No. 125,410

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

JEREMY A. CLINE,
Appellee.

SYLLABUS BY THE COURT

1.

Both the United States and Kansas Constitutions protect against unreasonable searches and seizures.

2.

Kansas law is clear that a seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave, and the person submits to the show of authority.

3.

The United States Supreme Court has held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's objective reasonableness standard.

4.

Determining whether the force used to carry out a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the

intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The proper application of this test requires careful attention to the facts and circumstances of each case.

5.

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence.

Appeal from Shawnee District Court; RACHEL L. PICKERING, judge. Opinion filed March 3, 2023. Affirmed.

Jodi Litfin, deputy district attorney, *Steven J. Obermeier*, assistant solicitor general, and *Derek Schmidt*, attorney general for appellant.

Reid T. Nelson and *Laura Stratton*, of Capital and Conflicts Appeals Office, for appellee.

Before MALONE, P.J., HILL and HURST, JJ.

MALONE, J.: A Kansas Highway Patrol (KHP) trooper tried to pull over Jeremy A. Cline for a broken windshield, but Cline did not stop. The trooper pursued Cline through residential streets of north Topeka and, after a few minutes of chasing, decided to perform a tactical intervention maneuver to immobilize Cline's vehicle. The maneuver caused Cline's car to spin, and it ran off the road into a utility pole, causing the death of Cline's passenger. As a result, the State charged Cline with felony murder and several other crimes. The district court granted Cline's motion to suppress all evidence recovered

after the maneuver to force his car off the road, finding the trooper's actions were an objectively unreasonable use of excessive force to carry out the seizure.

The State appeals the district court's suppression order and raises two related issues. First, the State claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment to the United State Constitution. Second, the State claims the district court erred in applying the exclusionary rule to suppress all evidence following the seizure. For the reasons we will carefully explain in this opinion, we disagree with the State's claims and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the late afternoon of March 6, 2021, Trooper Justin Dobler of the KHP was working with a task force called Operation Frontier Justice, a combined operation between federal and local law enforcement agencies intended "to enforce and help crack down [on] the rise of criminal activity in the City of Topeka." Dobler had just come on shift and decided to check out a neighborhood where a suspected drug house was located. Despite the stated goal of Operation Frontier Justice, participating law enforcement officers were instructed to avoid any vehicle pursuits; the operation plan specifically stated: "'Any pursuits that [do] occur should be constantly reevaluated and may be discontinued at any time'" and that "'[p]aramount consideration and prioritizing will be given to the safety of the public and the risk of pursuing individuals[.]'" Dobler had been discouraged from engaging in vehicle pursuits, unless necessary, and had received warnings for violating KHP's pursuit policies.

Dobler was sitting at the intersection of Northwest Taylor and Northwest Lower Silver Lake Road, near the suspected drug house and in the same area he had often patrolled, when he noticed a white sedan with a smashed windshield. Dobler believed the broken windshield obstructed the driver's view and was both a safety issue and a traffic

infraction. He also thought the car possibly matched the description of one that had been reported stolen. As the car turned and drove past him, Dobler believed the people in the car—a male driver and female passenger—seemed suspicious because they "were locked up, nervous, as they were completely looking away from me. As if, I don't see you, you don't see me type mentality." At that point, Dobler was "starting to develop a case."

Based solely on the broken windshield infraction, Dobler flicked on his emergency lights, pulled a U-turn, and started to follow the car. Dobler would later recall that he had no suspicion that the occupants of the car were felons, nor that they were engaged in any felonious activity, except for the possible car theft. As he began to follow, Dobler could make out the car's license plate, and he reported it to dispatch. He also immediately determined that the driver was not going to stop—the car turned right and began trying to evade him. In response, Dobler turned on his siren and informed dispatch of his pursuit, but the car still made no signs of pulling over.

As Dobler continued the pursuit, the fleeing car made many turns, often using its turn signals, and slowing—but not stopping—at several stop signs. Dobler later reported that he was concerned for his safety and for pedestrians along the road. But the dashcam footage recovered from his patrol car showed that the streets were almost empty—Dobler later agreed that he saw no pedestrians on the road at that point in the chase. Around this time, Dobler was informed that the car was not stolen, first over the radio from another officer and later from dispatch. Even so, Dobler continued the chase.

