No. 21-124607-A

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IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

v.

MILES MARTIN
Defendant-Appellant

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# Brief of Appellee

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Appeal from the District Court of Geary County
The Honorable Ryan Rosauer
District Court Case No. 19-CR-667

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## NATURE OF THE CASE

The defendant was found guilty at a jury trial of Possession of Methamphetamine, a drug severity level 5, nonperson felony, and No Drug Tax Stamp, a severity level 10, nonperson felony. The defendant was sentenced to a prison term of 20 months in the custody of the Department of Corrections. Prior to the jury trial, the defendant filed a motion to suppress, which was denied by the trial court. The defendant now appeals the denial of his motion to suppress and convictions.

## STATEMENT OF THE ISSUES

**ISSUE: THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.**

**ISSUE II: POSSESSION OF METHAMPHETAMINE IS NOT A LESSER INCLUDED OFFENSE OF POSSESSION OF METHAMPHETAMINE WITH NO DRUG TAX STAMP.**

## STATEMENT OF FACTS

The defendant was arrested on September 15, 2019, and subsequently charged with Possession of Methamphetamine With The Intent To Distribute Within 1000 Feet of a School Zone, a drug severity level 1, nonperson felony, and No Drug Tax Stamp, a severity level 10, nonperson felony (R. I, pp. 23-25). Prior to jury trial the defendant filed a motion to suppress, alleging the contents of a pill bottle did not fall under the plain view exception (R. I, pp. 88-93). The State filed its response to the motion to suppress, alleging the deputy's conduct fell under the voluntary consent and inevitable discovery, as a search incident to arrest (R. I, pp. 128-136).

The following facts were elicited at the defendant's motion to suppress hearing, held on January 22, 2021 (See Generally R.XII). Det. Cayla Da Giau of the Geary County Sheriff's Department testified that she had been employed with the sheriff's department for two and a half years (R. XII, p. 5). Prior to being employed with the Geary County Sheriff's Department, Det. Da Giau had spent 8

years in the U.S. Army military police (R. XII, pp. 5-6). Det. Da Giau testified that on September 15, 2019, at approximately 1 am, she was driving northbound on Eisenhower, when she observed the defendant's vehicle pass her in the opposite direction with a tag lamp that was not illuminating the license plate (R. XII, pp. 6-7, 12). Det. Da Giau turned her patrol vehicle around and caught up with the vehicle (R. XII, pp. 6-7). Det. Da Giau turned off her headlights to verify the tag lamp was not illuminating the license plate, and once she confirmed it was not operating properly, she activated her emergency lights to conduct a traffic stop (R. XII, pp. 6-7). Prior to activating her emergency lights, Det. Da Giau observed the vehicle turn on its right turn signal (R. XII, p. 7). The vehicle turned into one of the parking lots to the high school (R. XII, p. 7). The incident occurrred in Geary County, Kansas (R. XII, p. 12).

Once the vehicle stopped, Det. Da Giau approached the vehicle, advised the driver the basis for the stop and asked for his driver's license and vehicle insurance (R. XII, p. 7). The detective identified the driver as Mr. Martin, the defendant (R. XII, p. 7). While the defendant looked for his insurance, Det. Da Giau looked in the back seat and observed an open container of Crown Royal alcohol that was within reaching distance of the defendant (R. XII, pp. 7-8). Based on her observations, Det. Da Giau called for a backup officer (R. XII, p. 8). Det. Da Giau then asked the defendant to step out of the vehicle in order to conduct a probable

cause search (R. XII, p. 8). A pat down search of the defendant uncovered two knives and due to an injury to the defendant's leg, the deputies let the defendant sit on a curb near Det. Da Giau's patrol vehicle (R. XII, p. 9).

During the search of the vehicle, Det. Da Giau located a yellow straw with a white powdery residue, that the detective knew was drug paraphernalia used to snort narcotics ((R. XII, p. 9). This was located in the center console of the defendant's vehicle (R. XII, p. 9). The detective also located a butane lighter and 5 open containers of alcohol (R. XII, p. 9). Based on her search, the detective was going to place the defendant under arrest (R. XII, p. 9).

After locating the items, Det. Da Giau overheard the defendant advise Dep Garcia (backup deputy) that he was hot (R. XII, p. 10). Det. Da Giau offered to allow the defendant to put his dog in the detective's vehicle due to the heat, as it had air conditioning (R. XII, p. 10). Det. Da Giau also offered to allow the defendant to sit in the back seat of her patrol vehicle (R. XII, p. 10). Prior to getting into her patrol vehicle, Det. Da Giau advised the defendant they would do a real quick check to make sure he didn't have anything on him, before placing him in her patrol vehicle (R. XII, p. 10). Before the deputies could physically check him, the defendant started emptying his pockets and handing various items to Det. Da Giau (R. XII, p. 10). The defendant handed Det. Da Giau a cell phone, and cash (R. XII, p. 10). Det. Da Giau then asked the defendant if he had anything else

on his person and without verbally responding, the defendant handed Det. Da Giau a pill bottle he retrieved from his front pocket (R. XII, p. 10).

