No. 17-118640-A

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellant,

vs.

LEE SAWYZER SANDERS,
Defendant-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Mark Braun, District Judge
District Court Case No. 16 CR 2341

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NATURE OF THE CASE

This is an interlocutory appeal of the district court's suppression of evidence related to the lawful stop and arrest of Lee Sawyzer Sanders.

STATEMENT OF THE ISSUE

Issue: The district court erred in granting Sanders' suppression motion.

STATEMENT OF THE FACTS

On December 12th, 2016, Sanders possessed a baggie of methamphetamine ("meth") and a methamphetamine pipe when he was stopped by Topeka police officers. (R. III, 9-11.) On December 14th, 2016, the State charged Saunders with possession of meth, a level five drug felony, and unlawful use of drug paraphernalia, a class A misdemeanor, in Shawnee County District Court. (R. I, 12-14.)

Officer Belt sees Saunders acting suspiciously

On December 17, 2016, Officers Belt and Saunders were finishing up a call and driving in their patrol vehicle, when Officer Belt witnessed Sanders messing with a handle on a driver's door of a vehicle in the Dominos' parking lot. (R. III, 5, 16.) Officer Belt testified, "w]e had a lot of issues with stolen vehicles. I didn't know if he was trying to break in to a vehicle or what he was doing with the vehicle itself." (R. III, 6.) The officer observed Sanders in an

area where the officer checks for "stolen vehicles every single day". (R. III, 23.)

Officer Belt testified:

> I don't know if he had keys or not, but he was messing with the handle, stopped, looked over his ...on his right shoulder, which would have been towards myself and Officer Purney, immediately stopped messing with the handle, and began walking to the west towards the alleyway.
>
> I pulled around the...I guess it's Dominos and went to... there are two alleys in that area. I went into the smaller one behind Dominos and went north in the alleyway looking for Mr. Sanders. I got into the alley. I initially lost sight of him. It was dark. He had on a darker coat. But I pick him up just out of my peripheral. He was on the south side of 725 Topeka attempting to conceal himself next to the side of a building and a drainpipe.

(R. III, 6.)

Officer Belt told his partner, Officer Purney, that he witnessed Sanders attempting to get into a car. (R. III, 26.) "Once he opened up the door and he saw us, then he closed the car door and fled to the alley behind the case address." (R. III, 26.)

After entering the alley, Officer Belt testified that based on his observations of the car, and what Sanders was doing on the wall, "I didn't know if he was trying to break into a vehicle or what he was doing with the vehicle." (R. III, 6.) Officer Belt stated that he had to turn around in the parking lot and head back into the alley. (R. III, 7.) He observed Sanders leaving from the south side of the building, running or walking up to the

same vehicle he was initially seen. (R. III, 7). Officer Belt "hollered at him, hey, I would like to speak with you and at that point he [Sanders] took off running...along the sidewalk on the west side of Topeka Boulevard." (R. III, 7.)

Officer Belt then got out of his vehicle, and went north on the west side of 725 Topeka, cutting through an alley and onto the sidewalk. (R. III, 7). Officer Purney testified that he went the other way in case Sanders doubled back. (R. III, 29.) Sanders saw Officer Belt when the officer came around the corner, and Sanders turned around and started running back south toward the vehicle. (R. III, 7-8.) At that point, Officer Belt testified, "I just ran behind him, told him to stop, and he got to the vehicle as I ran—rounded around the corner." (R. III, 8.)

Sanders said he had a knife during Officer Belt's detention and safety search.

Officer Belt caught up to Sanders and placed him in handcuffs. (R. III, 8, 33.) Officer Belt detained Sanders for officer safety and because "he had already tried to elude me three or four times. I didn't want him to either try to fight me or to run away again...." (R. III, 8.) "I handcuffed him, asked him if he had any weapons on him." (R. III, 21.) Sanders told Officer Best that he had a knife in his pocket. (R. III, 9.) Officer Belt then felt his front right pocket where he said the knife was located:

> "I felt a hard object that I believed to be a pocket knife from the feeling through the pants. I removed the items from that pocket and there was no knife located...I asked where—you know, if it's not in his pocket, where the knife could be. He stated either could have been in the vehicle, but he wasn't sure so I asked permission to try to find the knife on his person just so we could secure it and make sure everybody was safe."

(R. III, 9.)

Sanders consented to Officer Belt's request to try to find the knife on Sanders. (R. III, 9.) In searching Sanders' heavy jacket's left breast pocket, Officer Belt found a meth pipe. (R. III, 9.) When the officer showed Sanders the pipe, Sanders also stated that he had forgotten that he had the pipe in his pocket. (R. III, 9.) Officer Belt found a deck of cards and other miscellaneous items while searching for the knife. (R. III, 10.) Despite Sanders' statement that there was knife on him, the officers did not recover a knife. (R. III, 21.)

Officer Purney discovers Sanders has a felony warrant.

While Officer Best was searching Sanders, Officer Belt located a Kansas Department of Corrections' identification card that said Lee Sanders. (R. III, 29.) The officer checked for wants and warrants and learned that Sanders had a felony warrant out of Shawnee County. (R. III, 26.) Officer Belt testified that he asked Sanders about the warrant, and Sanders said he knew he had the warrant. (R. III, 31.) At that point, Officer Best testified that Sanders was going to be arrested for the Shawnee County warrant. (R. III, 11.)

Officer Belt discovers meth in Sanders' deck of cards.

After finding the warrant, Officer Belt packaged Sanders' items to take to Department of Corrections. (R. III, 10.) Officer Belt testified, "I was just going through to make sure I didn't miss anything at that point." (R. III, 10.) "In the deck of cards, I noticed that there was a crease going down the center of the deck. I opened up the deck by squeezing it and was able to see a small baggy. I removed that baggy and it was a white crystalline substance that was in the deck of cards." (R. III, 11.) Officer Belt attempted to read *Miranda* rights to Sanders after the warrant was found, but was not able to get through them. (R. III, 31.) Officer Belt also attempted to advise Sanders of his *Miranda* rights while in the sally port of the jail, but Sanders did not want to talk to him. (R. III, 31, 32.)

Arguments presented at the suppression hearing:

After the presentation of evidence, the State argued why the evidence should not be suppressed, explaining why there was reasonable suspicion:

> Your Honor, the testimony was from Officer Belt that he saw this defendant at the car door of the vehicle on the driver's side. He saw him open the door and then he looked out his shoulder, saw that there were officers there and he closed the door and then he went behind 725 Southwest Topeka Boulevard. At that point, he pursued him because he had testified that there were a lot of cars stolen in that area and that the defendant was acting suspicious, so he went around to the alley. When he saw the defendant again, it was out of his peripheral and the defendant was up against the wall in a manner consistent with trying to conceal himself from the officers. At that point when officers tried to

make contact with him, he ran around the building and then once he got around the building, he continued to run.

(R. III, 33-35.)

The defense argued that Sanders was arrested when he was detained, and the officers did not have probable cause to arrest him:

> He wasn't doing any illegal and the fact that he was stopped for not getting into his vehicle does not rise to the level of probable cause for this warrantless arrest and I would submit to the Court that as soon as those handcuffs went on him, he was under arrest and not free to go and everything that came after that is fruit of the poisonous tree.

(R. III, 37.)

In response, the State explained:

> Your Honor, defense could be correct if this individual hadn't run and tried to conceal himself by the building. Those actions constitute a reasonable suspicion for the officer to investigate further. The reason that I asked the question about would it be fair to characterize this as an officer-safety related is because Officer Belt had immediately testified before that question, I placed him in cuffs because he had run from me and I didn't want him to run again or fight me.

(R. III, 38.)

The Court's ruling

> All right. Counsel, this hearing is troublesome to the Court. I've got what looks like, based on the Court's observations, two relatively young officers and there's been no testimony about how long they've been on the force or how long they've been law enforcement officers. But they both appear relatively young to the Court.
>
> I am usually one who is very supportive of law enforcement being able to do the things they need to do for public safety, being

able to do the things they need to do when it comes to an encounter. But the officers have had some contradictory testimony where one says that they were already stopped and parked in the parking lot behind the vehicle that the defendant was found to be wither messing with the handle or whatever else was going on, and the other officer says they were just driving down the road and on uninitiated activity and found or saw, observed what the defendant was allegedly doing. I'm not as concerned about whether they got the address right or wrong. It's a bit of a factor, but they were just at an address that was that area, that location. But the officer says, no, they were driving by and just happened to observe this.

The issue of whether the defendant walked away and whether it's a black man or a white man, I think some of the other issues are there as well that—what an officer observed or what the individual has a right to do. And I – too much, for me anyway at this time, too much of the answers to the questions or the scenario posed by both officers appears to be that of filling in the blanks after the fact as opposed to what they did, why they did at the time. And I'm not always suspicious of what an officer testifies to, but I try to listen and balance what that officer tells me.

There were so many things that Officer Belt did not know, a number of things that Officer Purney did not know. Purney seems to rely heavily upon what Belt told him about some of these things. The defendant apparently walked away initially and then at some point, may have run from the officer. I'm not clear that the officer was truly investigating or was making contact with somebody who was committing or had committed or was about to commit a crime. And I realize officers are free to make contact but at the same time, individuals are free to not have contact with law enforcement.

The issues of getting to the vehicle and observing the defendant and his response, that the part that the Court from the testimony, that I have difficulty with. Once they did make contact with him, the defendant was immediately cuffed because the defendant walked away, tried to not have contact with law enforcement. And yes, there was some running, but it was still never clear and that's the part of the part where as I watched the officers and their facial expressions as they testified separately and watched and listened to what their conduct was, the things

that might have been questionable, they could not recall, were not aware of, and it was things that they seemed – the impression I get from listening to their testimony is that they pieced things together after the fact.

And, again, the language by – well, the language by Purney about a self-initiated activity I've heard phrases like that, but I just see some contradictions and inconsistency in the testimony between the officers and that doesn't really balance or fit the two with each other.

The other part—well, my initial issue is the contact that the officer had in taking the defendant into custody, I have great difficulty with and I've tried to look at the fact of balancing whether the – I don't remember if it's the Attenuation Doctrine. You know, at some point, they find out that there's a warrant but my belief, counsel, is that the activity or that the whole issue of seizing the defendant, I have great difficulty with based on the testimony that I've heard.

What I'm going to do is I'm going to suppress the evidence that was made – or excuse me, found. I'm going to suppress the statements by the defendant as well. There was an attempt initially in the contact about weapons – I don't know that – I'm not going to suppress the weapon – I don't know that – I'm not going to suppress the weapon part because if they are frisking the defendant which, again, I still think the whole thing had been set up to be able to make contact and for those things with the defendant. Then they find out about the warrant. I'm going to allow the statement about the weapon but the statement about the warrant, the defendant apparently cut off the officer and he was not able to get the full statement, it sounds like of being able to hear the officer's *Miranda*. But then he proceeds to question him about the warrant knowing he didn't want to talk. So I am going to suppress that statement.

(R. III, 38-42.)

The district court did not address whether the officers had reasonable suspicion to stop Sanders, whether there was probable

cause to arrest Sanders, and did not apply the attenuation doctrine. The State timely filed a notice of appeal. (R. I, 33.)

ARGUMENTS AND AUTHORITIES

Issue: The district court erred in granting Sanders's motion to suppress.

Preservation

The State may file an interlocutory appeal when the district court suppresses evidence. K.S.A. 22-3603. (R. I, 33.) At the pretrial hearing, the district court granted the defendant's suppression motion. (R. III, 38-42.)

Standard of Review

When reviewing a district court's decision suppressing evidence, an appellate court reviews the factual underpinnings of a district court's decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those facts by a de novo standard. The ultimate determination of the suppression of evidence is a legal question requiring independent appellate review. *State v. Mendez*, 275 Kan. 412, 416, 66 P.3d 811 (2003).

Argument

Introduction

The district court erred in granting Sanders' suppression motion. At the suppression hearing, the State had proved the lawfulness of the seizure, search, and arrest of Sanders. The State presented evidence that Sanders was lawfully arrested for an outstanding Shawnee County warrant. (R. III, 11.) After officers arrested Sanders, an officer found meth during the pre-incarceration inventory of Sanders' personal effects. The items had been retrieved from a search of Sanders. Even if this Court finds that the seizure and search were unlawful, under the attenuation doctrine, the baggie of meth and meth pipe should not be suppressed.

The district court's ruling, however, fails to properly address the evidence presented to support the reasonable suspicion to seize Sanders; the lawful arrest of Sanders due to the Shawnee County warrant, and the attenuation doctrine. Finally, as shown in this case, based on the discovery of Sanders' warrant, the illegally obtained items would have inevitably been discovered during the officers' pre-incarceration inventory of Sanders' personal effects. This Court must reverse the district court's ruling.

Officer Belt had reasonable suspicion to stop Sanders.

"The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures." Without a warrant, a search is unreasonable unless it falls within a recognized exception. *State v. Canaan,* 265 Kan. 835, 840, 964 P.2d 681 (1998) (citing *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 [1967]).

K.S.A. 22-2402 provides:

> "(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed or is about to commit a crime and may demand of the name, address of such suspect and an explanation of such suspect's actions.
>
> "(2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that such officer's personal safety requires it, such officer may frisk such person for firearms or other dangerous weapons. If the law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, such officer may take and keep it until the completion of the questioning, at which time such officer shall either return it, if lawfully possessed, or arrest such person."

Investigatory detentions are generally permitted under the Fourth Amendment to the United States Constitution and K.S.A. 22–2402 if "an objective officer would have a reasonable and articulable suspicion that the detainee committed, is about to commit, or is committing a crime." *State v. Pollman,* 286 Kan. 881, 889, 190 P.3d 234 (2008) (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 [1968], and *State v. Thompson,* 284

Kan. 763, 773, 166 P.3d 1015 [2007]); see also *State v. Thomas*, 291 Kan. 676, 687, 246 P.3d 678 (2011).

In defining the reasonable suspicion standard, the United States Supreme Court stated:

> "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification.... [Citation omitted.] The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch" ' of criminal activity. [Citation omitted.]"

Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

Under K.S.A. 22-2402, the seizure of Sanders was lawful. Due to Sanders' suspicious behavior, the encounter between law enforcement and Sanders was investigatory. (R. III, 22.) Officer Belt testified how he first noticed Sanders attempting to get in a car in an area where a lot of vehicles had been stolen:

"I believed it was suspicious when he came out, was messing with a handle of a car, looks over his shoulder at a police officer and a police car, **he immediately stops messing with it and walks away**." (R. III, 22.) (Emphasis added.)

Also, Officer Belt testified how there had been a lot of stolen vehicles in the same area that Sanders was: "We had a lot of issues with stolen vehicles.

I didn't know if he was trying to break in to a vehicle or what he was doing with the vehicle itself." (R. III, 6.)

It was further suspicious when Sanders walked west towards the alleyway and attempted to evade the officers by concealing himself next to the side of the building. (R. III, 6.) As noted by the State at the suppression hearing: Sanders ran and "tried to conceal himself by the building. Those actions constitute a reasonable suspicion for the officer to investigate further." (R. III, 38.)

When officers followed Sanders into the alley, Officer Belt testified,

> "I initially lost sight of him. It was dark. He had on a darker coat. But I picked him up just out of my peripheral. He was on the south side of 725 Topeka **attempting to conceal himself** next to the side of a building and drainpipe."

(R. III, 6.) (emphasis added). When officers tried to speak to Sanders, he would not stop when they requested, but instead ran away. (R. III, 7.) The officers then had to chase him back to the vehicle. Officer Belt was able to catch up to Sanders, and then placed him in cuffs for safety precautions. (R. III, 8.)

In *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), the United States Supreme Court considered whether there was reasonable suspicion to justify the seizure of the defendant. In *Wardlow*, a police caravan drove into a neighborhood known for heavy drug trafficking.

When the caravan drove past one house, the defendant was standing near the building holding an opaque bag. The defendant fled when he saw the officers. Following a short case, the officers seized the defendant and upon a pat-down search of him and his bag, found a hard object that was later determined to be a gun. The defendant was arrested for felon in possession of a weapon.

In determining if there was reasonable suspicion, the *Wardlow* court held that the defendant's presence in "an area of expected criminal activity" together with his unprovoked flight at the sight of seeing the police was sufficient to constitute reasonable suspicion. *Wardlow,* 528 U.S. at 124. *Wardlow* is significant because it explained that that nervous, evasive behavior such as an unprovoked flight is a relevant factor in determining reasonable suspicion:

> Our cases have also recognized that ***nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.*** Headlong flight – wherever it occurs – Is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with the inferences draw from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."

Wardlow, 528 U.S. at 124-25 (emphasis added).

In *State v. Anderson,* No. 99,779, 2009 WL 1591399 (issued June 5, 2009) (unpublished) (attached), this Court considered whether there was

reasonable suspicion of illegal activity that justified the defendant's seizure. Particularly, the defendant immediately fled from the officer when the officer attempted to investigate the defendant's activity. There, the district court had identified three facts to support its conclusion that there was reasonable suspicion:

> (1) The police officer personally observed a foot chase in progress late at night in a high crime area;
>
> (2) when the individuals involved in the foot chase noticed the police officer, they immediately stopped running; and"
>
> (3) when the police officer indicated his intention to verify the defendant's story about what had happened, the defendant immediately took flight and ran away from the officer.

Anderson, 2009 WL 1591399 at *4.

The *Anderson* court looked to *Wardlow* for guidance due to the similar facts. After reviewing *Wardlow*, this Court also found there was reasonable suspicion: "The facts of our case establish an unexplained foot chase in progress late at night in a high crime area, an immediate termination of the foot chase upon noticing the presence of law enforcement, and unprovoked flight after law enforcement indicated an intention to investigate the circumstances." *Anderson*, 2009 WL 1591399 at *5. After considering all of these facts together, the *Anderson* court held that the officer had knowledge of facts giving rise to a reasonable and articulable suspicion that when he seized the defendant, the defendant "had committed, was committing, or was

about to commit a crime." *Anderson*, 2009 WL 1591399 at *5. In sum, the defendant's criminal activity, which included unprovoked flight after law enforcement indicated an intention to investigate the circumstances, supported a reasonable, particularized suspicion that the defendant was committing a crime.

Similarly, here Sanders' unprovoked flight after the officers indicated an intention to investigate his attempt to enter the vehicle, along with his other evasive behavior supported a reasonable, particularized suspicion that Sanders was committing a crime. Here, there were more factors than just Sanders begin present in an area known for having vehicles stolen. The officers had reasonable suspicion to stop Sanders due to his very suspicious behavior leading up to when he was seized. Initially, as he attempted to get into a car, Sanders noticed the officers watching him as he looked over his shoulder, and then he walked away from the car. The officer specifically testified how he found this behavior suspicious. "I believed it was suspicious when he came out, was messing with a handle of a car, looks over his shoulder at a police officer and a police car, he immediately stops messing with it and walks away." (R. III, 22.)

Similar to the defendant in *Wardlow*, Sanders fled from the officers. Then, he attempted to physically conceal himself from the officers. While the officers were looking for him, he concealed "himself

next to the side of a building and drainpipe" in an attempt to evade the officers. (R. III, 6.) Additionally, when officers tried to speak to Sanders, he would not stop when they requested, but instead ran away. (R. III, 7.) Finally, he continually fled from the officers until he was finally seized by the officers. (R. III, 6.)

The district court, however, brushed over the evidence presented of Sanders' suspicious behavior. In its ruling, the court merely stated:

> The defendant apparently walked away initially and then at some point, may have run from the officer. I'm not clear that the officer was truly investigating or was making contact with somebody who was committing or had committed or was about to commit a crime. And I realize officers are free to make contact but at the same time, individuals are free to not have contact with law enforcement.
>
> The issues of getting to the vehicle and observing the defendant and his response, that the part that the Court from the testimony, that I have difficulty with. Once they did make contact with him, the defendant was immediately cuffed because the defendant walked away, tried to not have contact with law enforcement.

(R. III, 40.)

The district court did not address Sanders' suspicious behavior when he was first spotted by the officers: how Sanders was attempting to get into a car in an area known for vehicles being stolen, while looking over his shoulder at the officers, and then walked away from the officers instead of getting in the car. This suspicious behavior coupled with his attempts to evade the officers by physically evading

the officers by concealing himself next to the side of the building; his refusal to speak to the officers when they attempted to initially speak with him; and he continuous runs from the officers was sufficient to establish reasonable suspicion for an investigative detention.

In reviewing an officer's belief of reasonable suspicion, an appellate court determines whether the totality of the circumstances justifies the detention, giving deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances. *State v. Walker*, 292 Kan. 1, Syl. ¶ 6, 251 P.3d 618 (2011). The officers had more than an un-particularized suspicion or hunch of criminal activity given Sanders' behavior once he first saw the officers, his behavior of walking away from the vehicle, his running from the officers, and attempts to physically conceal himself form the officers. The officers' reasoning was not subjective but instead was based on specific, articulable, and objective facts. See *Wardlow*, 528 U.S. at 123.

The stop was justified because there was reasonable suspicion to believe that a crime was in commission or had occurred based on the circumstances. See *Wardlow*, 528 U.S. at 125. The district court thereby erred in its ruling.

The Terry stop had not turned into an arrest.

Though not every investigative detention warrants handcuffs, "a *Terry* stop does not become unreasonable just because police officers use handcuffs

on a subject or place him on the ground." *United States v. Neff*, 300 F.3d 1217, 1220 (2002) (citing *United States v. Perdue*, 8 F.3d 1455, 1462 [10th Cir. 1993]); *United States v. Holmes*, 487 F. Supp. 2d 1206, 1215 (D. Kan. 2007).

In *United States v. Perdue*, 8 F.3d at 1462, the 10th Circuit held that the officers were justified in displaying "some force" when they had to display their weapons at a suspect. The *Perdue* court found that the officers were justified in ordering the defendant out of the car and onto the ground "as a means of neutralizing the potential danger." *Perdue*, 8 F.3d at 1463. "It was not unreasonable under the circumstances for the officers to execute the *Terry* stop with their weapons draw." The *Perdue* court explained, "[w]hile *Terry* stops generally must be fairly nonintrusive, officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures." *Perdue*, 8 F.3d at 1462.

Perdue, moreover, recognized how other courts found it reasonable for police to use handcuffs or place suspects on the ground during a *Terry* stop. The court noted how the Tenth Circuit along with several other court of appeals, had determined that "such intrusive precautionary measures do **not necessarily turn a lawful Terry stop into an arrest under the Fourth Amendment.**" *Perdue*, 8 F.3d at 1463 (citing *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir.1993) (display of firearms and use of handcuffs);

United States v. Smith, 3 F.3d 1088 (7th Cir.1993) (handcuffs); *United States v. Saffeels*, 982 F.2d 1199, 1206 (8th Cir.1992) (handcuffs), cert. granted, judgment vacated, 510 U.S. 801, 114 S.Ct. 41, 126 L.Ed.2d 12 (1993) vacated on other grounds); *United States v. Esieke*, 940 F.2d 29, 36 (2d Cir.) (handcuffs and leg irons), cert. denied, 502 U.S. 992, 112 S.Ct. 610, 116 L.Ed.2d 632 (1991); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir.1989) (handcuffs); *United States v. Kapperman*, 764 F.2d 786, 790 n. 4 (11th Cir.1985) (placing suspect in police car in handcuffs); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983) (making suspect lie on ground in handcuffs).

Here, the precautionary measure the officers took did not turn this lawful *Terry* stop into an arrest under the Fourth Amendment. Officer Belt testified that the reason he put Sanders in handcuffs was related to officer safety and "to detain him as he had already tried to elude me three to four times. I didn't want him to either try to fight with me or to run away again." (R. III, 8.)

Because the precautionary measure of force employed by the officers was reasonable in light of these circumstances, this Court should find that the officers conducted a reasonable *Terry* stop. Sanders was not under arrest until the discovery of his outstanding Shawnee County search warrant.

Officer Belt's search for the knife was proper as an officer safety search incident to the pat-down of Sanders person and Sanders' statement that he had a knife on his person.

Officer Belt had reasonable suspicion to pat-down Sanders due to officer safety and the officer "didn't want him to either try to fight me or run away again." (R. III, 8.) Importantly, during the pat-down, Sanders told Officer Belt that he had a knife on him. (R. III, 9.) Officer safety became an even greater concern when the knife was not where Sanders claimed it would be.

During an investigatory stop, law enforcement are entitled to make a limited search for weapons that might be used to harm them when they have a reasonable, articulable suspicion of danger. *United States v. Thomson*, 354 F.3d 1197, 1200 (10th Cir. 2003) (citing *Terry*, 392 U.S. at 24); see also *State v. Bannon*, __ Kan. __, 398 P.3d 846 (2017) (citing *Rodriguez v. United States*, 575 U.S. __, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 [2015], wherein the United States Supreme Court noted the government's "officer safety interest" in context of extending seizures during traffic stops, which can be "'especially fraught with danger to police officers'").

The United States Supreme Court has explained:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime --

> things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control."

Preston v. United States, 376 U.S. 364, 367, 84 S. Ct. 881, 883 (1964).

Officer Belt also properly detained and asked Sanders if he had any weapons on his person. (R. III, 8-9). See, K.S.A. 22-2402(2), e.g., *Michigan v. Long*, 463 U.S. 1032, 1036, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) (upon observing knife in car, officer frisked suspect and searched car for additional weapons); *Pennsylvania v. Mimms*, 434 U.S. 106, 107, 98 S. Ct. 330, 331, 54 L. Ed. 2d 331 (1977) (officer performed *Terry* frisk fearing that bulge might be a weapon); *Adams v. Williams*, 407 U.S. [143,] 145, 92 S. Ct. 1921, 32 L. Ed 2d 612 (1972) (officer was informed that suspect had a gun in his waist); *United States v. Trullo*, 809 F.2d 108, 110 (1st Cir.) (bulge in suspect's pocket) (1987).

In this case, Officer Belt had a reasonable basis for suspecting a weapon was on Sanders' person because Sanders' told how him that he had a knife in his pocket. (R. III, 8.) In response to Sanders' statement, Officer Belt felt Sanders' front right pocket where he said the knife was. (R. III, 9.) He felt a hard object he believed to be a knife and removed the item. (R. III, 9.) The officer recovered a key, not the knife. (R. III, 9, 32.) Officer Belt proceeded to ask Sanders where the knife could be; Sanders said okay to Officer Belt

searching his other pockets to "secure it and make sure everyone was safe." (R. III, 9.)

Officer Belt testified "He had a large, again, heavy jacket on. It was December. On the left breast pocket, there was a methamphetamine pipe I located inside of it...I found a deck of cards and a bunch of other miscellaneous items." (R. III, 9-10.) Noted in the preliminary hearing, Officer Belt only "searched the remainder of his pants pockets and then the pockets of the large coat he was wearing". (R. II, 9.) The Officer did have Sanders consent to look for the knife. No knife, however, was recovered, but a pack of cards, which later was determined to contain a baggie of meth, and a key. The search of Sanders was proper.

The attenuation doctrine also applies in this case.

Should this Court find the seizure and search were unlawful, the items in Sanders' possession would have been discovered when he was arrested for the outstanding Shawnee County warrant. Sanders would have been searched based on the arrest of his outstanding felony warrant. (R. III, 11.) Also, as shown here, the evidence would have inevitably been discovered through an inventory check prior to the officers taking Sanders to the Department of Corrections.

In ruling, the district court said:

> "I've tried to look at the fact of balancing whether the – I don't remember if it's the Attenuation Doctrine. You know, at some point, they find out that there's a warrant but my belief, counsel, is that the activity or that the whole issue of seizing the defendant, I have great difficulty with based on the testimony that I've heard."

(R. III, 41).

At the district court, the issue of Sanders' outstanding warrant - and thus his lawful arrest and inevitable discovery of the meth was raised by the State in both Officer Belt's direct testimony as to why Sanders was arrested and in the State's arguments to the court. (R. III, 11, 36.)