Dobler followed the car as it pulled into a trailer court. At that point, he thought about trying to perform a tactical vehicle intervention (TVI) "[d]ue to the high risk and how dangerous" the pursuit was, but he was unable to do so because of the cramped roadway. A TVI is a maneuver intended to end a car chase by forcing a fleeing vehicle off the road—in Dobler's words, the goal of a TVI is to cause the other car to do a "controlled spin . . . with the intention of disabling [the] vehicle to end a pursuit safely."

Dobler was taught the maneuver by the KHP and had employed it "an abundance of times"—he recalled at least 15 times, including 10 times in that specific neighborhood. Because he could not accomplish a TVI in the trailer court, Dobler backed off and continued his pursuit. As he trailed the car around the trailer court, Dobler noticed children playing close to the roadway. The fleeing car continued to use its brakes and turn signals as it passed through the trailer court, driving around 20-30 miles per hour, and it eventually left the trailer court and back out onto the street.

The car made a wide turn onto Tyler Street, a two-lane road, and Dobler decided to try a TVI. Dobler later testified that his main concern at the time was a car down the road that he believed was driving towards them. Dobler explained that he chose to perform the TVI "[b]ecause the individual fleeing placed an innocent bystander in immediate harm with his vehicle by going head on in the opposite direction with him." But the dashcam footage and photographs introduced into evidence showed that the approaching car was already pulled off to the side of the road. Dobler also acknowledged that the many obstructions on the side of the roadway made the location he performed the TVI less than ideal. In any event, Dobler accelerated to pull alongside the fleeing car, matched its speed, and then nudged the back right bumper of the car to begin the TVI.

Dobler's TVI succeeded; after nudging the bumper, the fleeing car spun around the front of his patrol vehicle, and then off the road. By the time Dobler turned around to see the result of the TVI, the car "was sideways and up against a utility pole." Dashcam footage from another officer's patrol car confirmed Dobler's recollection, showing the car spinning off the road and slamming into a telephone pole on its passenger side. In all, the pursuit lasted about 3 minutes and 35 seconds.

Dobler and another officer removed the driver, later identified as Cline, from the driver's side window of the car and placed him in handcuffs. Officers eventually found a knife, a bag of methamphetamine, and drug paraphernalia in Cline's possession. The

passenger, Anita Benz, was incoherent and slouched back in her seat. Both Cline and Benz were promptly transported to the hospital. Once at the hospital, Cline was interviewed by a KHP trooper and gave several explanations about his decision to flee from Dobler. Benz' injuries were severe, and four days later, she died from the blunt force head and pelvic injuries she sustained in the crash.

The State charged Cline with felony murder for Benz' death, fleeing or attempting to elude, possession of methamphetamine, possession of drug paraphernalia, interference with a law enforcement officer, and several traffic violations. After conducting a preliminary hearing, the district court bound Cline over for trial.

Cline later moved to dismiss the felony murder charge, arguing his actions were not the proximate cause of Benz' death. He also moved to suppress "any and all evidence flowing from the use of excessive force to seize his person." The suppression motion argued that Dobler violated KHP policies and Kansas law by beginning and continuing the car chase and using excessive force to carry out the seizure in violation of the Fourth Amendment. Cline requested that all evidence obtained after the TVI be suppressed including the medical evidence and reports establishing Benz' death. The State responded that Dobler's decision to use the TVI was not excessive, that he had reasonable grounds to stop Cline by such means, and that Cline's own criminal actions justified the use of deadly force. The State agreed that a seizure occurred when Dobler performed the TVI.

Evidence at the suppression hearing

At the suppression hearing, Dobler testified about his decision to pursue Cline as well as his rationale for performing the TVI. Dobler explained that he decided to execute the TVI because he believed Cline presented an "immediate threat," and that he executed the maneuver in accordance with his training. Dobler identified the immediate threat as "the endangerment of the innocent bystander motorist . . . in the opposite lane." Dobler

also testified that he knew that he had "a lot more resources available, just because of the other agencies involved, . . . So I knew I had immediate help somewhere." But when he did not hear back from other officers about setting up spike strips, Dobler decided to perform a TVI. Dobler conceded that the area he decided to perform the TVI was less than ideal because of the many telephone poles and ditches along the roadway.

