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No. 15-114574-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellant

vs.

LAKENDRICK K. SMITH,
Defendant-Appellee.

BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County, Kansas
Honorable Mark S. Braun
District Court Case No. 14 CR 2017

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Nature of the Case

This is a State's interlocutory appeal of an order suppressing evidence, under the provisions of K.S.A. 22-3603.

Issues on Appeal

Issue No. I: This court is without jurisdiction to consider the State's appeal, as the suppression of the evidence in question does not substantially impair the State's ability to prosecute this case.

Issue No. II: The trial court did not err in determining that the warrantless search of Mr. Smith's vehicle was unconstitutional. The State did not meet its burden to show that the officers conducting the search had probable cause to believe that the vehicle contained evidence of either criminal threat or disorderly conduct, nor did the State meet its burden to show that there were exigent circumstances sufficient to justify an exception to the warrant requirement.

Issue No. III: The trial court did not err in determining that Mr. Smith's statements to Officer Riggin should be suppressed under Miranda v. Arizona and Jackson v. Denno, as the statements were made in response to custodial interrogation or its functional equivalent, were not voluntary, and no public safety exception applies. Mr. Smith's statements should also be suppressed as resulting from the unconstitutional search of his vehicle.

Statement of Facts

Lakendrick Smith is charged, in Shawnee County, Kansas, with one count of criminal threat [K.S.A. 21-5415(a)(1)], as well as one count of disorderly conduct (K.S.A. 21-6203). (R. I, 8-9).

Mr. Smith filed a motion to suppress evidence - a gun - seized during a warrantless search of his car. (R. I, 18-21). This motion was granted, and the trial court also suppressed a statement Mr. Smith made regarding the gun. (R. III, 21-27; 28-29). The State has taken an interlocutory appeal. (R. I, 95-96).

In its statement of facts, the State has represented that "...the Defendant, Lakendrick Smith, was at the Burger Stand in Topeka, Kansas, making advances on a bartender named Heather Hodges. ... Smith eventually became agitated and said to people in the Burger Stand that he had a gun and 'would not hesitate to shoot every motherfucker in this place'" Mr. Smith objects to the inclusion of these allegations, as they are not supported by evidence in the record. Rather, they are taken from an Affidavit filed in the case that was not offered into evidence at any proceeding. (R. I, 12). Neither Ms. Hodges nor Mr. Hajnex have testified in this matter. Had the Affidavit been offered, Mr. Smith would have objected on the grounds that it constituted testimonial hearsay, and

was inadmissible as evidence, under the Confrontation Clause of the Sixth Amendment. See, Crawford v. Washington, 541 U.S. 36, 68,158 L.Ed.2d 177, 124 S.Ct. 1354 (2004)(testimonial hearsay statements are inadmissable unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant); State v. Noah, 284 Kan. 608, 611, 162 P.3d 799 (2007). For those reasons, Mr. Smith requests that this Court disregard those allegations.

On appeal from an order suppressing evidence, an appellate court reviews the trial court's findings of fact for substantial competent evidence. State v. Ackward, 281 Kan. 2, 8, 128 P.3d 382 (2006). The State does not contend that the district court's factual findings are without substantial evidentiary support, therefore this factual statement is taken wholly from the district court's findings, made September 19, 2015.

Shawnee County Deputy Sheriff Douglas Fehr was working, off duty, as a security guard at the College Hill apartment complex on September 12, 2014. (R. III, 3). Sometime close to 1 a.m., he received a telephone call from the Burger Stand, a business associated with the complex, requesting assistance with someone with a gun. (R. III, 3-4, 16). When he arrived at the business, the defendant, Lakendrick Smith, was pointed out to him. (R. III, 4, 5, 6). Deputy Fehr watched Mr. Smith for about 20 minutes, and, based on his observations, was able to determine that Mr. Smith did not have a gun. (R. III, 5).

The manager of the Burger Stand asked Deputy Fehr to remove Mr. Smith, so he approached Mr. Smith and told him that he would have to leave. (R. III, 5). Mr. Smith went outside with Deputy Fehr, then Deputy Fehr went back into the Burger Stand to ask Mr. Smith's friend, Jericho Sholl to leave as well. (R. III, 5-6). Mr. Sholl complied and

Deputy Fehr, Mr. Smith and Mr. Sholl stood on the sidewalk in front of the Burger Stand and engaged in small talk. (R. III, 6).

Mr. Smith was not under arrest, although the deputy would not have allowed him to return to the Burger Stand, had he attempted to do so. (R III, 6).

Mr. Smith asked why he had to leave. Deputy Fehr told him that the patrons at the Burger Stand were uncomfortable with him, and the things that he was saying. Deputy Fehr told him that some person or persons had stated that Mr. Smith had been saying that he had a gun on him. (R. III, 7). Mr. Smith told the deputy that he had a concealed-carry permit, but that he did not have a gun on him or in his possession. (R. III, 7). Mr. Smith and Deputy Fehr discussed gun laws and Mr. Smith became a bit agitated, as they discussed aspects of gun laws that Mr. Smith believed to be unfair. (R. III, 7). According to Deputy Fehr, Mr. Smith told Mr. Sholl, who was standing near Mr. Smith's vehicle, to go get the gun. (R. III, 7-8). Mr. Sholl started to move from the rear of the car to the passenger area. (R. III, 8). An employee of the Burger Stand, who was outside, smoking a cigarette, heard Mr. Smith tell Mr. Sholl to get the gun, went back inside and, according to Deputy Fehr, "All of a sudden there were cops there." (R. III, 8). (Mr. Smith does not concede that he made this statement, but does not dispute it for the purposes of this appeal.)

Officer Riggin of the Topeka Police Department arrived first. It had been reported to him that a black male with a blue hoodie was talking about going and getting a gun. (R. III, 8). Deputy Fehr was still standing with Mr. Smith. (R. III, 10). Officer Riggin patted down Mr. Sholl, determined he didn't have a gun, and had him sit on the curb. (R.

III, 10). Officer Cartmill, also of the Topeka Police Department, handcuffed Mr. Sholl and then put him in the back of one of the police vehicles. (R. III, 11-12).

Officer Riggin spoke with Deputy Fehr, who told him that he heard Mr. Smith tell Mr. Sholl to go get the gun. (R. III, 10). No one obtained any further information from Deputy Fehr. (R. III, 11).

Officer Cartmill went inside the Burger Stand to speak with someone, then observed that Mr. Smith was yelling, as he stood on the sidewalk outside the business with one or more police officers. (R. III, 13-14). Officer Cartmill told Mr. Smith that he was under arrest for disorderly conduct and that there was a report that he had been threatening "to shoot the place up." (R. III, 14). Mr. Smith told him that he had a concealed carry permit and expressed his belief that he was being harassed due to his race. Officer Cartmill obtained identifying information from Mr. Smith then searched him. Mr. Smith had no weapons on him. (R. III, 14). He was handcuffed, placed in a police vehicle, and belted in. (R. III, 14).

Mr. Smith was in custody. (R. III, 14). Officer Riggin and Officer Cartmill were considering charging Mr. Smith with criminal threat, as well as disorderly conduct. (R. III, 15). No one advised Mr. Smith of his Miranda rights. (R. III, 14).

The officers turned their attention to the vehicle associated with Mr. Smith and Mr. Sholl. The vehicle was parked and locked, both parties with keys to the car were in custody. (R. III, 24). The officers looked through the car windows, and did not see a gun in the vehicle. (R. III, 15, 24). Officer Riggin then went to the police vehicle where Mr. Smith was seated. Mr. Smith asked him why he had been placed in the car. Officer Riggin told him it was because he had been threatening people with a gun. (R. III, 17).

Officer Riggin then took a key or keys from around Mr. Smith's neck. (R. III, 17-18). When he did so, Mr. Smith said that the gun was in the car, in the glove box. (R. III, 18). Officer Riggin used the key to unlock the vehicle and found a gun in the glove box. (R. III, 18).

At no time did Mr. Smith have a gun while in the Burger Stand, where the criminal threat, whatever it was, was alleged to have been made. (R. III, 18-19). [The complaint alleges that the threat was made against Lonnie J. Hajnex, presumably someone who was in the business before Mr. Smith was asked to leave. Mr. Hajnex did not testify at the hearing on the motion to suppress. (R. I, 8-9, R. R. IV, generally)]. Neither of the charged crimes, disorderly conduct and criminal threat, involved a gun. (R. III, 23). The car was parked and both parties with keys to the car were in custody when the gun was seized. (R. III, 24).

The district court granted the motion to suppress the gun, and suppressed Mr. Smith's statement as well to Officer Riggin as well. (R. III, 26-27). The court found that Mr. Smith did not consent to a search of the car, rather, Officer Riggin simply took the key. (R. III, 21). Additionally, the court found that there was no probable cause to search for evidence of the crime in the car, as the gun was in no way part of the crimes being investigated, which were the statements in the Burger Stand, and the yelling on the sidewalk. (R. III, 24-25). The court further found there was no threat to anyone at the time the car was searched. (R. III, 26). The court also suppressed Mr. Smith's statement to Officer Riggin that the gun was in the glove box, finding that the statement was made as the result of a custodial interrogation, conducted without Miranda warnings. (R. III, 28, 34).

Argument and Authorities

Issue No. I: This court is without jurisdiction to consider the State's appeal, as the suppression of the evidence in question does not substantially impair the State's ability to prosecute this case.

Introduction and Standard of Review

In order for the State to bring an interlocutory appeal of a district court's decision to suppress evidence, the State must establish that suppression of the evidence substantially impairs its ability to prosecute the case. In this case, the district court suppressed a gun and a statement regarding a gun, neither of which had any connection to the crimes charged, or any bearing on whether or not the defendant committed the crimes charged. The defendant was not armed when the alleged offenses occurred, and possession of a weapon is not an element of either offense charged in this case. The gun in question was locked safely away from the alleged crime scene at the time of the alleged offenses. Because the gun and the statement regarding the gun are irrelevant to the prosecution, the State's ability to proceed is not affected by the court's order suppressing the evidence. Therefore, this Court lacks jurisdiction and this appeal should be dismissed.

Subject matter jurisdiction may be raised at any time, whether for the first time on appeal or even on the appellate court's own motion. State v. Sales, 290 Kan. 130, Syl. ¶ 3, 224 P.3d 546 (2010). The issue of a court's jurisdiction presents a question of law over which this Court has unlimited review. State v. Toahty–Harvey, 297 Kan. 101, 104, 298 P.3d 338 (2013). When the record discloses a lack of jurisdiction, it is the duty of the

appellate court to dismiss the appeal. City of Overland Park v. Travis, 253 Kan. 149, 153, 853 P.2d 47 (1993).