While waiting for the defendant to get comfortable, Det. Da Giau looked at the pill bottle (R. XII, p. 11). The pill bottle had a picture of the pills there were supposed to be in the pill bottle (R. XII, p. 11). While holding the pill bottle, the pill bottle shifted in her hand and Det. Da Giau (R. XII, p. 11). Det. Da Giau noted that the contents of the pill bottle did not feel like loose pills, the contents were "more scratchy"(R. XII, p. 11). This piqued her interest, so the detective opened the pill bottle (R. XII, p. 11). The detective reiterated that when she opened the pill bottle, the defendant was already going to be placed under arrest (R. XII, p. 11).

During cross examination, it was clear the defense was attacking the search of the pill bottle solely under the plain view argument, as defense counsel repeatedly asked the detective if she could identify the white powdery substance located on the straw found in the center console (R. XII, pp. 19-21). Det. Da Giau reiterated that after locating the contraband in the defendant's vehicle, she offered to let the defendant sit in her patrol vehicle (R. XII, pp. 24-25). After asking the defendant if he had anything in his pockets, the defendant handed the detective a cell phone and cash (R. XII, p. 25). The detective then asked if he had anything else in his pockets and the defendant handed the detective a pill bottle (R. XII, p.

25). The defense asked if the detective could see the contents of the pill bottle and the detective testified she could not (R. XII, p. 26). The defense asked the detective, " So when you took the pill bottle from Mr. Martin, other than what he told you about it being for heartburn and what it said on the label, you had no way of knowing what was inside that bottle. Correct?" (R. XII, p. 27). The detective answered, "Yes, sir." (R. XII, p. 27). The defense followed up with the following question, "And, in fact, at the time that he handed the pill bottle over, you did not know what was inside the pill bottle. Correct" (R. XII, p. 27). The detective answered, "That's correct, sir." (R. XII, p. 27). The detective reiterated that prior to opening the pill bottle, the defendant was going to be placed under arrest for transporting an open container, possession of drug paraphernalia, and no tag lamp (R. XII, p. 30).

On re-direct, the detective testified that based on her training and experience, the substance she observed in the straw was a controlled substance (R. XII, p. 31). The detective went into further detail about the glass located in the center console, which had unmelted ice in it (R. XII, pp. 31-32). The detective testified there was no condensation or dampness around the surrounding area of the glass (R. XII, pp. 31-32). The detective further testified that it is common for people to keep controlled substances in pill bottles (R. XII, p. 32).

During its argument on the motion to suppress, the State argued that the

white powdery residue in the straw constituted drug paraphernalia (R. XII, pp. 39-40). The State further pointed out that one of the open containers, a glass with ice in it, with suspected alcohol was located in the center console (R. XII, p. 39). As to the pill bottle, the State made two arguments (R. XII, p. 40-41). The State argued that when the detective asked the defendant if he had anything, he handed her his wallet, cash and cell phone (R. XII, p. 40). When asked whether he had anything else, he voluntarily relinquished the pill bottle (R. XII, p. 40). The State noted that Det. Da Giau never ordered him to give him the pill bottle, he simply handed it over (R. XII, p. 40). The defendant never gave a verbal response to any of the questions pertaining to what he may have had on his person (R. XII, p. 40). The State further argued that it did not matter whether the detective had ordered the defendant to hand her the pill bottle, or if he voluntarily relinquished it, as the detective had sufficient probable cause to arrest him at that point, "he was going to be searched. All of those items would have been found anyway." (R. XII, p. 40). The State further argued that based on what the detective had found in the defendant's Tahoe, being the straw with residue, the detective believed the pill bottle contained contraband in it (R. XII, p. 41).

In his argument, the defense argued that it was speculative that the items would have been found (R. XII, p. 42). Yet the defense never questioned the detective as to what she did with the items after they were located (R. See

Generally R. XII). The defense argued that Det. Da Giau, by asking him if he had anything else in his pockets, constituted an order (R. XII, pp. 42-43). The defense then argued that the contents of the pill bottle were not in plain view (R. XII, pp. 43-44). The court took the matter under advisement (R. XII, pp. 45-47).

In a written memorandum denying the defendant's motion to suppress, the trial court noted that "Det. Da Giau again asked if the Defendant had anything else. The defendant then handed Detective DaGiau a white opaque pill bottle" (R. I, p. 147). "While holding the bottle, Detective DaGiau testified that she did not feel like the contents of the bottle felt as it should for that type of pill. Detective DaGiau looked in the bottle and found a substance that would be identified as methamphetamine" (R. I, pp. 147-148). The court ultimately found:

> "Prior to the Defendant handing the pill bottle to Detective DaGiau, law enforcement had already seen and collected multiple open containers of alcohol in the Defendant's vehicle. Transportation of an open container is a misdemeanor and arrestable offense in Kansas. Further, law enforcement had also already discovered the butane lighter and yellow straw with white powdery residue in the Defendant's vehicle. Detective DaGiau testified regarding her training and experience in controlled substances and investigations. Further, Detective DaGiau testified that before she opened and looked inside the pill bottle, she already knew that she was going to place the Defendant under arrest. Therefore, the Court denies the Defendant's Motion to Suppress Evidence" (R. I, p. 148).