On cross-examination, Dobler agreed that an officer is not supposed to perform a TVI and should instead disengage a pursuit if the danger of performing the maneuver is greater than the danger of letting the suspect escape. Dobler admitted that before the car chase with Cline, he had been discouraged from engaging in vehicle pursuits, unless necessary, and had received written warnings for violating KHP's pursuit policy. The dashcam video from Dobler's patrol car and the dashcam video from another patrol car involved in the incident with Cline were admitted into evidence at the hearing. The evidence showed that speed of the cars during the chase was usually within the 35-mph speed limit except for a few stretches that Cline drove up to 55 mph.

The State also called KHP Master Trooper Scott Moses who testified that he interviewed Cline in the hospital after giving him his *Miranda* warnings, while Cline was being guarded and handcuffed to a hospital bed. The State introduced into evidence an audio recording of that interview.

Cline called some of Dobler's superiors from the KHP to testify. Lieutenant Bryce Whelpley testified that he had sent an email informing Dobler and other troopers that "'[g]iven the legal stance on pursuits, I would discourage pursuing anything less than a person felony.'" It also stated that "'[e]ven then I would think very hard about pursuing inside the city limits, probably wouldn't do it, unless someone's life is in danger.'"

Captain Joseph Witham of the KHP similarly explained that Dobler had been instructed in directives delivered to the whole troop "not to pursue in the City of Topeka

unless he's chasing a violent felon." And this instruction had been echoed to Dobler in both personal conversations and emails. After analyzing Dobler's dashcam footage, Witham described that the area where Dobler executed the TVI was not ideal because it was residential and there were many obstacles around the road. As for the testimony about the presence of children in the trailer court, Witham stated this fact would be a reason not to continue the pursuit. He explained that KHP troopers should, but are not required, to get authorization before performing a TVI and Dobler did not have approval to perform the TVI. He testified that Dobler's "entire pursuit should have been avoided [and] should not have occurred. . . . He was chasing, ultimately, a windshield violation."

Major Eric Sauer, who also reviewed Dobler's dashcam video and report, testified that Dobler failed to follow KHP directives about pursuing vehicles within Topeka. Sauer believed that the chase created a greater risk than giving up the pursuit of Cline. He testified that all five of the KHP's majors concluded that Dobler's pursuit—in its initiation, continuation, and conclusion—was against KHP policy. Sauer stated that the KHP's executive command review board unanimously recommended that Dobler be dismissed for his actions. Cline introduced letters from Colonel Herman Jones, superintendent of the KHP, without objection by the State, showing that Dobler was fired from the KHP on July 19, 2021, because he had been warned several times not to begin and pursue car chases like the one with Cline.

After both parties presented their evidence, Cline asked the district court to suppress "everything from—that follows from the moment of contact, which we see is the seizure. So that would be the evidence of the crash, the death of Miss Benz, and any item recovered from the vehicle." Cline contended that he was seized the moment that Dobler's patrol car contacted the bumper of his car while performing the TVI and that Dobler's decision was objectively unreasonable. The State countered that Dobler faced a split-second decision and reasonably believed that he needed to perform the TVI to protect the driver of the car approaching them in the opposite lane.

The district court's ruling

One week later, the district court orally announced its ruling from the bench. The district court denied Cline's motion to dismiss the felony murder charge "at this time," explaining that the motion raised both a factual and a legal question and the court did not find "substantial support of case law" to support the motion to dismiss. But the district court granted Cline's motion to suppress the evidence, finding that "the Fourth Amendment [was] violated due to the unreasonableness in the seizure, resulting in the death of the passenger." The district court elaborated:

> "The Motion to Suppress will be granted. I must point out that this is a very rare case, very rare case, that this court is indeed granting the Motion to Suppress. I base this on the argument that the Fourth Amendment was violated by unreasonable seizure.
>
> "Recently, in March of 2021, United States Supreme Court reaffirmed that a defendant is seized when touched. Here that is in *Torres v. Madrid*[, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021)]. And this Court does find indeed that Mr. Cline was seized when the trooper did hit his car.
>
> "So the question of him being seized is not the issue. The issue is whether that was an unreasonable seizure.
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> "This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake.
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> "The interest at stake here was a cracked windshield. The seizure taken was one that I believe is rare for law enforcement to do, and why it did indeed result in his release from Kansas Highway Patrol, and that is the TVI action which resulted in the fatality of the passenger.
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> "This Court does find that this indeed was excessive force. I've looked at all the circumstances including the—we all watched the videos, heard all the testimony presented. By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies. But the actions taken here by the trooper, this Court does find were unreasonable.
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> "This Court does recognize that it did violate the Kansas Highway Patrol policy, did violate direct orders to prevent vehicle pursuit within the City of Topeka. And that's

done for cases just like this one. This Court does understand that this excessive force violated the Fourth Amendment.

"The trooper used deadly force to apprehend a suspect fleeing. And that prior to that, the officer had learned that the car was not stolen. That was advised to him. This Court finds that the chase put the public in danger, but certainly not necessary for the amount of force used. And so—because there was no suspicion of a dangerous or violent crime.

"Again, even his supervisors stated it was a windshield crack. This is a traffic infraction that reasonable course would have been to decline pursuit, especially when there was oncoming cars. And so therefore this Court adopting the arguments made by the defense, does grant the Motion to Suppress.

"I have to note this is very rare for this Court to make such a ruling. But I think the parties can agree this is a rare case where the officer used quite excessive force and therefore the Motion to Suppress is granted. This Court will grant their request to have the—all evidence from the fruit of the poisonous tree theory resulting in that being suppressed."

The district court clarified that it was suppressing everything from after the point of vehicle contact between Dobler and Cline, including the drugs and drug paraphernalia in Cline's possession and Cline's statements to law enforcement at the hospital. The order still allowed the State to prosecute Cline for fleeing or attempting to elude and the various traffic violations, but it suppressed the evidence supporting the felony murder charge and the drug-related charges. The State timely filed an interlocutory appeal.

DID THE DISTRICT COURT ERR IN FINDING THE SEIZURE VIOLATED THE FOURTH AMENDMENT?

The State first claims the district court erred in finding the seizure was objectively unreasonable in violation of the Fourth Amendment. More specifically, the State asserts that the district court (1) inappropriately focused on Dobler's initial reason for the pursuit and conflated the pursuit with the eventual seizure in its analysis; (2) improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the

reasonableness of his decision to execute the TVI; and (3) wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable.

Cline contends that the district court's factual findings were supported by substantial competent evidence. He asserts that the district court correctly concluded that Dobler's decision to deploy the fatal TVI was objectively unreasonable under the circumstances, and the seizure violated the Fourth Amendment.

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). In reviewing the factual findings, an appellate court does not reweigh the evidence or assess the credibility of witnesses. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The State carries the burden to prove that the search and seizure were lawful. K.S.A. 22-3216(2); *Cash*, 313 Kan. at 126.

In granting Cline's motion to suppress, the district court ruled from the bench and did not clearly delineate its factual findings in making its ruling. But the State did not object to the adequacy of the district court's factual findings. Thus, this court may presume that the court made findings necessary to support its judgment. *State v. Jones*, 306 Kan. 948, 959, 398 P.3d 856 (2017). Likewise, "[i]n determining whether substantial competent evidence supports the district court findings, appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence." *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

We begin by examining the text of the applicable constitutional provisions. Both the United States and Kansas Constitutions protect against unreasonable searches and seizures. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated . . . . " U.S. Const. amend. IV. Similarly, section 15 of the Kansas Constitution Bill of Rights states, "[t]he right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate." Kan. Const. Bill of Rights, § 15. The Kansas Supreme Court has held that these two constitutional provisions provide the same rights and protections. *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014).

