

Received: 2022-SC-0382 06/13/2023  
 Filed: 2022-SC-0382 06/13/2023  
 Kelly L. Stephens, Clerk  
 Supreme Court of Kentucky

\*\*\*\*\**Electronically Filed*\*\*\*\*\*

**COMMONWEALTH OF KENTUCKY  
 SUPREME COURT  
 FILE NO. 2022-SC-0382**

**SCOTT EDWARD BITTER**

**APPELLANT**

**APPEAL FROM KENTON CIRCUIT COURT  
 HON. KATHLEEN LAPE, JUDGE  
 INDICTMENT NO. 2021-CR-00288-001**

**COMMONWEALTH OF KENTUCKY**

**APPELLEE**

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**REPLY BRIEF FOR APPELLANT, SCOTT EDWARD BITTER**

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Submitted by:  
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**CERTIFICATE REQUIRED BY RAP 31(C)(1):**

The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Kathleen Lape, Circuit Judge, Kenton County Justice Center, 230 Madison Avenue, Room 600, Covington, Kentucky 41011; the Hon. Noah Wentz, Assistant Commonwealth's Attorney, 1840 Simon Kenton Way, Suite 2300, Covington, Kentucky 41011; and electronically mailed to the Hon. Meredith Simpkins, Assistant Public Advocate, 333 Scott Street, Suite 400, Covington, Kentucky 41011; and to be served by messenger mail to Hon. Thomas A. Van De Rostyne, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on February 2, 2023. I further certify that the record on appeal was not checked out for purposes of the Reply Brief.

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**JENNIFER WADE**

REPLY BRIEF

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**PURPOSE OF THIS REPLY BRIEF**

The purpose of this Reply Brief is to respond to those arguments in the Brief for the Commonwealth which warrant a response. Any failure to respond should not be taken as a waiver of an issue or allegation. If Mr. Bitter has chosen not to respond to a particular point or argument, he reasserts the arguments made in the Brief for Appellant.

**I. Officer Igo unlawfully entered the basement.**

The Commonwealth brief does not dispute that Officer Igo unlawfully entered Mr. Bitter's apartment. (See Commonwealth's Brief at 10-11). Defense counsel argued this point below, and the Commonwealth and the trial court failed to address it in argumentation or the written order. VR 9/20/2021 at 3:27:22, TR I 72-77. This omission by the party with the burden of justifying the search and the trial court tasked with applying the law should prove fatal.

The evidence demonstrates that Officer Igo breached the threshold and immediately unlawfully entered Mr. Bitter's apartment. The Commonwealth and the trial court ignored clear argumentation and demonstrative evidence.

**II. The trial court erred when it applied an inapplicable warrant exception.**

The Commonwealth bases most of its arguments around the idea that the trial court was either not presented with an issue or that the trial court had correct findings of fact and conclusion of law. (Commonwealth's Brief at 7-8, 10, 12, 15). While the Commonwealth concedes that the trial court applied the "wrong standard" of a protective sweep, it failed to address the systematic harm on the trial court's order by forgoing any meaningful consideration of the appropriate standard, the plain-view warrant exception.

As the Commonwealth bears the burden to justify a warrantless search, the argument advanced below hinged on a plain-view exception. *See Brown v. Commonwealth*, 432 S.W.3d 765, 771 (Ky. App. 2014) (*citing Welsh*

*v. Wisconsin*, 466 U.S. 740, 751 (1984)). The Commonwealth admitted that the argument regarding the protective sweep was a red herring obscuring the plain-view exception that undergirded the evidence used to obtain a search warrant. VR 9/20/2021 at 3:23:01-3:23:18.

The trial court ignored the only argued and applicable warrant exception and based on this omission, addressed none of the elements of the plain-view test set out in *Horton v. California*, 496 U.S. 128 (1990). *See also Hazel v. Commonwealth*, 833 S.W.2d 831 (Ky. 1992). Mr. Bitter could never challenge findings of fact and conclusions of law when the order cites law and makes legal conclusions based on an entirely unrelated and irrelevant warrant exception.

**III. This Court should consider all elements of Mr. Bitter’s argument as the Commonwealth bears the burden during suppression hearings.**

The Commonwealth’s first argument is that defense counsel’s failure to argue below the consensual or non-consensual nature of the initial encounter between police and Mr. Bitter precludes review. (Commonwealth’s Brief at 7-10). The Commonwealth cites *Smith v. Commonwealth* as a precedent supportive of this position. 542 S.W.3d 276 (Ky. 2018). Still, it abstains from a discussion of how a case based on the failure of Commonwealth actors is relevant to a defendant.

Germane to this issue, the Commonwealth “bears the burden of proving the availability and applicability of the [warrant] exception, not the

defendant.” *Commonwealth v. Garrett*, 585 S.W.3d 780, 790 (Ky. App. 2019). The Commonwealth must justify all components of a warrantless search, including how the officers contacted Mr. Bitter.

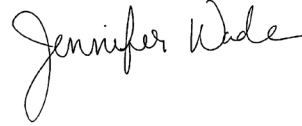
The Commonwealth made several statements seeking to downplay the calculated actions of the police against Mr. Bitter. The video evidence disputes this was as innocuous as the police simply knocking on the door and Ms. Hornsby voluntarily opening it for the police. (Commonwealth’s Brief at 9).

The police coordinated a ruse of providing a fake name and deliberately refusing to acknowledge they were law enforcement. VR 9/20/2021 at 2:59:49-3:01:23. The basement unit was windowless, and there was no visible peephole to allow occupants to discern who was standing at the front door. *Id.* The Commonwealth recasts the facts while also declining to fully address whether the police officer’s behavior satisfies a lawful consensual encounter.

**CONCLUSION**

Based on the above, most pointedly the unlawful entry of law enforcement, Mr. Bitter requests that this Court reverse and remand with the appropriate relief.

Respectfully submitted,



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