At jury trial, the defendant was ultimately convicted of Possession of Methamphetamine, a drug severity level 5, nonperson felony, and No Drug Tax Stamp, a severity level 10, nonperson felony (R. I, pp. 209-213). The defendant

filed a Notice of Appeal (R. I, pp. 248-249).

## ARGUMENTS AND AUTHORITY

**ISSUE I: THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.**

### Standard of Review

The standard of review for a district court's decision on a motion to suppress has two parts; the appellate court reviews the district court's factual findings to determine whether they are supported by substantial competent evidence, but the district court's ultimate legal conclusion is reviewed using a de novo standard. *State v. Hanke*, 307 Kan. 823, 415 P.3d 966 (2018).

### Arguments

There is substantial competent evidence to uphold the trial court's denial of the defendant's motion to suppress. The defendant argues the district court erred in denying the defendant's motion to suppress. At the motion to suppress, the State argued the pill bottle the defendant handed Det. Da Giau was admissible under two legal theories: (1) inevitable discovery under the search incident to arrest rule; and (2) consent, as the defendant voluntarily handed Det. Da Giau the pill bottle in question.

#### A. The Defendant Voluntarily Consented When He Handed The Pill Bottle To Det. Da Gaiu

The trial court noted that when asked whether he had anything else, the

defendant, who was not in handcuffs, handed Det. Da Giau the opaque pill bottle (R. I, p. 147). The trial court did not find that Det. Da Giau ordered the defendant to hand her anything. The defendant voluntarily turned over the pill bottle to Det. Da Giau. In *State v. Bieker*, 35 Kan.App.2d 427, 132 P.3d 478 (2006), officers had received a tip of a suspicious person buying a 96 count box of ephedrine cold tablets. Investigators were able to locate the suspicious subject and followed him to several stores in which he purchased ephedrine. At the last store, investigators approached the defendant and asked him to step outside, which the defendant did. Once utside, the investigators, now numbering four, asked the defendant for permission to conduct a pat down search. The defendant agreed and began taking items out of his pockets and showing them to the investigators. One of the investigators noticed a box of cigarettes in one of the defendant's pockets that the defendant had not shown the officers. One of the officers inquired about the box of cigarettes, and the defendant handed the box to the investigator. The investigator looked into the box and notice a substance the officer believed to be methamphetamine. The defendant was arrested. On appeal the defendant challenged the search of the cigarette box. On appeal, this Court held the defendant willingly complied with the officer's request in handing over his box of cigarettes, despite the fact that at the time, the defendant was lawfully detained. 35 Kan.App.2d 437-438. See also *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct.

2556, 65 L.Ed.2d 633 (1980).

In the case at hand, Det. DaGiau did not ask the defendant to remove any objects from his pockets, or his person. Det. Da Giau merely asked the defendant if he had anything else on his person and without any prompting, started handing Dert. Da Giau various objects. When asked again if that was everything, the defendant, rather than providing a verbal response, handed the detective a pill bottle. There is nothing in the record to suggest the defendant was ordered to hand over the objects on his person, or in his pockets, to include the pill bottle See Generally R. XII).

In the alternative, the State argued the pill bottle would have been searched under the inevitable discovery rule as the detective intended on arresting the defendant once she had located the items in the defendant's vehicle (See Generally R. I, pp. 128-136, R. XII). The State is not stipulating that the initial search was unlawful, just offering an alternative theory of admissibility. The defendant's immediate formal arrest was temporarily delayed when the defendant began complaining about the heat (R. XII, pp. 10, 24-25). However, the defendant was arrested upon the deputies' conclusion of their investigation (R. II, pp. 2-6)

**B. Search Incident To Arrest**

Det. Da Giau testified that after locating the open containers of alcohol , the butane lighter and the straw with the white powdery residue, she intended on

arresting the defendant (R. XII, p. 9). However, immediately after locating the contraband, Det. Da Giau overheard the defendant complaining about the heat (R. XII, p. 10). To insure the defendant's safety, Det. Da Giau offered for the defendant and his dog to sit in her air conditioned patrol car (R. XII, p. 10). The defendant was not free to go, and under arrest at that point.

**i. Probable Cause To Arrest**

The cut straw with a white powdery residue is sufficient probable cause for an arrest. Det. Da Giau testified she was aware that straws are commonly used as drug paraphernalia to snort narcotics (R. XII,9). The crime of possession of drug paraphernalia is set out in K.S.A. 2019 Supp. 21–5709(b)(2), which provides: "It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to: ... (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body."

Transporting an open container of alcohol is a misdemeanor, punishable by a fine of not more than $200, or by imprisonment for not more than six months, or both. K.S.A. 8-1599. Thus Det. Da Giau had probable cause to arrest the defendant. See also *State v. Blackburn*, 394 P.3d 904 (2017)(unpublished opinion-copy attached).

**ii. Search Incident To Arrest**

The defense argues that the defendant was not under arrest as the officers

had not started the arrest process. However, to be under arrest, an officer does not need to formally start an arrest process, nor has the defense cited any cases to suggest that is the law. In *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), without probable cause, 3 detectives took the defendant into custody, transported him to a police station for interrogation. The defendant was advised he was not in handcuffs, was told he was not under arrest, and was not "booked." The U.S. Supreme Court rejected the State's argument that the defendant was not under arrest.