Kansas law is clear that "[a] seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of authority." *State v. Morris*, 276 Kan. 11, Syl. ¶ 5, 72 P.3d 570 (2003). The parties agree that terminating a car chase by striking a fleeing vehicle—that is, performing a TVI—constitutes a seizure. See *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Recently, the United State Supreme Court has clarified: "A seizure requires the use of force *with intent to restrain.* Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule. [Citation omitted.]" *Torres v. Madrid*, 592 U.S. ___, 141 S. Ct. 989, 998, 209 L. Ed. 2d 190 (2021). There is no debate about whether Dobler intentionally applied physical force by performing the TVI, nor whether he objectively manifested an intent to stop Cline from driving away. Thus, a seizure occurred when Dobler performed the TVI maneuver.

Because a seizure unquestionably occurred, the relevant issue is whether that seizure was reasonable under the circumstances in which it was made. In *Graham v. Connor*, 490 U.S. 386, 392-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the United States Supreme Court held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's "objective reasonableness" standard. See also *Torres*, 592 U.S. at ___, 141 S. Ct. at 998 ("Only an objective test 'allows the police to determine in advance whether the conduct

contemplated will implicate the Fourth Amendment.'"). Here too, the parties agree that the ultimate question this court must resolve is whether Dobler's decision to execute a TVI on Cline's car was objectively reasonable under the circumstances.

The *Graham* Court explained that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing governmental interests at stake." 490 U.S. at 396. The *Graham* Court also cautioned:

> "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. [Citation omitted.]" 490 U.S. at 396.

The district court applied the correct test in analyzing the evidence presented at the suppression hearing about Dobler's use of force to carry out the seizure: "This Court does find, in looking at the totality of the circumstances, under the objective reasonableness, that—balancing the nature and quality of the intrusion against the countervailing government interest at stake. . . . This Court does find that this indeed was excessive force." The State asserts that "[a]lthough the district court mentions the objective reasonableness of the officer, it does not truly analyze the issue using this standard."

The State first asserts that the district court inappropriately focused only on the cracked windshield as the reason Dobler began the pursuit and erroneously conflated Dobler's pursuit of Cline with the seizure of Cline. Although the pursuit began over a cracked windshield, the State argues that it led to a fleeing and eluding situation that endangered the public, so it was reasonable for Dobler to execute the TVI under the

circumstances. The State contends that a court must focus only on the moment the seizure occurred—the moment Dobler decided to execute the TVI—to decide whether the seizure was objectively reasonable under the circumstances.

We find that the severity of the reason for an officer to initiate a vehicle pursuit is one factor to consider under all the circumstances in deciding whether the officer's use of force to carry out a seizure is objectively reasonable. *Graham*, 490 U.S. at 396. But even if we focus only on the moment the seizure occurred, as the State suggests, Dobler's decision to execute a TVI was problematic based on the evidence. Dobler executed the TVI after Cline had exited the trailer court, so the fact that Dobler said he saw children playing close to the roadway in the trailer court did not factor into the decision. Dobler stated the immediate threat that caused him to execute the TVI was the innocent bystander in the approaching car on the two-lane road. But the dashcam footage and photographs introduced into evidence showed that the car had pulled off to the side of the road before Dobler executed the TVI on Cline's car. If the reason for Dobler to execute the TVI was to protect the driver of the car that had pulled off to the side of the road, this reason does not appear to outweigh the danger involved in performing the maneuver.

One fact that is strikingly absent from Dobler's testimony is any concern he should have had for the safety of Cline's passenger, Benz. She, too, was a member of the public that Dobler should have been trying to protect. There is no evidence in the record that Benz was linked to Cline's criminal activity or that she was encouraging him to evade law enforcement. Dobler testified that the location he performed the TVI was less than ideal because of the telephone poles and other obstructions on the side of the roadway. Witham confirmed that the area where Dobler executed the TVI was not ideal because it was residential and there were obstacles around the road. Dobler could foresee that Cline's car might crash into a utility pole if he performed the TVI at the location he chose, but he performed the maneuver despite the risk—an action that contributed to Benz' death.

