No. 17-118640-A

IN THE

COURT OF APPEALS OF THE STATE

OF KANSAS

THE STATE OF KANSAS
Plaintiff/Appellant

v.

LEE SAWZER SANDERS,
Defendant/Appellee

BRIEF OF APPELLEE

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

Reid T. Nelson #12726
Capital and Conflicts Appeals Office
701 S.W. Jackson, 3rd Floor
Topeka, KS 66603
Phone: (785) 296-1833
FAX: (785) 296-7418
rnelson@sbids.org
Attorney for Appellant

Table of Contents

Nature of the case

This is a State's interlocutory appeal from the district court's suppression of evidence, which was based on the unlawful stop and arrest of Lee Sanders.

Statement of the Issue

Issue I. The district court did not err in granting Mr. Sanders' suppression motion. Substantial competent evidence supports that decision.

Factual statement

The State charged Mr. Sanders with possession of methamphetamine, and unlawful use of drug paraphernalia. (R. I, 12-14). After the suppression hearing the court suppressed evidence from the search. (R. III, 43).

The two officers offer their versions of events.

Two officers testified at the suppression hearing as to why Mr. Sanders was arrested. First, Officer Belt testified that on December 12, 2016, he was at 725 S.W. Topeka Boulevard, where he and his partner had been called to a disturbance, unrelated to Mr. Sanders. (R. III, 4-5, 12).

He alleged that the officers parked in a Dominos' parking lot, and then walked next door to respond to a call. (R. III, 18). After they finished with that, at 6:45 p.m., they returned to their vehicle to leave. (R. III, 19). Dominos was open for business and the parking lot light was on. (R. III, 19). At this time, Officer Belt testified that Mr. Sanders' car was parked directly in front of theirs,

and both cars were facing the same direction. (R. III, 5, 16). He initially testified that he saw Mr. Sanders "opening up the driver's door" to his car. (R. III, 5). Then he testified that, "He was messing with the handle. I don't know if he had keys or not, but he was messing with the handle, stopped , looked over to his — on his right shoulder, which would have been towards myself and Officer Purney, immediately stopped messing with the handle, and began walking to the west towards the alleyway." (R. III, 6).

He agreed with this description by defense counsel:

> Q. And you decide to follow Mr. Sanders because he did not get into his vehicle and walked off; correct?
> A. In a roundabout way, yes.

(R. III, 19).

Officer Belt next agreed with defense counsel that ***he did not "see any indication that Mr. Sanders was trying to steal that vehicle."*** (R. III, 23) (Emphasis added). He did not see any burglary tools, none of the car windows were broken, and Mr. Sanders had a key to his car. There was no description of the vehicle having been stolen. (R. III, 23). At preliminary hearing, referring to opening up one's car door, he had agreed that there was "***nothing illegal about that***." (R. II, 14) (Emphasis added).

This exchange also occurred during Belt's suppression hearing testimony:

> Q. What was the disturbance?
> A. I don't recall. It was unrelated.
> Q. Well, you responded to a call.

...

Q In fact, you don't even know who the reporting party was, do you?
A. Not off the top of my head.
Q. Do you know who you were looking for?
A. I don't recall.
Q. Did you write it down?
A. I'm sure I did, but I don't have it on me.
Q. Well, in this case, you know that Mr. Sanders was not that person that you had been looking for the other call; is that correct?
A. I don't recall that part.
Q. Okay. Were you looking for a male or a female when you got called in for the unwanted person?
A. I don't recall.
Q. You don't know if you were looking for a black or a white person; correct?
A. I don't recall.

(R. III, 12-13).

He had no "independent recollection" of the disturbance call. (R. III, 21-22).

Officer Belt's partner, Officer Purney, testified they were elsewhere, and he did not see the alleged event.

According to Officer Purney, the incident occurred while they were driving down the road, not on their way to a call. They were in "free mode." He stated, "There was no call we were going to, nothing to respond to." (R. III, 25-26). And as they were driving, Officer Belt told Purney that he saw Mr. Sanders attempting to get into a car. Once he opened up the door and he saw them, then he closed the car door and fled to the alley behind the case address. (R. III, 25).

