NOT DESIGNATED FOR PUBLICATION

No. 118,640

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

LEE SAWZER SANDERS,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MARK S. BRAUN, judge. Opinion filed May 25, 2018. Reversed and remanded.

Rachel L. Pickering, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellant.

Reid T. Nelson, of Capital and Conflicts Appellate Defender Office, for appellee.

Before BRUNS, P.J., HILL, J., and WALKER, S.J.

PER CURIAM: This is an interlocutory appeal brought by the State of Kansas. On appeal, the State contends that the district court erred in suppressing evidence seized by law enforcement officers from Lee Sawzer Sanders. Although we do not find that the district court erred in finding that the officers failed to articulate a reasonable suspicion to justify an investigatory detention, we conclude that the evidence seized from Sanders should not have been suppressed because the discovery of the arrest warrant attenuated the connection between the unlawful stop and the items seized. Thus, we reverse the suppression order and remand this matter to the district court.

FACTS

As the parties recognize, the district court granted Sander's motion to suppress on the record at a hearing held on November 1, 2017. For the purposes of this appeal, we will rely on the facts set forth in the transcript of that hearing. In addition, it does not appear that the district court entered a written suppression order into the record in this case. As such, we will also rely on the transcript for the district judge's findings and conclusions in ruling on the motion to suppress.

In the early evening hours of December 12, 2016, around 6:45 p.m., Officer Raph Belt and Officer Cody Purney of the Topeka Police Department were in a marked police vehicle near 7th Street and Southwest Topeka Boulevard. According to Officer Belt, the two officers "had just finished up a call of a disturbance and we got in our vehicle to leave" when he observed a man—later identified to be Sanders—"getting into a vehicle" parked in the parking lot of Domino's Pizza. Officer Purney recalls the events a little differently. He remembers that the officers were on "self-initiated activity" or "in free mode"—meaning, "[t]here was no call we were going to, nothing to respond to" when Officer Belt first saw Sanders—who is an African-American male—in the parking lot. Officer Purney also recalls that Sanders "was parked in a parking stall properly."

Sanders "was opening up the driver's door at the time [Officer Belt] took notice of him." Ultimately, the police officers would learn that Sanders had a key to the car he was getting into when Officer Belt first saw him. However, they did not know this prior to arresting Sanders. Regardless, Officer Purney did not see Sanders trying to get into his car. According to Officer Belt, Sanders was "messing with the handle" on his car when he "looked over . . . 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." (Emphasis added.) Officer Purney recalls, "[a]s Sanders saw

us drive by, he looked away or saw us, closed the door, and then started to *walk* down the alley." (Emphasis added.)

In response, the officers drove down the alleyway in their police vehicle to look for Sanders. According to Officer Belt, he was thinking at the time that "[w]e had a lot of issues with stolen vehicles. I didn't know if he was trying to break into a vehicle or what he was doing with the vehicle itself." At the time, the Domino's was open for business and the light in the parking lot was on. Officer Belt candidly admitted that he did not have any indication that Sanders was trying to steal the vehicle at the time the officers began looking for him. Moreover, the officers did not see burglary tools or any broken windows on the car. Rather, Officer Belt agreed at the suppression hearing that the officers decided to follow Sanders because he did not get into his vehicle and walked off after apparently seeing them.

The officers initially lost sight of Sanders but Officer Belt "picked him up just out of [his] peripheral . . . attempting to conceal himself next to the side of a building and a drainpipe." Officer Belt turned the patrol vehicle around and observed Sanders "walking or running up to the vehicle that he was initially at" in the Domino's parking lot. According to Officer Belt, he "hollered . . . hey, I would like to speak with you and at that point, he took off running . . . north along the sidewalk on the west side of Topeka Boulevard."

