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CLERK OF THE APPELLATE COURT
CASE NUMBER: 115956

No. 16-115956-A

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

REBECCA A. BLACKBURN
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Clay County, Kansas
Honorable John F. Bosch, Judge
District Court Case No. 15CR56

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Statement of the Case

Rebecca A. Blackburn was convicted by the district court at a bench trial on stipulated facts of one count each of possession of methamphetamine, a drug severity level five felony pursuant to K.S.A. 21-5706(a); and operating a vehicle with a broken taillight, a traffic infraction pursuant to K.S.A. 8-1706. Ms. Blackburn was given a controlling sentence of 15 months in the Department of Corrections with 12 months postrelease, suspended in favor of 12 months probation. Ms. Blackburn now appeals the district court's denial of her motion to suppress and her subsequent conviction.

Statement of the Issues

Issue I: The district court erred when it denied Ms. Blackburn's motion to suppress the evidence discovered as a result of the traffic stop and subsequent search of her shoe.

Statement of the Facts

On March 20, 2015, Ms. Blackburn was driving two other passengers, Ms. Nelson and Mr. Bowers, in her vehicle in Clay Center. (R. VI, 4-5, 7). Officer Browne noted, as he drove behind her, that Ms. Blackburn's taillight appeared to be cracked and was emitting a white light in addition to the legally required red light. (R. VI, 5, 8). The officer believed that the white light emitting from the taillight constituted a traffic violation and therefore conducted a traffic stop on Ms. Blackburn's vehicle. (R. VI, 5).

The Stop and Search

The officer pulled the vehicle over. (R. VI, 5-6). As he approached the car, he noticed that the two passengers appeared to moving around quickly inside of the cab. (R. VI, 5-6). Although the officer did not recognize the vehicle before he pulled it over, once he approached, he recognized all three people in the vehicle as people with prior drug convictions. (R. VI, 5, 33). The officer noted that the two passengers were not wearing seatbelts, so he took their information and returned to his car to run their names and begin writing citations. (R. VI, 8-9). While he was writing citations, the officer also called in another officer with a drug dog who quickly arrived at the scene. (R. VI, 8-9, 10). It was at this point that the officer also received information that one of the passengers, Ms. Nelson, had an active warrant. (R. VI, 9-10). She was removed from the car and arrested. (R. VI, 9-10).

While Officer Browne finished writing citations, the K-9 officer walked around the vehicle with the drug dog. (R. VI, 10). The drug dog alerted on the passenger side lower door frame. (R. VI, 10). As a result, Ms. Blackburn and Mr. Bowers were removed from the car and frisked. (R. VI, 10-11). Nothing was found on either of them during the frisk. (R. VI, 10-11). The officers then conducted a search of the vehicle. (R. VI, 12). The K-9 officer searched the driver's side where Ms. Nelson had been seated and found nothing. (R. VI, 39). However, Officer Browne searched the passenger side of the vehicle and found a cut down straw on the floorboard by the passenger seat as well as a small, plastic mirror like object in the glove box. (R. VI, 12, 14). Both items appeared to have a

white powdery substance on them. (R. VI, 12, 24). The officer tested the straw for methamphetamine. (R. VI, 14-16). The field test was negative for methamphetamine, but appeared to be possibly positive for amphetamine, although the officer later indicated that he did not trust that test result. (R. VI, 14-16, 24-25). The mirror was not tested at the scene. (R. VI, 25).

At that point, Officer Browne decided to search Ms. Blackburn again. (R. VI, 16). This time, he had her remove her shoes wherein he found a white crystal substance in a baggie. (R. VI, 16-17). Immediately thereafter, Ms. Blackburn was arrested. (R. VI, 17). The substance found in Ms. Blackburn's shoe was later tested by the KBI and was determined to be methamphetamine. (R. VI, 17). Based on these events, Ms. Blackburn was charged with possession of methamphetamine and operating a vehicle with a broken taillight. (R. I, 6-7).

The Motion to Suppress

Prior to trial, defense counsel filed a motion to suppress the methamphetamine found in Ms. Blackburn's shoe on two bases: (1) that the officer lacked reasonable suspicion to stop Ms. Blackburn's vehicle in the first place, and (2), that the officer lacked probable cause to search Ms. Blackburn the second time. (R. I, 21-31). To support of the first argument, defense counsel argued that under the plain statutory language of K.S.A. 8-1706, the fact that Ms. Blackburn's taillight was emitting a white light in addition to the clearly visible red light did not constitute a traffic violation. (R. I, 27-29). Therefore, since the "broken taillight" was the only reason for the traffic stop, the officer lacked the

reasonable suspicion to pull Ms. Blackburn over in the first place, thereby requiring the suppression of any subsequently discovered evidence as fruit of the poisonous tree. (R. I, 27-29).

To support the second argument in the motion to suppress, defense counsel also argued that, based on the totality of the circumstances, the officer lacked probable cause to conduct the second search where he found the drugs in Ms. Blackburn's shoe. (R. I, 29-31). Specifically, defense counsel argued that the field test was negative for methamphetamine on the straw, that the officer did not test the mirror, and that under those circumstances that was not enough to justify the officer's probable cause to search Ms. Blackburn the second time. (R. I, 29-31).

The district court held an evidentiary hearing on the motion to suppress. (R. VI, generally). At that hearing Officer Browne testified. (R. VI, 4). He confirmed that his only reason for pulling over the vehicle was the broken taillight. (R. VI, 5). He testified that it was his belief that the fact that the taillight was emitting white light, even though the red light was visible, still constituted a traffic violation. (R. VI, 5, 28-30). Although the State tried to suggest that the red light had to be visible from 1,000 feet away and that the white cracks at that distance would overpower the weaker red light, the officer admitted that he had only followed the vehicle from about a half-block away, significantly less than the 1,000 feet that the law required the red light to be visible. (R. VI, 28-30). The

officer admitted that from a half-block away, the red light was still visible. (R. VI, 19).

The officer testified that once he found the "drug paraphernalia" in the vehicle, he decided he had probable cause to arrest Ms. Blackburn on possession of drug paraphernalia and that the second search of her person was a search incident to arrest even though the arrest came immediately after that search. (R. VI, 16). The officer testified that even though the "drug paraphernalia" had tested negative for methamphetamine, and even though he was suspicious of the positive amphetamine result, he believed, based on the totality of the circumstances, that he still had probable cause to arrest Ms. Blackburn at that time. (R. VI, 16, 24-25, 33-34). Included in the factors that led him to that conclusion was the fact that he knew from some of the other officers that the three people in the vehicle had some drug history, that the drug dog had alerted on the car, that the occupants had been moving around quickly inside the cab as he initially approached, and that two items he identified as drug paraphernalia had been located in the vehicle Ms. Blackburn had been driving. (R. VI, 33, 10, 5-6, 16).

Defense counsel again argued at the hearing that the plain language of the broken taillight statute did not make driving with cracks in your taillight that emitted white light illegal, and that the officer had therefore lacked reasonable suspicion to even stop the vehicle in the first place. (R. VI, 50-52). Defense counsel then went on to argue that the officer's decision to arrest and therefore search Ms. Blackburn was not supported by probable cause. (R. VI, 52-55).

