NOT DESIGNATED FOR PUBLICATION

No. 118,237

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellant*,

v.

ERICA RENEE TATRO,
*Appellee*.

MEMORANDUM OPINION

Appeal from Saline District Court; RENE S. YOUNG, judge. Opinion filed April 13, 2018. Reversed and remanded.

*Brock R. Abbey*, assistant county attorney, *Ellen Mitchell*, county attorney, and *Derek Schmidt*, attorney general, for appellant.

*Joel Ensey*, Salina Regional Public Defender, of Salina, for appellee.

Before LEBEN, P.J., GARDNER, J., and BURGESS, S.J.

PER CURIAM: The State has taken an interlocutory appeal from the Saline County District Court's suppression of evidence seized during the search of Erica Renee Tatro. The State contends that the district court erred in concluding that Tatro was seized within the meaning of the Fourth Amendment, that the police officer lacked reasonable suspicion to conduct an investigatory stop of Tatro, and that the exclusionary rule applied under the circumstances. In looking at this case through the lens of *Utah v. Strieff*, 579 U.S. __, 136 S. Ct. 2056, 2061-62, 195 L. Ed. 2d 400 (2016), the decision of the district court is reversed and the case is remanded.

## FACTUAL AND PROCEDURAL BACKGROUND

At approximately 3:30 a.m. on June 4, 2017, Salina Police Officer Ricardo Garcia, while on routine patrol, observed a woman, later identified as Tatro, walking in the middle of a darkened street on the 600 block of South Phillips. That block of South Phillips was illuminated by streetlamps on the corners but not between intersections. Tatro was carrying a flashlight or some other illuminating device. Officer Garcia did not see Tatro point her light in the direction of any vehicles that might have been parked along the street.

Earlier in the evening, at about 11:30 p.m. or 12 a.m., Officer Garcia had received reports of "windows being shot out" of vehicles several blocks away in the 200 block of South Clark, the 300 block of South Clark, the 200 block of South Phillips, and the 400 block of East Prescott. The officer believed that Tatro's behavior was suspicious and circled around the block.

Officer Garcia parked his patrol car, directed his side lamp at Tatro, and then got out of his car and contacted her just west of the intersection of Prescott and Phillips on the 800 block of West Prescott. As he approached her, Officer Garcia directed Tatro to step over to the curb, ostensibly for the safety of both parties since she was in the street when the officer encountered her. Tatro complied, and Officer Garcia explained that he had stopped her because of the late hour and the vehicle burglaries occurring in the area. Officer Garcia asked her for her name, address, and date of birth, and Tatro provided the information to him.

Telling Tatro that he needed to verify her identifying information but would be right back, Officer Garcia left Tatro at the curb to run her information through the computer database and dispatch. Dispatch reported that Tatro had an outstanding bench warrant in municipal court for failing to appear. Officer Garcia arrested Tatro on the

warrant. Tatro admitted to using methamphetamine over the past couple months. Officer Garcia searched Tatro's purse and discovered a sock containing a glass pipe with white residue. The residue ultimately tested positive for methamphetamine. Inside Tatro's wallet, Officer Garcia discovered a plastic baggie containing white residue.

The State subsequently charged Tatro with possession of methamphetamine, possession of drug paraphernalia used to ingest a controlled substance, and possession of drug-packaging paraphernalia.

Tatro's counsel filed a motion to suppress the evidence of methamphetamine and drug paraphernalia, arguing that Officer Garcia lacked reasonable suspicion to conduct an investigatory stop of Tatro. Following an evidentiary hearing on July 27, 2017, the district court agreed and suppressed the evidence, announcing its decision from the bench several days later.

The State filed a timely notice of interlocutory appeal from the suppression ruling.

## DID THE DISTRICT COURT ERR IN SUPPRESSING THE DRUG CONTRABAND DISCOVERED IN THE SEARCH OF TATRO'S PERSONAL EFFECTS?

The State appeals the district court's suppression ruling pursuant to K.S.A. 2017 Supp. 22-3603. Because the district court's decision required suppression of the drug paraphernalia and controlled substances Tatro was charged with possessing, the ruling substantially impaired the State's ability to prosecute Tatro. See *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984). Consequently, this court may properly exercise jurisdiction over the State's interlocutory appeal.