In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), the U.S. Supreme Court upheld the warrantless search of the defendant, wherein the defendant was searched prior to be placed under formal arrest. The Court held that since officers had probable cause to arrest the defendant, the search of his person was lawful. It was not important whether the search preceded the arrest, or vice versa. 448 U.S. at 111.

The defense asserts that any delay in the defendant's immediate arrest was unjustifiable, thus search incident to arrest is inapplicable. However, Det. Da Giau testified that after locating the items of contraband located in the defendant's vehicle, she intended on immediately arresting the defendant, but then the defendant began to complain about the heat. The detective noted it was hot, despite being at 1 am. At this point, the defense would fault the deputy for

attempting to alleviate any potential medical issues the defendant might have been suffering from, and would have preferred the deputy neglect her community care taking responsibilities and simply have preferred the defendant be formally arrested. There is no indication the arrest of the defendant was hours after the search of the vehicle. The issue as to any time delay between finding of the methamphetamine within the pill bottle, and the defendant's arrest, was never raised at the suppression hearing by the defense, thus it is not preserved for appellate review (See Generally R. XII). See *State v. Ochoa-Lara*, 312 Kan. 446, 476 P.3d 791 (2020); *State v. Dukes*, 290 Kan. 485, 231 P.3d 558 (2010).

The defense had been provided a copy of Det. Da Giau's probable cause affidavit, which clearly shows there was no delay in arresting the defendant (R. II, pp. 2-6). The defense was aware of the detective's affidavit, as they inquired about it at the suppression motion (R. XII, pp. 12-14). An argument not raised in a motion to suppress cannot be raised for the first time on appeal. *State v. Johnson*, 293 Kan. 958, 964, 270 P.3d 1135 (2012). The defense may argue the facts are undisputed, however, since the defense never raised the argument as to any potential time delay between the search and arrest, or vice versa, the trial court was never provided the opportunity to address that issue. *State v. Phongmany*, 321 P.3d 36 (2014)(Unpublished opinion-copy attached).

**iii. Scope Of The Search Incident To Arrest of Person**

The defendant argues, without citing a case on point, that Det. Da Giau exceeded the scope for search incident of the defendant's person. The cases cited by the defendant on appeal all refer to either the search of vehicles, and/or cell phones, not of suspects/defendants. The U.S. Supreme Court however, has addressed this very issue and rejected the defendant's argument in *U.S. v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). The defendant has also cited cases involving the search of cell phones, which neither our appellate courts, nor the U.S. Supreme Court has extended to the search of arrestees. There was substantial competent evidence to support the trial court's factual findings in its denial of the defendant's motion to suppress.

## II. POSSESSION OF METHAMPHETAMINE IS NOT A LESSER INCLUDED OFFENSE OF POSSESSION OF METHAMPHETAMINE WITH NO DRUG TAX STAMP

### STANDARD OF REVIEW

Our review of double jeopardy and multiplicity challenges under these provisions is unlimited. *State v. Appleby*, 289 Kan. 1017, 1026, 221 P.3d 525 (2009). An appellate court applies unlimited review to multiplicity challenges. *State v. Gonzalez*, 311 Kan. 281, 295, 460 P.3d 348 (2020). An interpretation of statutes necessary to the multiplicity analysis is subject to de novo review. 311 Kan. at 295.

## ARGUMENT

This issue was not raised at the district court level, thus it has not been preserved for appeal. *State v. Ochoa-Lara*, 312 Kan. 446, 476 P.3d 7991 (2020). (Failing to preserve mulitplicity issue precluded appellate review). The defense argues that possession of methamphetamine and possession of methamphetamine without a drug tax stamp is multiplicitous, as possession of methamphetamine is a lesser included offense of possession of methamphetamine with no drug tax stamp. The defense has cited *State v. Hensley*, 298 Kan. 422, 313 P.3d 814 (2013). However, in Hensley, the Court held that possession of marijuana was a lesser included offense of possession of marijuana with no drug tax stamp, as marijuana was a misdemeanor and the no drug tax stamp was a felony offense. 298 Kan. at 438.

Unlike *Hensley*, possession of methamphetamine is a drug severity level 5, nonperson felony, while No Drug Tax Stamp is a severity level 10, nonperson felony. See K.S.A. 21-5706(a) and (c)(1); K.S.A. 79-5204 and K.S.A. 79-5208. The sentencing range for a drug severity level 5, nonperson felony is 10-42 moths in the Department of Corrections. See K.S.A. 21-6805. The sentencing range for a no drug tax stamp violation is 5-13 months. See K.S.A. 21-6804. As such, possession of methamphetamine is a higher severity level felony, thus it cannot be a lesser included offense of possession of methamphetamine with no drug tax

stamp.

"The Double Jeopardy Clause prevents a defendant from being punished more than once for the same crime." 311 Kan. at 296. Multiplicity occurs when a single offense is charged as several offenses in a charging document. Multiplicity involves a two-part test, determining first whether the convictions arise from the same conduct, and second whether by statutory definition there is only one offense. 311 Kan. at 296. Under the first prong, the court determines whether the conduct is discrete, meaning the convictions do not arise from the same conduct. But if the two convictions arise from the same act or transaction then the conduct is unitary, and the court must consider the second prong. 311 Kan. at 296. Under the second prong, if the convictions are for violating different statutes, the court applies "the same-elements" test: determining " ' "whether each offense contains an element not contained in the other; if not, they are the 'same offen[s]e' and double jeopardy bars additional punishment and successive prosecution." ' " 311 Kan. at 296; *State v. Schoonover*, 281 Kan. 453, 467, 133 P.3d 48 (2006).

