exterior of the car – such as the examination of the tires and the taking of paint scrapings – and the car is in a public place, no expectation of privacy is infringed); *New York v. Class,* 475 U.S. 106, 112-15, 106 S. Ct. 960, 965-66, 89 L. Ed. 2d 81 (1986) (no reasonable expectation of privacy in an automobile's "vehicle identification number"); *United States v. George,* 971 F.2d 1113, 1120 (4th Cir. 1992) ("There is thus little question in the aftermath of *Cardwell* and *Class* that one does not have a reasonable expectation of privacy in the visible exterior parts of an automobile that travels the public roads and highways."); *Shelton v. Commonwealth*, 484 S.W.2d 95, 96 (Ky. 1971) (taking pictures of the defendant's truck's tires does not violate the Fourth Amendment).

Second, we do not think the citizens of this Commonwealth are prepared to recognize as reasonable a person's subjective expectation of privacy in his or her

license plate. As succinctly explained by the Ninth Circuit in *United States v. Diaz-Castaneda,* 494 F.3d 1146 (9th Cir. 2007):

> First, license plates are located on a vehicle's exterior, in plain view of all passersby, and are specifically intended to convey information about a vehicle to law enforcement authorities, among others. No one can reasonably think that his expectation of privacy has been violated when a police officer sees what is readily visible and uses the license plate number to verify the status of the car and its registered owner. Second, a license plate check is not intrusive. Unless the officer conducting the check discovers something that warrants stopping the vehicle, the driver does not even know that the check has taken place.

Id. at 1151 (citation omitted).

Third, case law from other jurisdictions supports the conclusion that a person is not entitled to a reasonable expectation of privacy in his or her license plate. *See Diaz-Castaneda*, 494 F.3d at 1150 ("[L]icense plate checks do not count as searches under the Fourth Amendment."); *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999) (explaining a "motorist has no privacy interest in her license plate number" and, consequently, law enforcement may run a computer check on a vehicle's license plate without reasonable suspicion); *United States v. Walraven,* 892 F.2d 972, 974 (10th Cir. 1989) (no privacy interest in license plates); *United States v. Hensel*, 699 F.2d 18, 32 (1st Cir. 1983) (explaining no unreasonable search occurred because "a license plate is an item normally revealed to the public and . . . this license plate was observed in a place where the owner could not reasonably have expected it to remain hidden"); *State v. Lloyd,* 338

S.W.3d 863, 867 (W.D. Mo. 2011); *State v. Harding*, 670 P.2d 383, 392 (Az. 1983) ("[T]here is no expectation of privacy in the license plate affixed to the exterior of one's motor vehicle driven in public meriting constitutional protection . . . [nor is a] search or seizure of the vehicle at the time the license check [is] made."); *State v. Thomas*, 186 P.3d 864, 867 (Mont. 2008) (finding the defendant "had no expectation of privacy in the license plate that she knowingly exposed to the public[,]" and, as a result, the police officer's decision to run "the truck's license plate through dispatch" did not require any justification); *State v. Richter*, 765 A.2d 687, 688 (N.H. 2000); *State v. Lewis,* 671 A.2d 1126, 1126-27 (N.J. Super. 1996); *State v. Owens,* 599 N.E.2d 859, 860 (Ohio App. 1991); *State v. Bjerke*, 697 A.2d 1069, 1073 (R.I. 1997) (concluding neither the defendant nor "the public at large has any reasonable expectation of privacy in a motor vehicle registration license plate").

For the reasons stated, we believe Kentucky jurisprudence is consistent with this majority view. Therefore, we hold that there is no expectation of privacy in the license plate affixed to the exterior of one's motor vehicle that merits constitutional protection and, as a result, when a police officer checks or "runs" a motor vehicle's license plate, randomly or otherwise, there is no search as contemplated by Fourth Amendment jurisprudence.

Here, on both occasions when Officer Newman ran the Charger's license plate information, the Charger was parked or traveling on a public street, thereby exposing its license plate to public view. Officer Newman was also driving on

public streets when he observed the Charger's license plate on both occasions and, as a result, was in a place he had a right to be. Accordingly, Officer Newman's decision to check the Charger's license plate information did not constitute an illegal search in violation of the Fourth Amendment or Section 10 of Kentucky's Constitution.

