NOT DESIGNATED FOR PUBLICATION

No. 98,016

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MICHAEL SHAFER,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; DANIEL L. HEBERT, judge. Opinion filed September 26, 2008. Reversed and remanded.

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

Amy Hanley, assistant county attorney, *Ellen H. Mitchell*, county attorney, and *Paul J. Morrison*, attorney general, for appellee.

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

GREENE, J.: Michael Shafer appeals his convictions of possession of

methamphetamine and hydrocone, arguing the district court erred in denying his motion to suppress evidence. Concluding that the evidence was observed during an unreasonable detention, we reverse Shafer's conviction and remand for further proceedings.

Factual and Procedural Background

Shafer was asleep in a car parked in his own driveway when an officer responded to his address based upon a call from dispatch "to check the welfare of a subject that was passed out or slumped down in the wheel of his car." When the officer arrived, Shafer's car was backed into the driveway with the driver's door standing open and Shafer was found "either passed out or sleeping." The officer approached Shafer "to check the welfare of that subject" and attempted to wake him up to "make sure he was alright." Shafer awoke and explained that he was sleeping in his car because he had been locked out of his house. The officer determined Shafer "was alive" and did not appear to be in need of medical assistance.

Rather than terminate the encounter at that point, however, the officer asked Shafer for his identification. Shafer handed the officer his Kansas driver's license,

and the officer verified his identity. The officer then retained the license and employed his hand-held radio to run "a local 29" on Shafer's name and date of birth to determine whether there existed any wants or warrants for Shafer. When the check cleared Shafer, the officer prepared to leave when Shafer reached into his pocket and removed a glass pipe and other items, and then "fumbled underneath the dash with these items." After observing this "fumbling," the officer requested Shafer exit the car, and the subject evidence was procured from underneath the dash and in a subsequent pat-down of Shafer's person.

Shafer was charged with possession of methamphetamine, possession of hydrocone, and possession of drug paraphernalia. He moved to suppress the evidence procured during his encounter with the officer, but the district court denied his motion, concluding the detention was not unreasonable. At a subsequent bench trial, Shafer was acquitted of the paraphernalia count but convicted of the other felony possession counts and sentenced to 18 months' probation with an underlying prison term of 12 months. He timely appeals.

Did the District Court Err in Denying Shafer's Motion to Suppress?

Shafer argues the officer unreasonably exceeded the legitimate bounds of a public safety stop by requesting his driver's license and running a warrant check. We review the factual underpinnings of a district court's decision for substantial competent evidence, but we review de novo the ultimate legal conclusion drawn from those facts. The ultimate determination of the suppression of evidence is a legal question requiring independent appellate review. The State bears the burden to demonstrate that a challenged search or seizure was lawful. *State v. Moore*, 283 Kan. 344, 349, 154 P.3d 1 (2007).

Although we acknowledge that community caretaking or public safety encounters have been characterized as one of four types of lawful encounters between police and our citizens [see *State v. Vistuba*, 251 Kan. 821, 840 P.2d 511 (1992)], a public safety encounter must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441, 37 L. Ed. 2d 706, 93 S. Ct. 2523 (1973). Such an encounter must be based upon specific articulable facts establishing the need for intervention by an officer. *Vistuba*, 251 Kan. 821, Syl. ¶ 1. Moreover, any such detention 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 (10th Cir. 2005).

The State urges us to analyze the subject encounter as entirely consensual, arguing "there was no detention in this case. [The officer] did not stop Shafer, because the car was already parked when he arrived. . . . Shafer willingly conversed with [the officer]. A reasonable person in Shafer's situation would have believed he was free to leave and free to ignore any questions posed." We disagree.

Even if we were to concede that Shafer was not "stopped" or "seized" at the outset of this encounter, there is no question that he must be considered "seized" when the officer requested and retained his driver's license. Generally, an officer's retention of a defendant's documentation is significant because it indicates the defendant did not reasonably feel free to terminate the encounter. See *State v. Grace*, 28 Kan. App. 2d 452, 458, 17 P.3d 951, *rev. denied* 271 Kan. 1039 (2001). Therefore, when the driver has relinquished his license to an officer, the State cannot rely on the defendant's consent to justify further detention, questioning, or a search. See *State v. Thompson*, 284 Kan. 763, 799, 166 P.3d 1015 (2007) (citing and quoting *United States v. Burch*, 153 F.3d 1140, 1143, [10th Cir. 1998]). We decline to analyze this encounter as "consensual" after the officer requested and retained

Shafer's license.