The State also argues the district court improperly relied on KHP policies and procedures and the opinions of Dobler's superiors in evaluating the reasonableness of his decision to execute the TVI—not on what a reasonable officer would have done under the circumstances. But the district court made clear it was basing its decision on the Fourth Amendment rather than KHP policies: "By no means am I seeing this as anything but a Fourth Amendment violation. I do not comment on the Kansas Highway Patrol's own policies. That is their policies." In any event, the fact that Dobler violated KHP policies and had been discouraged from engaging in vehicle pursuits like the one with Cline was relevant as one of many circumstances for the district court to consider in deciding whether his actions were objectively reasonable. Dobler's disciplinary proceedings and the fact that he was fired because of repeated violations was possibly less relevant to this issue, but this evidence was admitted without objection by the State and was not the focus of the district court's decision to suppress the evidence.

The State argues that the district court wrongly concluded that Dobler's use of force to carry out the seizure was excessive and unreasonable. The State relies mainly on *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), a 42 U.S.C. § 1983 civil rights case, in which the United States Supreme Court held that a police officer may use force—even deadly force—to terminate a dangerous high-speed chase. Harris claimed that law enforcement used excessive force resulting in an unreasonable seizure when an officer used his cruiser to ram his car off the highway and into a ditch, rendering Harris a quadriplegic. The Supreme Court disagreed, stressing the importance of a fact-specific inquiry in making its decision and explaining that Harris had led the officers on "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." 550 U.S. at 380.

In finding the officer's actions were reasonable, the Court observed that (1) Harris posed an imminent threat to the public; (2) Harris was driving well over the speed limit, mostly on two-lane roads; (3) the officers had to perform hazardous maneuvers to keep

up with Harris in a chase that covered ten miles; (4) Harris smashed his way through an attempted trap by the police; (5) Harris swerved around more than a dozen cars on the road, forcing other drivers to swerve out of the way; and (6) the officer requested and received permission to force Harris off the road before doing so. Although the Court noted that excessive force by law enforcement could render a seizure unreasonable, it held: "[A] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 550 U.S. at 386.

The *Harris* Court refused to make any bright-line rule forbidding law enforcement officers from trying to terminate dangerous vehicle pursuits, and instead stressed the importance of analyzing whether a seizure is objectively reasonable under the circumstances presented. The facts in *Harris* involved a vehicle pursuit much more dangerous to the public than the facts here, and the case offers little support for the State's position that Dobler's actions in seizing Cline were objectively reasonable.

As we observed earlier, the district court did not clearly delineate its factual findings in making its ruling. But without an objection to the adequacy of the district court's findings, we can presume the district court made all the necessary findings from the evidence to support its judgment. *Jones*, 306 Kan. at 959. Here, the evidence showed that the encounter started over a cracked windshield. Dobler had no reason to believe that Cline was a dangerous felon. He also knew there was a passenger in the front seat of Cline's car. For the most part, the pursuit did not involve high speeds, and the traffic was light with few pedestrians near the roadway. Dobler had Cline's license plate number and he knew the car was not stolen, so he could have later tracked down the registered owner. He also knew that other officers were nearby and available to help stop Cline. As for the approaching driver, the evidence showed that he had pulled off to the side of the road. Dobler knew he was performing the TVI in a risky area. Dobler knew his actions violated KHP policy, and he had been warned before not to pursue car chases and run vehicles off

the road under the exact circumstances he was facing with Cline. These circumstances raise serious doubts about the reasonableness of Dobler's decision to execute the TVI, a maneuver that he readily conceded was a dangerous tactic.

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The district court heard the evidence and was tasked with the responsibility of balancing the nature and quality of the intrusion on Cline's Fourth Amendment rights against the countervailing governmental interests at stake. The Fourth Amendment does not require law enforcement officers to simply let fleeing suspects go on their merry way. And courts recognize that officers must often make split-second decisions to protect the public safety. But based on the evidence offered at the suppression hearing and considering all the facts and circumstances, the district court found that Dobler used excessive force to seize Cline. The record presented for our review reflects that the district court's findings were supported by substantial competent evidence and supported the district court's legal conclusion that Dobler's seizure of Cline was objectively unreasonable in violation of the Fourth Amendment.