Purney clarified that Mr. Sanders walked to the alley. (R. III, 26). Initially Officer Purney stated that he could not "confirm or deny" that Mr. Sanders' car was legally parked. (R. III, 27). Then he agreed that Mr. Sanders' car was properly parked in the Dominos' parking lot stall. (R. III, 27).

Officers look for Mr. Sanders.

Next, Officer Belt testified that the officers pulled their car around into an alley behind Dominos, looking for Mr. Sanders. Officer Belt saw Sanders on the south side of 725 Topeka, and opined that Mr. Sanders was trying to conceal himself next to a drainpipe. (R. III, 6). At preliminary hearing he agreed that Mr. Sanders weighs 300 pounds, and would not be able to hide behind the pipe. (R. II, 16). He clarified at preliminary hearing that Mr. Sanders had his back against the wall in the alley, but felt Mr. Sanders was trying to make himself look smaller. (R. II, 16).

Officer Belt testified that he saw Mr. Sanders walk or run towards Sanders' vehicle, and Officer Belt "kind of hollered at him, hey, I would like to speak with you." (R. III, 7). Then Sanders ran to the east side of 725 Topeka, and ran north along the sidewalk. Officer Belt got out of his car, and saw Sanders. Then Sanders turned around and ran back south towards Sanders' vehicle. Officer Belt ran behind him, told him to stop, and Sanders got to his own vehicle. Then the officer placed him in handcuffs. (R. III, 8).

After handcuffing him, he began to pat him down. (R. III, 32). The officer asked if he had any weapons. Sanders said he had a knife in his pocket, but it turned out to be a key. (R. III, 32). The officer continued searching, and found a "methamphetamine pipe" inside his jacket, a deck of cards, and I.D.. (R. III, 9-10). Officer Purney used that I.D. to run him for wants and warrants, and eventually discovered he had a felony warrant for his arrest. (R. III, 26). In the deck of cards, officer Belt discovered a small baggy of white substance. (R. III, 11).

Officer Belt initially asserted that he had pursued Mr. Sanders because they had a lot of stolen vehicles in the area, and "it was suspicious when he came out, was messing with a handle of a car, and walks away when he saw police." (R. III, 22).

On cross-examination, defense counsel asked him to clarify his knowledge of the car thefts, and his perception of the event:

Q. A lot of stolen vehicles. How many stolen vehicles?
A. I don't have the stats on me.
Q. Did you write them in your report?
A. The stats, no.
Q. **Did you, did you see any indication that Mr. Sanders was trying to steal that vehicle?**
A. Not at the moment.
Q. You didn't see any burglary tools; correct?
A. No.
Q. None of the windows were broken; correct?
A. No.
Q. He had a key to the car; correct?

A. From what I recall.
Q. No one had called in a description of that vehicle as having been stolen; is that right?
A. Nope.
Q. Did you go in and talk to anybody in Dominos to see if he had been a customer there?
A. I did not.
(R. III, 23).

In his preliminary hearing testimony Officer Belt testified as to Sanders' walking. He stated that he saw Mr. Sanders "walk" down into the alleyway. (R. II, 14). He testified that after Mr. Sanders left the side of the building he was walking back towards the vehicle. (R. II, 6). He testified that in the front area, when he tried to intercept him, Sanders tried to "walk" away again. (R. II, 19). This officer agreed that Mr. Sanders was "kind of, sort of" walking the entire time. (R. II, 20). He later characterized the situation as Sanders "walking away from us multiple times." (R. II, 27).

Officer Belt in his suppression hearing testimony stated that at the end, Mr. Sanders got back to his vehicle, which is where Officer Belt handcuffed him. (R. III, 20). Officer Purney stated that Officer Belt "took him into custody" and walked him back to the car. (R. III, 29).

The court made findings related to reliability and the stop:

> "Counsel, this hearing is troublesome to the Court. I've got what looks like, based on the Court's observations, two relatively young officers and there's been no testimony about how long they've been on the force or how long they've been law enforcement officers. But they both appear relatively young to the court.