The Attenuation Doctrine

Under the attenuation doctrine, evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, "but also when suppression would not serve the interest protected by the constitutional guarantee violated." *Hudson v. Michigan*, 547 U.S. 586, 586, 126 S. Ct. 2159, 2160, 165 L. Ed. 2d 56 (2006) (holding that violation of knock-and-announce rule did not require the suppression of all evidence found in the search); *Utah v. Strieff*, 579 U.S. __, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016). "The determination of dissipation is heavily fact-bound and, thus, dependent upon case-specific circumstances." *State v. Maier*, No. 115,248, 2017 WL 4216264 at *4 (issued Sept. 22, 2017) (unpublished opinion) (attached).

In analyzing whether the seizure of evidence is attenuated from the illegality, this Court considers:

> (1) the time elapsed between the illegality and the acquisition of the evidence;
>
> (2) the presence of intervening circumstances; and
>
> (3) the purpose and flagrancy of the official misconduct.

Strieff, 136 S. Ct. at 2061–62.

Consideration of the factors for attenuation:

The time elapsed between the illegality and acquisition of the evidence favors suppress because there was not a substantial about of time between the stop, search for weapons, running of identification, and discovery of the warrant. (R.III, 8-9, 21, 25-26, 31). However, the presence of intervening circumstances, namely, the discovery of an outstanding Shawnee County warrant and the lack of official misconduct favor, both strongly favor the State. Courts have held that evidence of two of the three factors supports refusal of suppression of evidence under the attenuation doctrine. See *Strieff*, 136 S. Ct. at 2060.

The intervening circumstance attenuating the unlawful conduct was the discovery of Sanders' outstanding warrant.

In *Utah v. Strieff*, the United States Supreme Court held that officer's discovery of valid, pre-existing arrest warrant attenuated connection between unlawful investigatory stop and drug-related evidence seized from defendant

during search incident to arrest, abrogating *State v. Moralez,* 297 Kan. 397, 300 P.3d 1090 (2013). As such, an intervening act like the discovery of an outstanding warrant prevents suppression.

Additionally, in *State v. Christian*, this Court held that the attenuation doctrine should apply because the discovery of an expired license plate attenuated the initial illegal seizure. *Christian*, No. 116,133, 2017 WL 3947406 at *9 (issued Sept. 8, 2017)(unpublished)(attached). In that case, the officers did not know of the intervening event, i.e., the expired license plate, until after the initial encounter with the defendant. The court found that the suppression was not appropriate because the officers' initial seizure was attenuated by the intervening event and the officer lacked flagrant misconduct. *Christian*, 2017 WL 3947406 at *9.

Similarly, in this case, the intervening event was the discovery of Sanders' outstanding Shawnee County warrant. Sanders would have been arrested for the warrant. (R. III, 11.) In its arguments and presentation of evidence, the State stressed that Officer Belt was going to arrest Sanders for the warrant and not for the methamphetamine or paraphernalia. And Officer Purney testified that Sanders had an outstanding warrant based on the running of his name on the ID provided to officers. (R. III, 26.) The warrant gave the officers justification to arrest Sanders. Once Sanders was lawfully arrested, the officers conducted a pre-incarceration inventory of the

items found on Sanders' person and found the meth. The existence of the warrant strongly favors the State.

Finally, the stop of Sanders was not related to "systemic or recurrent police misconduct." *Christian*, 2017 WL 3947406 at * 9. In this case, the Officer Belt detained, patted-down, and searched for weapons (specifically the knife) of Sanders, while the Officer Purney found an outstanding criminal warrant. (R. III, 8-9, 21, 25-26, 31.) Officer Belt detained Sanders because he had already tried to elude him three or four times. "I didn't want him to either try to fight me or to run away again." (R. III, 8.) Officer Belt then asked him if he had any weapons on him and the purpose of this question was officer safety. (R. III, 21, 31.) Officer Belt proceeded to ask Sanders where the knife could be, and Sanders said okay to officers searching his other pockets to "secure it and make sure everyone was safe". (R. III, 9.) In this case, there is no official misconduct by either officer.

In sum, the attenuation doctrine should apply here because there was a sufficient break in the casual connection between the initial illegal seizure and the discovery of the evidence. The officers would have arrested Sanders for his outstanding felony warrant after Officer Purney ran Sanders' identification. Upon his arrest, the meth was discovered.

The inevitable discovery doctrine

The test under the inevitable discovery rule is that, if the prosecution establishes by a preponderance of the evidence that the unlawfully obtained evidence ultimately or inevitably would have been discovered by lawful means, the evidence is admissible. *State v. Brown,* 245 Kan. 604, 612, 783 P.2d 1278 (1989) (citing *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 [1984]) (the prosecution may use evidence it obtained illegally but would have obtained legally in any event).

Here, the pre-incarceration inventory that Officer Belt conducted of the items found on Sanders establishes inevitable discovery. Police are allowed to search any article in the possession of an arrested person in accord with routine inventory procedures. *Illinois v. Lafayette,* 462 U.S. 640, 648, 77 L.Ed.2d 65, 103 S.Ct. 2605 (1983).

In *State v. Ingram,* 279 Kan. 745, 113 P.3d 228 (2005), the Kansas Supreme Court upheld a lower court decision that drugs taken from a suspect's pocket would have been inevitably discovered during a jail inventory search. And in *State v. Stowell,* 286 Kan. 163, 167, 182 P.3d 1214 (2008), the police illegally searched the defendant after he was arrested, and the State argued that cocaine found on his person inevitably would have been discovered at booking and during an inventory search at the jail.

Similarly, the meth pipe and meth in the deck of cards on Sanders' person would have been discovered based on the Officer Belt's testimony that

Sanders was arrested for the outstanding warrant. (R. III, 11.) As such, the district court should have applied the inevitable discovery exception to the exclusionary rule.

The baggie of meth was found when Officer Belt noticed the crease in the center of the deck of cards when he was packaging Sanders' items to take to DOC. (R.III, 10-11.) As shown here, the possession of meth had been discovered **after** Sanders was placed into custody for his outstanding Shawnee County felony warrant. That is, the discovery of drugs on Sanders was inevitable because a pre-incarceration inventory of Sanders' personal effects was an inevitable consequence of having a warrant.

At the suppression hearing, Officer Belt testified that he conducted a pre-incarceration inventory of the items founds on Sanders, and upon the inventory, he discovered the meth. He packaged Sanders' items to take to DOC. (R. III, 10.) "I was just going through to make sure I didn't miss anything at that point." (R. III, 10.) Further, in its argument to the court, the State explained, "it wasn't until after the warrant, after he was for sure going to jail that the methamphetamine was found inside the deck of cards." (R. III, 36.)

The underlying rationale for the exclusionary rule has not been met.

Lastly, the United States Supreme Court has rejected "[i]ndiscriminate application" of the exclusionary rule. *United States v. Leon*, 468 U.S. 897,

908, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The exclusionary rule is applicable only "where its deterrence benefits outweigh its 'substantial social costs,' " *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). Courts should apply the exclusionary rule and suppress any evidence unconstitutionally obtained to give effect to the Fourth Amendment's guarantee against unreasonable searches and seizures, and to deter illegal police conduct. *See Nix v. Williams,* 467 U.S. at 442–43, *Weeks v. United States,* 232 U.S. 383, 398, 34 S. Ct. 341, 58 L.Ed. 652 (1914); see also *State v. Smith,* 243 Kan. 715, 724, 763 P.2d 632 (1988) ("to deter law enforcement and other government officials and agents from unreasonable intrusions upon the lives and property of citizens."). Here, the rationale behind the exclusionary rule was not met. The district court erred in granting Sanders' motion to suppress.

Conclusion

For the above and foregoing reasons, the State respectfully requests this Court to reverse the district court's suppression ruling.

Respectfully submitted,

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208 P.3d 361 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Nico I. ANDERSON, Appellant.

No. 99,779.
|
June 5, 2009.
|
Review Denied May 18, 2010.

Appeal from Sedgwick District Court; Anthony J. Powell, Judge.

Attorneys and Law Firms

Carl Folsom, III, of Kansas Appellate Defender Office, for appellant.

Boyd K. Isherwood, assistant district attorney, and Steve Six, attorney general, for appellee.

Before GREENE, P.J., PIERRON and STANDRIDGE, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Nico I. Anderson was convicted by a jury for possession of cocaine and misdemeanor possession of drug paraphernalia. Prior to trial, he moved to suppress inculpatory evidence on grounds that the police officer did not have reasonable suspicion to detain him for investigation or probable cause to effectuate his arrest. The motion to suppress was denied, and Anderson appeals. For the reasons stated below, we affirm.

Facts

At approximately 11:30 p.m. on July, 27, 2006, Officer Travis Rakestraw was on patrol by the Trail Motel in Wichita, Kansas, which is a high crime area. Rakestraw observed Anderson, whom he did not know, running on the sidewalk in front of the motel with an older man running behind him. When Anderson saw Rakestraw, Anderson stopped running and stood in place. The man who was running behind Anderson also stopped running, but instead of standing in place, he began walking in the opposite direction. Rakestraw pulled up to Anderson, rolled down his window, and asked what was going on. Anderson said that he was just messing with "the old dude." Rakestraw told Anderson "that was fine, everything would be okay, but [Rakestraw] needed to verify this [information] with the old dude." As Rakestraw got out of his patrol car, Anderson took off running.

Rakestraw chased Anderson behind the motel and through a hole in the motel's privacy fence. When Rakestraw caught up to Anderson, Rakestraw drew his Taser.

Rakestraw ordered Anderson to show his hands, and Anderson complied. Other officers arrived, and Rakestraw ordered Anderson to get on the ground, face down. Rakestraw then ordered Anderson to put his hands behind his back. Rakestraw placed Anderson in handcuffs and frisked him for weapons. Rakestraw conducted a search of Anderson's person, and he found a crack pipe. Another officer searched the area immediately surrounding the arrest and found a baggie of crack cocaine. After being read the *Miranda* warnings, Anderson made some self-incriminating statements to the police.

Prior to trial, Anderson filed a motion to suppress the crack pipe and cocaine, which was denied. A jury ultimately convicted Anderson of possession of cocaine and misdemeanor possession of drug paraphernalia. Anderson's criminal history score was increased from H to C based upon his prior juvenile adjudications. Using criminal history score C, the court sentenced Anderson to a controlling sentence of 30 months' incarceration.

Analysis

Anderson claims the district court erred by denying his motion to suppress the evidence discovered. More specifically, Anderson argues the officers lacked reasonable suspicion of criminal activity in order to justify detaining him, and the officers lacked probable cause to justify his subsequent arrest. Anderson maintains that all evidence obtained should be suppressed as fruit of the poisonous tree.

A. Procedural Bar

The State argues that the issues presented for appeal are not properly before the court because Anderson failed to object when the evidence discovered at the scene was admitted at trial. Anderson concedes his trial attorney failed to lodge a contemporaneous objection.

***2** "When a motion to suppress evidence is denied, defendant must make a timely objection at trial, at the introduction of the evidence, specifying the ground for the objection in order to preserve the issue on appeal. [Citations omitted.]" *State v. Toney,* 253 Kan. 651, 656, 862 P.2d 350 (1993); see K.S.A. 60-404. Ordinarily, we do not consider objections raised for the first time on appeal. *State v. Brown,* 285 Kan. 261, Syl. ¶ 12, 173 P.3d 612 (2007). Kansas courts, however, have recognized an exception to the contemporaneous objection rule when failure to consider the untimely objection might result in a denial of fundamental rights. 285 Kan. 261, Syl. ¶ 13; *State v. Laturner,* 38 Kan.App.2d 193, 197, 163 P.3d 367 (2007). Because Anderson's objection to the evidence discovered implicates Anderson's fundamental right to be free from unreasonable searches and seizures, we will address Anderson's suppression issue, even though the issue was not presented for the district court's consideration during trial.

In addition to raising constitutional issues that should be resolved in the interests of justice and to prevent the denial of

fundamental rights, we also note that the legal issues presented in this appeal-precisely *when* Anderson was detained and then arrested-arise on uncontested facts and will be determinative of the case. See *State v. Clemons,* 251 Kan. 473, 483, 836 P.2d 1147 (1992), *abrogated on other grounds by State v. James,* 276 Kan. 737, 751, 79 P.3d 169 (2003); *State v. Williams,* 15 Kan.App.2d 656, 663-64, 815 P.2d 569 (1991) (cases cited by Court of Appeals in support of its decision to consider issue and dealing with Fourth Amendment claims raised for first time on appeal; legal question arising on uncontroverted facts). Finally, we note that "[t]he rationale underlying the contemporaneous objection rule, K.S.A. 60-404, is that stating the objection and grounds therefor permits the court to preclude improper evidence from affecting the decision. [Citation omitted.]" *State v. Urban,* 3 Kan.App.2d 367, 368, 595 P.2d 352 (1979). In this case, as in *Urban,* "the purpose for the rule was satisfied when defendant moved to suppress the evidence and a hearing was held." 3 Kan.App.2d at 368. For all of these reasons, we now proceed to the merits of Anderson's claims on appeal.

B. Motion to Suppress

The Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights prohibit unreasonable searches and seizures. *State v. Morris,* 276 Kan. 11, 17, 72 P.3d 570 (2003). When reviewing the district court's ruling on a motion to suppress evidence seized as the result of an allegedly unreasonable search, the appellate court reviews the factual basis of the decision using a substantial competent evidence standard. It reviews the ultimate legal conclusions drawn from those facts de novo. *State v. Thompson,* 284 Kan. 763, 772, 166 P.3d 1015 (2007). Where, as here, the material facts are not subject to dispute, suppression is a question of law over which the appellate court has unlimited review. *State v. Porting,* 281 Kan. 320, 324, 130 P.3d 1173 (2006). Appellate courts do not reweigh evidence, assess the credibility of witnesses, or resolve conflicts in the evidence. *State v. Ackward,* 281 Kan. 2, 8, 128 P.3d 382 (2006).