The State argued that the cracks and white light from Ms. Blackburn's taillight were sufficient to support the officer's reasonable suspicion that there was a traffic violation and therefore justified the initial stop. (R. VI, 43-45). The State argued that, under the totality of the circumstances, the officer had probable cause, even without a positive drug test on the "drug paraphernalia", to justify his decision to arrest Ms. Blackburn and therefore the so-called search incident to arrest was supported by probable cause. (R. VI, 45-46; R. I, 95-98).

Ultimately, the district court agreed with the State on both issues and found reasonable suspicion to support the initial stop for the traffic violation, as well as probable cause based on the totality of the circumstances to justify the officer's decision to arrest Ms. Blackburn and also the officer's decision to search her the second time immediately before her arrest. (R. VI, 56-59).

Bench Trial and Sentencing

After the motion to suppress was denied, Ms. Blackburn waived her right to a jury trial and agreed to proceed to a bench trial based on stipulated facts to the district court primarily in order to preserve her motion to suppress for appeal. (R. I, 127-128; VII, 2-4). After a quick hearing, the district court reaffirmed the motion to suppress findings, and adjudged Ms. Blackburn guilty of both possession of methamphetamine and operating a vehicle with a broken taillight. (R. VII, 5-6). At her sentencing hearing, she was determined to have a "G" criminal history score. (R. VIII, 3). The district court then sentenced her to a controlling sentence of 15 months in the Department of Corrections with 12

months postrelease, suspended in favor of 12 months probation, along with a fifty dollar fine for the broken taillight. (R. VIII, 4-5). Ms. Blackburn filed a timely notice of appeal from the denial of her motion to suppress, her conviction, and her sentencing. (R. I, 139).

Arguments and Authority

Issue I: The district court erred when it denied Ms. Blackburn's motion to suppress the evidence discovered as a result of the traffic stop and subsequent search of her shoe.

Introduction

Ms. Blackburn filed a motion to suppress arguing that the officer lacked reasonable suspicion to stop her vehicle and lacked probable cause to search her a second time. As a result, the drugs subsequently found in her shoe during that second search were fruits of the poisonous tree and should have been suppressed. That motion was denied on its merits and Ms. Blackburn now appeals the denial of her motion to suppress, arguing that the district court erred in refusing to suppress the drug evidence in her case.

Preservation of the Issue

Prior to trial, Ms. Blackburn filed a motion to suppress arguing that the evidence in her case should be suppressed because the officer lacked reasonable suspicion to stop her vehicle and lacked probable cause to search her the second time. (R. I, 21-31). That motion was heard at an evidentiary hearing and was rejected on its merits by the district court. (R. VI, 59). Ms. Blackburn then proceeded to a bench trial on stipulated facts which included a continuing

objection based on the motion to suppress. (R. I, 124-126; R. VII, 5-6). The district court noted the continuing objection and found Ms. Blackburn guilty of both charges. (R. VII, 5-6). Ms. Blackburn then filed a timely notice of appeal. (R. I, 139). As a result, this issue has been properly preserved for appeal and is ripe for consideration on its merits by this Court.

Standard of Review

An appellate court considers the district court's denial of a motion to suppress under a bifurcated standard. First, the appellate court reviews whether the district court's factual findings are supported by substantial competent evidence. Then the appellate court considers whether the district court's legal conclusions drawn from those facts is correct under a de novo standard of review. *State v. Carlton*, 297 Kan. 642, 645, 304 P.3d 323 (2013).

Argument

In order to comply with the search a seizure provisions of the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights, a police officer conducting a stop of a vehicle must have specific and articulable facts that rise to the level of reasonable suspicion that the person being stopped is committing, has committed, or is about to commit a crime. *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014); see also K.S.A. 22–2402(1). Additionally, in order to lawfully arrest or search someone, an officer must have probable cause, i.e., the reasonable belief under the totality of the circumstances, that the defendant has committed or is committing a specific

crime. *State v. Johnson*, 297 Kan. 210, 222, 301 P.3d 287 (2013); *State v. Fewell*, 286 Kan. 370, 377-378, 184 P.3d 903 (2008). However, when a defendant claims that such a stop, arrest, or search is in violation of the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights, it is the State's burden to prove the lawfulness of the stop. See K.S.A. 22–3216(2); *State v. Estrada–Vital*, 302 Kan. 549, 556, 356 P.3d 1058 (2015).

Reasonable Suspicion to Stop the Vehicle

The officer testified that his only basis for conducting a traffic stop on Ms. Blackburn's vehicle was the broken taillight, which he believed to be a traffic infraction. (R. VI, 5; R. I, 124).

Under K.S.A. 8-1706, every vehicle must be equipped with two rear tail lamps which, "when lighted as required in K.S.A. 8-1703, shall emit a red light plainly visible from a distance of one thousand (1,000) feet to the rear..." K.S.A. 8-1703 simply indicates when lighted lamps (headlights, taillights, etc) must be illuminated. It does not give any additional illumination as to whether a taillight must be solely red, or if the partial emitting of white light from, for instance a crack, would otherwise render the light in noncompliance with the traffic codes.

Officer Browne testified that he pulled Ms. Blackburn's car over for the traffic infraction of a broken taillight, indicating that because it was emitting a white light, which he believed constituted a violation of K.S.A. 8-1706, that he had reasonable suspicion to pull the vehicle over. (R. VI, 5-6). However, at the motion to suppress hearing, the officer agreed that the taillight was clearly

emitting the red light required by the statute at the relatively short distance (one half block) that he was following the vehicle. (R. VI, 19). Although the State tried to suggest that at 1,000 feet back, the white light would likely overpower the weaker red light and therefore would constitute a traffic infraction under K.S.A. 8-1706, because the officer had not followed the vehicle from that far back, the officer could not specifically confirm or prove that that allegation was true. (R. VI, 29-30). The State then appears to have somewhat vaguely suggested that even if the officer may have technically been mistaken about whether Ms. Blackburn's cracked taillight constituted a traffic infraction, that because he reasonably believed that it did at the time of the stop, the stop was still supported by reasonable suspicion. (R. VI, 30, 43-45). Ultimately, the district court determined that, based on the crack in the taillight and white light it emitted, that the officer had reasonable suspicion to conduct the traffic stop in this case. (R. VI, 56).

Blackburn's broken taillight did not violate K.S.A. 8-1706

One of the fundamental rules of statutory construction is to determine the intent of the legislature. *State v. Williams,* 298 Kan. 1075, 1079, 319 P.3d 528 (2014). However, the starting point for that analysis is to look at the plain language of the statute, which requires giving the statutory language used its ordinary and common meaning. *University of Kansas Hospital Authority v. Board of County Comm'rs of Unified Government of Wyandotte County*, 301 Kan. 993, 998-999, 348 P.3d 602 (2015). If the statutory language is plain and unambiguous, the appellate courts do "not speculate as to the legislative intent

behind it and will not read into the statute something not readily found in it." *University of Kansas Hospital Authority*, 301 Kan. at 999 (*quoting Cady v. Schroll,* 298 Kan. 731, 738-39, 317 P.3d 90 [2014]). In this case, the language of the statute is unambiguous.