When a district court's ruling on a suppression motion is challenged on appeal, an appellate court typically reviews the factual underpinnings of the decision under a

substantial competent evidence standard. However, the ultimate legal conclusion drawn from those facts is subject to plenary review. See *State v. Randolph*, 297 Kan. 320, 326-27, 301 P.3d 300 (2013). Where, as here, the material facts are undisputed, the suppression question becomes solely a question of law subject to unlimited appellate review. See *State v. Pettay*, 299 Kan. 763, 768, 326 P.3d 1039 (2014).

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and § 15 of the Kansas Constitution Bill of Rights protect individuals from unreasonable searches or seizures by the government. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *State v. Baker*, 306 Kan. 585, 589-90, 395 P.3d 422 (2017). The protections found in § 15 of the Kansas Constitution Bill of Rights are generally interpreted the same as the rights provided by the Fourth Amendment. See *State v. Thompson*, 284 Kan. 763, 779, 166 P.3d 1015 (2007) ("Kansas counts among the majority of states which have construed state constitutional provisions in a manner consistent with the United States Supreme Court's interpretation of the Fourth Amendment.").

A warrantless search is a categorically unreasonable search unless it fits one or more of a few well-delineated exceptions to the warrant requirement. *Los Angeles v. Patel*, 576 U.S. __, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015). One of these exceptions is search incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). However, the district court suppressed the evidence seized during the search of Tatro as fruit of the unlawful seizure of Tatro by Officer Garcia.

On appeal, the State makes three arguments challenging this ruling by the district court. First, the State contends that the encounter between Officer Garcia and Tatro constituted a voluntary encounter until the officer discovered the outstanding bench

warrant. Second, the State argues that, if the encounter was not voluntary, Officer Garcia possessed reasonable suspicion to conduct an investigatory detention of Tatro. The State does not attempt to justify the stop on the basis of public safety. Third, even if Officer Garcia unlawfully seized Tatro, the illegal stop was sufficiently attenuated from the discovery of the bench warrant to render the search of Tatro incident to her arrest reasonable under the Fourth Amendment.

*Proper Characterization of the Encounter*

Caselaw interpreting the Fourth Amendment has identified four types of police-citizen encounters: voluntary or consensual encounters, investigatory detentions, public safety stops, and arrests. *Thompson*, 284 Kan. at 772. The type of encounter dictates the quantity and quality of information the officer must possess to make the encounter lawful. See *State v. Glass*, 40 Kan. App. 2d 379, 382, 192 P.3d 651 (2008) (citing *State v. Toothman*, 267 Kan. 412, Syl. ¶ 5, 985 P.2d 701 [1999]). A voluntary or consensual encounter does not implicate the Fourth Amendment because a person who voluntarily interacts with law enforcement is not deemed to be seized. *State v. Tatum*, 40 Kan. App. 2d 846, 852, 196 P.3d 441 (2008). A police encounter is involuntary if a reasonable person in the position of the defendant would not have felt free to leave under the circumstances. *State v. Reiss*, 299 Kan. 291, 298-99, 326 P.3d 367 (2014).

In determining whether a police-citizen encounter is voluntary, a court should consider a nonexclusive list of factors including the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee. See *State v. Lee*, 283 Kan. 771, 775, 156 P.3d 1284 (2007).

The district court considered these factors in addition to others pertinent to this case as follows:

"As to these factors, the Court finds that only Officer Garcia was present during the encounter. Officer Garcia was driving a patrol vehicle and wearing his police uniform. He did not display his weapon. He did not make physical contact with her. Officer Garcia activated his alley light, or spotlight, and stopped his car. He exited his vehicle and told the defendant where to stand.

"Officer Garcia proceeded to ask the defendant a number of questions. He spoke to her in a polite, conversational tone. He then asked the defendant for identification and told her to wait while he ran her name and did a warrants check.