Discussion

The "threshold requirement" of substantial impairment to the ability to prosecute applies in this case.

This appeal was taken under the provisions of K.S.A. 22-3603:

> When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal.

This statute had been in effect, in this form, since 1975. The only change since 1975 has been a 2010 amendment which expanded the time limit for filing a notice of appeal from 10 to 14 days. Laws 2010, ch.135, § 27.

In 1984, the Kansas Supreme Court interpreted this statute and held:

> Under K.S.A. 22–3603, pretrial orders of a district court which exclude state's evidence so as to substantially impair the state's ability to prosecute the case may be appealed by the state by interlocutory appeal.

State v. Newman, 235 Kan. 29, Syl. ¶ 1, 680 P.2d 257, 258 (1984).

The Court explained that

> ...the section is intended to permit appellate review of trial court rulings on pretrial motions *which may be determinative of the case.* We wish to emphasize, however, that the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved. Interlocutory appeals are to be permitted only where the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired.
>
> In order to carry out this purpose of permitting interlocutory appeals by the State only in the cases referred to, the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the state's ability to prosecute the case. Such a showing

> may be required either on order of the appellate court or when appellate jurisdiction of the interlocutory appeal is challenged by the defendant-appellee.

235 Kan. 35 (emphasis in original).

There is language in the Newman decision that suggests that K.S.A. 22-3603 grants the prosecution the right to appeal an order suppressing evidence that substantially impairs the State's ability to prosecute the case as well as any suppression based on constitutional grounds (as in this case): "We hold that the term "suppressing evidence" as used in that statute is to have a broader meaning than the suppression of evidence which is illegally obtained. It should include not only "constitutional suppression" but also rulings of a trial court which exclude state's evidence so as to substantially impair the state's ability to prosecute the case." 235 Kan. 34. However, subsequent decisions have interpreted Newman as establishing a threshold for interlocutory appeals of orders suppressing evidence, without reference to whether the suppression was based on constitutional or non-constitutional grounds:

> K.S.A. 22–3603 does not authorize the prosecution to take an interlocutory appeal from a pretrial evidentiary ruling of a trial court suppressing evidence which does not substantially impair the State's ability to prosecute the case.

State v. Jones, 236 Kan. 427, 691 P.2d 35 (1984).

> Interlocutory appeals in criminal actions are to be permitted only where the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute is substantially impaired.

State v. McDaniels, 237 Kan. 767, Syl. ¶ 3, 703 P.2d 789 (1985).

> If an exclusion of evidence does not substantially impair the State's ability to prosecute a case, the State cannot raise the issue on an interlocutory appeal.

State v. Mitchell, 285 Kan. 1070, Syl. ¶ 6, 179 P.3d 394, 395 (2008).

> In an interlocutory appeal, the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the State's ability to prosecute the case.

State v. Sales, 290 Kan. 130, Syl. ¶ 5, 224 P.3d 546 (2010).

> K.S.A. 22–3603 allows the prosecution to appeal from a pretrial order suppressing evidence. A threshold requirement for such an interlocutory appeal is that the suppression order appealed from must substantially impair the State's ability to prosecute the case.

State v. Bradley, 42 Kan. App. 2d 104, 105, 208 P.3d 788 (2009).

> The State may not file an interlocutory appeal of an adverse pretrial ruling suppressing evidence unless its ability to prosecute the criminal case is substantially impaired as a result of the order.

State v. Bliss, 28 Kan. App. 2d 591, Syl. ¶ 2, 18 P.3d 979 (2001).

One panel of this Court has directly addressed the question of whether, in cases of the suppression of evidence on constitutional grounds, the State must show substantial impairment in order to take an interlocutory appeal. In State v. Mooney, 10 Kan. App. 2d 477, 478-79, 702 P.2d 328 (1985) the Court found that the substantial impairment threshold must be met:

> In *Newman,* the Court considered the scope of jurisdiction over orders "suppressing evidence." In an earlier Court of Appeals case, it was held that this language in K.S.A. 22–3603 only included suppression orders based on constitutional rulings so that interlocutory appeals could not be taken from rulings suppressing evidence as a result of the application of the ordinary rules of evidence. *State v. Boling,* 5 Kan.App.2d 371, 617 P.2d 102 (1980). In *Newman,* the Supreme Court rejected this distinction between constitutional and evidentiary suppression orders and held that K.S.A. 22–3603 was intended to permit interlocutory appeals of pretrial rulings which may be determinative of the case. The Court acknowledged that not all pretrial suppression orders should be appealable and, thus, held that the State is required to establish that the suppression order placed it in a position where its ability to prosecute the case would be substantially impaired before its appeal could be heard. *Newman,* 235 Kan. at 35, 680 P.2d 257. *Newman* determined that the jurisdictional basis for the appeal of a suppression order should be premised on its impact on the prosecution's case whereas *Boling* had adopted a distinction based on the rationale of the order excluding evidence. **In sum, *Newman* broadened the scope of appellate jurisdiction by interpreting the statute as permitting appeal of some orders based on evidentiary exclusion rules while still limiting jurisdiction to rulings of significant impact.**

(emphasis added).

This requirement has been applied in at least one Supreme Court case involving a suppression on constitutional grounds. In State v. Weis, 246 Kan. 694, 792 P.2d 989

(1990) the defendant's confession was suppressed on Fourth Amendment grounds as the product of an illegal seizure. Our Supreme Court considered the State's interlocutory appeal, noting, "When a motion to suppress an illegally obtained confession is granted, the State is allowed to take an interlocutory appeal under K.S.A. 22–3603, **if the suppressed evidence is essential to prove a prima facie case.**" 246 Kan. 696 (emphasis added).

In several unpublished decisions, panels of this Court have applied the threshold requirement of substantial impairment to State's appeals, when the suppression orders were based on constitutional grounds. For example, in State v. Kuszmaul, 327 P.3d 1052, 2014 WL 3024242 (Kan. Ct. App. 2014) the Court applied this requirement to an interlocutory appeal from a suppression order based on the Fourth Amendment, and dismissed the State's appeal. The Court commented, with regard to the Newman decision: "This court-made rule makes sense. If in the course of a criminal prosecution, the district court suppresses a relatively insignificant or minor piece of evidence as part of the State's case, the State should not be allowed to stay the prosecution for months pending determination of the appeal. The State is permitted to file an interlocutory appeal only when the suppression order substantially impairs its ability to secure a conviction against the defendant." Opinion, Page 2. In State v. Smith, 105 P.3d 279, 2005 WL 283626 (Kan. Ct. App. 2005) the district court suppressed evidence on Fourth Amendment grounds and the State took an interlocutory appeal. The defendant contended that the Court of Appeals did not have jurisdiction to consider the appeal because the State had not shown its ability to prosecute the case had been substantially impaired by the suppression. The Court agreed that the showing was a jurisdictional prerequisite and,

in the absence of that showing, dismissed the appeal. In State v. Little, 259 P.3d 749, 2011 WL 4035796 (Kan. Ct. App. 2011) the Court exercised jurisdiction over an interlocutory appeal of a suppression based on constitutional grounds after applying the threshold requirement of substantial impairment. "A threshold requirement for the State's interlocutory appeal is a showing that the suppression order substantially impaired the State's ability to prosecute the case." Opinion, Page 3. (These cases are cited as persuasive authority under Supreme Court Rule 7.04(g)(2)(B) and a copy of each is attached to this brief in Appendix A, B, and C, respectively).

The suppression order in this case does not meet the threshold requirement for a State's interlocutory appeal.

In this case, Mr. Smith is charged with criminal threat based on statements that he is alleged to have made to someone inside the Burger Stand. No weapon was involved. He is charged with disorderly conduct, based on the observations of law enforcement that he was outside the Burger Stand, yelling. No weapon was involved. Neither of the offenses that he is charged with have, as an element of the crime, the presence, use or display of a weapon:

> a) A criminal threat is any threat to:
> (1) Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities...

K.S.A. § 21-5415.

> (a) Disorderly conduct is one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace:
> (1) Brawling or fighting;
> (2) disturbing an assembly, meeting or procession, not unlawful in its character; or

> (3) using fighting words or engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others.

K.S.A. § 21-6203.

The essence of the offense of criminal threat is the words that were spoken. In this case, whatever words were spoken were spoken *without* a gun. Assuming *arguendo*, that Mr. Smith made threatening statements, the State is not required to prove that he had the ability to follow through on them, in order to prosecute him.

Additionally, the weapon in question was locked away safely, at some distance from the crime scene. There is no suggestion that Mr. Smith's ownership or possession of the gun was illegal.

The prosecutor proffered his theory on the gun's relevance to the prosecution, before the court ruled on the motion to suppress:

> (Prosecutor): The evidence at trial will indicate that the defendant made statements to people in the Burger Stand that he was in possession of a firearm, that he had the firearm in his vehicle, that he had a concealed carry permit to possess a firearm and use the firearm, and he threatened to shoot people with the firearm inside the Burger Stand.
>
> The State's argument is that the fact that the defendant – what the State has to prove is, that the defendant made those statements. The State's position is going to be that the fact that the firearm was in fact there and he did have it is corroborative of our witness's testimony that he made statements about a firearm and that he made threats to use the firearm.

(R. II, 18).

In other words, the gun has minor corroborative value. In the State's view, the fact Mr. Smith owned a gun makes it more likely that he said he would shoot someone. While the presence of the gun, in the car, might add minimal weight to the State's case, the suppression of the gun does not substantially impair the State's ability to prosecute Mr. Smith for offenses that occurred without the gun. Likewise, the suppression of Mr.

Smith's statement regarding the location of the gun does not impair the State's ability to prosecute these offenses.

At trial, it would be completely within the trial court's discretion to find that the gun had little, if any relevance, and to exclude it due to its prejudicial effect, under K.S.A. 60-445. See, State v. Lowrance, 298 Kan. 274, Syl. ¶ 9, 312 P.3d 328 (2013)("A trial judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by its prejudicial impact. On appeal, this determination is reviewed under an abuse of discretion standard, and the burden of persuasion is on the party alleging that the discretion was abused.") Indeed, the trial court commented, at the conclusion of the hearing on the motion to suppress, "I'm still trying to determine what the relevance is, if verbal statements were made of criminal threat, in or right outside the Burger Stand. I'm trying to sort out the relevance of whether there was a gun, however, far away it was in a vehicle." (R. IV, 80). This is the type of ruling that the Court referenced in Newman when stating that: "the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal [under K.S.A. 22–3603] from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." Newman, 235 Kan. 34–35.