DID THE DISTRICT COURT ERR IN APPLYING THE EXCLUSIONARY RULE TO SUPPRESS THE EVIDENCE?

The State next claims the district court erred in applying the exclusionary rule to suppress all evidence following the seizure. The State asserts that suppression of evidence is proper only when necessary to deter police misconduct, and it was an inappropriate remedy for the district court to apply in this case. Cline argues that suppression of the evidence was an appropriate remedy for Dobler's constitutional violations and that nothing else has deterred his misconduct until this case. As we stated in the last section of this opinion, an appellate court exercises unlimited review over the district court's ultimate legal conclusion to suppress evidence. *Cash*, 313 Kan. at 125-26.

Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. See *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (recognizing exclusionary rule in criminal prosecutions in federal court); see also *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (applying exclusionary rule in state court prosecution through the Fourteenth Amendment).

"[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and . . . 'evidence later discovered and found to be derivative of an illegality,' the so-called '"fruit of the poisonous tree."' [Citation omitted.]" *Utah v. Strieff*, 579 U.S. 232, 237, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). "[T]he exclusionary rule is not an individual right and applies only where it 'results in appreciable deterrence.' [Citation omitted.]" *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

The State cites one Kansas case to support its claim that the district court erred in applying the exclusionary rule to suppress the evidence. In *State v. McCloud*, 257 Kan. 1, 12, 891 P.2d 324 (1995), the Kansas Supreme Court addressed the defendant's argument that the district court should have suppressed evidence as a result of law enforcement's unnecessary and unreasonable use of force in executing a search warrant. In that case, the police executed a search warrant at McCloud's residence just after midnight by throwing a "flash bang" device through a side window as a diversionary tactic and entering the residence through the front door. An officer testified at trial that the police chose this manner of executing the search warrant because of the serious nature of McCloud's crimes, because McCloud had used a firearm in the commission of robberies, and for the

safety of the officers executing the search warrant and the surrounding neighborhood. McCloud was not injured by the device, and he was arrested without incident.

In finding no constitutional violation, the *McCloud* court explained that "[a]n officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest or to defend the officer's self from bodily harm while making the arrest." 257 Kan. at 12. The court also found that an "officer is justified in using force likely to cause death or great bodily harm if the officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance, or the suspect is attempting to escape by use of a deadly weapon." 257 Kan. at 12.

Even though the *McCloud* court found no constitutional violation, it also addressed whether the exclusionary rule would have been an appropriate remedy to suppress the evidence seized under the search warrant. The court explained that whether it is necessary to apply the exclusionary rule is determined by "weighing the extent to which its application will deter law enforcement officials from using excessive force in executing a valid search warrant against the extent to which its application will deflect the truth-finding process, free the guilty, and generate disrespect for the law and the administration of justice." 257 Kan. at 14. Under the facts, the court found that the exclusionary rule should not apply to the defendant's claim. 257 Kan. at 14. In doing so, the court found that "the right to bring a civil action against an officer is usually a sufficient deterrent to an officer's use of unreasonable force." 257 Kan. at 14.

The facts here are distinguishable from the facts in *McCloud*. As a result, the case offers little support for the State's claim that the district court erred in applying the exclusionary rule to suppress the evidence following Cline's seizure. Moreover, because the Kansas Supreme Court found no constitutional violation in *McCloud*, the court's analysis of whether the exclusionary rule would have been an appropriate remedy to suppress the evidence was unnecessary dicta in that case.

Although not cited by the State, we observe that federal courts have come down on either side of whether the exclusionary rule is the appropriate remedy in cases involving the unreasonable and excessive use of force by law enforcement officers, or if such a violation should instead be addressed in a civil action under 42 U.S.C. § 1983. Some courts have suggested that exclusion of evidence is an inappropriate remedy when a defendant alleges that officers used excessive force during a stop because the appropriate avenue for relief is a lawsuit under 42 U.S.C. § 1983. See, e.g., *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009) ("Application of the exclusionary rule would be particularly gratuitous in this case because the defendant has an adequate remedy by way of a civil action—a remedy better calibrated to the actual harm done the defendant than the exclusionary rule would be."). Other circuits have stated that the exclusionary rule may be invoked to suppress evidence in an excessive force case if the officer's actions are objectively unreasonable and a sufficient causal nexus exists between the excessive use of force and the evidence the defendant seeks to suppress. See, e.g., *United States v. Ankeny*, 502 F.3d 829, 836-37 (9th Cir. 2007).