"After considering the totality of the circumstances, the Court finds that a reasonable person in the defendant's circumstances would have felt compelled to stop and would not have felt free to leave. These circumstances include that the stop occurred in the early morning hours, at 3:30 A.M., where there was minimal lighting, defendant was alone. Officer Garcia activated his stop light, stopped his vehicle, and told her where to stand. Defendant submitted to the show of authority.

"Officer Garcia did not ask the defendant if she minded answering questions. After defendant answered Officer Garcia's questions, he told her to wait while he ran her name and did a warrants check."

The State does not take issue with the district court's findings but argues that these circumstances would not make a reasonable person in Tatro's position feel that their liberty to terminate the encounter was restricted. The State's argument is not particularly persuasive. Officer Garcia parked his patrol car across the street from Tatro and shined his "alley light" on her. While Officer Garcia did not display his service weapon or use a commanding tone, he approached Tatro and directed her to return to the curb out of the street. Officer Garcia did not ask her if she was willing to answer some questions but explained that he was investigating some vehicle burglaries, suggesting that the questions were designed to determine whether Tatro was responsible for the burglaries. When the officer returned to his car to run Tatro's information, he indicated to her that she should remain where she was by telling her that he would be right back. Tatro was on foot, and Officer Garcia had a car.

Under these circumstances, a reasonable person in Tatro's position would not have felt free to continue walking away from Officer Garcia. See *Tatum*, 40 Kan. App. 2d at 852 (seizure occurs within the meaning of the Fourth Amendment when an officer's actions or statements demonstrate a show of authority that would lead a reasonable person to believe that they were not free to leave and the individual submits to that show of authority); *State v. Dionne*, No. 116,009, 2017 WL 1826284, at *5 (Kan. App. 2017) (unpublished opinion) (finding a police-citizen encounter to be involuntary when officer parked, shone spotlight on defendant, approached defendant, asked defendant numerous questions, commanded defendant to keep his hands where the officer could see them, and directed defendant to stand with another officer when the officer arrived at the scene). Even if Officer Garcia's demonstration of authority in directing Tatro back to the curb did not transform the encounter into an investigatory detention, his implicit order to remain while he conducted an investigation into her identifying information could be considered a seizure. See *State v. Williams*, 297 Kan. 370, 377, 300 P.3d 1072 (2013) ("When no physical force is involved, a seizure by show of authority occurs when the totality of the circumstances surrounding the incident would communicate to a reasonable person the person is not free to disregard the officer's questions, decline the officer's requests, or otherwise terminate the encounter, and the person submits to the show of authority."); *State v. Grace*, 28 Kan. App. 2d 452, 458, 17 P.3d 951 (2016) (asking for driver's license to conduct warrants check converted voluntary encounter into investigatory detention).

*Reasonable Suspicion*

Whether government intrusion is reasonable rests upon a balance between the State's interest in the intrusion and the individual's interest in remaining free from unwarranted government interference. *State v. Marx*, 289 Kan. 657, 661, 215 P.3d 601 (2009). A law enforcement officer is justified in conducting an investigatory detention of an individual in a public place but only when the law enforcement officer possesses specific and articulable facts supporting the officer's reasonable suspicion that the

individual is violating the law. *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014); *Marx*, 289 Kan. at 661-62; *State v. Pollman*, 286 Kan. 881, 886, 190 P.3d 234 (2008) ("[T]he State bears the burden of proving to the trial court the lawfulness of the search and seizure by a preponderance of the evidence."). Reasonable suspicion represents a minimal level of objective justification based upon the totality of the circumstances from the perspective of a trained law enforcement officer. Reasonable suspicion does not demand proof equivalent to probable cause but must be more than an unparticularized hunch. *State v. Moore*, 283 Kan. 344, 354, 154 P.3d 1 (2007). Reasonable suspicion is judged from the totality of the information known to the officer prior to the investigatory detention. See *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (noting that the objective standard of reasonable suspicion requires the court to ask whether the facts available to the officer at the moment of seizure or search would warrant a person of reasonable caution to believe the search or seizure was appropriate).