1. Reasonable Suspicion to Detain Anderson for Investigation

***3** Anderson argues Rakestraw did not have the necessary reasonable suspicion to detain him for investigation. In order to properly consider this argument, we first must determine when Anderson actually was detained, or seized, because "it 'is at that critical time' that the officer must have had knowledge of facts giving rise to a reasonable and articulable suspicion that the defendant had committed, was committing, or was about to commit a crime." See *Morris,* 276 Kan. at 17.

Here, the evidence demonstrates Rakestraw, who was in uniform, pulled up to Anderson in a marked patrol car, rolled down the window, and asked what was going on. After Anderson responded that he was just messing with "the old dude," Rakestraw informed Anderson that he needed to verify Anderson's story. As Rakestraw got out of his patrol car, Anderson took off running. Based on these facts, Anderson contends the seizure of his person occurred when Rakestraw informed Anderson that

he needed to verify Anderson's story. Conversely, the State contends the seizure did not occur until Rakestraw apprehended Anderson after the resulting foot chase. We agree with the State.

"[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick,* 501 U.S. 429, 434, 115 L.Ed.2d 389, 111 S.Ct. 2382 (1991); see *State v. Marks,* 226 Kan. 704, 709-10, 602 P.2d 1344 (1979). A police officer seizes a person for purposes of the Fourth Amendment " 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *California v. Hodari D.,* 499 U.S. 621, 627-28, 113 L.Ed.2d 690, 111 S.Ct. 1547 (1991) (quoting *United States v. Mendenhall,* 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870, *reh. denied* 448 U.S. 908 [1980]). In addition to a show of authority indicating the restriction of freedom, *Hodari D.* also requires the person to submit to such show of authority in order for a seizure to actually occur. In other words, a police officer's assertion of authority without submission by the individual does not constitute a seizure. *Hodari D.,* 499 U.S. at 626; *Morris,* 276 Kan. at 18-19.

In this case, Anderson ignored Rakestraw's implicit request to stay put until Rakestraw could verify Anderson's story. Therefore, even if Rakestraw's implicit request to stay in place could be construed as an "assertion of authority," Anderson simply did not submit to it. Accordingly, Anderson was not seized for purposes of the Fourth Amendment until after the resulting foot chase, wherein Rakestraw apprehended Anderson by drawing a Taser and ordering Anderson to show his hands, at which point Anderson complied. See *Hodari D.,* 499 U.S. at 629 (holding that seizure of fleeing suspect does not occur, notwithstanding show of authority, until suspect actually stopped). We find it was at this point in time that the seizure occurred.

***4** Having determined the precise point at which Rakestraw seized Anderson, we now must determine whether there was reasonable suspicion of illegal activity to justify the seizure. The standard for determining reasonable suspicion is set forth in *State v. Slater,* 267 Kan. 694, Syl. ¶¶ 1-2, 986 P.2d 1038 (1999):

> "A law enforcement officer may stop any person in a public place based upon specific and articulable facts raising a reasonable suspicion that such person has committed or is about to commit a crime."
>
> "Reasonable suspicion is a less demanding standard than probable cause, not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors, quantity and quality, are considered in

the totality of the circumstances that must be taken into account when evaluating whether reasonable suspicion exists."

Similarly, the United States Supreme Court has stated that reasonable suspicion requires at least a minimal level of objective justification: "The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch" " of criminal activity. [Citation omitted.]" *Illinois v. Wardlow,* 528 U.S. 119, 123-24, 145 L.Ed.2d 570, 120 S.Ct. 673 (2000).

Here, the district court identified the following facts to support its conclusion that reasonable suspicion of illegal activity justified seizing Anderson at the time Rakestraw drew his Taser: (1) The police officer personally observed a foot chase in progress late at night in a high crime area; (2) when the individuals involved in the foot chase noticed the police officer, they immediately stopped running; and (3) when the police officer indicated his intention to verify Anderson's story about what was going on, Anderson immediately took flight and ran away from the officer.

We believe the facts of this case are somewhat similar to those in *Wardlow,* where Wardlow attempted to flee officers in a high crime area. When caught, a subsequent search of Wardlow led to the discovery of a handgun, resulting in his arrest and conviction of unlawful possession of a weapon by a felon. The United States Supreme Court reversed the Illinois Supreme Court decision that the officers acted without reasonable suspicion.

In determining whether there was reasonable suspicion to justify the seizure of Wardlow, the United States Supreme Court held that Wardlow's presence in "an area of expected criminal activity," together with his unprovoked flight at the sight of officers, was sufficient to constitute reasonable suspicion. *Wardlow,* 528 U.S. at 124. Significantly, the Court seemed to indicate that either factor, standing alone, would not be enough to rise to reasonable suspicion. 528 U.S. at 124. To that end, the Court purposefully rejected the proposition that " 'flight is ... necessarily indicative of ongoing criminal activity,' " 528 U.S. at 125, and instead adhered to its view that ' "[t]he concept of reasonable suspicion ... is not readily, or even usefully, reduced to a neat set of legal rules,' but must be determined by looking to 'the totality of the circumstances-the whole picture.' " 528 U.S. at 126-27 (Stevens, J., concurring) (citing *United States v. Sokolow,* 490 U.S. 1, 7-8, 104 L.Ed.2d 1, 109 S.Ct. 1581 [1989]).

***5** The facts of our case establish an unexplained foot chase in progress late at night in a high crime area, an immediate termination of the foot chase upon noticing the presence of law enforcement, and unprovoked flight after law enforcement indicated an intention to investigate the circumstances. Considering all of these facts together, we find Rakestraw had knowledge of facts giving rise to a reasonable and articulable suspicion, at the time Rakestraw drew his Taser, that Anderson had committed, was committing, or was about to commit a crime.

2. Probable Cause to Arrest Anderson

Anderson argues his arrest was effectuated when Rakestraw ordered him to the ground and handcuffed him, at which time there was no probable cause for such an arrest. The State contends Anderson was not under arrest at the time he was handcuffed but that Rakestraw was in the midst of an investigatory detention and reasonably believed it was necessary to handcuff Anderson in order to protect his safety and the safety of other officers. The State argues Anderson was not arrested until after the crack pipe was found on Anderson's person, and the discovery of this unlawful drug paraphernalia gave rise to the probable cause necessary to effectuate Anderson's arrest. Thus, in order to determine whether probable cause existed at the time of arrest, we first must determine at what point in the process Anderson actually was arrested.

A person is considered to be under arrest when he or she is physically restrained or when he or she submits to the officer's custody for the purpose of answering for the commission of a crime. K.S.A. 22-2202(4); K.S.A. 22-2405(1). For purposes of our analysis, the critical part of this definition is that the physical restraint be effectuated in order to answer for the commission of a crime as opposed to any other reason, including but not limited to officer safety.

Police officers are not required to take unnecessary risks in the line of duty. They are permitted to use precautionary measures that are reasonably necessary to safeguard their personal safety. *State v. Nugent,* 15 Kan.App.2d 554, 564, 811 P.2d 890, rev. denied 249 Kan. 777 (1991) (citing K.S.A. 22-2402[2]). For example, the use of handcuffs and/or frisking a detainee for weapons does not automatically convert an investigatory detention into an arrest. *State v. Hill,* 281 Kan. 136, 142, 130 P.3d 1 (2006). "[T]he test for whether a seizure and an arrest has occurred is based on what a reasonable person would believe under the totality of the circumstances surrounding the incident." 281 Kan. at 145 (citing *Morris,* 276 Kan. at 18-19). Accordingly, the issue presented here is whether a reasonable person would believe Rakestraw's actions in handcuffing and patting down Anderson were necessary to protect Rakestraw's safety and the safety of the other officers.

Here, Rakestraw observed Anderson in an unexplained foot chase in progress late at night in a high crime area. Anderson "stopped on a dime" at the precise moment he noticed Rakestraw, who was in a marked police car. Anderson took flight immediately after Rakestraw indicated an intention to investigate the circumstances. Rakestraw testified, "I didn't know what was going on, you know. I know in dealing with an area that involves narcotics, weapons aren't usually too far ... behind. So it's something I just want to be safe with." Considering all of these facts together, we find it was reasonable for Rakestraw to believe that Anderson might be in possession of a weapon and that his physical safety, and the physical safety of the other officers at the scene, might be in jeopardy. Because it was reasonably necessary for Rakestraw to handcuff and frisk Anderson for weapons,

the physical restraint and search did not convert the investigatory detention into an arrest. We conclude Anderson was not arrested until after the crack pipe was found on Anderson's person, and the discovery of this unlawful drug paraphernalia gave rise to the probable cause necessary to effectuate Anderson's arrest.

C. Juvenile Convictions

***6** As his final claim of error on appeal, Anderson argues the district court erred in using his prior juvenile convictions to enhance his sentence. He acknowledges that this issue has previously been decided in *State v. Hitt,* 273 Kan. 224, Syl. ¶ 2, 42 P.3d 732 (2002), *cert. denied* 537 U.S. 1104 (2003). He argues, however, that the Supreme Court's decision in *In re L.M.,* 286 Kan. 460, 186 P.3d 164 (2008), has altered *Hitt's* holding. The crux of Anderson's argument is that the changes in the juvenile code affording juveniles the right to a jury trial occurred prior to Anderson's juvenile convictions.

We are not persuaded by Anderson's argument. After the briefs were submitted in this case, the Kansas Supreme Court addressed this very issue and found that *Hitt* remained good law for all juvenile adjudications that were final on June 20, 2008, the date *In re L.M.* was filed. *State v. Fischer,* 288 Kan. 470, ----, 203 P.3d 1269, 1273 (2009). Here, Anderson's latest juvenile convictions occurred on May 3, 2002. There is nothing in the record that would establish that any of his juvenile convictions were not yet finalized prior to June 30, 2008. Thus, the district court properly relied on Anderson's prior juvenile convictions to enhance his sentence.

Affirmed.

All Citations

208 P.3d 361 (Table), 2009 WL 1591399

401 P.3d 1064 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Christopher Coty MAIER, Appellee.

No. 115,248
|
Opinion filed September 22, 2017

Appeal from Douglas District Court; SALLY D. POKORNY, Judge.

Attorneys and Law Firms

Patrick Hurley, assistant district attorney, Eve Kemple, senior assistant district attorney, Charles E. Branson, district attorney, and Derek Schmidt, attorney general, for appellant.

Dakota T. Loomis, of Law Office of Dakota Loomis, LLC, of Lawrence, for appellee.

Before Schroeder, P.J., Powell and Gardner, JJ.

MEMORANDUM OPINION

Gardner, J.:

*1 This appeal by the State challenges the district court's suppression of evidence police found while searching Christopher Coty Maier's hotel room after executing an arrest warrant there for Maier's girlfriend. The district court also suppressed post-*Miranda* statements Maier made after being arrested pursuant to his own warrant. We affirm the suppression of the evidence found in the hotel room but reverse the suppression of Maier's post-*Miranda* statements.

Factual and procedural background
In the afternoon of December 19, 2014, Lawrence police officers Tracy Russell, Brian Wonderly, and Kenneth Rodgers observed a maroon van in the parking lot of the Rodeway Inn. Officer Russell knew the van belonged to Amanda Lucas and that Lucas had an active bench warrant out for her arrest. The information from the in-car warrant alert identified it as a warrant for failure to appear but did not indicate whether it was for a criminal or civil case. Officer Russell assumed it was a criminal warrant due to his previous contact with Lucas. He later learned it was a bench warrant related to her child support case.

The officers went inside the motel to arrest Lucas but did not find her name on the guest register. They then went door-to-door to see if they could hear any activity inside the occupied rooms. The officers stopped at Room 233 after they heard several people inside the room being "quite boisterous." One of the females in the room referred to another female as "Amanda," and the officers heard them discussing borrowing money for a drug transaction. The officers waited outside the room for approximately 30 minutes listening to the conversation.

The door to the room then opened, and Crystal White exited. When Officer Russell asked her if Lucas was inside the room, she stepped aside and nodded toward one of the beds. Although the officers did not ask White if they could enter, they interpreted her gesture as an invitation to enter the room. They entered the room, saw several people, identified Lucas, and then arrested her pursuant to the warrant.

One officer saw a large serrated knife on the bed so he ordered Maier to stand with his hands against the wall for officer safety. An officer stood right behind him. Within a minute after Lucas' arrest, Officer Russell asked Maier if he had rented the room and whether he had any personal property in the room. Officer Russell asked Maier what items in the room belonged to him, and Maier pointed to several bags, a Honeywell safe, the knife, and a computer. Officer Russell asked if he could look in the safe, and Maier gave permission, saying nothing was in the safe. Maier provided a key to Officer Russell who opened the safe and found a digital scale, several watches, some rings, and approximately $70 in cash. Officer Russell asked Maier about the scale, and Maier claimed it belonged to another individual who had been in the room earlier in the day.

Officer Russell then asked to search the hotel room and Maier said, "[y]ou can search the whole thing." Officer Russell located a baggie, a clear glass jar that contained a white powdery substance, and a smoking pipe.

*2 At some point, Officer Rodgers took Maier outside the room into the hall to try to identify him. Maier gave him the false name of Timothy West, a false date of birth, and said his driver's license was from Colorado. When Officer Rodgers was unable to find any information about Timothy West in Colorado, he asked one of the persons present who the defendant was and she replied it was Christopher Maier. Officer Rodgers, who had had prior contact with Maier, then asked dispatch to run Maier's real name and was informed by dispatch of a warrant for Maier's arrest. Maier was then arrested.

Officer Russell took Maier to the patrol car and gave him his *Miranda* rights. Maier agreed to waive his rights and made the following statements to Officer Russell:

- White had asked him to loan her $125 so she could purchase some high quality methamphetamine;
- The jar the methamphetamine was in belonged to Maier but the low quality methamphetamine in the jar belonged to White;
- Maier had smoked some of the methamphetamine when White was in the room; and
- When Maier heard the police arrive he stashed the methamphetamine and pipe under the mattress.

Maier later moved to suppress the physical evidence and his statements. The district court initially denied that motion but then granted Maier's motion to reconsider, suppressing the evidence. The State then moved to reconsider the suppression, but the district court denied that motion.

The State takes this interlocutory appeal from the order suppressing evidence and shows that its inability to use that evidence substantially impairs its ability to prosecute the case. See *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984).