In State v. Mitchell, 285 Kan. 1070, 179 P.3d 394 (2008), the State took an interlocutory appeal after the district court ruled that it would accept the defendant's stipulation that at the time of the offenses for which he was being prosecuted he was legally prohibited from owning or possessing a firearm. The trial court disallowed the State's proposed stipulation that contained more information about the defendant's adjudication as a juvenile offender. The court also ruled that the State would not be

allowed to present additional evidence regarding that juvenile adjudication. 285 Kan. 1071-1072. The Kansas Supreme Court found that because the court's ruling did not prevent the State from proving the necessary elements of the charged offense, the State could not demonstrate that the order excluding the evidence substantially impaired its ability to prosecute the case. Thus, the Court concluded, it did not have jurisdiction to consider the State's appeal. 285 Kan. 1079-1080.

This case presents the same situation. Excluding evidence that Mr. Smith owned or possessed a gun that was not involved in the charged offenses, does not prevent the State from proving the elements of the charged offenses. As in Mitchell, this Court should find it does not have jurisdiction to consider this appeal.

Conclusion

Suppression of the evidence that Mr. Smith had a gun locked safely in his vehicle at the time of the alleged offenses, which do not involve a gun, does not substantially impair the State's ability to prosecute or prove the elements of the charged offenses. Therefore, this Court should dismiss the State's interlocutory appeal.

Issue No. II: The trial court did not err in determining that the warrantless search of Mr. Smith's vehicle was unconstitutional. The State did not meet its burden to show that the officers conducting the search had probable cause to believe that the vehicle contained evidence of either criminal threat or disorderly conduct, nor did the State meet its burden to show that there were exigent circumstances sufficient to justify an exception to the warrant requirement.

Introduction and Standard of Review

In granting Mr. Smith's motion to suppress, the district court held that the warrantless search of Mr. Smith's vehicle was unconstitutional. In reaching its decision, the court addressed each of the justifications raised by the State as to the constitutionality of the search: (1) valid consent, and, (2) probable cause plus exigent circumstances. The district court determined that the search was not consensual. (R. III, 21). The district court also determined that the officers did not have probable cause to believe that the vehicle contained evidence of the offenses of criminal threat and disorderly conduct, for which the defendant had been arrested at the time of the search, and there were no exigent circumstances to support a warrantless search of the vehicle. (R. III, 25-26). The trial court did not err in determining that the search was unconstitutional.

This issue concerns the district court's granting of a motion to suppress evidence. On appeal from an order suppressing evidence, this court "reviews the factual underpinnings of a district court's decision for substantial competent evidence and the ultimate legal conclusion drawn from those facts *de novo*." State v. Walker, 292 Kan. 1, 5, 251 P.3d 618 (2011) (internal citations and quotation marks omitted).

As explained in the Statement of Facts, the State does not contend that the district court's findings of facts, made September 19, 2015, are without substantial evidentiary support. Therefore, Mr. Smith relies on the district court's findings.

On appeal, the State apparently concedes that Mr. Smith did not give consent to search the vehicle. The State no longer argues that the search of the vehicle was lawful pursuant to valid consent—as it did before the district court in both its response to Mr. Smith's motion to suppress (R. I, 22) and its supplemental memorandum of law regarding the motion to suppress (R. I, 34) ("Evidence obtained from the Defendant's vehicle is

also admissible under two exceptions to the warrant requirement: consent and exigent circumstances.")—and it does not contest the district court's factual and legal determination on this issue.

Discussion

(a) The district court did not err in determining that the officers did not have probable cause that the vehicle contained contraband or evidence of criminal threat or disorderly conduct. Possession of a gun is not an element of either criminal threat or disorderly conduct, and the gun in the vehicle was not used in the commission of either of the alleged crimes.

Warrantless searches, "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) (footnote omitted) (emphasis added). "The State bears the burden to demonstrate a warrantless search was lawful." State v. James, 301 Kan. 898, 908, 349 P.3d 457 (2015) (citing State v. Pettay, 299 Kan. 763, 768, 326 P.3d 1039 (2014)). Exceptions to the warrant requirement "are 'jealously and carefully drawn,' and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." Coolidge v. New Hampshire, 403 U.S. 443, 455, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) (internal citations omitted).

In Carroll v. United States, 267 U.S. 132, 153, 69 L.Ed. 543, 45 S.Ct. 280 (1925), the Supreme Court first described the so-called automobile exception, recognizing a "necessary difference between a search of a store, dwelling house, or other structure in

respect of which a proper official warrant readily may be obtained a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." In that case, the Court held that a warrantless search of a vehicle traveling on a highway, conducted pursuant to a law passed by Congress during prohibition which "left the way open for searching an automobile or vehicle of transporation without a warrant, if the search was not malicious or without probable cause," did not violate the Fourth Amendment. 267 U.S. at 147. Under Carroll, because of the exigency presented by a traveling vehicle, a warrantless search is lawful if the officer has probable cause to suppor the search. See, 267 U.S. at 156 ("In cases where the securing of a warrant is reasonably practicable, it must be used . . . In cases where seizure is impossible except without a warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.") (citations omitted).

As the Supreme Court later articulated in Chambers v. Maroney, 399 U.S. 42, 51, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970):

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. *Only in exigent circumstances* will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.

(emphasis added).

These two requirements, probable cause and exigency, are salient throughout Carroll and subsequent cases. Probable cause and exigency form the twin theoretical justifications for the "automobile exception" to the protections of the Fourth Amendment; it is the exigency of a vehicle's mobility which justifies the transfer of a determination of probable cause from the neutral arbiter of a magistrate to the province of a police officer. See Chambers, 399 U.S. at 51 ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search."). The Supreme Court has held that the probable cause determination made by the officer at the time of the search "must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." United States v. Ross, 456 U.S. 798, 808, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982) (("[G]ood faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the [officer], which in the judgement of the court would make his faith reasonable.") (citations and internal quotation marks omitted)).

Probable cause sufficient to support a warrantless search of a vehicle "can be established if the totality of the circumstances indicates that there is a 'fair probability' that the vehicle contains contraband or evidence of [a crime]." State v. Stevenson, 299 Kan. 53, 64, 321 P.3d 754 (2014); see also United States v. Ludwig, 10 F.3d 1523, 1527 (10th Cir. 1993) (quoting Illinois v. Gates, 462 U.S. 213, 238, 76 L.Ed.2d 527, 103 S.Ct. 2317, (1983)) ("Probable cause means that 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"). Whether or not probable cause exists to support a warrantless search must be determined by the "totality of the circumstances under which the search occurred." Stevenson, 299 Kan. at 67. "A review

of the *totality* of the circumstances should, as the phrase implies, also include a consideration of the exculpatory factors." 299 Kan. at 67.

Where officers do not have sufficient probable cause to justify a warrantless search of an automobile under the automobile exception, that search must be found unconstitutional. See, *e.g.*, Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 222, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968) (suppressing evidence of an air rifle discovered pursuant to a warrantless search of an automobile without sufficient probable cause).

In State v. Stevenson, the Kansas Supreme Court held that officers did not have probable cause sufficient to justify a warrantless search of a vehicle under the automobile exception. In that case, officers stopped a vehicle based on a turn signal violation. Once the car was stopped, officers observed a "very strong odor of alcohol emanating from inside the vehicle." 299 Kan. at 54. Officers believed that they had probable cause to search the vehicle for an open container of alcohol "based solely on the odor of the alcohol." 299 Kan. at 55. During the course of the search, officers discovered methamphetamine. 299 Kan. at 55. The Kansas Supreme Court held that officers did not have sufficient probable cause to search with out a warrant as "it would not be enough for the officers to believe that there was a fair probability they would find alcohol in Stevenson's vehicle. Rather, they had to reasonably believe that Stevenson had *unlawfully* transported any alcohol that might be found in the vehicle." 299 Kan. at 65. The mere odor of alcohol, however strong, was not sufficient probable cause on its own to support a search of the vehicle, as alcohol itself is not illegal, and the odor could have been caused by lawful activity, such as a leaking wine bottle. 299 Kan. at 66. The Kansas

Supreme Court suppressed the methamphetamine found as the fruit of an illegal search. 299 Kan. at 54.

The court in Stevenson held that to detemine whether officers had probable cause to determine whether there would be evidence of the crime in the vehicle, "we start by looking at the evidence required to prove the crime." 299 Kan. at 65 (examining the elements of transporting an open container). In Mr. Smith's case, Mr. Smith is charged with criminal threat, in violation of K.S.A. 21-5415 (a)(1), and disorderly conduct, in violation of K.S.A. 21-6203. To convict a defendant of criminal threat, a jury must find that "the defendant threatened to commit violence and communicated the threat with reckless disregard of the risk of causing fear in another." PIK 4th (54.370) (2014 Supp.). Mr. Smith is also charged with disorderly conduct, the elements of which are: (1) the defendant engaged in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others, and (2) the defendant knew or should have known that his conduct or language would alarm, anger, or disturb others or provoke an assault or other breach of the peace. PIK 4th (62.030) (2013 Supp.). Neither of these offenses involve a weapon, or require evidence of a weapon to prove the charge.

As in Stevenson, there are lawful explanations for the presence of the gun in Mr. Smith's vehicle. Deputy Fehr testified that Mr. Smith told him that he had a concealed-carry permit, and that he did not have the gun on him. (R. III, 7). Officer Cartmill was also aware that Mr. Smith had a concealed-carry permit. (R. III, 14). Because guns are lawful to posses with a concealed carry permit in the State of Kansas, the presence of a gun in the vehicle is not, on its own, sufficient to support probable cause of contraband—defined as "goods that are unlawful to import, export, or possess," (Stevenson, 299 Kan.

at 65); nor is the presence of a gun evidence of the offenses of criminal threat and disorderly conduct.

The State argues on appeal that "[t]he district court did not make any factual findings that Riggin lacked probable cause to believe that he would find Smith's gun in the car." State's Br. at 9. While that may be true, it is simply irrelevant, as the gun was not evidence of the crime. The district court stated in its ruling on September 17, 2015, that

> ...it's clear throughout . . . with both Cartmill and Riggin, that the two crimes that were being dealt with were disorderly conduct and criminal threat. There is no evidence that the Court has seen, especially through Riggin, that the crime of criminal threat or disorderly conduct involves a weapon . . . as evidence of the crime that involved in this particular case.