Here, we must determine whether the officer exceeded the purpose of the public welfare encounter when he requested Shafer's driver's license and conducted a warrant check. Indeed, a public safety encounter is not for investigative purposes. See *State v. Gonzales*, 36 Kan. App. 2d 446, 457, 141 P.3d 501 (2006), and cases collected from Idaho, Illinois, and Washington. The State does not contend that the officer had developed any independent reasonable suspicion or probable cause to believe any crime had been committed at the time of requesting Shafer's license; in fact, the officer testified that his request for identification and subsequent warrant check was routine. But, by the time of the request, the officer had already determined that there was no cause for alarm; the purpose for the encounter had been fully addressed upon waking Shafer and determining that he was merely sleeping in his own driveway.

We conclude that obtaining and retaining Shafer's driver's license after resolving any public safety concern exceeded the legitimate bounds for a public safety encounter. Evidence procured thereafter, even though in plain sight of the officer, must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*,

371 U.S. 471, 9 L. Ed 2d 441, 83 S. Ct. 407 (1963). For these reasons, we must reverse Shafer's convictions and remand for further proceedings.

Shafer also argues on appeal that he did not personally waive his right to a jury trial and that his convictions must be reversed for this reason alone. We decline to address this argument because our conclusion as to the suppression of evidence has effectively mooted this issue.

Reversed and remanded.

LEBEN, J., concurring in part and dissenting in part: Michael Shafer had methamphetamine, hydrocodone, and drug paraphernalia in his coat pocket when a police officer came to Shafer's driveway to check on his welfare as he was asleep in his car with its door hanging open. Shafer claims that the drugs and drug paraphernalia should have been suppressed because the officer violated his constitutional rights by asking for and briefly taking Shafer's driver's license. But a brief handling of a person's ID during an otherwise consensual encounter does not violate the Fourth Amendment.

Shafer has separately appealed the district court's determination that Shafer waived his right to a jury trial. The majority declared that issue moot, but the case is being

remanded for a potential retrial. The district court has already determined that Shafer has waived his jury-trial right, and I am unaware of any case holding that a defendant's waiver loses its effect when a case is sent back for retrial. Thus, I would also reach the issue of Shafer's right to a jury trial on remand. The Kansas Supreme Court has held that a jury-trial waiver is not effective unless the court first advises the defendant of his right to a jury trial and then that defendant "personally waive[s] this right in writing or in open court for the record." *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 (1975); see *State v. Larraco*, 32 Kan. App. 2d 996, Syl. ¶ 1, 93 P.3d 725 (2004). These requirements were not met, so Shafer should be entitled to a jury trial if the case against him is retried.

I. *The Officer's Interactions with Shafer Did Not Violate the Fourth Amendment Because There Was Neither a Search Nor a Seizure Before Contraband Was Observed in Plain View of the Officer.*

Shafer claims that the conduct of the police officer at Shafer's home violated the protections of the Fourth Amendment. His claim therefore rests upon the applicability of those protections to his case; his claim fails because no conduct took place that the Fourth Amendment prohibits.

A. The Fourth Amendment Prohibits Only Unreasonable Searches and Seizures.

The Fourth Amendment protects us from unreasonable searches and seizures. But we are not searched when an officer observes illegal conduct—or evidence of it—from a

place the officer has a right to be present. And we are not seized when a police officer approaches us in a place the officer has a right to be present and merely asks a few questions of us.