Although the State in Hensley acquiesced that both possession of marijuana and poseession of marijuana with no drug tax stamp have the same elements, the State in this case disagrees. A person can possess methamphetamine, without violating K.S.A. 79-5204 and K.S.A. 79-5208, by simply possessing less than 1 gram, but still violate K.S.A. 21-5706(a). The defense further argues that

possession of methamphetamine is a lesser included offense of possession of methamphetamine with no drug tax stamp. However, possession of methamphetamine does not fall under the provisions of K.S.A. 21-5109(b), as noted above, as possession of methamphetamine is not a lesser crime than possession of methamphetamine with no drug tax stamp. This court should uphold the defendant's conviction for possession of methamphetamine and possession of methamphetamine with no drug tax stamp.

## CONCLUSION

There was substantial competent evidence to support the trial court's denial of the defendant's motion to suppress. Possession of methamphetamine is not a lesser included offense of possession of methamphetamine with no drug tax stamp

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that filed via the electronic filing system the original brief of the appellee with Clerk of the Appellate Court on October 17, 2022, 2022. Appellate counsel for the defendant will be notified by the electronic notification system.

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321 P.3d 36 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

State of KANSAS, Appellee,
v.
Arisack: **PHONGMANY**, Appellant.

No. 108,938.
|
March 21, 2014.

Appeal from Sedgwick District Court; James R. Fleetwood, judge.

**Attorneys and Law Firms**

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Matt J. Moloney and Julie A. Koon, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

Before GREEN, P.J., SCHROEDER, J., and JAMES L. BURGESS, District Judge Retired, assigned.

MEMORANDUM OPINION

PER CURIAM.

*1 On appeal, Arisack **Phongmany** challenges his conviction for possession of marijuana with intent to distribute. **Phongmany** claims three errors on appeal. First, the motion to suppress was improperly denied. Second, he was prevented from presenting his theory of defense. Finally, the jury instruction on aiding and abetting lacked a factual basis. For the reasons set out in this opinion, we find the district court did not err and affirm **Phongmany's** conviction.

FACTS

With a search warrant in hand, the Wichita Police Department went to a house on South Volustia Street to execute it. As they arrived, police found two males standing on the front porch and another male standing beside the passenger door of a black Honda Accord which had just pulled up and parked in front of the house. The police announced their presence and ordered the three males to the ground. The men on the porch complied; the male beside the car ran. Police pursued but were unable to catch him.

After searching the house, a K–9 unit was deployed on two vehicles, including the Honda parked in the street. With her handler, the drug dog indicated the presence of narcotics in the Honda. The police searched the unlocked car finding 25 grams of marijuana underneath the passenger seat of the car, a digital scale, a Kansas driver's license belonging to Arisack **Phongmany**, and the car registration reflecting Vanshy **Phongmany** as the owner. An officer identified Arisack **Phongmany** as the young man who ran off.

**Phongmany** was charged with possession of marijuana with intent to distribute. **Phongmany** filed a motion to suppress evidence obtained from the search of the car, claiming the police lacked suspicion to search without a warrant. Because neither **Phongmany** nor his car was within the scope of the search warrant, **Phongmany** claimed the search of his car violated his constitutional right to privacy. The State admitted the Honda Accord was not listed on the search warrant and was searched without a warrant.

At the motion to suppress hearing, the district court ruled the search warrant did not apply to the Honda and there was no car stop made because the vehicle was stopped before law enforcement became involved. However, the district court determined **Phongmany** had no Fourth Amendment rights to the air surrounding his vehicle. Because the K–9 dog unit indicating on the Honda was certified and trained, the K–9's indication established probable cause to search the Honda. The district court went on to say "once probable cause exists the police have the authority to search the vehicle as thoroughly as if a magistrate had authorized it through a warrant." Accordingly, the district court denied **Phongmany's** motion to suppress.

**Phongmany** objected during the jury trial to the admission of the evidence obtained from the search of his Honda. **Phongmany** also claimed another Asian male was driving the Honda Accord, but it was unclear who the male was. The State countered **Phongmany** was connected to the car and

  

marijuana by his driver's license found in the car, the officer identifying **Phongmany** as the Asian male he chased running away from the Honda, and a fingerprint expert testifying **Phongmany's** right thumbprint was on the baggy containing marijuana.

*2 During the State's case-in-chief, police testified about their arrival at the house on Volustia, the process of executing the search warrant, and the discovery of crack cocaine in the house. During the trial, **Phongmany** wanted to inquire if the Honda was described in the search warrant, and the State objected, arguing the motion to suppress had resolved the issue. The district court sustained the objection. Later, the State elicited testimony firearms were found inside the house. **Phongmany** objected, but the district court overruled the objection.