(R. III, 23).

> [T]he gun itself was not part of the crime. This is a crime that the oral statements that were made are what constitute the criminal threat, and the conduct of yelling out on the sidewalk with Officer Cartmill appears to be the disorderly conduct . . . . But again, the gun, whether or not a gun exists is not evidence of the crime of whether or not oral statements or the criminal threat were made or the communicated threat was made. It wasn't a situation, as I've had in the past, that somebody had a gun in their pants or their belt or pocket, whereever it might have been, and in a slight altercation or contact between two people, the communication of the threat was to move, and that may have been more of an aggravated assault charge than it was a criminal threat charge, but again, I have no evidence or information of communicating a threat where the gun was a part of the crime. So, counsel, I do not believe that there was probable cause to search the vehicle for the evidence of the crimes involved.

(R. III, 24-25).

Contrary to the State's position, the district court made ample factual finding, supported by substantial competent evidence, that the State simply had not met its burden to show that there was probable cause that there existed contraband or evidence of the crimes of criminal threat and disorderly conduct within the vehicle. The State failed to

put sufficient evidence before the district court to show that the weapon sought by the officers was used in, or even possessed during, the alleged commission of the offenses.

In reviewing the totality of the circumstances with respect to the probable cause finding, the district court must consider all circumstances, including the "exculpatory factors" before it. Stevenson, 299 Kan. at 67. The totality of the State's evidence supported a finding that the gun was not evidence of the crime, as Deputy Fehr testified that he was able to determine that Mr. Smith did not have a gun inside the restaurant, (R. III, 5) and Officer Cartmill determined that Mr. Smith did not have any weapons on him at the time of his arrest. (R. III, 14). Officer Riggin was able to determine that Mr. Sholl, Mr. Smith's friend, also did not have gun in his possession. (R. III, 10). Prior to the search, Mr. Smith and Mr. Sholl were handcuffed and placed into the back of separate patrol cars. (R. III, 11-12, 14).

Despite the State's apparent efforts in its appellate brief to mischaracterize the evidence before the district court as indicating that Mr. Smith threatened to "retrieve his gun from his car and shoot people," State's Brief at 8, or that "he had a gun in his car and he would not hesitate to shoot people," State's Brief at 11, this evidence was not before the trial court. Indeed, there was no testimony before the trial court as to what the actual criminal threat was. (R. III, 18) ("I have heard no direct testimony by anybody as to what actual statements were made or alleged to be made by the defendant that formed the basis of this criminal threat charge."). The State cites in its Statement of Facts to the content of the Charging Affidavit (R. I, at 12) for the language of the criminal threat. As noted previously, this document was not in evidence before the district court, although the court appeared to be aware of the language of the threat as contained in the Charging Affidavit.

(R. III, 18) ("I have had information throughout that the defendant made some statement to the effect, and it's then in writing, but no direct testimony, something to the effect that he would not hesitate to shoot every mother fucker in the place."). While the court did consider Officer Riggin's testimony that he had information that "somebody in a blue hoodie was going to get the gun," (R. III, 26), a review of the record incates that this this did not refer to the criminal threat which was being investigated, but rather to the statement that was allegedly made by Mr. Smith to Detective Fehr as they stood outside the Burger Stand, and was not the statement that formed the basis of the criminal threat. (R. III, 8).

The district court did not, as the State argues, "appl[y] an incorrect and overly restrictive definition of 'evidence of a crime' to [the test of probable cause]." State's Br. at 10. The State failed to meet its burden to show that the officers had probable cause, based on sufficient objective facts, see Ross, 456 U.S. at 808, that would justify a legal determination that the gun believed to be in the vehicle was contraband or evidence of the offenses of criminal threat and disorderly conduct. Thus, as in Stevenson, the State's burden to show probable cause to support a warrantless search of the vehicle under the automobile exception has not been met and this court should affirm the decision of the district court and hold that the search of the vehicle was unlawful.

(b) The district court did not err in determining that there were no exigent circumstances to justify a warrantless search of Mr. Smith's vehicle under the automobile exception. As in Coolidge v. New Hampshire, the inherent mobility of an automobile does not satisfy the exigency requirement where it cannot be reasonably determined that the factual circumstances actually pose any of the

exigencies justifying the automobile exception to the protections of the Fourth Amendment.

Even if this court holds that the there was sufficient probable cause to search Mr. Smith's vehicle, this court should affirm the district court's determination that there was no exigency justifying the warrantless search and therefore hold that the search of the vehicle was unconstitutional.

"Probable cause to search and exigent circumstances" is one of the five exceptions to the Fourth Amendment warrant requirement recognized in Kansas. See State v. Boyd, 275 Kan. 271, 273-74, 64 P.3d 419 (2003) (explaining that the other four exceptions are (1) consent, (2) hot pursuit, (3) search incident to a lawful arrest, and (4) stop and frisk). The automobile exception "is a subclass of the probable-cause-plus-exigent-circumstances exception." State v. Stevenson, 299 Kan. at 58. It is the ready mobility of a vehicle which establishes exigency and thus provides the justification for the exception to the warrant requirement. See, *e.g.*, 299 Kan. at 58 ("If a vehicle is *readily mobile* and probable cause exists to believe the vehicle contains contraband or evidence of a crime, the Fourth Amendment does not require a warrant for police to search the vehicle.") (emphasis added); see also Carroll, 267 U.S. at 154 ("recognizing a necessary difference between a search of a . . . structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."); Coolidge, 403 U.S. at 460 (("As we said in Chambers, 'exigent circumstances' justify the warrantless search of 'an automobile stopped on the highway,'

where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.' 'The opportunity to search is fleeting.'") (quoting Chambers, 399 U.S. at 51) (internal notations ommitted)); Ross, 456 U.S. at 806-07 ("Given the nature of *an automobile in transit*, the Court [in Carroll] recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance.") (emphasis added)).

Indeed, the automobile exception is most often applied to vehicles in transit or which have the potential to be readily moved. See, *e.g.*, Carroll, 267 U.S. at 132 (upholding the search of a vehicle that was stopped while "going westward on the highway between Detroit and Grand Rapids"); see also Chambers, 399 U.S. at 44 (vehicle stopped while traveling "two miles from the Gulf station"); Ross, 456 U.S. at 801 (upholding warrantless search of vehicle stopped by officers while "turning off Ridge Street onto Fourth Street").

However, where there is no actual exigency presented by the automobile, the underlying principles supporting the automobile exception are not in play, and the automobile exception does not apply. In Coolidge, the United States Supreme Court held that, although there was probable cause to search, the warrantless search of a vehicle was not lawful because the automobile presented no actual exigency. In that case, officers believed that a vehicle contained evidence of the murder of a 14-year-old girl. 403 U.S. at 445. Officers arrested Coolidge, the defendant, and secured the other potential driver of the vehicle, his wife. 403 U.S. at 447. The vehicle was parked in his driveway, and officers were present to secure the scene. 403 U.S. at 461. In holding that there was no justification for a warrantless search in that case, the Supreme Court explained that the

exception to the warrant requirement articulated in Carroll does not apply where there is no actual exigency. As the Court explained:

> The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contravand or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant'... and the automobile exception,' despite its label, is simply irrelevant.

403 U.S. at 462.

The State cites to Ludwig to support the State's argument that "[t]he automobile exception applies even when there is no further exigency such as a a probability of the vehicle actually being driven away." State's Brief at 9. However, in Ludwig, the Tenth Circuit specifically distinguishes the facts of that case from the facts of Coolidge, stating that "Coolidge differs in several significant respects, however, the most important of which is that in Coolidge the suspect had been arrested before the search, whereas Ludwig was arrested after the search. Unlike Coolidge, Ludwig could have driven off before the search." 10 F.3d at 1528 (in Ludwig, Border Patrol agents searched a vehicle for narcotics in a motel parking lot prior to the arrest of the defendant). In Mr. Smith's case, both Mr. Smith and his friend Mr. Sholl were already handcuffed, arrested, and secured in the back of a patrol car prior to the search. (R. III, 11-12, 14).

Thus, although vehicles may be "inherently mobile," this attribute alone does not necessarily constitute sufficient exigent circumstances to justify a warrantless search. As the Supreme Court held in Coolidge, where it is determined that the circumstances of the case do not pose any of the exigencies that are normally attendant to automobiles, the

underlying justifications for a warrantless search are not present and the automobile exception does not apply.

The facts of Mr. Smith's case show a lack of exigency, and Mr. Smith's case is thus similar Coolidge. As the district court explained:

> This was not a car stop. The vehicle was backed into a stall. Both people who have the access to the car, and again, I know that the defendendant had a key. I'm not sure whether or not Mr. Sholl had a key, but would infer that he did, because he was the one who was directed to go get the gun, but both of those people, from almost the minute that . . . Officer Riggin arrived, both of those people were in custody or being tended to, and at some point, both ended up in custody, in handcuffs, in separate patrol cars, and the mobility or exigency issues with the vehicle certainly are diminished, if not eliminated, by the fact that those two people are in the car.

(R. III, 23-24).

As the trial court determined, there was no reasonable exigency in Mr. Smith's case because the vehicle was not readily mobile; all potential drivers were arrested, handcuffed, and secured in the back of separate patrol cars and the keys had been obtained by law enforcement. (R. III, 11-12, 14, 17-18). Because both parties were in custody, there was no risk that either Mr. Smith or Mr. Sholl would abscond in the vehicle or that the vehicle would be "beyond the reach of the officer" before a warrant could be obtained. Carroll, 267 U.S. at 146. As the court in Coolidge explained, "there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States." 403 U.S. at 462. As the district court determined, under the facts of Mr. Smith's case, the underlying purpose of the exception to the warrant requirement—exigent circumstances—is not present, and the automobile exception does not apply. The district court did not err in determining that the State failed to meet its burden to show that exigent circumstances existed under the facts of this case.

Issue No. III: The trial court did not err in determining that Mr. Smith's statements to Officer Riggin should be suppressed under Miranda v. Arizona and Jackson v. Denno, as the statements were made in response to custodial interrogation or its functional equivalent, were not voluntary, and no public safety exception applies. Mr. Smith's statements should also be suppressed as resulting from the unconstitutional search of his vehicle.