The facts and circumstances of this case demonstrate that the exclusion of evidence because of Dobler's conduct falls within the purpose of the exclusionary rule. Based on Dobler's own testimony, his actions were not an isolated incident; he had used TVI maneuvers "an abundance of times" and had received reprimands for violating policies about pursuits. As Cline notes, these policies and reprimands did nothing to influence Dobler's actions. While the fact that Dobler was fired from the KHP makes it unlikely that he will cause this situation to recur as a KHP trooper, the record reflects that Dobler has simply moved on to a different law enforcement agency and was employed by the Jackson County Sheriff's Office at the time of the suppression hearing. Dobler's actions were part of a pattern of intentional conduct—as such, exclusion of the evidence derived from his unreasonable seizure would serve its intended remedial purpose.

More importantly, law enforcement officers from all agencies frequently deal with vehicle pursuits in which they may need to apprehend fleeing suspects. Encounters like the one between Dobler and Cline will likely happen again. Law enforcement officers need to know the parameters for properly using a TVI maneuver and the consequences of engaging in improper and highly dangerous car chases. Suppression of the evidence removes the incentive for officers such as Dobler to disregard policies and perform dangerous maneuvers simply to bring a hastier end to an ill-advised pursuit. The exclusion of evidence in circumstances like this one—although a drastic remedy—will likely deter future unconstitutional misconduct during car chases.

Perhaps most importantly, we have a direct causal connection between Dobler's use of excessive force and the evidence Cline seeks to suppress supporting the felony murder charge. While it is plainly true that Cline is not without fault in these unfortunate events, Dobler's use of the TVI maneuver caused the car crash and directly led to Benz' death. For all these reasons, we conclude the district court did not err in applying the exclusionary rule to suppress all evidence following the seizure.

Before concluding, we note that in one paragraph of its appellate brief, the State argues that the district court erred in applying the exclusionary rule because the evidence suppressed by the district court would have been inevitably discovered by law enforcement. The State made this argument in response to Cline's motion to suppress, but the district court did not address the issue. The inevitable discovery exception to the exclusionary rule allows the admission of otherwise unconstitutionally obtained evidence if law enforcement eventually would have found the evidence by lawful means. *State v. Baker*, 306 Kan. 585, 590-91, 395 P.3d 422 (2017). The State must prove by a preponderance of the evidence that the unlawfully seized evidence *would* have been found by lawful means; not just that it *may* have been found by lawful means. *State v. Salazar*, 56 Kan. App. 2d 410, 420, 431 P.3d 312 (2018). The inevitable discovery rule would not apply here because there is no showing that the evidence suppressed by the

court would have been found by lawful means. Without the TVI, there would have been no evidence of the crash that contributed to Benz' death, and it is unclear whether Cline would have been arrested and searched leading to the discovery of the drug evidence.

The State also argues in one paragraph of its appellate brief that Cline's statement to Trooper Moses at the hospital should have been admissible because Cline received *Miranda* warnings before making the statement. The State's argument refers to what is known as the attenuation doctrine, although it fails to use this term. The State made this argument in response to Cline's motion to suppress, but the district court did not address the issue. Under an attenuation analysis, courts generally consider (1) the time that elapsed between the illegal police misconduct and the acquisition of the evidence sought to be suppressed, (2) the presence of any intervening circumstance, and (3) the purpose and flagrancy of the official misconduct. *State v. Moralez*, 297 Kan. 397, 410, 300 P.3d 1090 (2013). The State has offered insufficient evidence and analysis for this court to decide whether Cline's statement to Moses made while he was being guarded and handcuffed to a hospital bed would be admissible under the attenuation doctrine. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (finding that a point raised incidentally in a brief and not adequately argued is considered waived or abandoned).

Affirmed.