K.S.A. 8-1706 requires that a red light be plainly visible from the taillights of a vehicle from a distance of 1,000 feet away. The officer in this case did not view Ms. Blackburn's vehicle taillights from 1,000 feet away. Instead, at a distance of about half a block, the officer could see white light from the taillight but also could still see plainly visible red light from the taillight. The plain language of K.S.A. 8-1706 does not require that *only* red light visible, just that red light is visible. Therefore, the fact that the taillight also emitted white light is not a traffic violation under the plain language of the statute.

The State candidly admitted in its response to the motion to suppress that although there are many Kansas appellate cases that discuss non-functional taillights or broken taillights, the facts of those cases often indicate that the taillights are completely non-functioning taillights or simply indicate that the lights were "broken" without being clear whether they were broken in a similar manner to Ms. Blackburn's taillight. (R. VI, 93-94). For example, in *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008), the officer saw a vehicle with a "broken taillight" and conducted a stop; but the initial traffic stop not challenged and the details of how the taillight was "broken" were not articulated. A review of Kansas appellate cases has found that there does seem to be a lack of case law in

Kansas that specifically deals with this particular disagreement over this specific statutory language. Nonetheless, Ms. Blackburn respectfully argues that the plain language of the statute requires only that the taillight emit visible red light and does not actually prohibit the emission of white light from cracks as well.

The officer's mistaken belief regarding K.S.A. 8-1706 does not constitute reasonable suspicion of a violation

Furthermore, although the State seemed to suggest that because the white light would eventually drown out the weaker red light, that at a distance of 1,000 feet the red light would not have been visible from Ms. Blackburn's taillights, the State failed to actually put on any evidence to support that assertion since the officer did not actually observe the car from that distance. As a result, any assumption that Ms. Blackburn's taillight would have violated K.S.A. 8-1706 at a distance of 1,000 feet was mere speculation and unsupported by the evidence at the motion to suppress. The State failed to meet its burden of proof on this issue at the motion to suppress. Although the officer only needed reasonable suspicion that a crime was being committed, Ms. Blackburn asserts that it was not reasonable for the officer under these circumstances to conduct a traffic stop on a vehicle with a plainly visible red light emitting from it along with a few white cracks under the unsupported assumption that the white light emitting from it would necessarily constitute a violation of K.S.A. 8-1706 at 1,000 feet away.

Additionally, to the extent that this Court may agree with Ms. Blackburn's argument that the white light emitting from the taillight in addition to the red light

did not actually constitute a violation of K.S.A. 8-1706, Ms. Blackburn further argues that the officer's mistaken belief that it did also cannot be used to support his reasonable suspicion to stop her vehicle.

In *State v. Knight*, 33 Kan. App. 2d 325, 327, 104 P.3d 403 (2004), this Court considered a Wichita police officer's reasonable suspicion to stop a vehicle based on a misinterpretation of a traffic ordinance. In *Knight*, a police officer stopped a vehicle after the vehicle turned onto a public street from the parking lot of a grocery store without using its turn signal. The officer indicated that the stop was partially predicated on the alleged traffic infraction of failing to use a turn signal. However, this Court reviewed the City of Wichita's ordinance, which stated that no person could turn a vehicle from a public roadway to enter a private road or driveway without the use of a turn signal. This Court noted that the plain language of the ordinance did not actually prohibit turning from a private driveway onto a public street without the use of a turn signal. The Court then went on to say that the officer, "whose employment by the city specifically includes enforcing the city's traffic ordinances, is charged with knowledge of those ordinances and a common sense interpretation of them." *Knight*, 33 Kan. App. 2d at 327. As a result, this Court concluded that the alleged traffic infraction did not warrant a traffic stop.

Similarly to the officer in *Knight,* Officer Browne's duties obviously appear to include conducting traffic stops for violations of the traffic code. As a result, he should also be charged with explicit knowledge of those ordinances and a common

sense interpretation of them. If this Court agrees with Ms. Blackburn's plain language interpretation of the statute, which is silent as to whether a taillight may emit other light besides red light, so long as the red light is still visible from 1,000 feet away, then Officer Browne's misinterpretation of that statute should not be deemed "reasonable" and should not be sufficient to support reasonable suspicion for the traffic stop in this case.

Probable Cause for the Second Search of Ms. Blackburn

Defense counsel also asserted below that the officer lacked probable cause to search Ms. Blackburn's shoe. (R. I, 29-31). Defense counsel did not contest the initial "frisk", nothing was found during that "frisk". (R. I, 29-31; R. VI, 10-11). Defense counsel argued that there was no probable cause to conduct a more invasive search of Ms. Blackburn's shoe after the short "frisk" and the search of the car. (R. VI, 29-31; R. VI, 52-55). The State argued that although Ms. Blackburn was not yet technically under arrest during the second search, that the officer had developed enough reasonable suspicion to arrest her for possession of drug paraphernalia and therefore the second search of her shoe constituted a search incident to arrest. (R. VI, 45-46; R. I, 95-98). The district court upheld that search and refused to suppress the evidence of drugs found in her shoe. (R. VI, 57-59).

The Kansas Supreme Court has held that warrantless searches preceding an arrest are properly classified as "search incident to arrest" as long as they meet two criteria; (1) there was a legitimate basis for the arrest before the search, and (2) the arrest followed shortly after the search. *State v. Conn*, 278 Kan. 387, 393, 99 P.3d

1108 (2004)(*citing United States v. Anchondo*, 156 F.3d 1043 [10th Cir. 1998]; and *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed. 2d 633 [1980]). Although the search in this case clearly immediately proceeded the arrest, Ms. Blackburn argues that the officer did not have probable cause for the arrest before the search.

When determining whether the officer had probable cause to arrest Ms. Blackburn prior to her search, this Court must consider the totality of the circumstances, which is an objective reasonable person standard. *See State v. Keenan*, 304 Kan. 986, 994, 377 P.3d 239 (2016). Probable cause is present when, under all the facts and circumstances, the officer may reasonably believe that an offense has been or is being committed. *Keenan*, 304 Kan. at 994 (*citing State v. Fewell*, 286 Kan. 370, 377, 184 P.3d 903 (2008); *State v. Hays*, 221 Kan. 126, 557 P.2d 1275 (1976).

At the time of the officer's decision to arrest Ms. Blackburn, but immediately before the second search where the drugs were found in her shoe, the officer had several factors to consider. He knew that the drug dog had alerted on the car. (R. VI, 10). He knew that a cut straw was found on the floorboard with a white powder on it and that a plastic mirror was found in the glove box also with a white powder on it. (R. VI, 12, 24). He knew that the straw had tested negative for methamphetamine but possibly positive for amphetamine. (R. VI, 15-16). He knew that the passengers had been moving around quickly inside the car before his

initial approach. (R. VI, 5-6, 34). And he knew that all three people in the vehicle had known drug histories. (R. VI, 37).

