

NOT DESIGNATED FOR PUBLICATION

No. 102,851

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LANIELLE J. LIST,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed December 23, 2010.
Reversed and remanded with directions.

Joshua S. Mikkelson, legal intern, and *Randall L. Hodgkinson*, of Kansas Appellate Defender Office, for appellant.

Ramsey A. Olinger, legal intern, and *Steven J. Obermeier*, assistant district attorney, *Stephen M. Howe*, district attorney, and *Steve Six*, attorney general, for appellee.

Before STANDRIDGE, P.J., MARQUARDT and LEBEN, JJ.

Per Curiam: Pursuant to a bench trial based on stipulated facts, Lanielle J. List was convicted of possessing methamphetamine and drug paraphernalia. On appeal, List argues the district court erred in denying her motion to suppress evidence. For the reasons stated below, we reverse the decision of the district court and remand with directions to grant the motion to suppress.

FACTS

On May 27, 2007, Officer Justin Reeder and Detective Andrew Kearney with the Overland Park Police Department were patrolling the area of 87th Street near Antioch Road. Kearney observed a female in the driver's seat of a black BMW and a male standing outside the vehicle leaning in the passenger side window. It appeared to Reeder and Kearney that the male and female were arguing. The argument did not appear to be a physical altercation.

Reeder assumed the argument was domestic related, so Reeder and Kearney decided to approach the individuals to make sure they were safe and that no crime was occurring. Thus, Kearney continued to observe the vehicle as it traveled westbound on 87th Street and pulled into a parking lot. Reeder and Kearney then followed the vehicle into the parking lot. The officers did not observe the driver commit any traffic violations. As the officers entered the parking lot, the male noticed the patrol car and immediately walked away from the female's vehicle. As the male walked away from the vehicle, the female continued to drive the car at a low rate of speed near the male. It appeared the two kept arguing as the male walked away. Eventually the female parked the vehicle.

Kearney made contact with the female as she exited the vehicle at the same time that Reeder approached the male. When the officers made contact with the two individuals, the arguing had ceased. The male was identified as Howard McDowell. Kearney asked the female if the two were arguing and, if so, what they were arguing about. The female confirmed that the two had been arguing and noted the argument was about money. Kearney then asked for her identification. The female retrieved a liquor license from a white purse inside the vehicle and handed the license to Kearney. The license identified the female as List. Kearney informed List that because she had been driving, he needed to see her driver's license. List then informed Kearney that her driver's license was suspended.

Kearney told List to sit on the hood of the vehicle. After confirming with dispatch that List's driver's license was, in fact, suspended, Kearney informed Reeder that List did not have a driver's license or proof of insurance. Reeder then asked List to produce a vehicle registration form or some proof of ownership for the vehicle. While List was looking for the vehicle's registration, Reeder observed a butane lighter in the middle console and a syringe cap in the passenger seat. Reeder also noticed a large box of syringes in the back seat. Reeder asked List if there was anything illegal in the vehicle, and List informed him that she did not think so.

Reeder then arrested List for driving on a suspended license and no proof of insurance. Because List claimed to be a Missouri resident, police department policy mandated that List be taken into custody, fingerprinted, photographed, and post a certified bond.

Reeder then searched the vehicle incident to List's arrest. Reeder found a white purse in the vehicle and asked List if that was her purse. After List informed Reeder that it was not her purse, Kearney told Reeder that List had obtained her identification from the purse. Reeder searched the purse and discovered a clear glass pipe with white residue, a cut drinking straw, an orange plastic bag containing white crystals, and a clear plastic bag containing white crystals. Upon a search of the area under the passenger seat of the vehicle, Reeder found a small black digital scale along with a large spoon with needle scratch marks and a crystallized substance attached to the face of the spoon.

After the search, List was provided a *Miranda* warning. Reeder thereafter asked List about the white crystal substance in the plastic bag and List informed Reeder that it was methamphetamine.

The State charged List with possession of methamphetamine, possession of drug paraphernalia, driving with a suspended driver's license, and no proof of insurance. List

filed a motion to suppress all evidence seized as well as any statements made to the police. In support of her motion, List argued the detention and search exceeded the scope of a public safety stop. List also argued the officers did not have authority to search the entire vehicle incident to an arrest for driving while suspended. Finally, List argued all statements made by her were obtained in violation of *Miranda*.

A hearing was conducted on the motion to suppress. Reeder and Kearney testified to the facts as set forth above. The district court denied List's motion on grounds that (1) List was properly detained during the course of a valid public safety stop; (2) List voluntarily told the officers that her driver's license was suspended; (3) the officers properly arrested List for driving while her license was suspended; and (4) the search of List's purse by the officers was a valid search incident to the arrest for driving with a suspended driver's license.

In light of the district court's decision, List waived her right to a jury trial, and the parties agreed to submit the case for a bench trial on stipulated facts. In exchange for a bench trial on stipulated facts, the State moved to dismiss the charges of driving with a suspended driver's license and no proof of insurance. List renewed her objection to the admission of the evidence seized. Based on the stipulated facts, the district court found List guilty of possession of methamphetamine and possession of drug paraphernalia.

ANALYSIS

We note, as a preliminary matter, that the district court's decision to deny List's motion to suppress was premised on a finding that List was detained during the course of a valid public safety stop. Moreover, the issue presented by both parties for determination in this appeal is whether the officers here exceeded the proper scope of a public safety stop during their encounter with List. Although the facts in the record are unclear as to whether List believed she was required to stay and answer questions when first

approached by Kearney, the State has not attempted to justify the lawfulness of its encounter with List as anything other than a public safety stop. For this reason, we necessarily limit our analysis to the proper scope of a public safety stop as presented by the parties in their briefs. See *State v. Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007) (An issue not briefed is deemed waived or abandoned.).