Officer Belt then exited his patrol vehicle and followed Sanders as he turned back to the south towards the Domino's parking lot. "At that point, [Officer Belt] told him to stop and he got to the vehicle as I . . . rounded the corner." Sanders stopped and Officer Belt placed him in handcuffs "[t]o detain him as he had already tried to elude me three to four times." Officer Purney "went the other way" and did not see Sanders again until Officer Belt had taken him into custody. At some point, Officer Belt evidently attempted

to read Sanders his *Miranda* rights. However, he did not complete this process because Sanders evidently said he did not want to speak with the officers.

Once Sanders was in handcuffs, Officer Belt asked if he had any weapons on him. In response, Sanders apparently indicated he had a knife in his pocket. Officer Belt began a pat down and detected a hard object in Sanders front right pocket that he believed to be a knife. However, it turned out to be a key. Officer Belt then sought and received permission to try to find the knife. In the left breast pocket of Sanders jacket, Officer Belt found a pipe he suspected was used to smoke methamphetamine. The officer also found a pack of cards and various other items on Sanders. However, he did not find a knife.

After the officers apprehended Sanders, Officer Purney asked Sanders his name and he "provided [him] a Kansas Department of Corrections' identification card that said he was Lee Sanders." The officer then checked to determine whether Sanders had any outstanding warrants. The check revealed that Sanders had a felony warrant out from Shawnee County. Officer Belt then went through the items found on Sanders prior to taking him to jail and found a small baggy in the deck of cards containing "a white crystalline substance" that he believe to be methamphetamine.

On December 14, 2016, the State charged Sanders with two counts: possession of an opiate, opium, narcotic drug, or stimulant, in violation of K.S.A. 2016 Supp. 21-5706(a), (c)(1); and unlawful use of drug paraphernalia, in violation of K.S.A. 2016 Supp. 21-5709(b)(2), (e)(3). On January 11, 2017, the district court held a preliminary hearing in which only Officer Belt testified. At the conclusion of the hearing, the district court found that there was probable cause that the crimes were committed and that Sanders committed the crimes. Accordingly, the district court bound Sanders over for trial on both charges.

Prior to trial, Sanders filed a motion to suppress evidence. The district court held a hearing on the motion on November 1, 2017. After considering the testimony of Officer Belt and Officer Purney—as well as the arguments of counsel—the district court granted the motion to suppress items seized from Sanders. In reaching this conclusion, the district court found that some of the testimony offered by the officers was "contradictory" and opined that "the whole thing had been set up to be able to make contact" with Sanders. Specifically, the district court pointed to the testimony of Officer Belt that the officers "were already stopped and parked in the parking lot" when he saw Sanders "messing with the handle" of his car, while Officer Purney testified that the officers "were just driving down the road and on uninitiated activity" when Officer Belt first saw Sanders.

Further, the district court found that "the scenario posed by both officers appears to be that of filling in the blanks after the fact as opposed to what they did [and] why they did [it] at the time." The district court also found it significant that there was "so many things" that the officers claimed not to know. Based on the testimony presented at the suppression hearing, the district court found that Sanders "walked away initially and then at some [later] point, may have run from the officer." Although district court found that "officers are free to make contact" with people, "individuals are free to not have contact with law enforcement." Finally, the district court briefly considered the attenuation doctrine but evidently did not believe it applied in this case.

On November 9, the State timely filed an interlocutory appeal.

ANALYSIS

The Fourth Amendment to the United States Constitution—made applicable to the states through the Fourteenth Amendment—and Section 15 of the Kansas Constitution Bill of Rights prohibit unreasonable searches and seizures. A warrantless search and seizure is per se unreasonable unless it falls within a recognized exception. *State v.*

Baker, 306 Kan. 585, 589-90, 395 P.3d 422 (2017); *State v. Ryce*, 303 Kan. 899, 913, 368 P.3d 342 (2016), *aff'd on reh'g* 306 Kan. 682, 396 P.3d 711 (2017). The exclusionary rule is a judicially created remedy that prohibits the introduction of evidence obtained in an unreasonable search and seizure in order to deter future violations. See *Davis v. United States*, 564 U.S. 229, 236-38, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