The drug dog alerted on the passenger's side, not the driver's side where Ms. Blackburn had been sitting. Although the drug dog had alerted on the vehicle, no actual drugs were found inside the vehicle other than the potential residue on the straw and mirror. In *State v. Anderson*, 281 Kan. 896, 904-905, 136 P.3d 406 (2006), the Kansas Supreme Court considered the officer's probable cause to arrest a defendant after a drug dog alerted on a vehicle but a subsequent search of the vehicle did not yield any incriminating evidence linking the defendant to a drug crime. As a result, the Court concluded that the officer's reasonable suspicion that the defendant had committed a crime never "ripened" into probable cause for the officers to arrest the defendant. *Anderson,* 281 Kan. at 905. Although Officer Browne found what he believed to be drug paraphernalia in Ms. Blackburn's car, which would differentiate this case from *Anderson*, Ms. Blackburn later argues that the so-called drug paraphernalia was also of very limited value to the probable cause determination. Certainly, the fact that the drug dog had alerted on the vehicle but only items of very limited value and no actual drugs were found renders this particular fact of very low value to the probable cause determination in this case.

Furtive movements can support a finding of probable cause. *State v. Schenk*, 2016 WL 6822037 (Kan. App. 2016)[1]. Although the officer gave a brief description that the passengers seemed to be moving about in the car as he approached, he did not indicate that, as a result of that movement, he saw anything that was particularly indicative of illegal acts. (R. VI, 34, 5-6). As a result, this information has little, if any, probative value.

The officer also testified that although he did not initially recognize the vehicle when he pulled it over, once he saw the three people inside the car, he knew that those three people had drug histories. When asked to clarify, the officer admitted that he did not know about any of the three occupant's drug histories as a result of having been personally involved in any of their cases, but simply because he had heard some of the other officers talking about them. (R. VI, 37). Although the collective knowledge of officers can support probable cause, that knowledge has to be based on reasonably reliable information and be communicated through a reliable chain of communication. See *State v. Ibarra,* 282 Kan. 530, 544–46, 147 P.3d 842 (2006) (relying on *State v. Clark,* 218 Kan. 726, 731–32, 544 P.2d 1372, *cert. denied* 426 U.S. 939, 96 S. Ct. 2657 [1976]).

However, in *State v. Brewer*, 49 Kan. App. 2d 102, 112, 305 P.3d 676 (2013), this Court held that if the officer cannot name from whom he obtained his information from and if there is nothing else in the record to otherwise support that

[1] Because this is an unpublished case, counsel has included a copy of this opinion as an attachment to the brief pursuant to Sup. Ct. Rule 7.04(g).

the information the officer had was reliable, then then that information cannot be used to support a probable cause finding. Here, as in *Brewer,* the officer did not provide any specific information about how he knew about the vehicle occupant's drug histories other than to say he knew it from other officers. Because there was information evidence provided by the State on this factor to support a finding by the district court or by this court that the collective knowledge of these officers was reasonable reliable and was communicated through a reliable chain of communication, this information cannot be used to support a probable cause finding in this case.

Finally, the main evidence, and the evidence the officer primarily appears to have relied upon, was the fact that the straw and mirror were found in the vehicle. The officer testified that the cut straw was indicative of drug paraphernalia and it did contain a white powdery substance which the officer tested. (R. VI, 12, 14). That test was negative for methamphetamine, but positive for amphetamines. (R. VI, 15-16). However, as the officer acknowledged, amphetamines are legal to possess with a prescription and the officer confirmed that he never asked either Mr. Bowser or Ms. Blackburn about any such prescription. (R. VI, 24-25). Although the officer testified that the cut straw was indicative of drug paraphernalia, that assessment is also of limited value as there are obviously legal and perfectly rational reasons why a defendant may have a cut straw in their vehicle. Perhaps the straw of a passenger's fountain drink from the gas station was simply too tall for their cup and so they snipped it off to make the

drink more convenient. Maybe the full straw was located in the car and was accidentally broken in half and part of it was never picked up from the floor of the car. Unlike some other, more obviously drug-related paraphernalia, a cut straw does not weigh particularly heavily in favor of a probable cause finding, particularly when it tested negative for methamphetamine and potentially positive for an otherwise legal substance.

Finally, there is the plastic mirror that was located in the glove box. Although the police officer also classified this as drug paraphernalia in light of the totality of the circumstances, this item should also not be weighed particularly heavily in favor of a probable cause finding. Although the officer testified that it too had a powdery substance on it, the officer did not test this item at all. (R. VI, 24, 25). And, although the officer testified that flat mirror like objects are often used in conjunction with straws for snorting drugs, mirrors are, in general, very commonly used items. Furthermore, the straw and the mirror were not found in the same location in the vehicle. In fact, the mirror was found in the glove compartment box.

In *State v. Knight*, 33 Kan. App. 2d 325, 104 P.3d 403 (2004), this Court discussed the relative value of items of common usage when determining whether an officer had reasonable suspicion to pull someone over for a suspected drug crime. In that case, the suspect had purchased two boxes of cold pills, a six-pack of bottle water, and table salt, which the state argued rose to the level of reasonable suspicion that the suspect was attempting to manufacture

methamphetamine. Judge McAnany noted that although salt was used in the manufacture of methamphetamine,

> Salt is also a compound that is essentially to the maintenance of human life. It has been used and consumed by every person, in every society, in every corner of the globe since before the dawn of human history. To predicate a stop upon the additional purchase of so ubiquitous a substance is not reasonable.

Knight, 33 Kan. App. 2d at 327-28. The Court then went on to find that the purchase of these items simply did not rise to the level of reasonable suspicion that a crime was being committed or about to be committed. *Id.*

What Judge McAnany was eloquently stating was the concept that some items are just so common that even though they may have potentially illegal uses, their value towards a legal standard such as reasonable suspicion in the *Knight* case, or comparatively in this case, probable cause, is of limited value. Ms. Blackburn respectfully argues that same general logic applies here to the straw and mirror. Although certainly both items can and sometimes are used as drug paraphernalia, because they are so ubiquitous, they likely deserve comparatively less weight when using them to attempt to support a finding of probable cause to justify a warrantless arrest and search.

As a result, although the officer was able to articulate a number of factors that could potentially have supported a probable cause finding in this case, Ms. Blackburn argues that each of these factors, individually, and under a totality of

the circumstances standard, simply do not rise to the level of probable cause to arrest and search Ms. Blackburn. Therefore, the evidence of methamphetamine obtained after the search of her shoe should be suppressed as a fruit of the poisonous tree. *See State v. Walker*, 283 Kan. 587, 603, 153 P.3d 1257 (2007)(The exclusionary rule prohibits the use of wrongfully obtained evidence.)

Conclusion

The district court erred when it found that the officer had sufficient reasonable suspicion to stop Ms. Blackburn's vehicle in this case due, in part, to an erroneous interpretation of the statutory language of K.S.A. 8-1706, as well as due to the State's failure to put on sufficient evidence to support the district court's reasonable suspicion finding. The district court also erred when it found that the officer had sufficient probable cause to search Ms. Blackburn a second time and that the drugs in her case should not be suppressed because, under the totality of the circumstances, the facts that the officer had to support its decision to arrest Ms. Blackburn were of very limited value. As a result, the district court erred in denying Ms. Blackburn's motion to suppress the evidence in this case and this Court should reverse that decision now on appeal.

Conclusion

For these reasons, Ms. Blackburn respectfully asks that this Court reverse her convictions in this case and remand her case for further proceedings in accordance with the above listed issues.