These rules are not subject to doubt. As to an officer's ability to ask questions, I rely upon the United States Supreme Court's decision in *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991). The *Bostick* Court concluded that—even without any suspicion of illegal activity—an officer may generally ask questions, ask to examine a person's identification, and even request consent to search a person's luggage "as long as the police do not convey a message that compliance with their requests is required." 501 U.S. at 434-35. As to an officer's observation of illegal conduct or evidence, I rely upon the United States Supreme Court's decision in *Horton v. California*, 496 U.S. 128, 133-34, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990), and the Kansas Supreme Court's decision (citing *Horton*) in *State v. Fisher*, 283 Kan. 272, 292-93, 154 P.3d 455 (2007) (plurality opinion). As our Supreme Court said in *Fisher*, "[N]o Fourth Amendment search occurs where a law enforcement officer observes incriminating evidence or unlawful activity from a nonintrusive vantage point." 283 Kan. at 293; see also *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

B. Shafer's Argument Must Be Supported by Evidence That a Search of Seizure Occurred.

The facts of our case are largely undisputed. On appeal from a ruling on a suppression motion, we accept the district court's factual findings that are supported by substantial evidence while we consider independently its legal conclusions. *State v. Moore*, 283 Kan. 344, 349, 154 P.3d 1 (2007). But the parties have not suggested any significant disagreement about what took place so only the legal conclusions drawn from those facts are disputed. The only fact that may be in dispute is whether the officer returned Shafer's license before observing the contraband.

The district court made no finding about when the officer returned Shafer's license. At the hearing on the motion to suppress evidence, the officer said, "I don't recall if I handed him his license back before I saw what I saw." At trial, Shafer described a sequence in which he got his license back before reaching into his pocket:

> "I guess four or five minutes went by and I'm still kind of wondering what I should do, you know, why he's basically standing there at my door. And of course he did take my license and we had to wait for that to run through, that was the process of the four or five minutes, and he hands me my license back or whatever and I, you know, reach in to get my keys and I still can't start it, reached under the hood to pull the hood latch."

Thus, it appears that the officer returned Shafer's license just before observing contraband.

In addition to the evidence noted above, I also note that the district court held that the rights of the Fourth Amendment weren't violated here and that the evidence would support a finding that the license was returned before the contraband was observed. The defendant did not object to the district court's failure to make a factual finding about when the license was returned; when there is no objection in the district court to the sufficiency of the findings, the trial court is presumed to have made the factual findings necessary to support its decision. *State v. Gaither*, 283 Kan. 671, Syl. ¶ 5, 156 P.3d 602 (2007); *State v. Coburn*, 38 Kan. App. 2d 1036, 1044, 176 P.3d 203 (2008). I do not believe that the timing of the return of the license would affect the result in this case. To the extent that it matters at all and any doubts exist about it, however, the facts are taken in the light necessary to support the district court's decision when supported by substantial evidence. The facts are therefore reviewed with the understanding that the officer returned the license shortly before observing apparent contraband.

Michael Shafer was asleep in his own car in his own driveway at mid-morning on a weekday; a Salina police officer came to check on his well-being. Shafer's car door was open. The officer woke Shafer, asked him a few questions to be sure he was okay, and then asked for Shafer's identification. The officer held Shafer's driver's license briefly while contacting a dispatcher on a hand-held radio to see whether there were any

outstanding warrants for Shafer's arrest. There were no warrants. The officer gave Shafer his license back.

But moments after that—and with the officer looking on—Shafer took a glass pipe and a lighter from his front coat pocket and put them under the dash. The district court found that the officer had a clear view of this. The officer thought the pipe looked like one commonly used to smoke illegal drugs.

Shafer makes a single claim in support of his argument that the pipe, methamphetamine, and hydrocodone discovered after this observation should be suppressed. Shafer claims that the officer was making a specific type of seizure—what's known as a safety stop—and that he exceeded the permissible scope for such a stop.

But the limiting rules that govern officer conduct during a safety stop—like all rules applied under the Fourth Amendment—don't apply unless there has first been a search or a seizure. Cases that involve safety stops (sometimes also called community-caretaking activities) generally arise when an officer stops a car because of a safety concern, *e.g.*, *State v. Gonzales*, 36 Kan. App. 2d 446, 141 P.3d 501 (2006) (an officer stopped a vehicle to check a potentially defective tire), or enters a home without a warrant based on safety or welfare concerns. *E.g.*, *State v. Horn*, 278 Kan. 24, 91 P.3d 517 (2004)

(an officer entered a home to check on the welfare of a resident). A traffic stop is a seizure, and entry into a home without a warrant is a search. Thus, in most contested cases in which officers are responding to safety concerns, a Fourth Amendment interest is in play. But if no search or seizure has occurred, the Fourth Amendment and the rules adopted pursuant to it for a safety stop simply don't apply at all. Thus, our initial task should be to determine whether there was even a search or a seizure of Shafer.