The sole issue presented by the State in this interlocutory appeal is whether "the district court erred in granting Sanders' suppression motion." We apply a bifurcated standard when reviewing a district court's decision on a motion to suppress. We first review the factual underpinnings of the district court's ruling to determine whether there was substantial competent evidence. We then review the legal conclusions reached by the district court under a de novo standard. In reviewing the factual findings, we do not reweigh the evidence or assess the credibility of witnesses. *State v. Patterson*, 304 Kan. 272, 274, 371 P.3d 893 (2016). Because this case comes before us following a ruling on a motion to suppress evidence, the State bears the burden of proving the lawfulness of its search and seizure. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014).

Reasonable Suspicion

Although the State argues that the district court did not look at the entire record, we do not find this to be the case. Rather, the district court appears to have considered all of the evidence presented but simply weighed it differently than the State would have liked. Ultimately, the question is not whether we would have weighed the evidence the same way as the district court but whether we find that substantial competent evidence in the record to support the factual underpinnings of the district court's decision. Based on our review of the record, we conclude that substantial competent evidence supported the district court's factual findings.

It does not appear from the record that the district court believed the officers were intentionally misstating the facts nor do we find that to be the case. Nevertheless, the district court was clearly troubled by some of the inconsistencies in the testimony as well as by several instances in which the officers could not recall certain facts. The district court also noted that in addition to simply listening to the words spoken by the officers, it also considered such things as their "facial expressions" and "conduct" as they testified. Certainly, the district court was in a better position to evaluate the demeanor of the witnesses than an appellate court relying upon the cold record.

We now turn to the encounter that Officer Belt and Officer Purney had with Sanders. Encounters with law enforcement officers generally fall into four categories: (1) voluntary or consensual stops; (2) investigatory stops; (3) public safety stops; and (4) arrests. *State v. Cleverly*, 305 Kan. 598, 605, 385 P.3d 512 (2016). The record reflects—and both parties agree—that this case falls into the category of an investigatory or *Terry* stop. *State v. Pollman*, 286 Kan. 881, 889-90, 190 P.3d 234 (2008) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 [1968]).

In *State v. Slater*, 267 Kan. 694, 696-97, 986 P.2d 1038 (1999), the Kansas Supreme Court found:

> "A law enforcement officer may stop any person in a public place based upon specific and articulable facts raising 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*."

Specifically, K.S.A. 22-2402(1) provides that "a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed, or is about to commit a crime . . . ." Moreover, the officer "must know of specific and articulable facts that create a reasonable suspicion the seized individual is

committing, has committed, or is about to commit a crime . . . . [Citations omitted.]" *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014); see *State v. Chapman*, 305 Kan. 365, 370, 381 P.3d 458 (2016). Simply having "a hunch has never been the benchmark of a proper police seizure." *State v. Martinez*, 296 Kan. 482, 488, 293 P.3d 718 (2013) (citing *Terry*, 392 U.S. at 27).

"Our standard for what is reasonable is based on the totality of the circumstances and is viewed in terms as understood by those versed in the field of law enforcement." *State v. Hanke*, 307 Kan. ___, 2018 WL 1886010, at *4 (No. 114,143, filed April 20, 2018) (citing *State v. Thomas*, 291 Kan. 676, 687, 246 P.3d 678 [2011]). In *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000), the United States Supreme Court explained:

> "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification . . . . The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity. [Citations omitted.]"

"'[W]e judge the officer's conduct in light of common sense and ordinary human experience. [Citations omitted.]'" *Hanke*, 2018 WL 1886010, at *4.

Here, Officer Belt first observed Sanders as he was attempting to get into a car that was properly parked in a parking spot in the Domino's parking lot. For whatever reason, Officer Purney did not see Sanders trying to get into the car and relied upon the information provided to him by Officer Belt. We also note that this event did not take place late at night or in the early morning hours. Instead, it occurred around 6:45 p.m., the parking lot was evidently illuminated, and the restaurant was open for business.