2016 WL 6822037
Unpublished Disposition
Only the Westlaw citation is currently available.
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

State of Kansas, Appellee,

v.

Larry Dean Schenk, Appellant.

No. 114,564

Opinion filed November 18, 2016

Appeal from Montgomery District Court; ROGER L. GOSSARD, judge.

Attorneys and Law Firms

Randall L. Hodgkinson, of Kansas Appellate Defender Officer, for appellant.

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Before McAnany, P.J., Pierron, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 At a bench trial on stipulated facts, the district court convicted Larry Dean Schenk of one count of possession of opiates/opium/narcotic drugs and certain stimulants, a level 5 nonperson felony, in violation of K.S.A. 2013 Supp. 21–5706(a), and one count of use/possess with the intent to use drug paraphernalia, a class A nonperson misdemeanor, in violation of K.S.A. 2013 Supp. 21–5709(b)(2). The district court imposed 11–month and 6–month prison sentences, respectively, and ordered the sentences to run concurrently. The district court suspended the sentences and granted Schenk 12 months' probation. Schenk filed this direct appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, in Independence, Kansas, Detectives Joseph Isaac Dye and Christopher V. Williams observed a pick-up truck crossing left of the center line and then failing to yield to oncoming traffic when making a left-hand turn. Larry Dean Schenk was a passenger in the cab of that truck. The driver's actions nearly caused an accident. The police activated their lights to initiate a traffic stop of the vehicle, but it did not pull over.

Maintaining a distance of approximately one car-length behind the vehicle, both detectives observed Schenk's unobstructed silhouette making furtive movements, such as leaning to the right, or bending down and forward, appearing as if he was trying to shove something under the seat or between the seats to his left. The detectives found these "unusually furtive movements" atypical for a traffic stop. Additionally, the driver did not stop immediately, but rather continued to drive for another 2 to 3 blocks before pulling over; the detectives suspected that Schenk's movements indicated an attempt to hide a weapon in the cab of the truck. While following the vehicle, the detectives called in the license plate and radioed for backup.

Sergeant Don Yaus arrived as backup at approximately the same time the detectives approached the cab of the truck. The officers' approach was before getting a full report on the license tag which was not unusual. Neither of the officers had their service weapons drawn as they approached the truck.

Detective Williams approached the driver's side of the vehicle while Detective Dye and Sergeant Yaus approached Schenk on the passenger side. Out of concern that there was a weapon somewhere in the passenger compartment, the detectives had both men exit the vehicle. This is common practice if officers suspect a weapon is involved. Detective Dye requested that Schenk step out of the vehicle, which he did without incident; however, Schenk left the door to the passenger side of the vehicle open. Sergeant Yaus conducted a weapons pat-down of Schenk while Detective Dye watched the driver's interaction with Detective Williams.

During the pat-down of Schenk three items were discovered: a pocketknife; a lighter in the right front pants pocket; and a wallet. Sergeant Yaus handed Schenk's

wallet to Detective Dye. Detective Dye testified that he obtained Schenk's consent to retrieve his identification from the wallet, intending to run it through the system to search for any warrants for Schenk and the driver of the vehicle. Schenk was uncertain whether he consented to Detective Dye retrieving his identification from his wallet. Schenk asserts that retrieval of his identification was not necessary since Detective Dye recognized him. The record is silent regarding police policy for requesting identification of a subject who is known to the requesting officer. Testimony revealed that calling in a warrant search is more efficient and reliable when using identification, rather than asking a subject for all of the necessary details.

*2 When Detective Dye removed Schenk's identification from his wallet, he noticed a folded piece of burnt foil behind it in the cardholder compartment. Detective Dye asked Schenk what it was, and Schenk replied, "Shit, that's some burnt up shit." Detective Dye then opened the burnt foil and observed what he believed to be methamphetamine. Detective Dye testified that Schenk was arrested based on what Schenk said about the substance. Detective Dye told Sergeant Yaus to handcuff Schenk. Detective Dye then went to speak with Detective Williams. The substance in the burnt foil was field-tested, as well as subsequently tested by the Kansas Bureau of Investigation, and both tests of the substance were positive for methamphetamine.

Shortly after or nearly simultaneously to the weapons pat-down of Schenk, Detective Williams requested the driver's identification and asked the driver to exit the vehicle. Detective Williams then conducted an incident-free weapons pat-down of the driver. Both the driver and Schenk continued to have access to the passenger compartment of the vehicle, and the officers "felt threatened ... for [their] safety."

Detective Williams then initiated a weapons search of the cab of the truck, limited to areas in which weapons might be placed or hidden, including the center seat console. Although he did not find a weapon, Detective Williams, a narcotics detective, did observe a glass pipe containing a burnt residue located in the center console of the seats. Detective Williams knew from his experience and training that this pipe was drug paraphernalia.

Detective Dye left Sergeant Yaus to handcuff Schenk and walked around the truck to Detective Williams. At this time, Detective Williams informed Detective Dye that he had observed a pipe in the cab of the truck. Based on this discovery, another officer who had arrived on-scene handcuffed the driver. Detective Williams was unaware of Detective Dye's discovery of the methamphetamine in Schenk's wallet until after he completed the weapons search of the cab of the truck. Detective Williams instructed Detective Dye to drive the vehicle to impound so that they could get a search warrant for the vehicle. There have been no objections or challenges to the validity or execution of the search warrant for the vehicle.

Schenk filed a motion to suppress from evidence "all items seized from the search of [the driver's] vehicle and search of [Schenk's] wallet and order [*sic*] suppressing statements obtained from Mr. Schenk made in connection with the illegal search of his wallet." The detectives testified that the initial weapons search of the cab of the truck was based on the furtive movements of Schenk when they activated the lights and attempted to initiate the traffic stop. Detective Williams testified that the initial search was a safety issue "based upon my training and experience, when people duck underneath the cars [*sic*] there's plenty of scenarios where officers get killed." During the protective search of the vehicle, Detective Williams also observed on the floor of the passenger side of the cab several hand-held tools (*e.g.*, wrenches and a sledgehammer) and the driver's wallet containing at least $300 in cash.

After hearing the evidence on Schenk's motion and, after deliberation, the district court determined that based on state and federal cases, and that "under the totality of the circumstances that the inspection of the vehicle by law enforcement officers was not unconstitutional or unreasonable." The district court ruled that the inspection of the truck's cab was based upon facts that gave rise to the officers' reasonable suspicion that a protective search of the vehicle for weapons was appropriate. As a result, the district court concluded that the motion to suppress "is and should be denied." The district court did not directly rule on the issues associated with Schenk's wallet or his statements. The record does not reflect that Schenk objected to the lack of findings on the wallet-related issues.