Our standard of review

We apply a mixed standard of review to decisions to suppress evidence. We determine, without reweighing the evidence, whether the facts underlying the district court's decision are supported by substantial competent evidence. We then conduct a de novo review of the district court's legal conclusion drawn from those facts. *State v. Morton*, 286 Kan. 632, 638–39, 186 P.3d 785 (2008).

General Fourth Amendment principles applicable to searches based on arrest warrants

The Fourth Amendment to the United States Constitution prohibits unreasonable government searches and seizures. The " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Payton v. New York*, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A search and seizure of evidence conducted without a warrant is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Generally, the Fourth Amendment provides overnight guests in motels the same expectation of privacy rights afforded to citizens in the home. *State v. Chiles*, 226 Kan. 140, 146–47, 595 P.2d 1130 (1979); see *Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Our case involves the search of a hotel room based solely on an arrest warrant. The United States Supreme Court has clarified the law as to the search of a residence based solely on an arrest warrant in two cases: *Payton*, 445 U.S. 573, and *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). We apply that law here.

An arrest warrant carries with it, by implication, a limited grant of authority to enter the target's residence so long as there is reason to believe that the target is inside. See *Payton*, 445 U.S. at 603. Here, officers had a facially valid arrest warrant for the target. As the United States Supreme Court emphasized in *Payton*, "the existence of an arrest warrant provides a buffer between the suspect and the zealous officer." *State v. Thomas*, 280 Kan. 526, 539, 124 P.3d 48 (2005). But officers have no authority to enter the residence of a third party to serve an arrest warrant on a suspect unless the officers have a valid search warrant to enter the residence. *Steagald*, 451 U.S. at 213–16. Generally speaking, these principles extend to the target's hotel or motel room, since such an accommodation is akin to a temporary residence. See *Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); *United States v. Beaudoin*, 362 F.3d 60, 65 (1st Cir. 2004).

*3 *Payton* " 'requires a two-part inquiry: first, there must be a reasonable belief that the location to be searched is the suspect's dwelling, and second, the police must have "reason to believe" that the suspect is within the dwelling.' " *State v. Beal*, 26 Kan. App. 2d 837, 840, 994 P.2d 669 (2000). To satisfy the *Payton* test, the officers must have a "reasonable belief" the arrestee lives in the residence, not merely a "reasonable suspicion" necessary

to justify a "stop and frisk" under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *United States v. Gay*, 240 F.3d 1222, 1227 (10th Cir. 2001).

As a preliminary matter, we must decide whether we should apply the *Payton* (suspect's home) or *Steagald* (third-party's home) standard to evaluate the lawfulness of the officers' entry into Maier's hotel room. We resolve this question under the first prong of the *Payton* test. *Gay*, 240 F.3d at 1226; *United States v. Thompson*, 402 Fed. Appx. 378, 382 (10th Cir. 2010) (unpublished opinion).

> "If the officers reasonably believe the suspect lives at the residence, then *Payton* applies. The officers may enter on the authority of the arrest warrant, provided they reasonably believe the suspect is inside. They do not need a search warrant. If, however, the officers' belief that the suspect lives at the residence is not reasonable, then this implies the residence is a third-party residence. In that case, *Steagald* applies, i.e., the officers' arrest warrant is insufficient—they need a search warrant to enter." *Thompson*, 402 Fed. Appx. at 382.

We evaluate whether the officers had a reasonable belief by using the totality of the circumstances test. *Beal*, 26 Kan. App. 2d at 840.

Did the officers have a reasonable basis to believe that Lucas was staying in Room 233?

We thus examine whether the officers reasonably believed, on the date they went to the hotel to arrest Lucas, that Lucas was staying at the Rodeway Inn. The facts known to the police officers about Lucas' status before they entered Room 233 are few. The officers knew that Lucas had been removed from the house she previously lived in and was staying wherever she could, including motel rooms. They knew that she had been arrested at the same Rodeway Inn two weeks before the event in question. On the date of the search, at mid-afternoon, officers saw Lucas' van parked in the parking lot of the Rodeway Inn. They determined that Lucas was not a registered guest, then wandered the halls and heard someone in Room 233 say Lucas' first name. These facts, although sufficient to warrant a reasonable belief that Lucas was inside Room 233, were insufficient to warrant a reasonable belief that Lucas was staying there overnight.

The State cites Lucas' testimony regarding her on-again, off-again romantic relationship with Maier and her history of sometimes living at her home and sometimes staying with Maier. Lucas did testify that on the date of the search she was homeless, was living at the Rodeway Inn, had met Maier there that morning, they had no plans where they were going, but she "always goes back to him, so [she] would have stayed with him." But whether Lucas was actually residing in Maier's room is not determinative, as our focus is on what the officers reasonably believed at the time of their entry into the room. The record does not reflect that the officers were aware of Lucas' relationship with Maier before they entered the room. Nor did the officers even know Maier, who had registered under the name Timothy West, was staying at the hotel until after they entered the room, arrested Lucas, searched the room, and learned Maier's true identity.

***4** The State relies on *United States v. Kern*, 336 Fed. Appx. 296, 297 (4th Cir. 2009) (unpublished opinion). But there, "several confidential sources" had informed law enforcement officers that a man, woman, and two children fitting the description of Kern's family had been observed for several weeks coming and going from a farm in Tyler County, West Virginia. Sources were unclear as to the owner of the property but believed it was an heirship. Based on that information, officers went to the farm to execute valid outstanding arrest warrants for Kern and found him there. It was undisputed that Kern, the target of the warrant, was either a resident or an overnight guest at the farm, thus the *Payton* requirement was met. *Kern*, 336 Fed. Appx. at 298. Such is not the case here.

The facts in our case are skinnier than those in cases which have found the requisite reasonable belief. See, e.g., *United States v. Jones*, 523 F.3d 31, 37 (1st Cir. 2008) (hotel manager told officers that suspect had rented a particular room for three weeks and a man detained in the parking lot told officers that suspect was then inside the suite); *United States v. Pelletier*, 469 F.3d 194, 197, 200–01 (1st Cir. 2006) (officers who went to defendant's home were told he was not there; defendant's girlfriend's sister said he was at a certain room at a motel; the room was registered in the sister's name; and a motel maintenance worker identified the defendant as the sole occupant of the room); *Thompson*, 402 Fed. Appx. at 386 (presence of suspect's vehicle over multiple days and throughout the night at one residence and information that suspect was staying there was sufficient to form a reasonable belief that suspect was living there).

The district court properly determined that the officers did not have a reasonable basis to believe that Lucas was a resident of Room 233. Thus, the officers needed a search warrant to enter Maier's third-party room to arrest Lucas there pursuant to her arrest warrant. See *Steagald*, 451 U.S. at 213–16.

The State contends that even if the officers' entry violated the Fourth Amendment, the evidence should not be suppressed. "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Davis v. United States*, 564 U.S. 229, 236, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). Instead, "[t]he rule's sole purpose ... is to deter future Fourth Amendment violations." *Davis*, 564 U.S. at 236–37. Whether to apply the remedy of exclusion or not ultimately "depend[s] on the circumstances of the particular case." *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). See 468 U.S. at 922 n.23 ("In making this determination, all of the circumstances ... may be considered."); 468 U.S. at 924–25 ("[C]ourts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases."). The State asserts two exceptions to the exclusionary rule: good faith and the attenuation doctrine. We address the latter first.

Did the district court err in finding that the attenuation doctrine did not apply?

The State argues that even if the officers' entry was illegal the evidence should not be suppressed, relying on the attenuation doctrine. The State argues that three intervening events separated the officers' illegal entry from the evidence they discovered thereafter: (1) Maier consented to the search; (2) Maier provided false identifying information to the officers; and (3) the officers, upon learning Maier's true identity, discovered an outstanding bench warrant for his arrest.

The attenuation doctrine, generally

Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.' *Hudson*, [547 U.S.] at 593, 126 S. Ct. 2159." *Utah v. Strieff*, 579 U.S. ——, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016). See *State v. Martin*, 285 Kan. 994, 1003, 179 P.3d 457 (2008) (applying attenuation doctrine). The determination of dissipation is heavily fact-bound and, thus, dependent upon case-specific circumstances. See *State v. Swanigan*, 279 Kan. 18, 44, 106 P.3d 39 (2005).

***5** To determine whether a sufficient intervening event breaks the causal chain between the unlawful act and the discovery of drug-related evidence, we examine a number of factors articulated in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), and cited by our Kansas Supreme Court in *Swanigan*, 279 Kan. at 43:

- The "temporal proximity" between the unconstitutional conduct and the discovery of evidence, *Brown*, 422 at 603;
- the presence of intervening circumstances, *Brown*, 422 at 603–04;
- the purpose and flagrancy of the official misconduct, *Brown*, 422 at 604; *Strieff*, 136 S. Ct. at 2061–62;
- a change in place, *Swanigan*, 279 Kan. at 42;
- the involvement of different law enforcement officers, *Swanigan*, 279 Kan. at 42;
- whether the suspect received *Miranda* warnings before making the incriminating statements, *Brown*, 422 U.S. at 603; *Kaupp v. Texas*, 538 U.S. 626, 633, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003); *State v. Little*, No. 104,794, 2012 WL 3000342, at *5 (Kan. App. 2012) (unpublished opinion) (finding sufficient attenuation).

The State contends that the district court erred in finding insufficient attenuation because it analyzed only one factor—temporal proximity. We examine all the factors below.

Miranda *warnings*

We begin with the latter factor first. This factor does not apply to the physical evidence found in the search of the hotel room before Maier was given the *Miranda* warnings but applies to Maier's statements. It is undisputed that Maier's statements were made after he was arrested and given his *Miranda* warnings, over an hour after the officers entered his hotel room.

Providing *Miranda* warnings is an "important, although not dispositive," factor that weighs against suppression of Maier's subsequent statements. *Rawlings v. Kentucky*, 448 U.S. 98, 107, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Even persons who are arrested illegally will often decide to confess as an act of free will, unaffected by the initial illegality. 448 U.S. at 106. Maier was not arrested illegally and has not shown that his post-*Miranda* statements made after his arrest pursuant to a valid arrest warrant were somehow affected by the officer's initial

entry into his hotel room. This factor favors the admission of Maier's statements.

Temporal proximity
The search of the hotel room occurred soon after officers entered it. Officer Russell testified that it took one to two minutes to arrest Lucas on the warrant and "then our focus turned to Mr. Maier and asked him for consent to search the room." The district court found that while one officer was arresting Lucas, "exactly at that same time," other officers started talking to Maier, who "starts pointing out what [property] is his and consenting to the search." The district court found that the arrest and search were "so intertwined and intermeshed that I cannot find that there is any separation from the unlawful entry and the immediate search of the room."

But Maier's false identification was made at some unspecified time after the search, and his post-*Miranda* statements in the patrol car were made approximately an hour and a half after the initial entry into his hotel room. The district court recognized that Maier's statements after his arrest and reading of his *Miranda* rights were arguably attenuated but found that the statements would not have been made had the officers not illegally entered the room and illegally searched it.

***6** That is not the proper test for attenuation, however. The Supreme Court has rejected a "but for" test for determining whether evidence is a fruit of unlawful police activity. *Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The "more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " 371 U.S. at 488. See *State v. Poulton*, 286 Kan. 1, 6, 179 P.3d 1145 (2008) ("Although not all evidence is fruit of the poisonous tree simply because it would not have become known without the illegal actions of the police, the doctrine bars any evidence that becomes known through exploitation of the illegality.").

The Supreme Court has cautioned that the temporal proximity factor favors attenuation only if a substantial time has elapsed between the conduct and the discovery of evidence, and has found less than two hours insubstantial. *Kaupp*, 538 U.S. at 633; see *Brown*, 422 U.S. at 604 ("less than two hours," no attenuation). Here, less than two hours separated all the intervening events from the initial entry. We thus agree that the temporal proximity between the unconstitutional conduct and the discovery of evidence favors suppression of the evidence.

Intervening circumstances
The State argues that three intervening events severed the connection between the initial illegality and the discovery of evidence: (1) Maier's consent to the search; (2) Maier's provision of a false identity to the officers; and (3) the officers' discovery of an outstanding bench warrant for his arrest. We find the third event significant.

1) *Maier's consent*

To vitiate the unlawfulness of an entry, consent to a search must be both voluntary and "an intervening independent act of a free will" sufficient "to purge the primary taint of the unlawful invasion." *Brown*, 422 U.S. at 598. Thus evidence obtained by purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality. *United States v. Melendez–Garcia*, 28 F.3d 1046, 1054 (10th Cir. 1994); *State v. Schmitter*, 23 Kan. App. 2d 547, 556, 933 P.2d 762 (1997) (adopting the dual analysis articulated in *Melendez–Garcia*).

The district court found the consent involuntary based on the following facts: (1) the motel room was very small; (2) at least four people other than officers were in the room; (3) at least two officers were in the room and one was at the door; (4) all of the officers were in uniform and were armed; and (5) Maier was not advised that he could refuse consent or that he could leave. The record also shows that Maier was quickly told to stand with his hands against the wall because an officer standing "right behind" him ordered him to do so for officer safety after seeing a large serrated knife on the bed. The record contains sufficient evidence to support the district court's conclusion that Maier's consent to the search of his room was not voluntary under the totality of the circumstances, including the fact that Maier's consent was requested soon after the illegal entry to his room. Maier's consent thus cannot serve as a valid attenuating event. See *Melendez–Garcia*, 28 F.3d at 1054.

2) *Maier's false identification*

The State asserts that Maier's falsely identifying himself to the officers constitutes an intervening event, separating

the illegal entry from the discovery of incriminating evidence. The State relies on the following facts: Maier repeatedly provided a false name and a false date of birth to officers; Maier said his driver's license was from Colorado; and when Officer Rodgers was unable to find any information about the defendant in Colorado he asked White who he was and she told him Maier's real name.