C. There Was No Search.

If the officer had a right to be where he was when he observed the apparent contraband, then there was no search because an officer is free to make observations from a legal vantage point under *Horton*, *Fisher*, and *Katz*. Shafer's location when the officer encountered him leads easily to the conclusion that the officer had a right to be present there.

Shafer was in his driveway in a residential area in Salina. No evidence suggested that the officer had to go through any gate or fence to approach him, and "there is no expectation of privacy in a driveway that is exposed to the public." *United States v. Roccio*, 981 F.2d 587, 591 (1st Cir. 1992). Accord *Rogers v. Vicuna*, 264 F.3d 1, 6 (1st Cir. 2001); *Knott v. Sullivan*, 418 F.3d 561, 573-74 (6th Cir. 2005); *United States v. Evans*, 27 F.3d 1219, 1228-29 (7th Cir. 1994); *United States v. Ventling*, 678 F.2d 63, 66

(8th Cir. 1982); *United States v. Humphries*, 636 F.2d 1172, 1178-79 (9th Cir. 1980), *cert. denied* 451 U.S. 988 (1981); *Parks v. Tatarinowicz*, 2005 WL 2989673 at *3 (D.N.H. 2005) (unpublished opinion); *Nasca v. County of Suffolk*, 2008 WL 53247 at *6 (E.D.N.Y. 2008) (unpublished opinion); *McDonald v. State*, 354 Ark. 216, 223, 119 S.W.3d 41 (2003); *Commonwealth v. A Juvenile (No. 2)*, 411 Mass. 157, 160-61, 580 N.E.2d 1014 (1991); *People v. Shankle*, 227 Mich. App. 690, 693-94, 577 N.W.2d 471 (Mich. App. 1998); *State v. Merrill*, 252 Neb. 510, 515-16, 563 N.W.2d 340 (Neb. 1997); see also 1 LaFave, Search & Seizure § 2.3(e) at 592-93 (4th ed. 2004) ("It is not objectionable for an officer to come upon that part of the property which 'has been opened to public common use.' The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take that route 'for the purpose of making a general inquiry' or for some other legitimate reason, they are 'free to keep their eyes open' . . . .").

I have relied upon out-of-state authority on this point because no Kansas cases are directly on point. But a recent Kansas case is consistent with the cited out-of state cases. In *State v. Fisher*, 283 Kan. 272, 154 P.3d 455 (2007), six members of the Kansas Supreme Court recognized that an officer usually may use a driveway to approach a residence and need not close his eyes to what he sees en route. The *Fisher* case involved a rural home with a "Notice, No Trespassing" sign posted where one would turn onto the

driveway from the highway. In a plurality opinion, Justice Nuss, writing for himself and two other justices, said that "while walking to and from [a] parking spot on the driveway, while walking to and from the front door, and while at the front door, the officer may make lawful observations." 283 Kan. at 296. Justice Nuss found that the officer had exceeded these limits—at least with respect to the authority to seize contraband the officer saw—by using a turnaround at the end of the driveway that went behind the house. Justice Davis, writing for himself and two other justices, concluded that the officer could lawfully use the turnaround portion of the driveway, make observations from that location, and even seize contraband viewed from there. 283 Kan. at 326. In sum, six of the seven justices who decided *Fisher* recognized that an officer may make lawful observations from the driveway of a property; three even concluded that the officer may seize items seen from the portion of the driveway that gave a view behind the residence.

Our case does not present the complexities presented in *Fisher*. Shafer lived in the city, not in a rural area. There was no sign against trespassing, the officer did not go to the back of Shafer's house, and the items of contraband were located on the driveway, not even further afield on the property. Because the officer was lawfully present, his observations did not constitute a search subject to the Fourth Amendment.