I am usually one who is usually very supportive of law enforcement being able to do the things they need to do for public safety, being able to do the things they need to do when it comes to an encounter. But the officers have had some contradictory testimony where one says that they were already stopped and parked in the parking lot behind the vehicle that the defendant was found to be either messing with the handle or whatever else was going on, and the other officer says they were just driving down the road and on uninitiated activity and found or saw, observed what the defendant was allegedly doing. …the officer says, no, they were driving by and just happened to observe this."

(R. III, 38-39).

The court continued,

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

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

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

the officers and their facial expressions as they testified separately and watched and listened to what their conduct was, the things that might have been questionable, they could not recall, were not aware of, and it was things that they seemed—the impression I get from listening to their testimony is that they pieced things together after the fact.

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

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

(R. III, 39-41) (Emphasis added).

Arguments and Authorities

Issue I: The District Court did not err in granting Mr. Sanders' motion to suppress.

Standard of Review

This court reviews a district court's decision on a motion to suppress in two stages. First, it determines whether substantial competent evidence supports the district court's factual findings. It does not reweigh the evidence, nor does it assess the credibility of witnesses. Next, the court reviews, with an unlimited standard of review, the ultimate legal conclusions drawn by the district court from those factual findings. See *State v. Martinez,* 296 Kan. 482, 485, 293 P.3d 718

(2013). Substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. May,* 293 Kan. 858, 862, 269 P.3d 1260 (2012). When the material facts to a trial court's decision on a motion to suppress evidence are not in dispute, the question of whether or not to suppress is a question of law over which we have unlimited review. *Martinez,* 296 Kan. at 485. The State bears the burden of proof for a suppression motion. It must prove to the trial court the lawfulness of the search and seizure. *State v. Cleverly*, 305 Kan. 598, 605, 385 P.3d 512 (2016).

"The Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights prohibit unreasonable governmental searches and seizures. Any warrantless search is unreasonable unless it falls within an exception recognized in Kansas cases." *State v. Warren*, 38 Kan. App. 2d 697, 698, 171 P.3d 656, 658 (2007).

The *Terry* stop exception is as follows:

> "A law enforcement officer may stop any person in a public place based upon a specific and articulable facts raising a reasonable suspicion that such person has committed or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). K.S.A 22-2402(1), the Kansas stop and frisk statute is a codification of the Fourth Amendment search and seizure principles expressed in *Terry*."

State v. Slater, 267 Kan. 694, 696-97, 986 P.2d 1038 (1999)."

Overview of credibility determinations.

The district court is in a position to see the witnesses testify, and our Court of Appeals frequently states that it is not in a position to independently assess witnesses' credibility, and that it has no license to do so. See *State v. Campbell,* 297 Kan. 273, 300 P.3d 72, 76 (2013) (appellate court will neither reweigh credibility nor otherwise rebalance conflicting evidence in reviewing motion to suppress); *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008) ("[T]he ability to observe the declarant is an important factor in determining whether he or she is being truthful."). *State v. Ransom,* 289 Kan. 373, 381, 212 P.3d 203 (2009) (the district court makes credibility judgments that the Court of Appeals is "neither equipped nor authorized to make." The district court may regard one version of events as reliable, and may discount the other).

The federal appellate standard also defers to the trial court. "At a hearing on a motion to suppress, the credibility of the witnesses and the weight to be given the evidence, together with the inferences, deductions and conclusions to be drawn from the evidence, are all matters to be determined by the trial judge." *U.S. v. Walker,* 933 F.2d 812, 815 (10th Cir.1991).

Argument

In this case the court made credibility and reliability determinations in the face of significantly varying accounts of what occurred.

Officer Belt, the only witness to testify that he saw Mr. Sanders at his car, characterized the initial situation in two different ways. First, Officer Belt stated, when answering defense counsel's questions, that he saw "***no indication***" that Mr. Sanders was trying to steal his own vehicle. (R. III, 23). To support this, he agreed there were no burglary tools, broken windows, or reports of a stolen car. Plus, Mr. Sanders had a key to the car. (R. III, 23). This is substantial competent evidence that supports the court's finding that there was no reasonable articulable suspicion of a crime.