As a corollary to his first argument, Gentry contends a police officer may not search or seize a person in the absence of an "individualized suspicion of wrongdoing." To that end, Gentry asserts Officer Newman's practice of randomly running vehicles' license plate information without an individualized suspicion of wrongdoing violates the Fourth Amendment and Section 10 of the Kentucky Constitution. However, the "individualized suspicion of wrongdoing" requirement does not apply to searches that do not fall within the protection of the Fourth Amendment. Since we have held that a person does not have a reasonable expectation of privacy in his or her license plate, a police officer's search thereof, even absent individualized suspicion of wrongdoing, does not violate the Fourth Amendment or Section 10 of the Kentucky Constitution. As aptly expressed by the New Hampshire Supreme Court, we "recognize the authority of police to run random computer checks of passing vehicle licenses, without suspicion of criminal conduct" and "[s]uch a check is not a search" subject to Fourth Amendment protections. *Richter*, 765 A.2d at 688 (citation omitted).

Gentry next argues a police officer's running of a vehicle's license plate information without guiding police department policies and/or supervisor

involvement, is arbitrary in violation of Section 2 of the Kentucky Constitution. In essence, Gentry asserts local police departments must promulgate policies and procedures to curb a police officer's discretion in running random license plate information checks. In support of his position, Gentry relies upon our Supreme Court's decision in *Commonwealth v. Buchanon*, 122 S.W.3d 565 (Ky. 2003).

In *Buchanon*, the Court addressed whether a particular roadblock was constitutionally permissible. In finding it was not, the Court first noted that a roadblock is a seizure for Fourth Amendment purposes. *Id.* at 568. Accordingly, for law enforcement to stop vehicles at a roadblock, they must have either an "individualized suspicion of wrongdoing" or, in the absence thereof, a "systematic plan" constraining the "discretion of officers at the scene[.]" *Id.* at 568-69. With respect to the latter, the Court promulgated "several non-exclusive factors courts may consider in determining the reasonableness of a particular roadblock[,]" such as supervisor involvement and recognized procedures for establishing the roadblock. *Id.* at 570-71. Gentry requests this Court adopt similar procedures to restrain a police officer's discretion in running random searches of motor vehicle license plate information. We decline to do so today.

Importantly, *Buchanon* dealt with stopping vehicles at a roadblock, a seizure invoking Fourth Amendment protections. Here, we have found persons do not enjoy a reasonable expectation of privacy in vehicle license plates. Because a police officer's decision to run a license plate does not fall within the parameters of the Fourth Amendment, *Buchanon* is inapposite.

Moreover, the roadblocks at issue in *Buchanon* involved an intense, *albeit* short, invasion of a person's privacy. *See Delaware v. Prouse*, 440 U.S. 648, 657, 99 S. Ct. 1391, 1398, 59 L. Ed. 2d 660 (1979) (explaining the stopping of a motor vehicle "interfere[s] with freedom of movement," is "inconvenient," and "consume[s] time"). In contrast, the running of a person's vehicle's license plate information is so non-intrusive that the majority of drivers are unaware that the check has even occurred. *Lloyd*, 338 S.W.3d at 866. Accordingly, we find *Buchanon* factually and legally distinguishable.

Gentry next argues that, even if Officer Newman's computer check of his license plate number was proper, Officer Newman lacked an articulable and reasonable suspicion of criminal activity[4] to then initiate the traffic stop.[5] Specifically, Gentry contends Officer Newman did not have a sufficient opportunity to observe the driver of the Charger to conclude whether the driver matched that of the vehicle's owner, Dominick Evans. Gentry reiterates that Dominick Evans was a twenty-three-year-old, six-foot-one, one hundred and seventy pound black man while Gentry was a twenty-three-year-old, five-feet-nine, one hundred and ninety pound black man. Based on Officer Newman's brief view

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[4] At times, Gentry contends Officer Newman must have had "probable cause" to conduct the traffic stop. However, as previously explained by this Court, "probable cause is not the standard by which the stopping of a vehicle by the police is measured." *Graham v. Commonwealth*, 667 S.W.2d 697, 698 (Ky. App. 1983).