*3 In early June 2014, Schenk appeared with his counsel and stated he was "inclined to go to trial" at the end of the month. However, at this same hearing, Schenk's counsel

stated that they were in discussions with the prosecutor to avoid a trial and told the district judge that he need not summon a jury:

> "THE COURT: In the meantime I have to summons a jury?
>
> "[SCHENK'S COUNSEL]: I don't think so, Your Honor. We're in the position whether—we've come to the agreement to submit this to trial instead [on] stipulated facts or potentially pursue diversion for part of the charges. No jury.
>
> "THE COURT: If I cancel the—cancel the jury trial we'll either reschedule it later and you'll waive speedy trial rights?
>
> "[SCHENK'S COUNSEL speaking to Schenk]: You understand what he's talking about in terms of that?
>
> "[SCHENK]: Yes.
>
> "[SCHENK'S COUNSEL]: Yes, Your Honor.
>
> ....
>
> > "THE COURT: ... We're going to strike the jury trial. You want to make sure Ellen knows that before she sends those [summons] out today?
>
> ....
>
> "THE COURT: She's working on them as we speak."

As of the end of June 2014, according to Schenk's counsel, the parties were in agreement to submit the case to trial before the district court on stipulated facts, rather than a jury trial: "[T]he jury trial scheduled herein was stricken from the [district] court's jury trial calendar and [Schenk] entered his waiver of his right to speedy trial." At the next hearing, Schenk, with his counsel, affirmed to the district court that they were in agreement with the prosecutor to "submit this to trial to the bench on a set of stipulated facts and objections.... We have previously waived speedy trial in this matter." The district judge, again, asked Schenk if he waived his right to a speedy trial, to which Schenk replied, "Yes, sir."

By mid-August 2014, at a hearing with Schenk present, a tentative bench trial date was set for late-September 2014 to commence if a set of stipulated facts were not agreed upon by then. In late-September, Schenk's counsel requested a continuance from the scheduled bench trial so that the parties could complete their agreed stipulation of facts; the district court set the next status hearing for mid-October. Finally, in mid-October 2014, Schenk's counsel informed the district court that Schenk signed the agreed stipulation of facts, and that it would be submitted "to the Court for trial to the bench on the set of stipulated facts." The district judge replied, "Okay. Good. I [will] look at all that and [will] write you a nice letter and tell you whether he's guilty or not guilty, right?" Schenk's counsel replied, "Yes, Judge."

In the agreed stipulation of facts, Schenk renewed his objections to the search of his wallet, to the seizure of the contents of the wallet, and the admission of those contents into evidence.

After the district court reviewed the record, it found Schenk guilty beyond a reasonable doubt of both drug-related charges. The district court further affirmed its previous decision on Schenk's motion to suppress and stated the motion "should be and is hereby again denied," and provided the same supporting rationale regarding the search of the vehicle. Again, the record reflects that Schenk did not object to the lack of findings on the wallet-related issues.

At the sentencing hearing, Schenk made no statement on his own behalf and the district court sentenced Schenk to 12 months' probation on each charge, to run concurrently, with underlying jail sentences of 11 months for the felony charge and 6 months for the misdemeanor charge. Schenk timely appeals.

WAS THE DISTRICT COURT'S DENIAL OF SCHENK'S MOTION TO SUPPRESS BASED UPON SUBSTANTIAL COMPETENT EVIDENCE?

***4** Schenk claims that the district court committed reversible error by denying his motion to suppress and argues that the facts presented do not give rise to reasonable suspicion to perform a *Terry* stop. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968). According to Schenk, finding no weapons upon the individuals during the pat-downs, the officers' concern for their safety should have been satisfied. The seizure and

subsequent search of Schenk's wallet, as well as the search of the cab of the truck, were thus, not protective, and any evidence discovered should have been suppressed.

Standard of Review

When reviewing an evidence suppression issue, this court employs a bifurcated standard of review. *State v. Karson*, 297 Kan. 634, 639, 304 P.3d 317 (2013). First, without reweighing the evidence, this court considers whether the district court's findings are supported by substantial competent evidence. This court then reviews the district court's conclusions de novo. If the material facts are undisputed, the issue becomes a question of law subject to unlimited review. 297 Kan. at 639.

Searches and Seizures

Both the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights protect individuals from unlawful searches and seizures. *State v. Garza*, 295 Kan. 326, 331, 286 P.3d 554 (2012). Warrantless searches are per se unreasonable unless the search fits one of the recognized exceptions. *State v. Sanchez-Loredo*, 294 Kan. 50, 55, 272 P.3d 34 (2012). One such exception is probable cause plus exigent circumstances. 294 Kan. at 55. The probable-cause-plus-exigent-circumstances exception includes the "automobile exception," which states that a vehicle's mobility provides, without the necessity of proving anything more, exigent circumstances. 294 Kan. 50, Syl. ¶ 4. Probable cause can be established by "specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

Here, the probable-cause-plus-exigent-circumstances and automobile exceptions apply. Probable cause existed for the traffic stop because of the uncontested traffic infractions. Probable cause existed for the initial warrantless searches. While the driver failed to pull over after a longer than normal period of time, Schenk appeared by his furtive movements to use that time to hide contraband—feared to be a weapon—in the cab of the truck. Finally, exigent circumstances existed because the vehicle was mobile.

Schenk does not dispute that probable cause existed to stop the vehicle, or to search his person during the pat-down. Schenk argues instead that the officers' concern for their safety should have been satisfied by the individual pat-downs of Schenk and the driver. In other words, Schenk argues that the protective search of the cab of the truck was outside the scope of the *Terry* stop, as was the foray into his wallet. Schenk claims that his wallet was illegally seized and searched, and the cab of the truck was illegally searched, so the evidence discovered in these two spaces should have been suppressed.

The Vehicle

A traffic stop is a seizure. *Garza*, 295 Kan. at 332. For a seizure to be constitutionally reasonable, the law enforcement officer "must know of specific and articulable facts that create a reasonable suspicion the seized individual is committing, has committed, or is about to commit a crime or traffic infraction. [Citations omitted.]" *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014). In this case, Schenk does not dispute the underlying traffic infractions that triggered the traffic stop. He disputes the officers' reasonableness in conducting a protective search of the cab of the truck.

***5** Relying on *State v. Epperson*, 237 Kan. 707, 703 P.2d 761 (1985), Schenk argues that once the officers had removed Schenk and the driver from the vechile and performed the pat-downs, the concern for the officers' safety should have been satisfied. In support of this argument, Schenk claims that neither he nor the driver could have gotten past the three officers present at the time to obtain a weapon from the vehicle. Schenk also argues that he would not have been able to get out of his handcuffs to obtain a weapon.

The State argues that it is mere speculation by Schenk to suggest that because the officers outnumbered Schenk and the driver that the officers need not have reasonably worried about the men attempting to secure a weapon from the uncleared vehicle. Further, the State argues that since no weapons were found on either Schenk's or the driver's person, there was a "heightened" reasonable belief that there might still be an accessible weapon in the vehicle. The State's arguments have merit.

The facts of this case are distinguished from those in *Epperson* in several ways. In this case, the vehicle was observed violating traffic laws, the driver failed to pull over for several blocks while Schenk made furtive movements suggesting he was hiding a weapon, the officers were concerned for their safety, the officers did call for backup, and the officers began the encounter by

having the men exit the vehicle and undergo pat-down searches for weapons. *Cf. Epperson*, 237 Kan. at 714–15. Further, the timeline of events indicates that Detective Williams was conducting the protective search of the vehicle's interior while the pat-down of Schenk was still being concluded with the discussion of the burnt foil found behind his identification. Schenk was not handcuffed by Sergeant Yaus until Detective Dye left him to reconnoiter with Detective Williams at the back of the vehicle. It was at this meeting that Detective Dye learned of Detective Williams' observation of drug paraphernalia in the cab of the truck. This indicates that both Schenk and the driver were being handcuffed at approximately the same time, after the protective pat-downs and protective search of the cab had been concluded. Consequently, neither Schenk nor the driver were restrained during at least a portion of the protective search of the vehicle.