D. <u>There Was No Seizure</u>.

Shafer claims that a seizure occurred when the officer asked for Shafer's driver's license, took it, and checked for outstanding warrants. Shafer contends that this violated the Fourth Amendment because it exceeded the scope of a safety stop in which the officer may only be concerned with making sure Shafer was okay. See *Gonzales*, 36 Kan. App. 2d 446, Syl. ¶¶ 3-4. As I've already noted, however, those specific rules apply *only* if there has already been some sort of seizure or detention. And no search or seizure had occurred before the officer asked for the driver's license. Thus, what we actually must determine is whether the act Shafer complains of—taking and briefly holding his driver's license while checking for warrants—turned the encounter into a seizure of Shafer.

Seizures of a person are distinguished from voluntary encounters, in which "a reasonable person would feel free to go about his or her business and disregard the law enforcement officer." *State v. Lee*, 283 Kan. 771, 775, 156 P.3d 1284 (2007). The United State Supreme Court's test for when an encounter ceases to be voluntary and instead becomes a seizure is whether "a reasonable person would feel free to 'disregard the police and go about his business.'" *State v. Thompson*, 284 Kan. 763, 788, 166 P.3d 1015 (2007) (citing *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 [1991]).

"Given that test . . ., it becomes crucial to focus on what the person's immediate 'business' is, in order to decide if the police retention of his papers would likely impede his freedom to proceed with it." *United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992). Shafer's immediate business was sleeping in his driveway, apparently waiting to call his father for a key until later in the morning. The brief check of his driver's license and the check for possible warrants certainly didn't interfere with Shafer's apparent business and took only about 5 minutes. Unlike the typical traffic stop, in which a person is en route somewhere, Shafer was not going anywhere: he was already at home and showed no desire to leave. Nor did he ask the officer to leave.

The officer's possession of Shafer's license was brief. The officer never left the side of Shafer's car and chose to use a hand-held radio to check for warrants with his dispatcher. While some Kansas caselaw discusses ID and warrant checks in the context of a seizure such as a traffic stop, I have not located a Kansas case that involves a brief ID and warrant check during a voluntary encounter. But many other courts have concluded that an officer's brief taking of a person's driver's license or identification papers—often including a check for outstanding arrest warrants for that person—does not turn an otherwise voluntary encounter into a seizure subject to Fourth Amendment restrictions. See *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992) (an officer's possession of the driver's license of a person using the pay phone near his car while that officer made a

warrants check with his hand-held radio by the defendant's car did not turn a voluntary encounter into a seizure); *United States v. Withers*, 972 F.2d 837, 842 (7th Cir. 1992) (an officer's brief examination of a person's airline ticket and driver's license in a public airport corridor did not turn a voluntary encounter into a seizure); *United States v. Tavolacci*, 895 F.2d 1423, 1425-26 (D.C. Cir. 1990) (concluding that the "initial holding and review" of identification documents of a passenger on a train while that train was stopped at a station did not constitute a seizure, although the court noted that a prolonged retention or a retention accompanied by another act might); *People v. Lampkin*, 2002 WL 15668 (Cal. App. 2002) (unpublished opinion) (an officer's possession of an identification card for "a couple of minutes" to check for warrants on a person who was sitting in a parked car did not turn a voluntary encounter into a seizure); *Golphin v. State*, 945 So. 2d 1174 (Fla. 2006) (plurality opinion) (an officer's brief possession of the nondriver's identification while checking warrants through that officer's hand-held radio did not turn a voluntary encounter into a seizure); *State v. Stacy*, 121 S.W.3d 328, 332-33 (Mo. App. 2003) (an officer's possession of a license for a brief period while that officer checked for warrants with a hand-held radio in the presence of the pedestrian did not turn a voluntary encounter into a seizure); *State v. Adams*, 158 P.3d 1134 (Utah App. 2007) (an officer's possession of a pedestrian's license for up to a minute while checking for warrants with a portable radio did not turn a voluntary encounter into a seizure).