Officer Belt also made statements somewhat supportive of the State's position, stating that he did "*not know*" if Sanders was trying to break into a vehicle or what he was doing with the vehicle. (R. III, 6). And he said that Sanders "fled" to the alley. (R. III, 26). But he had at other times been clear that Sanders had merely walked to the alley. (R. III, 6).

Here, the court heard both accounts, and assessed the officer's credibility and reliability, and accepted the first statement, that there was no indication that a crime was occurring. There is substantial competent evidence.

Furthermore, in all the court's determinations of whether the state carried its burden of persuasion on its factual assertions, it must be born in mind that the court found the officers' testimony as overall lacking in necessary reliability. It stated,

> [*T*]*he officers have had some contradictory testimony where one says that they were already stopped* and parked in the parking lot behind the vehicle that the defendant was found to be either messing with the handle or whatever else was going on, and the other officer says they were just driving down the road and on uninitiated activity and found or saw, observe what the defendant was allegedly doing. …***the officer says, no, they were driving by and just happened to observe this***.

(R. III, 38-39) (Emphasis added).

The court's concern about the overall reliability of the testimony from these officers was supported by substantial competent evidence. Officer Belt's testimony and Officer Purney's testimony were directly contradictory in terms of where the officers were located, or why they were even at the scene. With that in mind, the court appropriately attached little weight to the officers' testimony about suspicious behaviors of Mr. Sanders, particularly the part about entering his own car.

Officer Belt's testimony, of being at a location immediately adjacent to Mr. Sanders' car, suggested that both officers had a bird's eye view of Mr. Sanders and his car. This is an important fact that would support the ability of Officer Belt to get a good look at what Mr. Sanders was doing.

However, Officer Purney indicated otherwise, stating that they were actually driving by when officer Belt claimed to have seen the event. (R. III, 25). The court was right to be concerned. Officer Belt's testimony of having a bird's eye view, was not questionable simply because it was contradicted by Officer Purney, but also because if the officers were sitting still, and were immediately

facing Mr. Sander's car, it would be odd if Officer Purney did not see the same thing that Officer Belt saw.

When asked by defense counsel about details surrounding this, that might support Officer Belt's testimony about being parked so close to Mr. Sanders, Officer Belt was unable to support this version of events with any details about why there were there. As the trial court noted, Officer Belt conceded that he could recall very little of the surrounding events.

Because the officers had opposing testimony about the very reason for being there and the location from which they observed events, there are concerns about whether Officer Belt was where he claimed he was and his ability to perceive this event the way he claimed. The court appropriately assigned little weight to Officer Belt's observations.

Next, Officer Belt gave different descriptions of what he saw. On the one hand, he described that Sanders was "messing with the handle" and attempting to get in the car when he saw officers and walked away. (R. III, 22). This makes it sound as if criminal behavior is afoot, because burglars spend time trying to get car doors open. However, this description omitted the critical fact, that he gave at another part of his testimony, that Mr. Sanders actually opened his car's door. So by one version it appears as though Sanders was trying to break into a car, and the other version is supportive of someone who is simply opening their

own car door. The court which observed Officer Belt's testimony accorded weight to the idea that this was the more innocent act of opening and closing a car door, and walking away.

The officer's attempt to characterize this as someone trying to break into a car was also contradicted by his statement later that he saw "no indication" of criminal behavior.

The trial court did not make a finding that this was a high crime area.

An appellate court presumes that the district court made the factual findings necessary to support its decision." *State v. Gaither,* 283 Kan. 671, 686, 156 P.3d 602 (2007).

If the state proves that there is a "high crime area," and also proves that the defendant engaged in "headlong" flight, these can create reasonable suspicion for a limited *Terry* stop. See *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000) (describing factors, including requirement of "headlong flight").