*7 The State does not show how defendant's falsely identifying himself to the police constitutes an intervening event. The State does not argue, for example, that by doing so Maier committed a crime in their presence, warranting his arrest and a search pursuant to a valid arrest. Instead, the State fails to relate the facts to any legal argument or to cite any authority showing that these facts necessarily constitute sufficient attenuation. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority amounts to an abandonment of the issue. *State v. Murray*, 302 Kan. 478, 486, 353 P.3d 1158 (2015). We consider this argument to be abandoned.

3) *The officers' discovery of an outstanding bench warrant for Maier's arrest*

The State also contends that the officers' discovery of an outstanding bench warrant for Maier's arrest constitutes an intervening event. The arrest warrant was discovered before Maier's statements but after the search revealed physical evidence. The warrant thus cannot serve as an intervening event as to anything but Maier's subsequent statements.

The district court's comments in relation to Maier's statements reveal the district court's erroneous understanding that a "but for" test was appropriate in determining attenuation:

> "[O]nce you've already said, 'Oh, yeah, that is mine; oh yeah, my gosh, there is digital scales there; yeah, I guess there is methamphetamine there,' once you basically have confessed in the motel room, the officers can't just wait and question you again and say, 'That is sufficiently attenuated.' ... But [Maier] wouldn't have had to explain[ ] more if the officers were not there unlawfully in the first place."

As we noted above, the court's use of a "but for" test constitutes a legal error in its attenuation analysis. See *Hudson v. Michigan*, 547 U.S. 586, 593, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (finding attenuation "occurs when, *even given a direct causal connection*, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained" [Emphasis added.]); *Wong Sun*, 371 U.S. at 487–88 (rejecting a "but for" test for determining whether evidence is a fruit of unlawful police activity).

The district court's comments also reflect a factual error: as the State correctly asserts and defendant tacitly concedes in his brief, Maier made no incriminating statements in the hotel room. His statements were made in the patrol car to Officer Russell after Maier was arrested and was read his *Miranda* rights. Maier was thus in a different place—in a patrol car outside and not in the hotel room—and was with just one instead of several officers who had entered his room. He made the statements after officers discovered an arrest warrant for him, arrested him, and read him *Miranda* warnings.

The State has filed a notice of additional authority on this topic, citing *Strieff*. Although the State's notice was untimely, the State gave a good reason for its delay. Maier has not objected to our consideration of *Strieff*, and *Strieff* merely applied the preexisting attenuation doctrine. We thus consider this additional authority.

Strieff held that an officer's discovery of a valid, preexisting arrest warrant was enough to break the causal link between an unlawful investigatory stop and drug-related evidence seized from a defendant during a search incident to arrest, abrogating *State v. Moralez*, 297 Kan. 397, 300 P.3d 1090 (2013) (which found that a warrant is of minimal importance in the attenuation analysis):

> "[W]e hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct." *Strieff*, 136 S. Ct. at 2063.

**8 We find *Strieff* applicable here. Even though the initial entry violated *Payton*, Maier's statements made after his arrest based on a valid warrant and made voluntarily outside the hotel after waiving his *Miranda* rights should not have been suppressed. The discovery of Maier's arrest

warrant broke the causal chain between the unconstitutional entry and Maier's post-*Miranda* statements.

We find further support in *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). There, the United States Supreme Court held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." 495 U.S. at 21. In *Harris*, officers unlawfully entered the defendant's home—with probable cause but without consent or a warrant—to arrest the defendant in connection with a murder. While the police were in his house during the warrantless entry, the defendant made incriminating statements in response to their questions. After the officers brought the defendant to the station, the defendant drafted a written confession. At trial, the defendant sought to suppress the written confession on the grounds that it was fruit of the unlawful entry into his home. The trial court suppressed the statements made in the home but not the written confession made at the police station.

The Supreme Court affirmed the admission into evidence of the subsequent custodial statement, explaining that the custodial statement was admissible because it was "not the fruit of the fact that the arrest was made in the house rather than somewhere else." *Harris*, 495 U.S. at 20.

> "To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated. We are not required by the Constitution to go further and suppress statements later made by Harris in order to deter police from violating *Payton*.... Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home. If we did suppress statements like Harris', moreover, the incremental deterrent value would be minimal." 495 U.S. at 20.

The Supreme Court explained these justifications for admission of evidence in spite of a violation in *Hudson*. *Hudson* held that the exclusionary rule did not require suppression of the evidence when the interests to be protected, and which were violated, had nothing to do with the seizure of the evidence. 547 U.S. at 594. Such is the case here. This factor strongly favors admission of Maier's statements.

The purpose and flagrancy of the official misconduct

The flagrancy of police misconduct is the most important element of our analysis because the exclusionary rule is aimed at deterring police misconduct. *United States v. Reed*, 349 F.3d 457, 464–65 (7th Cir. 2003) (citing *Brown*, 422 U.S. at 600). "The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Strieff*, 136 S. Ct. at 2063.

***9** " '[P]urposeful and flagrant' misconduct is not limited to situations where the police act in an outright threatening or coercive manner." *Reed*, 349 F.3d at 465.

> "Rather, purposeful and flagrant misconduct is generally found where: '(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up." ' *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006) (quoting *Brown*, 422 U.S. at 605, 95 S. Ct. 2254)." *United States v. Fox*, 600 F.3d 1253, 1261 (10th Cir. 2010).

"When an officer's conduct is negligent but not flagrant or purposeful, the exclusionary rule's objective is not served and strongly favors admissibility. *Id.* Good-faith mistakes, resulting from errors in judgment, 'hardly rise to a purposeful or flagrant violation of ... Fourth Amendment rights.' *Id.*" *McDaniel v. Polley*, 847 F.3d 887, 896 (7th Cir. 2017) (citing *Strieff*, 136 S. Ct. at 2063). Even an unreasonable mistake alone is not sufficient to establish flagrant misconduct. *United States v. Herrera–Gonzalez*, 474 F.3d 1105, 1113 (8th Cir. 2007). Nor is a recklessly untrue statement by an officer necessarily flagrant. *United States v. Yorgensen*, 845 F.3d 908, 915 (8th Cir. 2017) (finding an officer's recklessly untrue statement in a probable cause affidavit in support of a search warrant not purposeful or flagrant).

A good-faith mistake was found in *Strieff*, where an officer stopped Strieff leaving a suspected drug house without reasonable suspicion of wrongdoing. The court found that the officer violated Strieff's Fourth Amendment rights and should have asked Strieff to talk

instead of demanding that he do so. Despite that violation, the court concluded that this prong of the *Brown* test was not satisfied because the officer made a good-faith mistake and did not act purposefully or flagrantly. "[A]ll the evidence suggests that the [arrest] was an isolated instance of negligence that occurred in connection with a bona fide investigation." *Strieff*, 136 S. Ct. at 2063.

The same rationale applies here. The officers entered the motel room without the necessary reasonable belief that Lucas was living there. Their belief that she was living there was thus objectively unreasonable. But this does not mean that the officers' conduct was flagrant or for an improper purpose. We do not conflate the standard for an illegal entry of a residence for purposes of an arrest warrant with the standard for flagrancy. Instead, we recognize that the officers' determination of where a suspect lives is not always simple. For example, what if a person lives at more than one dwelling? "The *Payton/Steagald* distinction does not lend itself to resolving the situation where a suspect lives in more than one dwelling." *Thompson*, 402 Fed. Appx. at 383. Here, the officers knew that their suspect was homeless and living various places. And how is an officer to determine whether a particular residence is that of the suspect or is instead that of a third party? Residences can rarely be neatly divided into those that are third-party residences and those that are suspects' residences. 402 Fed. Appx. at 385 (citing *Valdez v. McPheters*, 172 F.3d 1220, 1225 [10th Cir. 1999]) ("*Payton* and *Steagald* cannot be understood to divide the world into residences belonging solely to the suspect on the one hand, and third parties on the other."). This is particularly so for short-term residences, such as hotels.

***10** "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure. See, e.g., *Kaupp*, 538 U.S. at 628, 633, 123 S. Ct. 1843 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause)." *Strieff*, 136 S. Ct. at 2064. Here, neither the officers' alleged purpose (to arrest Lucas pursuant to her arrest warrant) nor the flagrancy of their violation (entering a third-party's motel room which they erroneously believed to be Lucas' room) rises to a level of misconduct sufficient to warrant suppression. See *McDaniel*, 847 F.3d at 896 (finding no flagrant acts where officer's mistake, if any, in illegally arresting the defendant constituted negligence, and everything that occurred after the initial arrest was legal). Nothing in the record suggests the officers' actions were taken in bad faith or were motivated by an intent to circumvent the strictures of the Fourth Amendment. This factor weighs in favor of admitting Maier's statements.

Sufficient attenuation has been shown as to Maier's statements

Our weighing of the relevant factors persuade us that although the physical evidence found in the hotel room was the product of the illegal entry into the hotel room, Maier's statements made in the patrol car were not. Maier was in custody pursuant to a valid arrest warrant at the time. Neither were his statements the fruit of having been arrested in his hotel rather than someplace else. Here, as in *Harris*, 495 U.S. at 19, defendant's post-*Miranda* statements were not made due to an exploitation of the illegal entry into his residence. See *State v. Koutsogiannis*, No. A-5772-14T4, 2017 WL 2471029, at *8 (N.J. Super. 2017) (unpublished opinion) (finding even if the entry of the residence was unlawful, the statements from defendant as well as the items recovered pursuant to the search warrants would not be "poisoned fruit" and subject to the exclusionary rule); *People v. Garcia*, 74 N.E.3d 108, 116 (Ill. App. 2017) (holding where officers had probable cause to effectuate defendant's arrest, and while their entry into his home to do so was unlawful under *Payton*, the evidence recovered outside his home was not required to be suppressed), *reh. denied* March 21, 2017; *Kerr v. Jones*, No. 5:15CV6-WS/CAS, 2017 WL 1158249, at *13 (N.D. Fla. 2017) (holding because police had probable cause to arrest defendant at the time of the alleged *Payton* violation, his subsequent statement to police made after *Miranda* warnings would not have been suppressed), *report and recommendation adopted*, No. 5:15CV6-WS/CAS, 2017 WL 1147473 (N.D. Fla. 2017); *United States v. Espinoza*, No. 3:15-CR-30077-RAL, 2015 WL 9222570, at *4 (D.S.D. 2015) (unpublished opinion) (finding postarrest statements were sufficiently purged from the existence of any *Payton* violation); *Torres v. State*, 95 Md. App. 126, 131, 619 A.2d 566 (1993) (finding statement given by defendant after police officers entered his girlfriend's motel room without warrant and arrested him was not tainted by officers' unlawful entry into motel room; although warrantless arrest in home or its functional equivalent is invalid absent exigent circumstances, once parties leave protected premises there is clean break in chain of causation). Accordingly, we reverse the determination that Maier's custodial statements should be suppressed.

Good-faith exception

The State contends that all the evidence should be admitted because the officers acted in objectively "reasonable reliance" on an arrest warrant for Lucas

which was subsequently discovered to be a civil and not a criminal warrant.

The good-faith exception provides that a court should suppress evidence only "if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Herring v. United States*, 555 U.S. 135, 143, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). The United States Supreme Court has "over time applied [the] 'good-faith' exception across a range of cases" where applying the exclusionary rule would not "yield 'appreciable deterrence.' " *Davis v. United States*, 564 U.S. 229, 237–38, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) (quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 [1976]). For example, the Court has held that, under the good-faith exception, evidence need not be suppressed where police conduct a search in "objectively reasonable reliance" on a search warrant subsequently deemed invalid, *Leon*, 468 U.S. at 922, on a statute subsequently held unconstitutional, *Illinois v. Krull*, 480 U.S. 340, 360, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), on an arrest warrant that had previously been recalled, *Herring*, 555 U.S. at 136, or on binding precedent that has been overruled, *Davis*, 564 U.S. at 241. See *State v. Powell*, 299 Kan. 690, 700, 325 P.3d 1162 (2014); *State v. Pettay*, 299 Kan. 763, 769, 326 P.3d 1039 (2014); *State v. Daniel*, 291 Kan. 490, 492, 242 P.3d 1186 (2010).

***11** Both parties contend that *Herring* favors their position. We find two barriers to the State's assertion of this exception.

First, to date, the Supreme Court has invoked the "good faith" exception only when the law enforcement officer responsible for the constitutional violation unknowingly relied on errors or statements of law made by others. See *Davis*, 546 U.S. at 238–39 (collecting cases); see also *United States v. Mota*, 155 F. Supp. 3d 461, 475 (S.D.N.Y. 2016) ("The common thread uniting these exceptions is that it was not the officer conducting the search who erred, but another actor, such as the legislature.") (citing *Davis*, 546 U.S. at 240–41). Such is not the case here. The officers who illegally entered the motel room relied on their own collective knowledge to form the erroneous belief that Lucas was living there and do not allege that they relied on erroneous information from others about where Lucas was living.

Secondly, unlike the officers in *Herring* who effected an arrest during a traffic stop and then searched a vehicle incident to arrest, the officers here needed to comply with the *Payton/Steagald* requirements for in-home arrests. Officers thus had to show not only their good-faith reliance on the arrest warrant, but also a reasonable basis to believe that Lucas was staying in Room 233 overnight. As we have found, they failed to show the latter. Their entry into Maier's hotel room therefore cannot be justified under the good-faith exception even if their reliance on the facially valid arrest warrant for Lucas was objectively reasonable. See *Thomas*, 280 Kan. at 532 (finding an arrest warrant alone is an insufficient basis to allow entry into a third party's residence). We thus find *Herring's* good-faith exception inapplicable here.