When, as here, the material facts to a district court's decision on a motion to suppress evidence are not in dispute, the question of whether to suppress is a question of law over which an appellate court has unlimited review. See *State v. Fitzgerald*, 286 Kan. 1124, 1126, 192 P.3d 171 (2008).

List does not dispute that the circumstances observed by Reeder and Kearney legally justified their decision to verify her safety and well-being. Nevertheless, List asserts that once the officers verified she was safe, the purpose of the public safety stop was accomplished, and any further detention was prohibited in the absence of reasonable suspicion that a crime had been committed, was being committed, or was going to be committed.

Kansas courts recognize four types of encounters between police and citizens: voluntary encounters, investigatory stops, public safety stops, and arrests. *State v. Gonzales*, 36 Kan. App. 2d 446, 451, 141 P.3d 501 (2006). The Kansas Supreme Court first recognized the concept of a public safety stop, or community caretaking stop, in *State v. Vistuba*, 251 Kan. 821, Syl. ¶ 1, 840 P.2d 511 (1992), *disapproved in part on other grounds State v. Field*, 252 Kan. 657, 847 P.2d 1280 (1993). In recognizing the concept of a public safety stop, the court determined and held: "[A] civil or criminal infraction is not always essential to justify a vehicle stop. Safety reasons alone may justify the stop, *if the safety reasons are based on specific and articulable facts.*" *Vistuba*, 251 Kan. at 824.

A public safety stop is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 214-15, 99 P.3d 1125 (2004) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 [1973]), and "is not to be used for investigative purposes." *State v. McCaddon*, 39 Kan. App. 2d 839, 842, 185 P.3d 309 (2008) (citing *Gonzales*, 36 Kan. App. 2d at 457). The stop "must last no longer than is necessary to effectuate its purpose, and its scope must be carefully tailored to its underlying justification." *United States v. Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005).

In *Gonzales*, this court further refined the scope of a public safety stop. In that case, an officer stopped the defendant's vehicle when the officer observed a "bouncing" rear tire and an open hatch over the fuel cap. During the stop, the officer advised the driver and passenger of the reasons for the stop and then shut the hatch cover over the gas cap. The officer then asked both the driver and passenger for their driver's licenses and registration for the vehicle. The officer then ran a "wants and warrants" and "triple I" check on the driver and passenger. 36 Kan. App. 2d at 448. While this was going on, the officer examined the problematic tire. After several more minutes of questioning, the driver consented to a search of the vehicle. The court upheld the initial vehicle stop for public safety reasons, but the court also held the subsequent search of the vehicle was illegal because the duration of the stop exceeded the scope of the public safety justification. 36 Kan. App. 2d at 454, 458.

In addressing whether the detention exceeded the basis for the stop, the court recognized that the scope of the detention during a public safety stop cannot exceed the justifications for the stop. The court determined that once the officer has completed the inquiry necessary to satisfy the purpose of the initial detention, the officer must allow the person to proceed unless the officer has a reasonable suspicion of criminal conduct. *Gonzales*, 36 Kan. App. 2d at 455 (quoting *Garner*, 416 F.3d at 1213). The court concluded that the justification of the stop was limited to an examination of the tire to

determine if it was safe to continue driving and obtaining and retaining the occupants' driver's licenses exceeded the justification for the stop. 36 Kan. App. 2d at 457.

In this case, List contends that because the verbal argument between her and McDowell was over by the time the officers approached her, the purpose of the stop had been effectuated, and any further detention, including asking List for her identification, was outside the scope of the stop. We scrutinize carefully actions taken under the public safety stop exception to ensure that the Fourth Amendment protections are not emasculated. *Gonzales*, 36 Kan. App. 2d at 455.

The officers decided to approach List and McDowell because it appeared to the officers that the two were arguing. Kearney testified that the purpose of the stop was to "make sure that all parties involved were safe and that everything was okay" and "that there was no crime that was occurring at the time." The justification for the stop was limited to making sure List and McDowell were safe and presumably to prevent the verbal argument from escalating into a physical altercation. From the record, it appears that any argument between List and McDowell was over when the officers made contact. In fact, Kearney testified that when he made contact with List, he believed the argument was over. Further, McDowell had walked away from the vehicle and was already 50 feet away from List. Both parties appeared to be safe, and the officers had no indication that List and McDowell were going to continue arguing or physically harm each other. After establishing that both were safe, the scope of the public safety stop was finished. Neither the initial request for documentation proving List's identity nor the follow-up request for documentation proving List possessed a license to drive were necessary to effectuate the purpose of the stop.

Based on the facts presented and the applicable law, we find Kearney's request to List for identifying documentation exceeded the scope of the safety stop and thus violated List's constitutional rights. See *Gonzales*, 36 Kan. App. 2d at 456 (once officer is assured

that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating the protections provided by the Fourth Amendment to the United States Constitution). Based on this violation, we further find that any information subsequently obtained (List was driving on a suspended license) or evidence subsequently seized (drugs and drug paraphernalia) were inadmissible as fruit of the poisonous tree. See *Wong Sun v. United States*, 371 U.S. 471, 493, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). As such, the district court erred in denying List's motion to suppress the evidence.

Reversed and remanded with directions to grant the motion to suppress.