Officer Belt testified that he did not know whether Sanders had keys in his hands when he was "messing" with the door of the car. Moreover, although the testimony of the officers was inconsistent regarding what they were actually doing prior Officer Belt observing Sanders, it is clear that they had not been called to the scene to investigate automobile break-ins or stolen vehicles. Furthermore, the officers did not see any burglary tools, broken glass, or other evidence to suggest that a crime was being or had been committed.

According to Officer Belt, he saw Sanders look over his shoulder towards the officers as he was attempting to get into the car. Apparently, Sanders "immediately stopped messing with the handle, and began *walking* to the west towards the alleyway." (Emphasis added.) It was at that point that Officer Belt decided that he wanted to stop Sanders. There is nothing in the record to indicate that Sanders ran away from the car, or even walked quickly, prior to him entering the alleyway. Hence, it seems that at most Officer Belt had a hunch that Sanders might be doing something illegal.

When initially asked at the suppression hearing why he wanted to stop Sanders, Officer Belt testified that "[w]e had a lot of issues with stolen vehicles. I didn't know if he was trying to break into a vehicle or what he was doing with the vehicle itself." Officer Belt further explained on redirect examination that the officers pursued Sanders "[b]ecause of we had a lot of stolen vehicles in the area. I believed it was suspicious when he . . . was messing with a handle of a car, looks over his shoulder at a police officer and a police car, he immediately stops messing with it and walks away." However, when asked on recross-examination, Officer Belt was unable to quantify what he meant by "a lot of stolen vehicles in the area," and the State offered no evidence to support this assertion.

The State suggests this case is similar to *Illinois v. Wardlow* in which the United States Supreme Court found that law enforcement officers have reasonable suspicion to

conduct an investigatory stop when a suspect flees from them in a high crime area. 528 U.S. at 123-24. Specifically, the *Wardlow* Court found:

> "[The arresting officers] were among eight officers in a four-car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *Brown v. Texas*, 443 U.S. 47[, 99 S. Ct. 2637, 61 L. Ed. 2d 357] (1979). But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a 'high crime area' among the relevant contextual considerations in a *Terry* analysis. *Adams v. Williams*, 407 U.S. 143, 144, 147-148[, 92 S. Ct. 1921, 32 L. Ed. 2d 612] (1972).
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> "In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885[, 95 S. Ct. 2574, 45 L. Ed. 2d 607] (1975); *Florida v. Rodriguez*, 469 U.S. 1, 6[, 105 S. Ct. 308, 83 L. Ed. 2d 165] (1984) *(per curiam)*; *United States v. Sokolow*, 490 U.S. 1, 8-9, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)]. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. See *United States v. Cortez*, 449 U.S. 411, 418[, 101 S. Ct. 690, 66 L. Ed. 2d 621] (1981). We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further. *Wardlow*, 528 U.S. at 124-25.

We find the present case to be distinguishable from *Wardlow* for several reasons. First, there is no evidence in the record to establish that the Domino's parking lot was "an area of expected criminal activity" nor did the State attempt to prove that it is in a high crime area. Second, there is no evidence in the record to suggest that the officers expected to encounter criminal activity in the Domino's parking lot during business hours. Third, even if we assume that Sanders saw the patrol vehicle before he walked away from his car, walking away from one's car is not the type of "headlong flight" referred to in *Wardlow*. As the district court noted, although there was some testimony presented regarding Sanders attempting to hide and running away, this occurred after the officers had already made the decision to pursue him.

Based on our review of the record, we find that Officer Belt at most had a hunch that Sanders may have been trying to break into a car when he made the decision to pursue him. Clearly, the Fourth Amendment requires that an officer must be able to articulate more than a hunch of criminal activity. *Wardlow*, 528 U.S. at 123. This is also true of K.S.A. 22-2402. See *Martinez*, 296 Kan. at 488-89; *State v. Coleman*, 292 Kan. 813, 817, 257 P.3d 320 (2011). At the suppression hearing, neither Officer Belt nor Officer Purney were able articulate a specific reasonable suspicion that Sanders was committing, had committed, or was about to commit a crime. Accordingly, we do not find that the district court erred in concluding that the officers did not have reasonable suspicion to support an investigatory detention under the circumstances presented.