Accordingly, we do not reach the interesting issue whether officers may enter a target's residence to execute a bench warrant. See *United States v. Spencer*, 684 F.2d 220, 223 (2d Cir. 1982) (holding that a bench warrant is the equivalent to a judicial determination of probable cause); *United States v. Smith*, 468 F.2d 381 (3d Cir. 1972) (finding when a defendant is named in a bench warrant, probable cause for arrest exists); *Johnson v. Provenzano*, 646 Fed. Appx. 279, 281 (3d Cir. 2016) (unpublished opinion) (finding " '[t]he simple fact of nonappearance [for his summons] provided ... probable cause ... for a bench warrant' "); *Carter v. Baltimore County*, 95 Fed. Appx. 471, 479 (4th Cir. 2004) (unpublished opinion) (finding that once an officer determines that the person is the individual listed on the bench warrant, the officer has "probable cause [and indeed the duty] to serve the warrant and take [the plaintiff] into custody"); cf. *State v. Ruden*, 245 Kan. 95, 103–04, 774 P.2d 972 (1989) (holding officers have no authority to enter a subject's residence to arrest a person on a bench warrant they know is to assist the execution of a judgment in a limited action case); *Thomas*, 280 Kan. at 531 (citing *United States v. Bervaldi*, 226 F.3d 1256 [11th Cir. 2000] [*Payton* rule applies for bench warrants]).

We affirm the district court's suppression of the physical evidence found in the hotel room and reverse the suppression of Maier's statements made outside the hotel room.

All Citations

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401 P.3d 189 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Daniel J. CHRISTIAN, Appellant.

No. 116,133
|
Opinion filed September 8, 2017

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, Judge.

Attorneys and Law Firms

Kimberly Streit Vogelsberg, of Kansas Appellate Defender Office, for appellant.

Andrew R. Davidson, assistant district attorney, Keith Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before Schroeder, P.J., Powell and Gardner, JJ.

MEMORANDUM OPINION

Powell, J.:

**1 Daniel J. Christian appeals his convictions of possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia, arguing the district court erred by (1) failing to advise him of his right to a jury trial before accepting his waiver of that right, (2) failing to grant his motion to suppress evidence, and (3) utilizing a 1969 Colorado robbery conviction in his criminal history score. After careful review, we find no error in the district court's denial of Christian's motion to suppress and affirm that decision. However, because we find the district court failed in its duty to fully advise Christian of his right to a jury trial, we must reverse his convictions and remand to afford Christian the opportunity to exercise his right to a jury trial.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Christian with possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia based upon an incident that occurred on July 4, 2014. Around midnight, the police received a call concerning a suspicious vehicle. The caller stated that a white male was sitting in a maroon vehicle in front of her house. The caller believed that one person had exited the vehicle and another had remained inside. The vehicle had been in front of the caller's house for approximately one hour.

Hutchinson Police Officer Adam Weishaar responded to the call and observed a vehicle matching the description provided by the caller. As he passed the vehicle, Weishaar observed the driver duck down. Weishaar pulled in behind the suspicious vehicle, activated his emergency lights but not the siren, and approached the vehicle. As Weishaar walked toward the vehicle, he observed the license plate had expired.

Weishaar identified Christian as the person in the vehicle—Christian provided a license but no proof of insurance. Weishaar testified that while Christian was in his vehicle he was acting "real fidgety and kept trying to dig around in the vehicle." Weishaar asked Christian to step out of the vehicle and arrested Christian for failure to provide proof of insurance. A second officer who had arrived after Weishaar observed a small metal container on Christian's keychain and inquired about it. Christian stated that it was a container for pills. The second officer asked for consent to search the container, and Christian agreed to allow the police to search it. The container contained a green leafy substance that was consistent with marijuana. Weishaar then placed Christian under arrest for possession of marijuana. The police searched the vehicle and found two black scales—one with a crystal-like residue and one without—and a small white container with a green residue inside. Christian also had a baggie containing methamphetamine in his possession.

Christian filed a motion to suppress, arguing that the police did not have reasonable suspicion to stop him and that the evidence obtained from the police encounter was inadmissible fruit of the poisonous tree. The district court held a hearing on the motion to suppress.

**2 At the hearing, Weishaar testified to the above facts concerning the suspicious activity call and his response to the call. Weishaar stated that he pulled behind the vehicle

because he viewed the activity as suspicious. Other circumstances contributing to the suspicious activity were that the car had been sitting outside the caller's house with an occupant for over an hour around midnight, the driver had ducked when the patrol vehicle drove by, Christian had stated that he had dropped off a friend but did not provide identifying information for the friend, and there was a narcotics house on the same block. On cross-examination, Weishaar agreed with defense counsel that, based upon the call, he did not believe any illegal activity was occurring. The district court took the matter under advisement and allowed the State to file a written response to Christian's motion to suppress.

After the State responded, the district court ruled that the evidence should not be suppressed. The district court found that the officer had seized Christian at the time he activated his emergency lights. Furthermore, the district court found that although it was a close call, reasonable suspicion supported the stop and the lack of insurance justified an arrest. Additionally, Christian had consented to the search of the container on his keys, and the discovery of the evidence was inevitable because the car was going to be towed.

The district court held a preliminary hearing where Christian purportedly waived his right to a jury trial. At the bench trial, the State introduced as evidence a photograph of Christian's keys, a photograph of the metal container on Christian's keys, and the metal container containing a green leafy substance without objection. When the State attempted to introduce the scale that had the crystalline residue, Christian's counsel at first did not object but after an off-the-record bench conference stated: "I think the previous attorney had done a suppression motion in this. I just want to make sure we're not waiving any of those issues through this matter so we, with that, with that exception. I don't have any objection as far as the foundation, but." The district court responded that the appellate court would decide the suppression issue. Lab reports identifying the substance in the metal container as marijuana and the crystalline residue on the scale as methamphetamine were admitted without objection. The white container containing green residue believed to be marijuana residue and the other scale were admitted over an objection relating to the motion to suppress.

The district court found Christian guilty of possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia. At sentencing, Christian did not object to his criminal history score of C that was based, in part, on a 1969 Colorado robbery conviction. The district court sentenced Christian to 30 months in prison but placed him on probation from that sentence for 12 months. Christian timely appeals.

DID THE DISTRICT COURT OBTAIN A VALID WAIVER OF CHRISTIAN'S RIGHT TO A JURY TRIAL?

Christian first alleges the district court did not obtain a proper waiver of his right to a jury trial. Specifically, Christian claims the record fails to show he was properly informed of his right to a jury trial or that he knowingly waived that right. However, Christian did not raise this issue below. In *State v. Frye*, 294 Kan. 364, 370–71, 277 P.3d 1091 (2012), our Supreme Court recognized that this issue may be raised for the first time on appeal to prevent the denial of a fundamental right and serve the ends of justice. However, the *Frye* court did not create a bright-line rule that all jury trial waivers may be raised for the first time on appeal; rather, the court should utilize the general preservation requirements for addressing issues for the first time on appeal. *State v. Beaman*, 295 Kan. 853, 857, 286 P.3d 876 (2012). Christian asserts that this issue may be raised to prevent the denial of a fundamental right because the right to a jury trial is one of the most fundamental rights in the United States. Christian has provided a sufficient basis for reaching the merits of this issue for the first time on appeal.

**3 In reviewing a challenge to a jury trial waiver, the factual findings of the district court are reviewed for substantial competent evidence, and the legal conclusions drawn from those facts are reviewed de novo. *Frye*, 294 Kan. at 371. When the facts surrounding a jury trial waiver are not in dispute, we review the issue de novo as only a question of law is presented. *Beaman*, 295 Kan. at 858. Here, the facts surrounding the waiver are not in dispute.

A defendant has a right to a jury trial and may waive that right with consent of the prosecution and the court. K.S.A. 22-3403(1). The waiver of a right to a jury trial is valid if the right is voluntarily waived "by a defendant who knew and understood what he or she was doing." *Beaman*, 295 Kan. at 858. A waiver must be strictly construed in favor of the defendant being allowed to exercise his or her right to a jury trial. See *State v. Rizo*, 304 Kan. 974, 980, 377 P.3d 419 (2016).

Our Supreme Court has dictated that in order for a jury trial waiver to be valid, "the defendant must first be advised by the court of his [or her] right to a jury trial, and he [or she] must personally waive this right in writing or in open court for the record." *State v. Irving*, 216 Kan.

588, 590, 533 P.2d 1225 (1975). Such a waiver cannot be presumed from a silent record. 216 Kan. at 589. Here, Christian does not raise a challenge under the second prong of *Irving* as the record is clear that the purported waiver occurred in open court; nor does he challenge whether he voluntarily waived the right. Rather, Christian challenges whether he knowingly waived his right to a jury trial.

Before the district court accepted Christian's waiver the following colloquy occurred:

> "[THE COURT:] The matter was set this morning for jury trial. The court has been advised that the defendant wishes to proceed with a bench trial.
>
> Mr. Christian?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Is it correct you want to have a trial but you want to have that to the judge and not have a jury?
>
> "THE DEFENDANT: Yes. Yes, sir.
>
> "THE COURT: Okay. You understand that your attorney makes decisions on how to proceed in the case, but that's a decision you have to make. And you're telling me that's how you want to proceed, without a jury trial, but you want a trial to the court?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Okay. We will—does the state agree?
>
> "[THE STATE]: Yes, judge, we will waive a jury trial as well.
>
> "THE COURT: As does the court. ..."

Christian alleges that this colloquy was insufficient to show that he knowingly waived his right to a jury trial because he was not informed by the court of that right. We agree.

Our court has recently reiterated that the failure of the district court to inform the defendant of his or her right to a jury trial as part of a waiver is fatal. *State v. Chavez–Majors*, No. 115,286, 2017 WL 3572948, at *6 (Kan. App. 2017). Moreover, our Supreme Court has held that because the right to waive a jury trial rests solely with the defendant and because knowledge of the right to a jury trial is not intuitive, the responsibility to ensure that a defendant is informed of his or her right to a jury trial "rests squarely with the presiding judge." *Frye*, 294 Kan. at 371. Whether this has been done is determined largely on the basis of the particular facts and circumstances of each case. *Beaman*, 295 Kan. at 858.

The State relies on *Beaman* for the proposition that Christian's waiver was knowing even though the district court never used the words "right to a jury trial." In *Beaman*, the district court was informed that the defendant wished to waive a jury trial against the advice of counsel. The district court informed Beaman that it was likely better for him to have the case heard by a jury and inquired why Beaman wished to proceed against the advice of counsel. In his response, Beaman indicated that he did not want to have to put the victim or family through the jury process. The district court informed Beaman that the victim would still have to testify, and Beaman indicated that he understood.

**4 Our Supreme Court determined that this exchange was sufficient to show that Beaman knowingly and voluntarily waived his right to a jury trial and upheld the waiver without a direct statement concerning the right to a jury trial. 295 Kan. at 861. Although the *Beaman* court stated: "Without question, it would have been a better practice for the district court to have expressly told Beaman on the record that he had a *right* to trial by jury [,]" the exchange between Beaman and the district court was sufficient to show Beaman understood what was being given up. 295 Kan. at 860–61.

We consider *Beaman* to be largely limited to its facts and view the factual situation similar to the one faced by our court in *State v. Cervantes–Cano*, No. 107,179, 2013 WL 1943060 (Kan. App. 2013) (unpublished opinion). In that case, like here, the district court never explained the defendant's right to a jury trial nor did the district court explain or verify that the defendant understood what it meant to try the case to the court. The court distinguished *Beaman* on the grounds that the district court in *Beaman* specifically advised the defendant that he would be better off with a jury and had a detailed discussion with the defendant regarding the nature and extent of the right being waived. 2013 WL 1943060, at *4.

Here, the exchange between the district court and Christian does not indicate that Christian understood what was being waived. The district court did not inform Christian that he had a right to a jury trial—at most, the district court confirmed that Christian did not want a jury trial and that Christian's attorney could not make the decision not to have a jury trial. While the exchange between Christian and the district court shows that Christian was personally waiving the right to a jury trial, it does not show that Christian understood the right he was waiving. The lack of any indication that Christian

was aware of his right to a jury trial is fatal to the validity of his plea.

The State also argues that invited error should apply because Christian had informed the district court that he wanted to waive his jury trial. The State has raised invited error challenges to jury trial waivers in other cases without success. See *State v. Morfitt*, 25 Kan. App. 2d 8, 12, 956 P.2d 719, *rev. denied* 265 Kan. 888 (1998). The invited error doctrine is a court-made rule that prevents a party who induces the district court to act in a particular way from complaining on appeal of errors caused by the inducement of the action. *State v. Sasser*, 305 Kan. 1231, 1235, 391 P.3d 698 (2017). Whether the invited error rule applies is a question of law over which we have unlimited review. *State v. Hankins*, 304 Kan. 226, 230, 372 P.3d 1124 (2016).

The invited error rule is inapplicable to this situation because the district court has the duty of ensuring the defendant has been adequately informed of the right to a jury trial. *Frye*, 294 Kan. at 373–74. While Christian may have initiated the waiver proceeding and acquiesced in the jury trial waiver, he did not invite the district court to inadequately inform him of his rights during the waiver proceeding. Therefore, because the district court failed to inform Christian of his right to a jury trial, Christian's convictions are reversed, and the case is remanded to give Christian the opportunity to exercise his right to a jury trial or to effect a valid jury trial waiver.

DID THE DISTRICT COURT ERR IN DENYING CHRISTIAN'S MOTION TO SUPPRESS EVIDENCE?

Christian next argues the district court erred when it denied his motion to suppress evidence that was found because of the car stop. Specifically, Christian argues the police officer lacked reasonable suspicion to stop him.

A. Merits of suppression issue may be addressed

****5** Despite having reversed Christian's convictions, we consider this issue because it may present itself again on remand. Before we do so, however, we must first address whether the suppression issue is properly preserved because Christian did not raise a contemporaneous objection to the admission of some of the evidence from the encounter. Generally, a contemporaneous objection is required to review whether evidence was erroneously admitted. *State v. Kelly*, 295 Kan. 587, 589, 285 P.3d 1026 (2012). A pretrial objection, through a motion to suppress, is not sufficient to preserve an issue for appeal. 295 Kan. at 590. An objection at trial is required because it allows the judge to revisit the pretrial ruling based upon what occurred up until that point at trial. *State v. Houston*, 289 Kan. 252, 270, 213 P.3d 728 (2009). However, our Supreme Court has relaxed the preservation rule for bench trials. *State v. Bogguess*, 293 Kan. 743, 747, 268 P.3d 481 (2012) (citing *State v. Parson*, 226 Kan. 491, 493–94, 601 P.2d 680 [1979]).