A search of the passenger compartment of a vehicle, if limited to those areas in which a weapon may be placed or hidden, is permissible if the police have a reasonable belief based on " 'specific and articulable facts which, taken together with the rational inferences from those facts,' " reasonably warrant the officers' belief that the suspect is dangerous and that he may gain immediate control of weapons. *Michigan v. Long*, 463 U.S. 1032, 1049–50, 103 S. Ct. 3469, 77 L.Ed. 2d 1201 (1983) (quoting *Terry*, 392 U.S. at 21) (vehicle searched for weapons after Long was patted down and while he was outnumbered by police officers). In this case, the protective search of the truck's cab was founded on the officers' apprehensions of a weapon after observing Schenk's atypical and furtive movements during the delay in the driver pulling over. The search of the truck's cab was limited to areas in which a weapon could be placed or hidden.

The totality of the circumstances do not support Schenk's argument that the officers acted on an unparticularized suspicion or hunch. Rather, the officers testified as to their observations of Schenk's behavior, the delay in the driver pulling over, their apprehensions because of these observations, and what these facts could mean in the context of their experience and training. See *Terry*, 392 U.S. at 27; *United States v. Arvizu*, 534 U.S. 266, 122 S. Ct. 744, 151 L.Ed. 2d 740 (2002); *State v. Johnson*, 293 Kan. 959, 966, 270 P.3d 1135 (2012). These circumstances are enough to find that the officers had reasonable suspicion that there was a weapon accessible to Schenk within the cab of the truck. Accordingly, the protective search of the vehicle was not outside the scope of the *Terry* stop, and the district court did not err in denying Schenk's motion to suppress evidence from the warrantless search of the vehicle.

Seizure of the Wallet

***6** Schenk appeals the seizure and subsequent search of his wallet. However, Schenk did not raise the seizure of the wallet as an issue before the district court. Schenk only raised the search of the wallet itself. Constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Further, generally, if any issue is not raised before the district court, it cannot be raised for the first time on appeal. *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Although Schenk's motion to suppress requested generally that the district court suppress "all evidence and statements obtained by an unlawful and unconstitutional seizure and search," the seizure of the wallet was not specified. Rather, Schenk requested suppression of "all *items seized from the ... search of* [*Schenk's*] *wallet*." (Emphasis added.) The item seized from the search of his wallet was the burnt foil containing the methamphetamine, not the wallet itself.

There are several recognized exceptions to this general rule against raising issues for the first time on appeal. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). However, Schenk does not claim that any of these exceptions apply to the issue of the seizure of his wallet during the pat-down. Further, Schenk offers no explanation to this court why this issue should be addressed for the first time on appeal. Accordingly, the issue of the seizure of Schenk's wallet is not properly before this court. See *Godfrey*, 301 Kan. at 1043–44 (failure to brief an exception means the issue will not be addressed); Kansas Supreme Court Rule 6.02(a)(5) (2015 Kan. Ct. R. Annot. 41).

Search of the Wallet

Schenk appeals the search of his wallet. The record demonstrates that Sergeant Yaus located the wallet in Schenk's pocket, along with the pocketknife and lighter, and handed the wallet to Detective Dye, who then requested Schenk's permission to retrieve his identification. Schenk was uncertain whether he consented to Detective Dye retrieving his identification.

Nevertheless, Schenk argues that the search of his wallet was outside the scope of the *Terry* stop.

The bulk of Schenk's motion to suppress before the district court addressed the search of the vehicle and did not specifically argue that the search of his wallet during the pat-down was improper. Even during references to the pat-down in the motion, Schenk simply indicated that the men made no "furtive movements towards the vehicle." Schenk's motion to the district court made no argument pertaining to the search of the wallet, but merely made a reference to the illegality of a "warrantless search" of the wallet in the conclusion of the motion. Further, the district court did not make any specific findings of fact regarding the search of the wallet, likewise limiting its discussion in the decision to the constitutionality and appropriateness of the protective search of the vehicle.

The State has the burden of establishing the scope and voluntariness of the consent to search, and whether consent is voluntary is an issue of fact which appellate courts review to determine if substantial competent evidence supports the trial court's findings. *State v. James*, 301 Kan. 898, 909, 349 P.3d 457 (2015). If the parties do not dispute the material facts, the suppression issue is solely a question of law. *State v. Spagnola*, 295 Kan. 1098, 1104, 289 P.3d 68 (2012). Here, the record reflects that the State offered testimony that the scope of the search to which Schenk voluntarily consented was to retrieve his identification from his wallet so that the detective could run a routine warrant search. Schenk did not object to the lack of findings below regarding the wallet, and consequently, this court will presume that the district court made the necessary findings to support its conclusions in denying Schenk's motion. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009).

*7 Schenk argues that consent granted during an illegal seizure is tainted, and so even if he did voluntarily consent to the retrieval of his identification, the fruits of that consent should be suppressed. For this proposition, Schenk relies on *State v. Grace*, 28 Kan. App. 2d 452, 456, 17 P.3d 951 (2001), which held that consent obtained during an illegal detention is tainted. However, this argument fails for two reasons. As discussed above, the illegal seizure of the wallet as an issue was not properly before this court and Schenk neither argues, nor does the record support that he was illegally detained.

Further, Schenk does not claim that he did not give consent—only that he is uncertain on the matter—and he makes no claim that the officers exceeded the scope of his consent to retrieve the identification. Accordingly, once the identification was removed and the burnt foil containing methamphetamine was in plain view, it was subject to legal seizure. *State v. Fisher*, 283 Kan. 272, 292–99, 154 P.3d 455 (2007) (plain view); *State v. Ewertz*, 49 Kan. App. 2d 8, 14, 305 P.3d 23 (2013) (plain view).

Lastly, Schenk argues that before the officers searched his wallet and discovered the burnt foil, there was no sign of drug activity. However, this claim is not supported by the record. The record establishes that Detective Williams conducted the protective search of the truck's cab and discovered the drug pipe nearly simultaneously with Detective Dye discovering the burnt foil behind Schenk's identification. As the officers independently found drug paraphernalia in the center seat console of the truck, both men would likely have been taken into custody, and their possessions inventoried at the police station. *Long*, 463 U.S. at 1050 (police cannot be required to ignore contraband other than weapons; the Fourth Amendment does not require suppression in such cases). Schenk's identification would have been sought at that time, and the burnt foil with methamphetamine inevitably discovered. *Utah v. Strieff*, 579 U.S. ——, 136 S. Ct. 2056, 2061, 195 L.Ed. 2d 400 (2016) (inevitable discovery doctrine is an exception to the exclusionary rule).