At trial, the State argued that Officer Garcia was justified in conducting an investigatory detention of Tatro for violating K.S.A. 8-1537. Even though Officer Garcia did not testify that this was the basis for stopping Tatro, the traffic infraction would provide an objective basis for conducting an investigatory stop. *Jones*, 300 Kan. at 637 (citing *Marx*, 289 Kan. at 662). Because the Fourth Amendment is concerned about objective rather than subjective reasonableness, the fact that Officer Garcia did not cite this reason as justification for stopping her does not render his actions objectively unreasonable. See *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (justification for investigatory detention not based upon officer's subjective motivations); *United State v. Sanchez*, 555 F.3d 910, 922 (10th Cir. 2009) (finding irrelevant under an objective standard whether the officer intended to arrest the defendant for some other crime than the crime ultimately charged); *United State v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998) (concluding that an officer's subjective intent to arrest the defendant for a particular offense is immaterial for analyzing search incident to arrest; search justified if objective facts would have supported arrest for an offense).

Nevertheless, the State does not pursue this argument on appeal and has, therefore, abandoned it. *State v. Williams*, 303 Kan. 750, 758, 368 P.3d 1065 (2016).

Officer Garcia stopped Tatro because it was late, i.e., 3:30 a.m., she was walking down the middle of a darkened street, she was using some sort of illumination device, and several vehicle burglaries had occurred recently in the general area. These circumstances do not rise to reasonable suspicion that Tatro was engaged in criminal activity. Assuming someone had a noncriminal purpose in walking down a darkened street, it is reasonable that he or she would carry an illumination device to light his or her way. Officer Garcia admitted that he did not see Tatro direct the light of her illumination device toward a parked car. Walking in the middle of the night might be unusual behavior, but it is not indicative of criminal behavior. Tatro was not behaving furtively but was walking in the middle of the street. As a woman alone at night, it is reasonable to believe that she might have been walking in the street for protection, i.e., the ability to see another person approaching her. While the reports of vehicle burglaries might be a reason that Officer Garcia was on heightened vigilance, reports of vehicle burglaries a few blocks away several hours earlier do not create a reasonable inference that Tatro was likely responsible. Individually and collectively, none of the circumstances Officer Garcia relied upon were sufficient to create a reasonable suspicion that Tatro was involved in criminal activity.

*Attenuation*

The State's third argument for reversing the district court's suppression ruling relies on *Strieff*, 579 U.S. at __, 136 S. Ct. at 2061-62. The State argues that the search of Tatro (incident to her arrest on the bench warrant) was sufficiently attenuated from any illegal investigatory detention to render the exclusionary rule inapplicable under the circumstances of this case.

In *Strieff*, law enforcement officers had been watching a suspected drug house for about a week. During that time, the officers had observed several visitors to the house who left after only a few minutes. One of the visitors was Strieff. When Strieff left the house, he walked to a nearby convenience store. In the parking lot, a law enforcement officer stopped Strieff, asked him some questions, and requested identification. Strieff produced a Utah identification card, and the officer ran the identification through dispatch, discovering that Strieff possessed an outstanding arrest warrant for a traffic violation. The officer arrested Strieff and searched him, finding a baggie of methamphetamine and some drug paraphernalia.

The United States Supreme Court assumed that the law enforcement officer had lacked reasonable suspicion to conduct an investigatory detention of Strieff and the State conceded the point. The Court then considered whether the discovery of the arrest warrant was sufficiently attenuated from the illegal seizure to preclude application of the exclusionary rule to the contraband found in a search incident to Strieff's arrest on the warrant. In conducting its attenuation analysis, the Court cited the three factors articulated in *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

> "First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, and 'particularly' significant, we examine 'the purpose and flagrancy of the official misconduct.' In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence. [Citations omitted.]" *Strieff*, 579 U.S. at __, 136 S. Ct. at 2062.

In applying the *Brown* factors, the *Strieff* Court held that the first factor of temporal proximity weighed in favor of Strieff. The officer found the drug contraband on Strieff's person within minutes after the stop. The Court noted that this factor is only applied in favor of the State when "'substantial time' elapses between an unlawful act and when the evidence is obtained." *Strieff*, 579 U.S. at __, 136 S. Ct. at 2062 (citing *Kaupp v. Texas*, 538 U.S. 626, 633, 123 S. Ct. 1843, 155 L. Ed. 2d 814 [2003]). This factor similarly should weigh in favor of Tatro under the facts of the present case. Watching the video from Officer Garcia's body camera, it is clear that the arrest and search of Tatro's belongings occurred within minutes of the initial stop.