Here, there was no additional evidence presented to the district court prior to the admission of the now challenged evidence that was presented at the hearing on the motion to suppress. Accordingly, the district court did not have any additional facts to reassess for the ruling making a contemporaneous objection unnecessary. Accordingly, we shall consider the merits of the issue.

B. Stop not supported by reasonable suspicion

When reviewing a motion to suppress, we utilize a bifurcated standard of review. The district court's factual findings are reviewed for substantial competent evidence, and the ultimate legal question of whether the evidence should be suppressed is reviewed de novo. In reviewing the evidence, we do not reweigh the evidence or reassess witness credibility. *State v. Patterson*, 304 Kan. 272, 274, 371 P.3d 893 (2016). The State bears the burden of proving the legality of a challenged search or seizure. *State v. Thompson*, 284 Kan. 763, 772, 166 P.3d 1015 (2007).

Turning to the district court's factual findings, substantial competent evidence is evidence that is both factually and legally relevant and sufficient for a reasonable person to rely upon it to support a conclusion. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). The district court utilized five facts in finding reasonable suspicion: (1) A private citizen called about a suspicious vehicle; (2) the vehicle was parked for an extended period of time around midnight; (3) one individual left the vehicle and the driver remained; (4) the driver ducked down when the officers passed; and (5) there was a known drug house on the same block as this was occurring. Weishaar's testimony at the suppression hearing provided substantial competent evidence for the district court's conclusion.

Next, we must determine whether the stop was supported by reasonable suspicion and whether the discovery of the expired license plate purged the taint of any illegality.

****6** Whether a police encounter is an illegal seizure depends on how the encounter is categorized. Police encounters with citizens in public are separated into four

categories—voluntary, investigatory, public safety, and arrests. See *State v. McGinnis*, 40 Kan. App. 2d 620, 623–24, 194 P.3d 46 (2008), *aff'd* 290 Kan. 547, 233 P.3d 246 (2010). The police do not need justification for a voluntary encounter, but justification is required for an investigatory detention and arrest. See *State v. Williams*, 297 Kan. 370, 376, 300 P.3d 1072 (2013). A police encounter is involuntary if a reasonable person would not feel free to leave under the circumstances. *State v. Reiss*, 299 Kan. 291, 298–99, 326 P.3d 367 (2014). When Weishaar pulled behind Christian and turned on his emergency lights, he initiated an investigatory detention because a reasonable person would not have felt free to leave at that time. See *State v. Morris*, 276 Kan. 11, 20, 72 P.3d 570 (2003). An investigatory detention is permissible if the police have reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 27–28, 30, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968).

In order to satisfy the reasonable suspicion test, an officer must have a minimum level of objective justification for the stop. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed. 2d 1 (1989). We analyze whether " 'an objective officer would have a reasonable and articulable suspicion that the detainee committed, is about to commit, or is committing a crime.' " *State v. Thomas*, 291 Kan. 676, 687, 246 P.3d 678 (2011) (quoting *State v. Pollman*, 286 Kan. 881, 889, 190 P.3d 234 [2008]). We do not assess each factor individually but look from the viewpoint of a trained law enforcement officer to determine whether all the circumstances together present an articulable belief that criminal activity is occurring. *State v. Moore*, 283 Kan. 344, Syl. ¶ 8, 154 P.3d 1 (2007).

The first factor the district court relied upon was the phone call concerning a suspicious vehicle. Before considering whether the information provided by the caller provided reasonable suspicion, we must consider whether the call was sufficiently reliable to consider in the calculus of information available to the officer. See, e.g., *Alabama v. White*, 496 U.S. 325, 328–332, 110 S. Ct. 2412, 110 L.Ed. 2d 301 (1990).

The reliability of this information depends on how the tip was categorized. The most reliable type of information occurs when the person providing the information identifies himself or herself in a way that the person could be held accountable for the information. The second most reliable type occurs when the person does not identify himself or herself but provides information that the identity of the person may be ascertained. The least reliable type of information is an anonymous tip. Anonymous tips that are corroborated by an officer's observation may provide reasonable suspicion, but uncorroborated anonymous tips will seldom be sufficient to support a finding of reasonable suspicion. See *State v. Slater*, 267 Kan. 694, 700–02, 986 P.2d 1038 (1999).

Here, the record is not clear whether the caller identified herself. However, the caller stated that the car was parked on the street outside of her home. At the very least, the caller falls into the second category because she provided information that affords the ability to ascertain her identity. Additionally, the information provided by the caller was corroborated by the police observing a single car matching the description provided by the caller. The tip was sufficiently reliable information to be included in the calculus of whether the officer had reasonable suspicion.

Next, we must consider whether the caller provided information that would inform the officer that criminal activity was occurring. See *Thomas*, 291 Kan. at 687. Here, the caller did not provide any information that would constitute a crime—Weishaar agreed that he did not believe anything illegal was happening based on the call alone. However, innocent activity can provide reasonable suspicion to trained law enforcement officers. See *Moore*, 283 Kan. 344, Syl. ¶ 8.

**7 The facts here are similar to *State v. Chapman*, 305 Kan. 365, 381 P.3d 458 (2016). In *Chapman*, the police received an anonymous call concerning suspicious persons walking around a model home in the middle of the night and a suspicious vehicle in front of the model home. The police identified a vehicle that matched the description provided by the caller and stopped the vehicle. The driver never committed a traffic infraction, and the police stopped the vehicle because of the suspicious character call. Due to the stop, the police discovered evidence of various crimes. Our Supreme Court held there was not reasonable suspicion to stop the vehicle because the tip only relayed suspicious, not criminal, activity and the lack of reasonable suspicion was supported by the lack of reliability because the tip was anonymous. 305 Kan. at 373–74.

The *Chapman* court relied upon *State v. McKeown*, 249 Kan. 506, 819 P.2d 644 (1991), to support its finding. In *McKeown*, around midnight an anonymous caller told the police that an unfamiliar pickup truck was parked near a residence on a road in a rural area. The caller could not determine what the vehicle was doing at the location. As the police were arriving at the location, two vehicles that were parked near the edge of the road departed. The officer testified that the vehicle was not doing anything wrong and that he stopped the vehicle because it matched the description provided. The district court found that the

officer did not have reasonable suspicion to support the stop and suppressed evidence that was obtained because of the stop. Our Supreme Court affirmed the district court's holding because "involvement in some kind of criminal activity must be suspected" to justify a stop, but no criminal activity was suspected by the officer. 249 Kan. at 511.

Here, the facts are similar to *Chapman* and *McKeown*. The caller told the police that a car had been sitting outside with its engine running for about an hour. The call occurred around midnight. The caller had also observed one person leave the car while another remained inside. At the suppression hearing, Weishaar agreed with defense counsel that the information from the call did not inform him that illegal activity was occurring and did not provide a particular and articulable reasonable suspicion that criminal activity was occurring. See *Chapman*, 305 Kan. at 372.

However, as the State points out, there are additional facts which make *Chapman* and *McKeown* slightly distinguishable. In particular, the State argues that Weishaar observed Christian duck as the patrol vehicle drove by and testified that a narcotics house was located on the block. These additional facts, which were known to the officer at the time of the stop, must be considered in determining whether reasonable suspicion existed.

Reasonable suspicion has been upheld when a direct connection exists between a known drug house and a suspect. *State v. Griffin*, 31 Kan. App. 2d 149, 154–56, 61 P.3d 112, *rev. denied* 275 Kan. 966 (2003). In *Griffin*, the police were executing a valid search warrant on an apartment complex for suspected drug activity when a car pulled up to the location. The officer stopped the vehicle after observing the vehicle attempt to leave. Our court found that the officer had reasonable suspicion because there was a sufficient connection between the location where drug activity was occurring and the attempt to flee when the occupants of the vehicle saw an officer. 31 Kan. App. 2d at 154–55 (citing *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L.Ed. 2d 570 [2000]). Here, there was no direct connection between Christian and the narcotics house, only a loose connection because Christian and the narcotics house were on the same block. There is not a sufficient nexus between Christian and the narcotics house to justify a reasonable belief that Christian was engaging or about to engage in criminal activity.

**8 Turning to Christian ducking down in his vehicle, a panel of this court addressed a similar situation in *State v. Green*, No. 96,336, 2007 WL 2043578 (Kan. App. 2007) (unpublished opinion). Near midnight the police were patrolling an area of Kansas City that was "part of a 'Weed and Seed' program—a federal program targeting violent crime and drugs at public housing projects." 2007 WL 2043578, at *1. The police observed a vehicle parked near the corner; as the police drove by the vehicle, the officers observed someone in the car duck down. The police stopped behind the vehicle and initiated the patrol vehicle's emergency lights. Cocaine and two scales were seized from the stop.

Our court found the stop was not supported by reasonable suspicion. First, the officers did not suspect any particular criminal activity was occurring at the time of the stop. Second, the ambiguous gesture of ducking down did not indicate that a crime had been, was being, or was about to be committed. Although there was a dissenting opinion, and the court recognized that furtive actions could support a finding of reasonable suspicion, it held that "the mere ducking down of Green's head at or about the time the police vehicle passed Green's car is not necessarily indicative of a furtive movement." 2007 WL 2043578, at *4.

Here, Weishaar did not suspect that any specific criminal activity was occurring when he received the information from the police dispatcher. Although Christian ducked as the police vehicle drove by, even if we assume it was a furtive movement, such an act standing alone is not necessarily indicative of criminal activity. In fact, all the information available to Weishaar at the time he initiated the stop—the call about a suspicious vehicle, the driver ducking when the patrol vehicle passed, and a narcotics house being on the block—does not amount to the minimum objective justification necessary for an investigatory detention. See *Chapman*, 305 Kan. at 372. Even though Weishaar was suspicious about Christian's activity, that suspicion was not in relation to any particular criminal activity. Weishaar was acting on an unparticularized hunch, not a reasonable suspicion that criminal activity was occurring; thus, the seizure was illegal.

C. Suppression of the evidence not appropriate due to intervening circumstance

Although the seizure was not based upon reasonable suspicion, suppression of the evidence is not necessarily required under the exclusionary rule. The purpose of the exclusionary rule is to deter unlawful conduct by the police. See *Herring v. United States*, 555 U.S. 135, 144, 129 S. Ct. 695, 172 L.Ed. 2d 496 (2009). Courts have created various doctrines that allow illegally seized evidence to be introduced at trial. See, e.g., *Murray v.*

United States, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L.Ed. 2d 472 (1988) (applying the independent discovery exception to the exclusionary rule). Relevant to the present inquiry is the doctrine of attenuation. This doctrine allows for illegally obtained evidence to be admitted because "the poisonous taint of an unlawful search or seizure dissipates when the connection between the unlawful police conduct and the challenged evidence becomes attenuated." *State v. Martin*, 285 Kan. 994, 1003, 179 P.3d 457 (2008), *disapproved of by State v. Moralez*, 297 Kan. 397, 300 P.3d 1090 (2013), *abrogated by Utah v. Strieff*, 579 U.S. ——, 136 S. Ct. 2056, 195 L.Ed. 2d 400 (2016). Put another way, the "[e]vidence is admissible when the connection between the unconstitutional police conduct and the evidence ... has been interrupted by some intervening circumstance ...." 136 S. Ct. at 2061.

**9 The United States Supreme Court recently elaborated on this doctrine. In *Strieff*, police were staking out a suspected drug house. The police observed a person leave the building and detained him. While confirming Strieff's identity, the police discovered that Strieff had a valid outstanding arrest warrant. After officers discovered the warrant, Strieff was searched incident to arrest and contraband was discovered. The Supreme Court analyzed whether the discovery of the warrant purged the taint of the illegal stop prior to the seizure of the evidence and found that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. 136 S. Ct. at 2060–63.

In analyzing whether the seizure of evidence is attenuated from the illegality, "we consider (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Moralez*, 297 Kan. at 411; see *Strieff*, 136 S. Ct. at 2061–62. These factors are used to determine whether there is a "sufficient intervening event to break the causal chain between the unlawful stop and the discovery of [evidence]." 136 S. Ct. at 2061.

We view at least two of the three factors as supporting the district court's refusal to suppress the evidence. As to the first factor, if a substantial amount of time passes between the illegality and the discovery of evidence, such a fact supports not suppressing the evidence. 136 S. Ct. at 2062. While it is true that an exact time between the illegal stop and the discovery of the evidence is not apparent from the record, we do know that the officer discovered Christian's expired license plate before he began his encounter with Christian.

The second factor, the existence of an intervening circumstance, strongly favors the State. See 136 S. Ct. at 2062. Here, the discovery of the expired license plate was a sufficient intervening circumstance which gave law enforcement justification in and of itself to stop Christian's vehicle. Moreover, once Weishaar encountered Christian and lawfully demanded proof of insurance—which Christian could not produce—under K.S.A. 8-2104, Weishaar had the discretion to arrest Christian. Once Christian was lawfully arrested, the officers reasonably believed that evidence relevant to the crime of arrest might be found in his vehicle. The vehicle search incident to arrest made lawful the discovery of the evidence obtained.

Finally, as to the purpose and flagrancy of the police conduct, 136 S. Ct. at 2062, we see nothing in the record that suggests this stop was related to a systemic or recurrent police misconduct. The officers were responding to a complaint about a suspicious vehicle. There was nothing to suggest that the officers' goal was to search Christian for drugs.

Accordingly, our weighing of the factors outlined in *Strieff* demonstrates that there was a sufficient break in the causal connection between the initial illegal seizure and the discovery of the evidence. Thus, the taint of the initial illegal seizure was sufficiently attenuated by the discovery of the expired license plate. The district court did not err in refusing to suppress the evidence.

We affirm the district court's refusal to suppress the evidence discovered from the stop but reverse Christian's convictions due to the district court's failure to properly inform Christian of his right to a jury trial and remand for further proceedings consistent with this opinion. Christian's challenge to his criminal history score is moot.

***190** Affirmed in part, reversed in part, and remanded with directions.

All Citations

401 P.3d 189 (Table), 2017 WL 3947406

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, a copy of this Appellant's Brief was served on Stacey Donovan, #18384, by email to sdonovan@sbids.org.

/s/ Rachel L. Pickering
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