Introduction and Standard of Review

In suppressing Mr. Smith's statements under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) and Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S.Ct. 1774 (1964), the district court held that Mr. Smith's statements to Officer Riggin were the product of custodial interrogation or its functional equivalent, without the benefit of Miranda warnings, and were not voluntary or knowingly made. (R. III, 29). The trial court also addressed the issue of the "public safety exception" to the Miranda requirement, raised by the State, and held that under the facts of this case, the public safety exception did not apply. (R. III, at 28-29). The trial court did not err in determining that the statements made by Mr. Smith should be suppressed.

This issue concerns the district court's determination that statements should be suppressed under Miranda and Jackson v. Denno. In reviewing this determination, this court must "review[] the factual underpinnings of the decision under a substantial competent evidence standard and review[] the ultimate legal concusion drawn from those facts *de novo*." State v. Warledo, 286 Kan. 927, 935, 190 P.3d 937 (2008). "In doing so, an appellate court does not reweigh evidence or assess the credibility of witnesses but will give deference to the trial court's findings of fact." 286 Kan. at 935.

As explained in the Statement of Facts, the State does not contend that the district court's findings of facts, made September 17, 2015, are without substantial evidentiary support. Therefore, Mr. Smith relies on the district court's findings.

Discussion

(a) The district court did not err in determining that Mr. Smith's statements should be suppressed under Miranda and Jackson v. Denno.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 at 444 (1966). The Kansas Supreme Court has held that "custodial interrogation," for purposes of Miranda, "refers not only to express questioning but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminatory response from the suspect." State v. Lewis, 258 Kan. 24, 35, 899 P.2d 1027 (1995); see also State v. Hebert, 277 Kan. 61, 68, 82 P.3d 470 (2004) ("Miranda warnings come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

Where a statement is the product of custodial interrogation, or its functional equivalent, "[t]he failure of officers to administer the Miranda warnings . . . [creates] the presumption of compulsion." Lewis, 258 Kan. at 37. Even where Miranda does not apply because the defendant was not subjected to custodial interrogation, a defendant's statements "may nevertheless be inadmissible if they were obtained in violation of the due process voluntariness requirement." State v. Morton, 286 Kan. 632, 649, 186 P.3d 785 (2008). It is the State's burden to show, by a preponderance of the evidence, that a

statement made by the defendant which the State seeks to admit at trial is voluntary. Lewis, 258 Kan. at 36. "The proper analysis is how a reasonable person in the suspect's position would have understood the situation." Hebert, 277 Kan. at 68.

The district court held that the statements made by Mr. Smith were inadmissible under Miranda and Jackson v. Denno. (R. III, 28-29). The State apparently concedes that Mr. Smith was in custody at the time that he made the statement regarding the location of the gun, and only contests the district court's determination that Miranda applies on the basis that the statement was not a product of interrogation or its functional equivalent. State's Brief at 16.

It is uncontroverted that Mr. Smith was in police custody at the time that the statements were made; he was in handcuffs, had been arrested, and was secured in the back of a patrol car. (R. III, 14). According to the factual findings made by the district court, Officer Riggin approached the patrol car where Mr. Smith was being held. (R. III, 17). Mr. Smith asked Officer Riggin why he had been placed in the patrol car and Officer Riggin's response "was along the lines that he had been threatening people with a gun." (R. III, 17). Officer Riggin then reached inside the patrol car and took a key or keys from around Mr. Smith's neck. (R. III, 17-18). When Officer Riggin removed the keys, Mr. Smith stated that the gun was in the car, in the glove box. (R. III, 18).

Mr. Smith's statement to the officers was the result of the action of taking the key from around Mr. Smith's neck with the intention of unlocking the vehicle to conduct a search. This was an action which was reasonably likely to elicit a response from Mr. Smith, as Mr. Smith would have been aware that the officers were going to enter his vehicle with the key, and, without having been warned of his Miranda rights, would

reasonably have felt compelled to explain the contents of the vehicle and provide the officer information regarding the weapon. Because no Miranda warnings were given, Mr. Smith's statements are presumptively inadmissible.

(b) The district court did not err in determining that the "public safety exception" does not apply.

Both the United States Supreme Court and the Kansas Supreme Court have recognized a "public safety exception" to the Miranda requirement. See, *e.g.*, New York v. Quarles, 467 U.S. 649, 81 L.Ed.2d 550, 104 S.Ct. 2626 (1984); see also, *e.g.*, State v. McKessor, 246 Kan. 1, 785 P.2d 1332 (1990). Under this "narrow exception to the Miranda rule," statements made to officers prior to the issuance of Miranda may be admissible where "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." Quarles, 467 U.S. at 657-58.

In Quarles, the United States Supreme Court held that "the doctrinal underpinnings of Miranda [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." 467 U.S. at 656. The immediacy of the public safety concerns justifying the exception was paramount to the Court, as it "decline[d] to place officers . . . in the untenable position of having to consider, *often in a matter of seconds*, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile

situation confronting them." 467 U.S. at 657-58 (emphasis added). In that case, officers sought a suspect who had just raped a woman, was carrying a gun, and had fled into a supermarket. 467 U.S. at 651-52. When the man was apprehended, officers frisked him and discovered that he was wearing an empty shoulder holster and the location of the gun was unknown. 467 U.S. at 652. The officer handcuffed the defendant and questioned him regarding the location of the gun without first giving Miranda warnings. 467 U.S. at 652. The Court held that under these circumstances, "overriding considerations of public safety justify the officer's failure to provide Miranda warnings before he asked questions devoted to locating the abandoned weapon." 467 U.S. at 651. However, the court explained that this was a "narrow exception to the Miranda rule" and "in each case [the exception] will be circumscribed by the exigency which defines it." 467 U.S. at 658.

The State argues that if this court determines that the defendant's statements were the product of custodial interrogation, that the statements are admissible because the "public safety exception" applies in this case. In determining that there was no public safety concern in this case that would justify an exception to the Miranda requirement under the public safety exception, the court distinguished the facts of Mr. Smith's case from Quarles, McKessor, and State v. Bailey, 256 Kan. 872, 889 P.2d 738 (1995), explaining:

> In all three of those [cases], it was clear from the get-go that a gun was used, that there were more public safety issues involved where the rape in Quarles occurred, where the . . . [robbery in] McKessler . . . , and [the chase in] Bailey . . . . and I've looked at that whole idea of what the officers knew, what . . . Riggin testified as to what information he had, and again, his information was that somebody in a blue hoodie was going to get the gun.
>
> The first person he came in contact with a blue hoodie, there was not a weapon on him. There was a belief by Riggin the whole time that the gun

> was in the car, that the vehicle was locked. It certainly did not present a threat to anybody at the scene during that time. . . .

(R. III, 26-27).

> . . . More to the point of McKessler, Bailey, and the Quarles issue, these are circumstances where, in each of those three cases, when the officers made contact for public safety reasons, the . . . factual issues of what the scene was certainly presented much more of a threat to public safety than these issues did. I realize that Riggin may have wanted to know where the gun was, but again, this is a situation where, from the get-go, they knew that the defendant did not have any, and the other individual did not have guns or weapons on them. They . . . spent as much time trying to find the gun after they'd already secured the scene, after any public safety or public threat issues were dealt with.

(R. III, 28-29).

The district court's decision on this issue is supported by substantial competent evidence based on the facts before it. As the district court determined, the facts of Mr. Smith's case do not fall under the public safety exception and are distinguishable from Quarles and its progeny. The responding officers in Mr. Smith's case did not have reason to believe that Mr. Smith or his friend had possessed a weapon during the commission of either of the alleged offenses—criminal threat and disorderly conduct. At the time of the search, both of the individuals who potentially had access to the vehicle were in handcuffs, arrested, and secured in the back of two separate patrol cars. (R. III, 11-12, 14). Further, the officer's own actions belied the fact that they were not concerned about an immediate public safety issue of the type justifying the Miranda exception in Quarles. Officer Riggin did not immediately question Mr. Smith regarding the whereabouts of the weapon, rather, some time had passed before Officer Riggin removed the keys from Mr. Smith's neck with the intention of searching Mr. Smith's vehicle. This was hardly the type of emergency situation in which, as the court stated in Quarles, officers must make public safety decisions "in a matter of seconds." 467 U.S. at 657-58.

The public safety exception is a "narrow exception" which applies only to those situations in which there is an imminent public safety concern. In this case, the crimes alleged were verbal threats, not weapons-related offenses, and both parties were already in custody in the back of the police car at the time Mr. Smith's statement was made. As the district court determined, the public safety concerns in this case were not sufficient to justify the application of the public safety exception to Miranda and the statements must be suppressed.

(c) Mr. Smith's statements should be suppressed as resulting from the unconstitutional search of his vehicle.

Mr. Smith moved the district court to suppress all statements that were derived from the unconstitutional search of Mr. Smith's vehicle. The district court did not rule on whether it considered Mr. Smith's statements to be the fruit of the unconstitutional search. Nevertheless, this court can affirm the district court's decision on this basis if it determines that "the judgment of the trial court was right for the wrong reason." State v. Morton, 283 Kan. 464, 472, 153 P.3d 532 (2007).

"When applicable, the fruit of the poisonous tree doctrine bars not only derivative physical evidence, but also derivative testimonial evidence, such as . . . the testimony of witnesses discovered as a result of an unlawful search." State v. Deffenbaugh, 216 Kan. 593, 598, 533 P.2d 1328 (1975) (citing Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407, (1963)). "[V]erbal evidence . . . is no less the 'fruit' of official legality than the more common tangible fruits of the unwarranted intrusion." Deffenbaugh, 216 Kan. at 487. If this court determines that the search of Mr. Smith's vehicle was unconstitutional, this court should hold that Mr. Smith's statements should be

suppressed as resulting from the unconstitutional search, which was initiated when Officer Riggin removed the key or keys from Mr. Smith's neck.

Mr. Smith's statements were a product of Officer Riggin's actions to gain entry into Mr. Smith's vehicle to conduct a warrantless search in violation of the protections of the Fourth Amendment. See Issue II. This court should affirm the district court's decision to suppress Mr. Smith's statements on the additional ground that they were fruit of the unconstitutional search of Mr. Smith's vehicle and therefore inadmissible at trial.

Conclusion

For the foregoing reasons, the State's interlocutory appeal should be dismissed. In the alternative, the decision of the district court should be affirmed.