[5] Similarly, Gentry claims the circuit court erred in refusing to suppress the traffic stop as the fruit of the poisonous tree, the illegal search, *i.e.*, the running of the vehicle's license plate information. Since we have found Officer Newman's search of Gentry's license plate information proper, no "illegal search" occurred and, in turn, there is no "fruit of the poisonous tree" to suppress.

of the vehicle's occupants, coupled with the clear difference between Gentry's and Evans's height and weight, and the vehicle's tinted windows, it was unreasonable, Gentry argues, for the circuit court to conclude Officer Newman was able to match Evans's description with the Charger's driver.

Gentry, in effect, takes issue with the circuit court's factual finding that Officer Newman had a reasonable opportunity to view the vehicle's driver and concluded, based on his observation, that the driver matched Evans's description. As noted, we review the circuit court's findings of fact under the clearly erroneous standard and those factual findings are deemed conclusive if they are supported by substantial evidence. *Banks*, 68 S.W.3d at 349.

During the suppression hearing, Officer Newman explained he had two opportunities to view the vehicle's occupants prior to conducting the traffic stop: first when the Charger entered into the liquor store parking lot, and second when the Charger exited the parking lot. On both occasions, Officer Newman observed a young black male driving the Charger who matched Evans's height, weight, and general description. While it is undisputed that the Charger's windows were tinted, Officer Newman testified he could see inside the vehicle. Moreover, despite the height and weight differences between Evans and Gentry, Officer Newman testified, in viewing Gentry while seated in the car, he appeared to fit Evans's physical description. Based on this testimony, the circuit court concluded Officer Newman had a "sufficient opportunity to observe the driver and to make a quick determination of whether he fit the description of the owner who had a

suspended license." (Cir. Ct. Op. 3). Because the circuit court's finding is based on Officer Newman's testimony, and thus substantial evidence, it is not clearly erroneous.

Moreover, we find Officer Newman had an articulable and reasonable suspicion to conduct the traffic stop. A police officer may stop and detain a vehicle if the officer reasonably believes criminal activity is afoot. *See Creech v. Commonwealth*, 812 S.W.2d 162, 163 (Ky. App. 1991). To that end, a police officer may conduct an investigatory stop of a vehicle if the officer is able to point to specific and articulable facts, taken with rational inferences therefrom, which give rise to a reasonable belief that the vehicle's occupant is violating the laws of the state. *Delaware v. Prouse,* 440 U.S. 648 at 663, 99 S. Ct. 1391 at 1401. (concluding a police officer may stop a vehicle "in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law"); *Graham v. Commonwealth*, 667 S.W.2d 697, 698 (Ky. App. 1983).

Here, by virtue of running the Charger's license plate information – which we have found to be constitutionally sound – Officer Newman discovered that Evans, the owner of the Charger, was a six-foot-one, one hundred seventy pound black male in his low-to-mid-twenties, and that his driving privileges had been suspended. Officer Newman then concluded the Charger's driver matched Evans's description. As explained by our sister state, "[i]t is reasonable to assume that the

driver of a vehicle is most often the owner of the vehicle." *State v. Owens*, 599 N.E.2d 859, 860 (Ohio App. 1991). In this situation, Officer Newman acted on specific and articulable facts which, together with their rational inferences, reasonably warranted stopping the vehicle and questioning the driver concerning a possible violation of the law. Accordingly, we reject Gentry's assertion of error.

Finally, Gentry argues Officer Newman's decision to run the auto's license plate was racially motivated, *i.e.*, racial profiling. Gentry claims Officer Newman chose to run the Charger's plates because the vehicle appeared "glammed" out with tinted windows, oversized tires, chrome rims, and sport styling. As the circuit court noted, and we readily repeat, the record is void of any evidence to support Gentry's position that the officer was improperly motivated. In fact, Officer Newman testified that, in his experience, the make and model of a car is not indicative of ethnicity; nor is the Charger's Louisville license plate indicative of the vehicle owner's race. Gentry's position is simply unavailing.

IV. Conclusion

For the reasons set forth above, the Fayette Circuit Court's August 24, 2010 order is affirmed.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I concur with the result reached by the majority but write separately to discuss the issue of standing. At no time during the trial or appellate process did any party raise the issue of standing.