However, State did not really argue these factors to the court, during its summary of what supported reasonable suspicion. (R. III, 36, lines 1-10). The trial court did not make such findings, nor was it asked to.

Further, Officer Belt's testimony did not establish this was a high crime area. First, as mentioned, the court did not accord the testimony much reliability because of fundamental contradictions.

Next, Officer Belt only made one isolated statement supporting crime in the area: "We had a lot of stolen vehicles in the area." (R. III, 22). And when this was challenged by the defense, he did not support it. Counsel asked him to merely provide some idea of the number of stolen vehicles, to which he responded, "I don't have the stats on me." Further, it was apparently not an important enough fact to have written it in his report, nor was it mentioned at preliminary hearing.

Defense counsel argued to the court that there was a "progression" of reasons being given to support the stop. (R. III, 36). In other words, things were being brought in to support the stop which had not been mentioned before. This appears to be one. The court was concerned enough about their overall testimony to find that the officers were "filling in the blanks after the fact." (R. III, 40).

The court's decision to find that the state had not carried its burden of proof on this point was supported by substantial competent evidence, including assessments of reliability.

The State did not carry its burden of proving that Mr. Sanders engaged in "headlong flight."

Not only must the State prove that this was a high crime rate area, but it must couple that with proof that a suspect has engaged in headlong flight. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000) ("headlong flight" can be suggestive of wrongdoing).

Officer Belt testified that Mr. Sanders walked away from his own vehicle. (R. III, 19). He testified that Mr. Sanders was "walking toward the alley." (R. III, 6). This is not headlong flight.

Although police officers may approach and question an individual, the individual may refuse to answer any questions, and may go on their way. *Florida v. Royer,* 460 U.S. 491, 497–98, 103 S.Ct. 1319, 1323–24, 75 L.Ed.2d 229 (1983). In *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000), the Court determined that "headlong flight" may be suggestive of wrongdoing. But in that case the defendant was holding an opaque bag, and after he saw officers he *ran* through a gangway and an alley. Further, that it was a high crime area was uncontested, as the officers were in a car caravan "converging on an area known for heavy narcotics trafficking." That there was "headlong flight," in this "high crime area" were factors beyond any dispute. The basis for the assertion was not challenged, as it was in this case.

Whereas, walking away from officers is treated differently. See *In re J.G.*, 2004 PA Super 385, 860 A.2d 185, 189 (2004) (court distinguishes between someone walking away from police, versus being in "headlong flight," the latter providing no grounds for a *Terry* stop even in a high crime area); *Greeno v. State*, 861 N.E.2d 1232, 1233 (Ind. Ct. App. 2007) (an officer without reasonable suspicion of wrongdoing may approach a citizen, but that citizen remains free to ignore the questions and walk away); *Woody v. State*, 765 A.2d 1257, 1264 (Del. 2001) ("An individual may walk away from an officer who initiates an encounter and refusal to cooperate with the officer cannot be the sole grounds constituting reasonable suspicion.").

In the hearing, there was testimony about running, but it was unreliable. Officer Belt asserted that after he saw Sanders in the alley he "took off running," (R. III, 7), and then did so again in the front area heading to his own car. (R. III, 7).

And yet at preliminary hearing, Belt testified that Mr. Sanders walked to the alley, and left the side of the building walking back towards the vehicle. And he walked away from him in the front. (R. II, 14, 6, 19). In fact, Officer Belt asserted he was "kind of, sort of" walking the entire time. (R. II, 20). His conclusion at that hearing was that Sanders was "walking away from us multiple times." (R. II, 27).

Therefore, Officer Belt's divergent accounts of an important fact in this case again supports the court's decision not give the overall testimony much weight. As defense counsel pointed out, his answers were evolving.

The court, in observing the testimony could attach little weight to the officer's assertion of "flight," in light of the conflicts and evolving testimony.

In summary, in judging the credibility and reliability of the statements by the officers, the court could have fairly concluded that the officers were driving when this occurred; that they did not have a good view or were not even watching it; that the owner of the car simply opened his car door, and then walked away; and that there was insufficient evidence of a high crime area. And it could have concluded that Mr. Sanders desired to avoid contact with the officers, but that he was not engaged in headlong flight.