During the jury instructions conference, the district court discussed with both parties whether an instruction on aiding and abetting would be necessary. The State pointed out **Phongmany**, in his opening argument, stated another person was driving the Honda. **Phongmany** objected to the inclusion of this instruction, arguing there was no evidence to support an aiding or abetting instruction. The defense argued **Phongmany** simply was not present, so no aiding and abetting instruction was necessary. **Phongmany** also noted the instruction was taken from the third edition of the pattern instructions, and was not included in the fourth edition. The State countered by arguing even if **Phongmany** was not at the scene, he aided the person who fled from the police to distribute the marijuana baggie bearing **Phongmany's** thumbprint.

The district court subsequently issued instructions to the jury, including the instruction on aiding and abetting:

> "A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids another to commit the crime.
>
> "[The person is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the person could reasonably foresee the other crime as a probable consequence of committing or attempting to commit the intended crime.]"

**Phongmany** was found guilty of possession of marijuana with intent to distribute. The district court then denied **Phongmany's** posttrial motions. **Phongmany** timely appealed.

## ANALYSIS

**Phongmany** claims three errors on appeal. First, the motion to suppress was improperly denied. Second, he was prevented from presenting his theory of defense. Finally, the jury instruction on aiding and abetting lacked a factual basis. Each of **Phongmany's** arguments will be addressed in turn.

### *Did the District Court Err in Denying the Motion to Suppress?*

**Phongmany** claims the search of his vehicle was unconstitutional and his motion to suppress should have been granted. **Phongmany** also claims the initial police commands to lie down created an illegal seizure requiring suppression of all evidence under the exclusionary rule. These issues will be discussed following an explanation of the applicable standard of review.

#### *Standard of Review*

When the trial court has denied a motion to suppress, the moving party must object to the introduction of that evidence at the time it was offered at trial to preserve the issue for appeal. *State v. McCaslin*, 291 Kan. 697, 726, 245 P.3d 1030 (2011); see K.S.A. 60–404. Here, **Phongmany** clearly objected to the introduction of evidence at trial, thereby preserving the issue for appeal.

*3 The standard of review of a district court's decision on a motion to suppress uses a bifurcated standard. The appellate court reviews the district court's findings to determine whether they are supported by substantial competent evidence. In reviewing the factual findings, the appellate court does not reweigh the evidence or assess the credibility of witnesses. The ultimate legal conclusion is reviewed using a de novo standard. *State v. Martinez*, 296 Kan. 482, 485, 293 P.3d 718 (2013) (reasonable suspicion to stop and search defendant).

The State bears the burden of proof on a suppression motion. It must prove to the trial court the lawfulness of the search and seizure. *State v. Morlock*, 289 Kan. 980, 985, 218 P.3d 801 (2009).

*Was the Search of the Honda Unconstitutional?*

**Phongmany** claims both his federal and state constitutional rights were violated by the search of the Honda because the police lacked exigent circumstances to conduct a warrantless search. However, the State claims this argument was newly raised at the appellate level and therefore not properly before this court. First, we will discuss whether **Phongmany's** arguments are properly before this court; because they are not, we decline to address the merits of his argument.

*Are **Phongmany's** arguments properly before the panel?*

**Phongmany** claims his federal and state constitutional rights were violated because there were no exigent circumstances, coupled with probable cause, to permit a warrantless search of the Honda. The State argues **Phongmany** failed to challenge the district court's factual findings and conclusions of law. Without such a challenge, the State claims **Phongmany's** argument is waived or abandoned and there is no basis to reverse the district court's denial of the motion to suppress. See *State v. Johnson,* 293 Kan. 958, 964, 270 P.3d 1135 (2012) (issues not raised before the trial court cannot be raised on appeal).

**Phongmany** argues the issues he raises were properly preserved at trial because he relied on Fourth and Fourteenth Amendment arguments, the Kansas Constitution, and statutory provisions regarding search and seizure in his motion. **Phongmany** also cites *State v. Ortega–Cadelan,* 287 Kan. 157, 159, 194 P.3d 1195 (2008), to demonstrate the issues he raises involve questions of law based upon undisputed facts, which should therefore be heard for the first time on appeal.

The State argues **Phongmany** is improperly trying to introduce an argument that was not made at the district court level. **Phongmany** did not raise the issue of exigent circumstances in his motion to suppress, at the hearing on that motion, or in any of his continuing objections. A trial court must be provided a specific and timely objection to the introduction of evidence for the issue to be reviewable on appeal.See K.S.A. 60–404; *State v. Richmond,* 289 Kan. 419, 428–29, 212 P.3d 165 (2009).

The district court only issued findings of fact regarding the issues actually raised by **Phongmany** at trial. K.S.A. 22–3216(2) requires a defendant's motion to suppress to set forth the reasons for the suppression, and the district court "shall receive evidence on any issue of fact necessary to determine the motion." The State argues **Phongmany** never raised an issue regarding the mobility of the Honda at the suppression hearing or at trial and the record is therefore lacking facts to consider exigent circumstances.