Previously, standing was considered by the United States Supreme Court as present whenever the legality of a search was contested. *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). Subsequently in *U. S. v. Salvucci,* 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), the United States Supreme Court held that the benefits of the Fourth Amendment exclusionary rule would apply only when the person challenging the search had rights which were violated, overruling *Jones*. Thus, to have standing to challenge a search, the person challenging the search must have a subjective expectation of privacy in the premises searched. *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L. Ed. 2d 85 (1990); the burden is on the defendant to establish the standing necessary to assert a Fourth Amendment violation. *United States v. Smith,* 263 F.3d 571, 582 (6th Cir. 2001).

The importance of this analysis becomes more complicated under the case now before our Court because the issue was never raised at the trial court level and was not briefed to our Court. We are placed in the position of deciding an issue concerning the application of Fourth Amendment rights when, as appears from the evidence *sub judice*, the defendant had no standing to assert such rights.

The issue of importance to this Court would be, at a minimum, when and by whom the issue of standing may be raised. In *Steagald v. U.S*, 451 U.S. 204, 101 S.Ct. 1642, 68 L. Ed. 2d 38 (1981), the Supreme Court states:

> Aside from arguing that a search warrant was not constitutionally required, the Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

Id., 451 U.S. 204 at 209, 101 S. Ct. 1642 at 1646.

Alternative interpretations of when standing may be raised were presented in *U.S. v. Paopao,* 469 F3d 760 (9th Cir. 2006), wherein the Ninth Circuit opined:

> On appeal of the denial of his suppression motion, Paopao claims that the District Court erred in upholding the protective sweep of the Game Room. The government argues that Paopao did not have Fourth Amendment standing to challenge the protective sweep because he lacked an expectation of privacy in the Game Room. The government did not raise this argument below. However, "[t]he fact that the [g]overnment did not specifically raise the expectation of privacy issue during the course of the hearing on the motion [ ] to suppress is of no consequence." *United States v. Nadler, 698 F.2d 995, 998 (9th Cir.1983)*. In this case, Paopao has appealed the denial of his suppression motion; as such, he carries the burden to show that the District Court was in error. The District Court never ruled on whether Paopao had a privacy interest in the Game Room;

> nonetheless, the government may argue for the first time on appeal that Paopao lacks standing to challenge the protective sweep. *United States v. Taketa,* 923 F.2d 665, 670 (9th Cir.1991) (holding that, where reliance was not an issue, and the government was not the party with the burden, the issue of standing could be raised for the first time on appeal).

Paopao at 764.

Additionally, in *U.S. v. Taketa*, 923 F.2d 665 (9th Cir. 1991), the Ninth Circuit stated:

> Similarly, in *United States v. Sherwin,* we did not consider a challenge to fourth amendment standing not raised in the district court or as an original ground for appeal. 539 F.2d 1, 5 n. 4 (9th Cir.1976) (en banc). Moreover, Judge Kennedy cited his *Sherwin* precedent a decade later in a case that correctly distinguished fourth amendment from Article III standing in light of *Rakas,* and declined to consider a fourth amendment standing argument that apparently would have been decided in favor of the government if timely raised. *United States v. Spilotro,* 800 F.2d 959, 962–63 (9th Cir.1986).
>
> We conclude that both *Steagald* and the *Sherwin* line of case law can be distinguished from the present appeal. In *Steagald,* the government repeatedly had acquiesced in the district and appellate courts incorrect findings of fact regarding Steagald's status. 451 U.S. at 210, 101 S.Ct. at 1646. Here, although the government did not press the issue in the district court, it neither assented to contrary findings of fact nor abandoned the issue. The reliance issue raised by *Steagald* does not concern us here.
>
> *Sherwin* and *Spilotro* involved government appeals of suppression motions that had been granted. It was proper that in that circumstance the appellate courts declined to consider government arguments untimely

> raised. In this case, by contrast, we consider a defendant's appeal of a suppression motion that was denied, when the question was raised in the district court. The burden of demonstrating that the evidence should have been suppressed is upon the appellants. *See* *United States v. Nadler*, 698 F.2d 995, 998 (9th Cir. 1983). Taketa must demonstrate that he had a reasonable expectation of privacy in O'Brien's office even if the government has not argued on appeal that his interest differs from O'Brien's.

Taketa at 670.

In that the issue was never raised, then an analysis thereof is unnecessary. Nevertheless, I do believe that it is important to recognize that the issue does exist. I concur.

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