Detective Dye's search of Schenk's wallet was limited in scope to Schenk's consent to retrieve his identification. Once the identification was removed, the burnt foil was in plain view. Accordingly, the district court did not err in denying Schenk's motion to suppress and allowing into evidence the drugs found in the course of this limited and permitted search.

The district court's ruling on the suppression issue is affirmed.

IS THERE SUBSTANTIAL COMPETENT EVIDENCE TO DEMONSTRATE THAT SCHENK'S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS EFFECTIVE?

Schenk claims that the waiver of his right to a jury trial was improper. Specifically, he argues that the record "does not

include any evidence that the district court addressed and informed Mr. Schenk of his right to waive a jury trial or obtained a waiver thereof." Schenk contends that because the record does not show that the district court informed him of his right to a jury trial, nor did it obtain a valid waiver, his conviction should be reversed and remanded for a jury trial.

Jurisdiction

Schenk did not raise this issue before the district court. Generally, even constitutional issues asserted for the first time on appeal are not properly before this court for review. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). There are, however, exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, one of which is where "consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights." *State v. Anderson*, 294 Kan. 450, 465, 276 P.3d 200, *cert. denied* 133 S. Ct. 529 (2012). Schenk claims that his conviction by a judge without a proper waiver of his right to a jury trial is a denial of a fundamental right.

***8** This court has previously considered a challenge to the waiver of a right to a jury trial for the first time on appeal to prevent the denial of a fundamental right. *State v. Frye*, 294 Kan. 364, 370–71, 277 P.3d 1091 (2012); *State v. Bowers*, 42 Kan. App. 2d 739, 740, 216 P.3d 715 (2009). A criminal defendant's right to a jury trial is guaranteed by constitution and by statute. U.S. Const. Amend. VI; Kan. Const. Bill of Rights §§ 5, 10. "There is no more fundamental right in the United States than the right to a jury trial." *State v. Larraco*, 32 Kan. App. 2d 996, 999, 93 P.3d 725 (2004). The constitutional right is codified in K.S.A. 22–3403(1), which requires that all felony cases be tried to a jury unless the defendant and prosecuting attorney, with the consent of the court, submit the matter to a bench trial.

The State argues Schenk does not specifically allege that he did not knowingly and voluntarily waive his right to a jury trial, but that he merely asserts the record is insufficient on the subject. In *State v. Mullen*, 51 Kan. App. 2d 514, 524, 348 P.3d 619 (2015), *aff'd* 304 Kan. 347, 371 P.3d 905 (2016), this court found that the effectiveness of the appellant's waiver of his right to a jury trial could be raised for the first time on appeal to prevent the denial of a fundamental right. Consequently, it is appropriate for this court to consider whether Schenk's waiver of his right to a jury trial was effective.

Standard of Review

A substantial competent evidence standard of review is applicable to this issue because whether a defendant waived his or her right to a jury trial is a factual question. *State v. Beaman*, 295 Kan. 853, 858, 286 P.3d 876 (2012). When the facts are undisputed, however, whether a defendant voluntarily and knowingly waived his or her right to a jury trial is a question of law, subject to unlimited review. 295 Kan. at 858.

Jury Trial Waiver

The right to a jury trial may be waived if it is done so voluntarily and knowingly. *State v. Irving*, 216 Kan. 588, 589, 533 P.2d 1225 (1975). The waiver of the right to a jury trial should be "strictly construed to afford a defendant every possible opportunity to receive a fair and impartial trial by jury." 216 Kan. at 589. Determining whether this test has been met will depend on the particular facts and circumstances of the case, "but a waiver of the right to a jury trial will not be presumed from a silent record. [Citations omitted.]" 216 Kan. at 589. A court will not accept a jury trial waiver unless the defendant, after being advised by the court of his or her right to a jury trial, personally waives that right, either in writing or in open court. 216 Kan. at 590.

In this case, between early June 2014 and mid-October 2014, Schenk appeared with his counsel in the district court on no fewer than six occasions. Each time, his counsel openly represented to the district court that Schenk was pursuing a bench trial (or, "trial to the court") on stipulated facts. A jury trial had initially been scheduled for late June; however, Schenk's counsel, in open court, told the district judge that there would be "No jury," and agreed the district court should cancel the jury summons that were already being prepared. While allowing Schenk's counsel to pursue stipulated facts to present to the district court for bench trial, the district judge clarified that if that process didn't work, they would revisit the issue. The district judge then declared that the jury trial would be stricken and asked Schenk if he would waive his speedy trial rights. Schenk said he understood and agreed.

***9** On at least two other occasions by the end of June 2014, similar exchanges between Schenk, his counsel, and

the district court took place. In a motion for continuance, Schenk's counsel represented that they would proceed without a jury trial, and that Schenk waived his right to a speedy trial. Again, in open court, Schenk, present with his counsel, affirmed to the district court that they were in agreement with the prosecutor to "submit this to trial to the bench on a set of stipulated facts and objections.... We have previously waived speedy trial in this matter." The district judge, again, asked Schenk if he waived his right to a speedy trial, to which Schenk replied, "Yes." A bench trial was scheduled and then continued to allow the parties more time to agree upon stipulated facts. Finally, in mid-October 2014, Schenk's counsel informed the district court that Schenk signed the agreed stipulation of facts, and that it would be submitted to the Court for trial to the bench on the "set of stipulated facts."

The record does not reflect that Schenk provided a written waiver of his right to a jury trial. Under *Irving*, Schenk would have had to have waived his right in open court. 216 Kan. at 590. The plan to move forward without a jury trial and have a verdict issued on stipulated facts after a bench trial was discussed numerous times in open court while Schenk was present. However, the two times the district judge addressed Schenk directly on the issue, the question was whether Schenk waived his right to a *speedy* trial. In the context of moving forward with a trial to the bench, the record reflects that various written documents demonstrate a waiver of his speedy trial rights.

There are two possible interpretations of the use of the word "speedy" in the record while discussing moving forward with a bench trial: (1) that the word "speedy" was inadvertently conflated with the word "jury" while discussing the issues involved with scheduling; or, (2) that the district court understood, in context, Schenk's intent to waive his right to a jury trial, pending the process of developing agreed upon stipulated facts, but acknowledged that if that process fell through after additional time passed, Schenk could request a jury trial with the understanding that it would not be a speedy jury trial. The record is not informative.

The State argues that there is no fundamental right to a colloquy between a defendant and the district court regarding the validity of a jury trial waiver. This argument fails because it presumes there was already an effective waiver of the jury trial right. While the record reflects, in the aggregate, that Schenk was aware he was not going to have a jury trial, the record does not reveal that the district court informed Schenk of that right, nor did it secure an effective verbal waiver of the right from Schenk in open court. Based on these facts, reversal of Schenk's convictions is appropriate. See *Mullen*, 51 Kan. App. 2d at 517, 524–26 (reversing a defendant's convictions because the district court did not explain to the defendant his right to a jury trial or obtain the defendant's verbal waiver on the record). Therefore, we remand this case so that Schenk can effectively waive his right to, or proceed to, a trial by jury.

Affirmed in part, reversed in part, and remanded.

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to Richard E. James, Clay County Attorney, 712 5th Street, Ste. 202, Clay Center, KS 67432; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 1st day of December, 2016.

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