*4 The State is correct in pointing out that **Phongmany** failed to raise the issue of exigent circumstances at the district court level. In his motion to suppress and at the hearing, **Phongmany** argued the lack of probable cause to make an investigatory stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). On appeal, he has changed his argument to one involving exigent circumstances regarding the mobility of the car rather than probable cause. While both issues are part of the larger rubric of Fourth Amendment search and seizure law, **Phongmany** did not specifically object to the issue of exigent circumstances, nor did he indicate there was a question regarding the mobility of the Honda, which would have allowed the district court to hear evidence on the issue and rule on it. See *Richmond,* 289 Kan. at 428–29; see also *State v. Hall,* No. 108,350, 2013 WL 3970190, at *2–3 (Kan.App.2013) (unpublished opinion) (State raised automobile exception below, even though it was not specifically stated, because the record was clear that the State was relying on this exception), *rev. denied* 298 Kan. —— (February 18, 2014). Because **Phongmany** did not specifically raise the issue of exigent circumstances or clearly contest the Honda's mobility before the district court, we find **Phongmany** failed to preserve the issue for appeal.

We cannot address the issue as a pure question of law either, because the facts are not undisputed. As **Phongmany** states:

> "There is no evidence of whether there was anyone else who could move the vehicle, whether there were keys available or present such that the vehicle was subject to removal, no evidence it was unlawfully parked and subject to tow, and certainly the only individual associated with the car was gone and unlikely to return while police were present at the residence."

Typically, this lack of evidence would weigh in **Phongmany's** favor, as it is the State's burden to prove the legality of a

warrantless stop. See *Morlock*, 289 Kan. at 985. However, because this issue was not raised below, **Phongmany** cannot claim the facts are undisputed and, at the same time, argue the evidence surrounding the mobility of the car was insufficient. See *Ortega–Cadelan*, 287 Kan. at 159 (exception for newly asserted claim that involves only a question of law arising on proved or admitted facts and is determinative of the case). **Phongmany's** claim based on exigent circumstances cannot be reviewed as the district court was not given an opportunity to address it, and the issue does not involve a question of law based on undisputed, admitted, or proven facts.

*Was **Phongmany** Seized Upon the Police's Initial Command Requiring Suppression of All Evidence Under the Exclusionary Rule?*

**Phongmany** argues when the police ordered him to the ground, they illegally seized him, thereby requiring suppression of all evidence obtained. The State counters no seizure occurred as **Phongmany** fled and abandoned his car.

*Was **Phongmany** seized?*

*5 **Phongmany** argues there was clearly a seizure. Under the recent case of *State v. Williams*, 297 Kan. 370, Syl. ¶¶ 3–5, 300 P.3d 1072 (2013), the Kansas Supreme Court stated a person is seized if a reasonable person would not feel free to end the encounter. The court utilized a totality of the circumstances test to determine if an individual is seized, noting factors to consider include " '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 approach, and an attempt to control the ability to flee.' " 297 Kan. at 377 (quoting *State v. McGinnis*, 290 Kan. 547, 553, 233 P .3d 246 [2010] ). Here, the police clearly intended to control the scene, but that is not what happened. **Phongmany** was ordered to the ground as armed, uniformed police officers exited their patrol cars with lights activated, but he failed to heed the order and fled, thereby abandoning the location and his vehicle.

**Phongmany** was subject to a show of force by law enforcement. However, **Phongmany** fled the scene, rather than submitting to the show of force. In *California v. Hodari D.*, 499 U.S. 621, 626–29, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the United States Supreme Court noted street pursuits put the public at risk and that sanctioning unlawful orders through the exclusionary rule would not be effective; therefore, the Court chose to encourage compliance with police orders. The Court accordingly refused to "stretch the Fourth Amendment beyond its words and beyond the meaning of arrest" and held that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. *Hodari D.*, 499 U.S. at 626–28. The Kansas Supreme Court has echoed *Hodari D.*, holding that a seizure occurs when there is an application of physical force or a show of authority indicating to a reasonable person that they are not free to leave "and the person submits to the show of authority." *State v. Morris*, 276 Kan. 11, 19, 72 P.3d 570 (2003) (citing *Hodari D*, 499 U.S. at 629).

**Phongmany** failed to submit to the show of authority. When ordered to the ground, he fled the scene. Because **Phongmany** did not submit to the show of authority, there was no seizure. See *Hodari D.*, 499 U.S. at 626–29; *Morris*, 276 Kan. at 19. Without a seizure, **Phongmany's** argument the evidence found in the Honda should have been suppressed under the exclusionary rule fails. Because **Phongmany** failed to raise exigent circumstances and was not seized, the district court was correct in finding the evidence was admissible.

*Did the District Court Impermissibly Prevent **Phongmany** from Presenting His Theory of Defense?*

**Phongmany's** second claim is the district court denied him the right to cross-examine the officer regarding the preparation and execution of the search warrant on the Volustia residence; thus, **Phongmany** argues the district court stopped him from presenting a part of his theory of defense.

*Standard of Review*

*6 Determining whether a district court's evidentiary exclusion infringed upon a defendant's constitutional right to present a theory of defense is reviewed de novo. *State v. Bridges*, 297 Kan. 989, 996, 306 P.3d 244 (2013). However, this right is also subject to statutory rules and caselaw interpreting rules of evidence and procedure: "Every decision to exclude evidence proffered by a criminal defendant does not amount to a constitutional violation." *State v. Wells*, 297 Kan. 741, 759, 305 P.3d 568 (2013).