Respectfully Submitted:

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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Brief, along with the attached Appendixes was served upon:

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/s/Ann Sagan
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Appendix A

327 P.3d 1052 (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, Appellant,
v.
Julian Michael KUSZMAUL, Appellee.
No. 110,694.
June 27, 2014.
Appeal from Douglas District Court; Barbara Kay Huff, Judge.

Attorneys and Law Firms

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Before MALONE, C.J., BRUNS, J., and HEBERT, S.J.

MEMORANDUM OPINION
PER CURIAM.
*1 In this interlocutory appeal, the State claims the district court erred in granting Julian Michael Kuszmaul's motion to suppress evidence. Specifically, the State argues that the district court erred in finding that the warrantless blood draw to test Kuszmaul's blood-alcohol level violated his rights under the Fourth Amendment of the United States Constitution. But in order for the State to bring an interlocutory appeal of the district court's decision to suppress evidence, the State must establish that suppression of the evidence substantially impairs its ability to prosecute the case. And here, the State has failed to make any argument that the suppression order substantially impairs its ability to prosecute the case, even after Kuszmaul raised the issue in his brief. Therefore, we dismiss the State's interlocutory appeal for lack of appellate jurisdiction.
The record on appeal is thin, and we do not have a substantial amount of information about the underlying case. On August 26, 2012, while driving in Lawrence, Kansas, Kuszmaul struck a pedestrian, causing serious injury. When law enforcement spoke with Kuszmaul, he had smelled of alcohol and had bloodshot, watery eyes. He submitted to field sobriety tests at the scene. Lawrence police took Kuszmaul to the hospital, where he refused to submit to a blood draw for chemical testing to determine his blood-alcohol level. Police directed medical professionals to draw blood without Kuszmaul's consent and without a warrant, pursuant to K.S.A.2012 Supp. 8–1001.
On January 2, 2013, the State charged Kuszmaul with one count each of possession of marijuana; driving under the influence with an alcohol concentration of .08 or more or, in the alternative, while under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle (DUI); and following another vehicle too closely.

The State later amended the information to add a charge of refusing to submit to alcohol testing.

On June 4, 2013, Kuszmaul filed a motion to suppress the results of the blood-alcohol test. Specifically, Kuszmaul contended that the warrantless, nonconsensual drawing of his blood violated his constitutional rights under the Fourth Amendment. The State filed a response to the motion, arguing that the blood draw was lawful under K.S.A.2012 Supp. 8–1001(b) and (d). In the alternative, the State argued that the blood test results should not be suppressed because even if the blood draw was constitutionally impermissible, the police acted in good faith in reliance on the statute.

On August 27, 2013, the parties submitted the motion to the district court on stipulated evidence. In addition to admitting into evidence the implied consent advisory form and the notice of Kuszmaul's driver's license suspension, the parties agreed to the following facts:

"1. [Kuszmaul] was driving a car in Lawrence, KS, [Douglas County] on 8/26/12 at around 1:25 a.m.

"2. While driving, [Kuszmaul] hit a pedestrian ... causing serious injury to that individual.

*2 "3. [Kuszmaul] was transported to [Lawrence Memorial Hospital] by [Lawrence Police Department].

"4 [Kuszmaul] was offered chemical testing & refused.

"5. Blood draw was taken by a medical professional pursuant to K.S.A. 8–1001.

"6 [Kuszmaul] had prior DUI diversion in case # 10TF160–LF out of Lawrence [Municipal Court].... The diversion agreement was signed on July 6, 2010."

On October 7, 2013, the district court filed a memorandum decision. After briefly reciting the relevant facts and outlining the parties' arguments, the district court found that the Kansas implied consent statute is constitutional and allows compulsory testing for alcohol or drugs through implied consent. However, the district court also stated that such tests must meet constitutional requirements and that under the Fourth Amendment, a warrantless search is unreasonable unless an exception to the warrant requirement applies. The district court noted that the State had not argued or shown any evidence of exigent circumstances or an emergency that would justify a warrantless blood draw. Finally, the district court rejected the State's argument that the good-faith exception to the exclusionary rule applied. Thus, the district court granted Kuszmaul's motion to suppress the results of the blood-alcohol test. The State timely filed this interlocutory appeal.

As a threshold issue, Kuszmaul asserts that this court should not consider the State's interlocutory appeal because it does not meet the requirements for such appeals set by our Supreme Court. Specifically, Kuszmaul contends that the suppression order does not substantially impair the State's ability to prosecute the case and, consequently, this court does not have jurisdiction over the appeal. The State has not filed a reply brief and has not responded to Kuszmaul's argument in any way.

" 'The State's right to appeal in a criminal case is strictly statutory, and the appellate court has jurisdiction to entertain a State's appeal only if it is taken within time limitations and in the manner prescribed by the applicable statutes. [Citation omitted .]' " *State v. Sales*, 290 Kan. 130, 134, 224 P.3d 546 (2010). "Jurisdiction is a question of law over which we have unlimited review. [Citation omitted.]" *State v. Toahty–Harvey*, 297 Kan. 101, 104, 298 P.3d 338 (2013).

The requirements for an interlocutory appeal by the State are set forth in K.S.A.2013 Supp. 22–3603, which states:
"When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order ... suppressing evidence ... an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal."

In *State v. Newman,* 235 Kan. 29, 35, 680 P.2d 257 (1984), the Kansas Supreme Court determined that interlocutory appeals by the State were proper "only where the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired." This court-made rule makes sense. If in the course of a criminal prosecution, the district court suppresses a relatively insignificant or minor piece of evidence as part of the State's case, the State should not be allowed to stay the prosecution for months pending determination of the appeal. The State is permitted to file an interlocutory appeal only when the suppression order substantially impairs its ability to secure a conviction against the defendant.
*3 Since *Newman,* both our Supreme Court and this court have repeatedly examined the State's interlocutory appeals to determine whether the order of suppression or exclusion substantially impairs the State's case. See *Sales,* 290 Kan. at 134–41, 224 P.3d 546 (tracing history of this requirement, determining that the excluded evidence did not substantially impair the State's prosecution, and dismissing for lack of jurisdiction); *State v. Griffin,* 246 Kan. 320, 323–26, 787 P.2d 701 (1990) (noting *Newman* requirement and proceeding to examine the merits of the issue); *State v. Huninghake,* 238 Kan. 155, 156–57, 708 P.2d 529 (1985) (noting *Newman* requirement and finding that the suppression substantially impaired the State's case); *State v. Galloway,* 235 Kan. 70, 73–74, 680 P.2d 268 (1984) (same); *State v. Bradley,* 42 Kan.App.2d 104, 105–06, 208 P.3d 788 (2009) (noting *Newman* requirement and proceeding to examine the merits of the issue); *State v. Bliss,* 28 Kan.App.2d 591, 594–95, 18 P.3d 979 (noting *Newman* requirement and finding that the suppression substantially impaired the State's case), *rev. denied* 271 Kan. 1038 (2001); *State v. Nuessen,* 23 Kan.App.2d 456, 458–59, 933 P.2d 155 (1997) (same).
In addition, *Newman* placed the burden on the State to show that the suppression order substantially impairs its ability to prosecute the case. Our Supreme Court stated:
"In order to carry out this purpose of permitting interlocutory appeals by the State only in the cases referred to, the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the State's ability to prosecute the case. Such a showing may be required either on order of the appellate court or when appellate jurisdiction of the interlocutory appeal is challenged by the defendant-appellee." 235 Kan. at 35, 680 P.2d 257.
In *Sales,* our Supreme Court noted that the State had not responded prior to oral argument or in writing to the appellee's argument on the jurisdictional issue. 290 Kan. at 140–41, 224 P.3d 546. The *Sales* court then quoted *Bradley,* 42 Kan.App.2d at 106, 208 P.3d 788, in which this court stated: "The State did not file a reply brief. Its failure to adequately brief the issue of substantial impairment of its prosecution could be deemed waiver or abandonment of the necessary jurisdictional showing. Accordingly, this court could refuse to exercise jurisdiction over the State's interlocutory appeal. [Citation omitted.]' " 290 Kan. at 141, 224 P.3d 546. Although the *Bradley* court ultimately did not dismiss for

lack of jurisdiction, the language in that case makes clear that such a disposition is proper in the appropriate case.

Here, the record on appeal is so lacking that we are unable to determine if the suppression of the blood-alcohol test results substantially impairs the State's ability to prosecute the case. As Kuszmaul argues in his brief, the State routinely prosecutes DUI cases without breath or blood test results. The evidence before this court on the record provided by the State is that Kuszmaul was driving and hit a pedestrian, that he had the odor of alcoholic beverages on his person, and that he had bloodshot and watery eyes. Additionally, the State is allowed to present evidence of Kuszmaul's refusal to submit to testing. See K.S.A.2012 Supp. 8–1001(k)(7). Kuszmaul argues in his brief that outside of the record that has been provided to this court, the State also has evidence that Kuszmaul smelled strongly of burnt marijuana, that he was found to be in possession of marijuana, and that he admitted to consuming alcohol before driving. The State has filed no response to Kuszmaul's argument even though the burden is on the State to establish jurisdiction.

*4 Accordingly, this court finds that the State has waived and abandoned any argument that the suppression order substantially impairs its ability to prosecute Kuszmaul. See *State v. Littlejohn,* 298 Kan. 632, 655–56, 316 P.3d 136 (2014) (stating that issues not briefed by the appellant are deemed waived and abandoned). As a result, we conclude that this court lacks appellate jurisdiction to consider the merits of the State's interlocutory appeal.

Appeal dismissed.

State v. Kuszmaul, 327 P.3d 1052 (Kan. Ct. App. 2014)

Appendix B

105 P.3d 279 (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, Appellant,
v.
Dean SMITH, Appellee.
No. 92,917.
Feb. 4, 2005.
Appeal from Finney District Court; Thomas F. Richardson, judge. Opinion filed February 4, 2005. Appeal dismissed.

Attorneys and Law Firms

Tamara S. Hicks, assistant county attorney, John P. Wheeler, Jr., county attorney, and Phill Kline, attorney general, for appellant.
Richard L. Marquez, of Lindner & Marquez, of Garden City, for appellee.
Before MARQUARDT, P.J., MALONE and CAPLINGER, JJ.