The officers lacked probable cause that Mr. Sanders had committed a crime when they arrested him.

The officers did not have probable cause to arrest Mr. Sanders. As soon as Officer Belt put him in handcuffs, Mr. Sanders was arrested under K.S.A. 22–2202(4).

"A person is seized when an officer accosts the person and restrains the person's freedom to walk away." *State v. Hill,* 281 Kan. 136, 142, 130 P.3d 1 (2006). A person may be considered under arrest if they are physically restrained. 281 Kan.

at 143, 130 P.3d 1. "[T]he test for whether a seizure and an arrest has occurred is based on what a reasonable person would believe under the totality of the circumstances surrounding the incident." 281 Kan. at 145.

Probable cause to arrest exists when an officer has sufficient knowledge that would assure a reasonable person that a crime has been committed or is being committed and that the person to be arrested is or was involved in a crime. *State v. Hill*, 281 Kan. at 146, 130 P.3d 1. There was no evidence establishing probable cause to arrest.

Officer Belt testified that this was not an arrest, but suggested it was a detention for officer safety or to prevent flight. (R. III, 8). But the officer immediately put Sanders in handcuffs, prior to any issues with officer safety or flight could arise. The officer only mentioned officer safety when prompted to do so by the prosecutor.

And, again, the overall reliability of this officer's testimony as to the events observed are in doubt. While Officer Belt said Sanders "got to the vehicle" and was placed in handcuffs (R. III, 8), his partner said that Officer Belt took him into custody, and then "walked him back to the car." (R. III, 29). This is just another of many instances where testimony did not line up, and the court acted within its wide discretion to find that the testimony lacked the reliability necessary, and that the State had not carried its burden.

The pat down search

Appellant has a section explaining how the pat down search was reasonable, because Sanders told the officer that he had a knife in his pocket. (Appellant, 20-23). However, he had already been illegally stopped, and placed in handcuffs. The drug paraphernalia and drugs were fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The Attenuation Doctrine and Inevitable Discovery were raised for the first time on appeal and were not preserved.

Appellant argues that if the Court finds the search and seizure to be unlawful, the items would have been discovered when he was arrested for the warrant. However, the "meth pipe" was discovered prior to the warrant, and presumably was the reason why Mr. Sanders was detained for the length of time it took to run a warrants check.

The rule for preserving an issue was set forth:

> We generally refuse to consider an issue on appeal if it has not been raised in the district court. See, *e.g., State v. Shadden,* 290 Kan. 803, 813, 235 P.3d 436 (2010). Specifically, we have rebuffed a defendant's effort to advance new reasons to support suppression for the first time on appeal. See *State v. Mack,* 255 Kan. 21, 27–28, 871 P.2d 1265 (1994). What is sauce for the goose is sauce for the gander, and the State's mirror image effort to advance new reasons to avoid suppression must likewise be rejected.
>
> We also note that Supreme Court Rule 6.02(e) (2011 Kan. Ct. R. Annot. 39) provides that an appellant must "explain why" an issue not considered in district court should be considered for the first time on appeal. *State v. Perez,* 292 Kan. 785, 789, 261 P.3d 532 (2011).

State v. Johnson, 293 Kan. 959, 964, 270 P.3d 1135, 1139 (2012).

Appellant does not supply a reason for why these grounds were not raised to the trial court, or why they should be considered for the first time on appeal. Appellant pointed to the following State's argument to the court, as preserving the attenuation doctrine issue:

> "The State would submit that there is a progression from reasonable suspicion in this case based on what happened at the car door and then the defendant trying to conceal himself up against this building and once he was apprehended from running, then he consented to the search and that search was, again, based off of officer safety and that it wasn't until after the warrant, after he was for sure going to jail that the methamphetamine was found inside the deck of cards, Your Honor."

(R. III, 35-36)

The State did no briefing of the issue for the court, and in the above passage there does not appear to be any argument addressing attenuation doctrine, or inevitable discovery. Those words were not spoken, no case was mentioned. And the trial court's passing mention of the phrase, without being asked to consider it and without making any findings, is also insufficient.