Attenuation Doctrine

In the alternative, the State contends that the attenuation doctrine applies in this case because "the items in Sanders' possession would have been discovered when he was arrested for the outstanding warrant." Although Sanders contends that we should not address this issue because it was not raised by the State below, a review of the record reveals that the district court did consider the attenuation doctrine when ruling from the

bench at the suppression hearing. Accordingly, we will address the merits of this issue. See *State v. Mullen*, 304 Kan. 347, 352-53, 371 P.3d 905 (2016) (citing *Huffmier v. Hamilton*, 30 Kan. App. 2d 1163, 1167, 57 P.3d 819 [2002]) (when district court chooses to address issue not raised by the parties, appellate courts may also address the issue).

The State cites to *Utah v. Strieff*, 579 U.S. __, 136 S. Ct. 2056, 2060-62, 195 L. Ed. 2d 400 (2016), to support its position that, when a valid, unrelated warrant is found during an otherwise illegal stop, the valid warrant attenuates any taint from the stop and any evidence discovered is therefore admissible. In *Strieff*, a law enforcement officer stopped the defendant who had left a suspected drug house as he was walking through a parking lot of a nearby convenience store. Upon running Strieff's name through dispatch, the officer discovered that he had an outstanding arrest warrant for a traffic violation. The officer arrested Strieff and searched him. In doing so, the officer found 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. Nevertheless, the Supreme Court determined that the discovery of the arrest warrant was sufficiently attenuated from the illegal seizure to preclude application of the exclusionary rule to the contraband found during the search incident to Strieff's arrest. In conducting its attenuation analysis, the Supreme 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).

Specifically, the *Strieff* Court found:

> "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 . . . [the officer]

> 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 [the officer] was unaware of its existence. [Citations omitted.]" *Strieff*, 136 S. Ct. at 2062.

In applying these factors, the United States Supreme Court held that the first factor weighed in favor of Strieff because the drugs and paraphernalia were found within minutes after the stop. In analyzing the second factor, the *Strieff* court determined that the facts weighed in favor of the State because the warrant was valid, predated the stop, and was unrelated to the detention. *Strieff*, 136 S. Ct. at 2062-64. See *Segura v. United States*, 468 U.S. 796, 814-815, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984). Finally, in analyzing the third factor, the *Strieff* court determined that once the officer was aware of the warrant, he had a duty to enforce its provisions. See *United States v. Leon*, 468 U.S. 897, 920 n.21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) ("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.").

Here, we find that the first factor weighs in Sanders' favor due to the close proximity in the timing between the investigatory detention without reasonable suspicion and the discovery of the outstanding warrant. On the other hand, we find that the second factor weighs in favor of the State in light of the preexisting arrest warrant, which provides an intervening circumstance that dissipates the taint of the initial unlawful seizure. Likewise, with respect to the third factor, we find no evidence in the record to suggest that the officers seizure—albeit overzealous—to constitute flagrant misconduct. See *Strieff*, 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."). While Officer Belt's initial decision to pursue and detain Sanders was mistaken, it was reasonable to check for warrants and to perform a search incident to arrest. See *Strieff*, 136 S. Ct. at 2063.

Based on the reasoning of *Strieff*, we find the attenuation doctrine to be applicable in this case. Specifically, we find that the evidence seized from Sanders should not have been suppressed because the discovery of the arrest warrant attenuated the connection between the unlawful stop and the items seized. *Strieff*, 136 U.S. at 2064. In other words, the outstanding arrest warrant was a critical intervening circumstance independent from the unconstitutional investigatory detention. We, therefore, conclude the suppression order is reversed and this case is remanded to the district court for further proceedings.

Reversed and remanded.