MEMORANDUM OPINION
PER CURIAM.
*1 The State appeals the district court's decision granting Dean Smith's motion to suppress evidence. We hold this court lacks jurisdiction to consider this interlocutory appeal because the State has failed to establish that the district court's ruling will substantially impair the State's ability to prosecute the case.
Dean and Lisa Smith were divorced on October 31, 2002. On February 6, 2003, Lisa obtained a protection from abuse order against Dean. The order stated that neither Lisa nor Dean shall have contact or communicate with the other except through e-mail for the purpose of arranging Dean's parenting time with the parties' minor child.
On April 22, 2003, Sergeant Philip Moore and Officer Andrew Roush were dispatched to 2505 Lamplighter in Garden City to check on Lisa's welfare. This residence had been awarded to Dean in the divorce, although Dean testified that Lisa was residing there with him despite the protection from abuse order. The officers were not aware who owned the residence at 2505 Lamplighter. The officers had been advised by dispatch that there was a protection from abuse order against Dean, although they were not advised that it was a mutual restraining order.
The officers approached the residence and knocked on the front door. The screen door was closed, but the main door was partially open. As soon as the officers knocked on the door, Dean slammed and locked the main door. Lisa immediately unlocked the door, opened it, and stepped aside stating: "I'm glad you're here, he was about to beat me." The officers proceeded inside the house.
As the officers entered, Dean was walking away from them towards the kitchen. The officers told Dean to stop and turn around. Dean was then arrested for violation of a protective order. Dean told Moore about a letter in the garage that was supposed to

amend the protection from abuse order. Moore retrieved the letter, which included a copy of an order, but there was no signature on the copy.

The officers transported Dean to the law enforcement center. After receiving *Miranda* warnings, Dean provided additional information to the police about his relationship with Lisa.

Dean was ultimately charged with 21 counts in six separate cases relating to Dean's behavior towards Lisa and her children. Some of the charges arose from incidents in June and July 2002. The only charges against Dean arising from the incident on April 22, 2003, included one count of violation of a protective order and one count of aggravated kidnapping of Lisa which allegedly occurred between April 19, 2003, and April 22, 2003. Several other charges were for incidents between the parties that occurred after April 22, 2003. The district court consolidated the cases, and the State filed an amended complaint including all the charges into one complaint.

Dean filed a motion to suppress all evidence obtained from the warrantless entry/search of his residence on April 22, 2003. After hearing evidence, the district court denied the motion to suppress. Dean filed a motion for reconsideration. Although no additional testimony or evidence was presented, the district court reversed its previous ruling. The district court ruled that the officers had conducted a warrantless entry into Dean's residence which was not based upon exigent circumstances. The district court indicated that the officers entered the residence without invitation even though Lisa had unlocked the door. The district court found that Dean's arrest was unjustified and in violation of his constitutional rights. The district court then stated:

*2 "I don't know what that means for the rest of the case. Normally that means statements taken at the scene probably are going to be suppressed. Whatever else that means I can't tell you. I am going to leave it to you to sort out, but I am going to find that that was a warrantless arrest that was illegal and a warrantless entry into the home which also was illegal in violation of the U.S. and Kansas Constitution.

"So, you let me know what ramifications that has."

The State responded to the district court's ruling by filing its notice for an interlocutory appeal. Dean filed a motion with this court for involuntary dismissal on the ground that this court lacked jurisdiction to consider an interlocutory appeal of the district court's order. The State filed a response. This court initially denied the motion on present showing, noting that the panel deciding the appeal on the merits would address the jurisdictional issues.

Does this court have jurisdiction?

Dean contends that this court lacks jurisdiction to hear the interlocutory appeal. Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *State v. James,* 276 Kan. 737, 744, 79 P.3d 169 (2003). "The State's right to appeal in a criminal case is strictly statutory, and the appellate court has jurisdiction to entertain a State's appeal only if it is taken within time limitations and in the manner prescribed by the applicable statutes. [Citation omitted.]" *State v. Snodgrass,* 267 Kan. 185, 196, 979 P.2d 664 (1999). Additionally, an appellate court only obtains jurisdiction over the rulings identified in the notice of appeal. *State v. G.W.A.,* 258 Kan. 703, Syl. ¶ 3, 906 P.2d 657 (1995).

K.S.A. 22-3603 states:

"When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if notice of appeal is filed within ten (10) days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal."

Case law indicates that K.S.A. 22-3603 authorizes an interlocutory appeal only where the district court's ruling will "substantially impair the State's ability to prosecute the case." *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984). See *State v. Bliss*, 28 Kan.App.2d 591, 594, 18 P.3d 979 (2001). In *Newman*, the court explained:

"We wish to emphasize, however, that the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved. Interlocutory appeals are to be permitted only where the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired.

*3 "In order to carry out this purpose of permitting interlocutory appeals by the State only in the cases referred to, the prosecutor should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from substantially impairs the State's ability to prosecute the case. Such a showing may be required either on order of the appellate court or when appellate jurisdiction of the interlocutory appeal is challenged by the defendant-appellee." *Newman*, 235 Kan. at 35.

Here, the district court was unclear as to what specific evidence was suppressed as a result of its ruling. The district court found that the officers' entry into the residence was unauthorized and that Dean's arrest violated his constitutional rights. The district court surmised that statements taken at the scene "probably" should be suppressed. The district court stated that the parties should determine how the court's ruling would affect the rest of the case.

In its response to Dean's motion for involuntary dismissal, the State noted that the court "suppressed the entry into the house and the arrest of the defendant, which substantially impairs the ability of the State to fully prosecute the crimes which occurred on around the 22nd day of April." However, the State offers no reasoning to support this conclusion. The district court indicated that its ruling would probably affect any statements taken at the scene of the arrest. However, it appears from the record that Dean made no incriminating statements at the scene of his arrest. Dean made subsequent statements to the police at the law enforcement center after receiving his *Miranda* warnings. The district court gave no indication whether these statements were included in the suppression order. The State makes no attempt to argue that the district court's ruling affects any alleged crimes that did not occur on or around April 22, 2003.

In its brief to this court, the State suggests that "perhaps the court could give counsel guidance as to what extent the suppression order should go." This request exceeds the purpose and jurisdiction of this court. It would have been appropriate for the State to file a motion for clarification requesting the district court to specifically delineate the evidence being suppressed as a result of the court's ruling. The district court is responsible for identifying the evidence that is actually being suppressed.

Without knowing what evidence was suppressed in this case, we have no way of knowing whether the State's ability to prosecute the case has been substantially impaired. Such a

finding is a jurisdictional prerequisite for the State's interlocutory appeal. Accordingly, we conclude that Dean's motion for involuntary dismissal should be granted.
Appeal dismissed.

State v. Smith, 105 P.3d 279 (Kan. Ct. App. 2005)

Appendix C

259 P.3d 749 (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, Appellant,
v.
Kenneth LITTLE, Appellee.
No. 105,221.
Sept. 9, 2011.Review Denied March 8, 2012.
Appeal from Sedgwick District Court; Gregory L. Waller, Judge.

Attorneys and Law Firms

Boyd K. Ishenvood, assistant district attorney, Nolo Tedesco Foulston, district attorney, and Derek Schmidt, attorney general, for appellant.
Carl F.A. Maughan and Catherine A. Zigtema, of Maughan & Maughan LC, of Wichita, and Richard Ney, of Ney & Adams, of Wichita, for appellee.
Before GREENE, C.J., MALONE, J., and KNUDSON, S.J.

MEMORANDUM OPINION
PER CURIAM.
*1 The State has filed this interlocutory appeal pursuant to K.S.A. 22–3603. The district court suppressed evidence taken from the trunk of Kenneth Little's vehicle that was located on the premises during execution of a residential search warrant. Little was not a target of the search, nor did he currently reside at the premises to be searched. However, he was present when the police officers arrived to execute the search warrant and was detained during the subsequent search. The district court held that because "after the residence was secure [*sic*], law enforcement had no legal justification to continue the detention of the defendant or his vehicle," the search of Little's vehicle was unlawful. We conclude Little's lawful detention could only be coextensive with the period of the search authorized under the warrant. However we are unable to determine from the record on appeal what factual findings were made by the district court to support a legal conclusion that the period of Little's detention was constitutionally unreasonable. Moreover, based on the district court's expressed rationale, we will not entertain a presumption of unreasonableness. Accordingly, we must reverse and remand this case for additional findings and conclusions. See *State v. Vaughn*, 288 Kan. 140, 200 P.3d 446 (2009).
During a drug investigation, a search warrant was issued for the residence at 2011 N. Minneapolis in Wichita. When officers arrived at the residence, a person standing on the porch saw police and ran inside. Authorized to execute a "no-knock" warrant, officers entered the residence. Vincent Metcalf, identified as the male who ran inside, was located in one of the bedrooms. An unknown female was found in the bedroom with Metcalf. Another male, identified as Little, was located in a separate bedroom. The occupants were handcuffed for officer safety and detained separately in patrol cars. Little was also

searched and property was removed from his person, including a wallet and set of keys. There were four vehicles located in the parking area of the residence. Little denied ownership of any of the vehicles.

During Little's detention in a patrol car, a police officer searched the bedroom where Little was initially located and discovered a small bag of ecstasy pills in close proximity to where Little was found. After completing a search of the house, officers turned their attention to the cars parked on the premises. A drug dog was brought in and alerted on the trunk of one car, identified through its VIN number as registered to Little. Officers retrieved Little's keys. In the trunk, officers found a black duffle bag containing marijuana, crack cocaine, two digital scales, and 410 ecstasy pills. A traffic citation issued to Little was also located in the car.

Little was charged with cultivation and distribution of a controlled substance and failure to affix a drug tax stamp. Before trial, the district court sustained Little's motion to suppress all evidence taken from him and his vehicle. The State has not appealed from the ruling that Little was unlawfully searched. The only issue before us concerns the evidence seized from the trunk of Little's vehicle.

*2 The district court's memorandum opinion provides:

"The Court raised the issues of the validity of the search of the defendant's vehicle and the application of the inevitable discovery rule. Based upon the evidence presented at hearing, the defendant's vehicle was one of four located on the property. It was in the rear of the driveway near the back of the residence. No evidence was presented as to whether or not the vehicle was blocked in by the other vehicles. All of the vehicles on the property were searched because they 'did not find much in the house.' Nothing was found in any vehicle except defendants [*sic*]. A drug dog was called to the scene and alerted upon the trunk of the defendant's vehicle. The trunk was opened with the keys taken from the defendant and a black bag was found in the trunk. The bag contained marijuana, crack cocaine, ecstasy, pills and scales. *The vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house.*"

....