The court stated,

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

(R. III, 41).

The attenuation doctrine is fairly complex, governed by a list of factors set forth in case law, and it required analysis by the parties and factual and legal findings by the court. Under that doctrine,

> "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.' *Hudson,* [547 U.S.] at 593, 126 S. Ct. 2159."

Utah v. Strieff, ___ U.S. ___, 195 L.Ed.2d 400 136 S.Ct. 2056, 2061 (2016).

The causal link from the illegality to discovery of the meth pipe was not remote. The meth pipe was found immediately after officers took Sanders into custody. He was likely being held, because of that, for the time it took to discover a warrant. So, the illegality was not interrupted by the warrant, but rather led to a meth pipe, leading to a warrant, and then the baggie.

The Supreme Court has cautioned that one factor, the temporal proximity of the intervening event to the illegality, favors attenuation only if a substantial time has elapsed between the officers' conduct and the discovery of evidence. Less than two hours, as in our case, is insubstantial. *Brown v. Illinois*, 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) ("less than two hours," no attenuation). Here, the discovery was immediate.

The second factor is the presence of the intervening circumstance, and whether there was a connection between the circumstance and the illegal search.

In *Strieff*, the warrant was "entirely unconnected with the stop." 136 S.Ct. at 2062. No one addressed this issue below, but it appears that the warrant was discovered directly as a result of the stop and discovery of the meth pipe. Finally, as to whether the police misconduct was purposeful or flagrant, the officers' actions were purposeful, as they pursued a stop without reasonable suspicion, and there were no good faith mistakes as in *Strieff*.

Next Appellant argues for inevitable discovery, but this was not argued to the court either. In its brief, Appellant argued for the first time,

> "The meth pipe and meth in the deck of cards on Sanders' person would have been discovered based on the Officer Belts' testimony that Sanders was arrested for the outstanding warrant. (R. III, 11). As such, the district court should have applied the inevitable discovery exception to the exclusionary rule."

(Appellant's brief, 28).

The district court did not make findings on inevitable discovery, because no one asked it to. Nevertheless, the meth pipe would not have been inevitably discovered based on the outstanding warrant, because it had already been discovered *prior* to the warrant. Inevitable discovery is simply not applicable.

Unless the State presented evidence that every time these officers conducted a *Terry* stop — which by its nature is to be brief and not intrusive — they also hold people for a sustained period to run them for warrants, it has not sustained its burden on inevitable discovery. The opposite is hopefully true,

where officers in usual cases quickly dispel their suspicions and release a suspect.

Even if it had presented such evidence, the State must demonstrate by a preponderance of that evidence that the methamphetamine would have eventually been discovered by other lawful means. Setting aside that the meth pipe that was found was a result of the illegal search (and which logically supplied motivation to search the cards) the state would need to put on evidence to show that the contents of the deck of cards would have been discovered through an inventory search at some point. See, e.g., *State v. Stowell*, 286 Kan. 163, 168, 182 P.3d 1214, 1217 (2008) (finding the State had failed to carry burden because it did not present any evidence that the defendant would have been booked into jail or any evidence of jail search procedures).

Conclusion

For the foregoing reasons the defense respectfully requests that this court affirm the trial court's decision to suppress the evidence.

Respectfully submitted,

/s/ Reid T. Nelson

Reid T. Nelson #12726
Capital and Conflicts Appellate Defender
701 Jackson, 3rd Floor
Topeka, Kansas 66603
Phone: (785) 296-1833
FAX: (785) 296-7418
rnelson@sbids.org

Attorney for Defendant

Certificate of Service

I, Reid T. Nelson, certify that I caused a correct copy of the above brief to be sent by e-mail to Rachel Pickering at rachel.pickering@ag.ks.gov; and Kristafer Ailslieger at kris.ailslieger@ag.ks.gov.

on this 16th day of February, 2018.

/s/ Reid T. Nelson
Reid T. Nelson #12726