In analyzing the remaining two factors, the court in *Strieff* determined that the facts weighed in favor of the State. With respect to the presence of intervening factors, the Court cited to *Segura v. United States*, 468 U.S. 796, 799-800, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), for the proposition that a validly executed search warrant constituted an intervening circumstance to preclude the suppression of evidence obtained in an illegal search of the residence before the warrant was obtained. Applying *Segura*, the *Strieff* Court then reasoned:

> "In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. 'A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions.' *United States v. Leon*, 468 U.S. 897, 920, n.21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (internal quotation marks omitted). Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputably lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety. See *Arizona v. Gant*, 556 U.S. 332, 339, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (explaining the permissible scope of searches incident to arrest)." *Strieff*, 579 U.S. at __, 136 S. Ct. at 2062-63.

This court is bound to follow the United States Supreme Court's interpretation of Fourth Amendment law. Accordingly, we are guided by the reasoning of *Strieff*.

In analyzing the presence of an intervening factor test enunciated in *Brown*, the facts related to the respective officer's knowledge of pre-existing arrest warrants before the initial illegal detentions in the present case and the *Streiff* are legally indistinguishable. Both Officers Garcia and Fackrell respectively stopped Tatro and Strieff for the investigation of criminal activity. For purposes of the *Strieff* court's analysis, both Officer Garcia and Officer Fackrell lacked reasonable suspicion to detain the individuals. During the course of the illegal detention, both officers learned that the individuals possessed valid arrest warrants. Accordingly, the existence of an arrest warrant on Tatro provides an intervening circumstance that dissipates the taint of the initial illegal seizure under the reasoning of *Strieff*.

With respect to the third *Brown* factor—the purpose and flagrancy of the official misconduct—the United States Supreme Court noted that the unconstitutional conduct in seizing Strieff without reasonable suspicion does not necessarily constitute flagrant misconduct. See *Strieff*, 579 U.S. at __, 136 S. Ct. at 2064 ("For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure.").

> "Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was s short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to 'find out what was going on [in] the house.' Nothing prevented him from approaching Strieff simply to ask. See *Florida v. Bostick*, 501 U.S.

> 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) ('[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions.'). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.
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> "While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a 'negligibly burdensome precautio[n]' for officer safety. *Rodriguez v. United States*, 575 U.S. __, 135 S. Ct. 1609, 1616, 191 L. Ed. 2d 492 (2015). And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest. [Citations omitted.]" *Strieff*, 579 U.S. at __, 136 S. Ct. at 2063.

The *Strieff* court in analyzing this factor appeared to focus on three circumstances of the illegal detention: (1) the nature of the officer's mistaken judgment; (2) the officer's conduct throughout the detention; and (3) the burden the detention imposed on the seized individual. Based on this criteria, it is not possible to distinguish Officer Fackrell's conduct in *Strieff* from that of Officer Garcia in the present case. Both officers presumably possessed the subjective belief that they possessed reasonable suspicion to conduct an investigation. Officer Garcia clearly believed he possessed reasonable suspicion to stop Tatro to investigate the rash of vehicle burglaries in the area, and the State has presented an appellate argument that Officer Garcia's knowledge and experience created reasonable suspicion. There is no indication in the record that Officer Garcia's investigation was a mere pretext to investigate Tatro for drug contraband. The video demonstrates that Officer Garcia remained respectful and polite throughout the encounter. Aside from his lack of reasonable suspicion, Officer Garcia conducted himself lawfully, arresting Tatro on the bench warrant before searching her incident to that arrest.

Based on the reasoning of *Strieff*, "the evidence [Officer Garcia] seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from [Tatro]

incident to arrest." 579 U.S. at __, 136 S. Ct. at 2064. Accordingly, the district court erred in applying the exclusionary rule to suppress the evidence obtained in the search of Tatro.

Reversed and remanded.