"The Court believes that *after the residence was secure,* law enforcement had no legal justification to continue the detention of the defendant or his vehicle. The inevitable discovery doctrine requires this Court to view the circumstances as they existed before the unlawful search. In this case *the defendant should have been released once it was determined there was no probable cause to hold him and safety of the search was not in jeopardy.* The Court believes that the inevitable discovery doctrine does not apply. Therefore, the Court is suppressing for use against the defendant the evidence found in the trunk of his vehicle." (Emphasis added).

We note in passing that the district court was not troubled by the use of Little's car key to open the trunk of the vehicle. The district court acknowledged the trunk could have been forcibly opened once the drug dog alerted. What the district court found impermissible was the detention of Little from the time the premises were secured until the drug dog alerted. Before turning to a discussion of the substantive issue, we need to consider Little's contention that the State's interlocutory appeal is not properly before us.

Little contends the State's appeal is not properly before this court for the following two reasons. First, Little argues the State did not timely file its notice of appeal because the plain language of K.S.A. 22–3603, providing for the State's appeal in this instance, does

not extend the time for appeal by the filing of a motion to reconsider. The State maintains it timely filed the notice of appeal after entry of the court's order in this case.
Little's argument has no merit. Motions to reconsider, treated as motions to alter or amend the judgment under K.S.A. 60–259(f), apply in criminal cases in the absence of a specific statute to the contrary. *McPherson v. State,* 38 Kan.App.2d 276, 287, 163 P.3d 1257 (2007). We conclude the State's motion to reconsider was properly filed and extended the time for appeal. See K.S.A. 60–2103(a).
*3 Second, Little contends the State has not shown its prosecution would be substantially impaired by suppression of the evidence, because evidence recovered from his car was not the sole evidence in this case. Little maintains testimony at the suppression hearing and the proffer of facts show drugs, money, indicia of residence, and other contraband were recovered from the premises. Little's citations to the record are less sweeping, referring to an officer's testimony that "we didn't find that much in the house" and that the search of the bedroom where Little was located resulted in the discovery of a small bag of ecstasy pills and possibly some indication of Little's occupancy of the bedroom.
In response, the State indicates it charged Little with cultivation and distribution of a controlled substance under K.S.A.2009 Supp. 21–36a05. According to the State, an element of that crime requires the State to prove Little possessed illegal drugs with the intent to distribute. Thus, the focus of the suppression motion was the 410 ecstasy pills found in Little's car. The State asserts this element could not be met by merely showing Little was in constructive possession of some drugs found in the house.
A threshold requirement for the State's interlocutory appeal is a showing that the suppression order substantially impaired the State's ability to prosecute the case. See *State v. Griffin,* 246 Kan. 320, 324, 787 P.2d 701 (1990); *State v. Newman,* 235 Kan. 29, 34, 680 P.2d 257 (1984). In *Griffin,* the State claimed the court's suppression of cocaine evidence substantially impaired its case because, in part, the evidence would indicate the defendant's intent to sell. See *State v. Sales,* 290 Kan. 130, 138–39, 224 P .3d 546 (2010) (finding *Griffin* impliedly found the order of exclusion substantially impeded the State's ability to prosecute the case); see also *State v. Huninghake,* 238 Kan. 155, 157, 708 P.2d 529 (1985) ("Suppression rulings which seriously impede, although they do not technically foreclose, prosecution can be appealed under K.S.A. 22–3603."). We conclude the reasoning in *Griffin* is equally applicable in this appeal. We hold suppression of the 410 ecstasy pills found in Little's car would substantially impair the State's prosecution alleging distribution of controlled substances. We turn next to a discussion of the issue presented on appeal.
' "[T]his court reviews the factual underpinnings of a district court's decision for substantial competent evidence and the ultimate legal conclusion drawn from those facts de novo. The ultimate determination of the suppression of evidence is a legal question requiring independent appellate review. [Citation omitted.] The State bears the burden to demonstrate that a challenged search or seizure was lawful. [Citation omitted.]" ' *State v. Morlock,* 289 Kan. 980, 985, 218 P.3d 801 (2009) (quoting *State v. Moore,* 283 Kan. 344, 349, 154 P.3d 1[2007]).
*4 The district court suppressed the evidence taken from the trunk of the vehicle after concluding: (1) Little should have been released from custody as soon as the residence was secured and (2) Little's vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house. The district court's conclusion that

Little should have been released as soon as the residence was secured is not an accurate statement of law. Implicit in the conclusion that Little's vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house is a determination that the delay was unreasonable. We cannot determine from the record on appeal whether the delay was unreasonable; thus, we remand for additional findings.

The State argues Little's detention was authorized under the authority of *Michigan v. Summers,* 452 U.S. 692, 702–03, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (limited detention during execution of a search warrant is justified by the need to prevent flight, to protect officers, and to complete the search in orderly manner), and *Muehler v. Mena,* 544 U.S. 93, 99, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) (officer safety justified handcuffing and detaining the occupants of a residence in the garage during execution of a residential search warrant). "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Mena,* 544 U.S. at 98 (quoting *Summers,* 452 U.S. at 705 n. 19).

Little contends *Summers* and *Mena* are distinguishable because, in those cases, the defendant was the resident and subject of the search warrant. Instead, Little cites to *State v. Wilson,* 30 Kan.App.2d 100, 106, 39 P.3d 668, *rev. denied* 273 Kan. 1040 (2002) (nonresident's detention and consent to search during execution of a search warrant was illegal), and *State v. Vandiver,* 257 Kan. 53, 64, 891 P.2d 350 (1995) (finding a warrantless search of defendant's pocket during execution of a search warrant was illegal where defendant was a mere visitor), as the decisions to consult when reviewing the rights of nonresidents present in a location at the time a search warrant is executed. Further, Little maintains he was not a threat and made no moves to conceal or otherwise destroy evidence described in the warrant; thus, law enforcement officers had no right to detain and search him under K.S.A. 22–2509.

The district court's determination that Little was illegally detained because he was not the target of the search warrant and there was no probable cause for his detention was in error. *Summers* ' balancing of rights under the Fourth Amendment to the United States Constitution led the Court to find the detention of occupants during execution of a search warrant was constitutional, particularly because the warrant signifies there was probable cause to find criminal activity occurring in the house and authorized a significant intrusion into the occupant's privacy.

*5 "Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Summers,* 452 U.S. at 701.

Although *Summers* ' interchangeable use of "occupants" versus "residents" in the opinion and the district court's finding that Little was not a target of the search warrant may have led the district court to reject the holding in *Summers* and *Mena,* courts have consistently held that *Summers* applies to *any* occupants present at a search location, whether residents or visitors. See, *e.g., United States v. Martinez–Cortes,* 566 F.3d 767, 770 (8th Cir.2009) (Cases following *Summers* have confirmed law enforcement's authority to

forcibly detain during the warrant search extends to all occupants of the premises, not just the owner or the subject of the warrant); *United States v. Sanchez,* 555 F.3d 910, 918 (10th Cir.2009) (concluding the authority to detain relates to all persons present on the premises).

The decisions in *Wilson* and *Vandiver* were decided before the Supreme Court in *Mena* stated the authority to detain occupants incident to a search warrant is absolute. See *Mena,* 544 U.S. at 98. Further, *Vandiver* was primarily concerned with the legality of the search of the defendant. *Vandiver* noted the application for the search warrant in that case did not request a search of persons present on the premises other than the resident. Additionally, the court found there was nothing to indicate the officer was concerned for his safety or that the defendant was connected to the marijuana discovered in plain view to suggest a need to prevent the defendant's disposal or concealment of the contraband; thus, the search was not justified under K.S.A. 22–2509 ("In the execution of a search warrant the person executing the same may reasonably detain and search any person in the place at the time: [a] To protect himself from attack, or [b] To prevent the disposal or concealment of any things particularly described in the warrant."). *Vandiver,* 257 Kan. at 63–64.

In *Wilson,* the court found the defendant was illegally seized or detained during execution of the search warrant. As a result, the court determined the defendant's consent to a search was tainted, and contraband found during the search was suppressed. In analyzing the case, the court followed the reasoning in *Vandiver,* noting the officer testified the defendant did not pose a reasonable threat, the officer did not observe drugs or contraband in the defendant's proximity, and the officer did not reasonably suspect that the defendant was involved in criminal activity. Consequently, the court determined the officer was not justified in his continued detention of the defendant after the house was secured and, further, the detention exceeded that addressed in *Vandiver* because the defendant was handcuffed during the entire interrogation process and the officers retained his identification card. *Wilson,* 30 Kan.App.2d at 106.

*6 The district court found the detention and search of Little was improper because officers had no reason to believe he was involved in criminal activity or presently armed and dangerous. As a result, the court suppressed the items removed from Little's pockets. But as stated above, Little's detention was constitutional under *Mena* and, more importantly, the State is not challenging the court's conclusion the search of Little's pockets was illegal or the suppression of the items removed from Little's pocket. We conclude the critical issue is whether Little's period of detention after the residence was searched but before the drug dog alerted on the vehicle was reasonably necessary to complete the search of the premises, including the four vehicles parked in the driveway. We have noted *Mena* stands for the proposition that the duration of a detention may be coextensive with the period of a search and requires no further justification. See *Dawson v. City of Seattle,* 435 F.3d 1054, 1066 (9th Cir.2006); see also *State v.. Kirby,* 12 Kan.App.2d 346, 355, 744 P.2d 146 (1987), *aff'd* 242 Kan. 803, 751 P.2d 1041 (1988) (when analyzing whether the duration of a *Terry* stop is excessive, a court considers ' "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" '). Also in *Mena,* the Supreme Court upheld the reasonableness of

handcuffing an innocent occupant, and the 2– to 3–hour duration of the detention, as necessary given the nature of the search. 544 U.S. at 98–99.

We conclude the district court did not enter adequate findings addressing the issue of necessary time delay after the residence was secured but before the drug dog alerted on the vehicle. Moreover, we are unable to determine from the record on appeal the length or reasons for any time delay. Accordingly, we will not entertain a presumption that delay, if any, was not reasonably necessary given the nature of the search authorized under the search warrant. We remand this case to the district court for further findings and a determination of whether any delay was reasonably necessary. On remand, the district may consider testimony previously presented under Little's motion to suppress, exhibits that have been introduced into evidence, and arguments of counsel.

Reversed and remanded with directions.

State v. Little, 259 P.3d 749 (Kan. Ct. App. 2011)