I recognize that the lengthy retention of such papers, often accompanied by the officer's retreat to a nearby patrol car to conduct a records check, may turn an otherwise voluntary encounter into a seizure. *E.g.*, *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) (a seizure found when a driver was approaching his car to leave an airport with his luggage was then stopped by federal agents, who requested and then retained his ID for 20 to 25 minutes in an airport parking lot); *State v. Grace*, 28 Kan. App. 2d 452, 17 P.3d 951, *rev. denied* 271 Kan. 1039 (2001) (a seizure found of two individuals in a parked car when the officers took possession of their ID's and spent approximately 25 minutes running warrant checks); *State v. Dixon*, 218 S.W.3d 14, 19-21 (Mo. App. 2007) (a seizure found when an officer took the driver's license of a person whose car had broken down on a roadway back to patrol car to run warrants check and told that person to stay in his vehicle, events that took place after the person had said he didn't need any assistance from officer); *People v. Mitchell*, 355 Ill. App. 3d 1030, 1035, 824 N.E.2d 642, *appeal denied* 215 Ill. 2d 611 (2005) (a seizure found when an officer took a pedestrian's driver's license back to the patrol car to check for warrants because "a reasonable person . . . would not have felt free to approach the squad car, knock on the window, and demand the immediate return of his identification").

Further, the retention of a driver's license may be especially problematic when a seizure has already occurred, such as in the typical traffic stop, and the officer takes the

driver's license back to a patrol car. See *United States v. Weaver*, 282 F.3d 302, 309-11 (4th Cir. 2002) (noting that retention of driver's license "is a highly persuasive factor in determining whether a seizure has occurred" in a traffic stop since a license is required to drive away). But those are not the facts of Shafer's case.

The officer's use of Shafer's driver's license was quite brief and took place immediately outside Shafer's vehicle. Shafer had not been going anywhere—he was already at his own home, and he showed no interest in leaving. The officer's brief handling of Shafer's driver's license did not turn this encounter into a seizure under Fourth Amendment caselaw. During an encounter, an officer may "ask to examine the individual's identification" without triggering Fourth Amendment limitations. *Bostick*, 501 U.S. at 435. On the facts of Shafer's case, the officer's brief examination of Shafer's identification did not constitute a seizure.

With neither a search nor a seizure, there is no Fourth Amendment violation. The district court was right to deny Shafer's motion to suppress the physical evidence.

II. *The Record Does Not Show That Shafer Waived His Right to a Jury Trial, So He Is Entitled to a Jury Trial if the Case Is Retried.*

A criminal defendant's right to a jury trial is guaranteed by both constitution and statute. *State v. Larraco*, 32 Kan. App. 2d 996, Syl. ¶ 1, 93 P.3d 725 (2004).

Recognizing the importance of this right, the Kansas Supreme Court long ago set out clear rules to follow before a defendant can knowingly waive this right. Specifically, the defendant must be advised by the court of his right to a jury trial and must then "personally waive this right in writing or in open court for the record." *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 (1975).

But the State has cited items from the record that do not meet the standard set out in *Irving*. At the beginning of the trial transcript, the district judge announced that Shafer's attorney had told the judge that Shafer wanted to waive a jury trial and proceed to try the case to the judge. Shafer's counsel agreed; Shafer was present.

Although Shafer was present, the record does not show that he was advised that he had a right to a jury trial. Nor does the record show Shafer's *personal* waiver of that right. The right to a jury trial may not be waived by an attorney unless the record also shows that the attorney has discussed the matter fully with the client and that the client has voluntarily waived the right. *Larraco*, 32 Kan. App. 2d 996, Syl. ¶ 4. Because the record does not show either that the district court advised Shafer of his right to a jury trial or that Shafer personally waived it, Shafer's jury-trial right was not waived in a manner meeting these minimum standards. Trial to a judge will not suffice when a defendant has not waived that right.

I would uphold the district court's denial of the motion to suppress. Even so, Shafer was entitled to a jury trial, but he did not receive one. I therefore concur with the majority's decision to reverse and remand, though for an entirely different reason. I dissent from the majority's decision that the State may not use key evidence against Shafer on retrial.