Generally speaking, all relevant evidence is admissible. K.S.A. 60–407(f). K.S.A. 60–401(b) defines relevant evidence as "evidence having any tendency in reason to prove any material fact." This definition encompasses two elements: a materiality element and a probative element. A fact is material if it "has a legitimate and effective bearing on the decision of the case and is in dispute." *State v. Stafford*, 296 Kan. 25, 43, 290 P.3d 562 (2012). Review for materiality is de novo. *State v. Ultreras*, 296 Kan. 828, 857, 295 P.3d 1020 (2013). Evidence is probative "if it has any tendency to prove any material fact." *Stafford*, 296 Kan. at 43. An appellate court reviews the district court's assessment of the probative value of evidence under an abuse of discretion standard. *Ultreras*, 296 Kan. at 857.

*Was Evidence Wrongly Excluded?*

**Phongmany** claims when the State presented evidence regarding the search warrant and what was found, the State was proceeding on more than one "alternate theory of prosecution" to support the claim he possessed marijuana with intent to distribute: that **Phongmany** aided and abetted an unknown driver and that **Phongmany** was at the house to trade marijuana for crack cocaine. Based on these alternate theories, **Phongmany** claims the issues and circumstances surrounding the search warrant were relevant, material, and probative to help distance him from the "gun-toting crack dealers which were the target of the warrant."

**Phongmany** points to *State v. Green*, 237 Kan. 146, 149, 697 P.2d 1305 (1985), to support his contention that merely being present in the vicinity of criminal activity is insufficient to support a theory of aiding and abetting. Several officers testified the marijuana was held for sale given the amount, its packaging, and the possibility of trading for crack. **Phongmany** counters he should have been permitted to show he was not part of the search warrant or the information considered to issue it, to challenge he was there to trade marijuana for crack.

The State responds the reason behind the search warrant was not material. **Phongmany's** motion to suppress had been denied and **Phongmany** could not relitigate a matter of law before the jury.

The State is correct the excluded evidence was not material evidence. This legal question of searching his car had already been litigated at the suppression hearing and was not material to the trial. The evidence was not material to the ultimate fact question the jury was tasked to answer: whether **Phongmany** was guilty of possessing marijuana with intent to distribute. Accordingly, the district court did not err in excluding this evidence.

*7 Even if the evidence were material, **Phongmany's** claim fails because he was allowed to present his theory of defense. **Phongmany's** theory of defense was mistaken identity because it was "the only viable defense to the possession of the individually packaged marijuana." Thus, the issue for the jury was whether the officers accurately identified the fleeing male. The district court allowed **Phongmany** to cross-examine the officers regarding their ability and accuracy in identifying **Phongmany** as the man who fled from police. This testimony was sufficient to allow the jury to decide whether **Phongmany's** defense of mistaken identity was valid. "When a district court judge allows a criminal defendant to present evidence supporting his or her theory of defense such that the jury could reach a conclusion on its validity, exclusion of other evidence is not necessarily error." *State v. Jones*, 287 Kan. 547, 555, 198 P.3d 756 (2008). The district court's denial of **Phongmany's** questions to develop the issues around the application and issuance of the search warrant was not error.

*Was the Aiding and Abetting Instruction Improperly Given?*

Finally, **Phongmany** claims the aiding and abetting instruction was unnecessary and inappropriately connected him to the drugs found in the house on Volustia. The instruction allowed the State to broaden its theory of prosecution. **Phongmany** also claims the district court instructed on a new crime without notice and deprived him the ability to prepare his defense.

The Kansas Supreme Court has provided a four-part progression of analysis and corresponding standards of review when determining jury instruction issues:

> " 'For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an

> unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).' " *State v. Smyser*, 297 Kan. 199, 203–04, 299 P.3d 309 (2013) (quoting *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 [2012] ).

In addressing the first question, **Phongmany** objected to the instruction on aiding and abetting at trial and has preserved the issue for review.

Next, we must ask if the instruction on aiding and abetting was legally appropriate. To be legally appropriate, the challenged instruction must "fairly and accurately state the applicable law" when viewed in isolation from the facts. *Plummer*, 295 Kan. at 161. **Phongmany** argues the instruction on aiding and abetting was legally inappropriate because it was overbroad and did not allow him to prepare a defense. See *State v. Hart*, 297 Kan. 494, 508, 301 P.3d 1279 (2013) ("An overbroad instruction is erroneous because the charging instrument sets out the specific offense alleged to inform the defendant of the nature of the accusation, to permit the development of a defense to meet that accusation, and to protect against conviction based on facts not contemplated in the accusation ." [citing *State v. Trautloff*, 289 Kan. 793, 802–03, 217 P.3d 15 (2009) ] ). In particular, **Phongmany** contends the State "impermissibly broadened its theory of prosecution without notice" by obtaining the aiding and abetting instruction to improperly tie him to all of the activity in the house for which he was not charged.

***8** The State counters the Kansas Supreme Court has consistently held there is no legal requirement that a defendant be charged with aiding and abetting because aiding and abetting is not a separate crime in Kansas. See *State v. Amos*, 271 Kan. 565, 568–69, 23 P.3d 883 (2001) (citing *State v. Pennington*, 254 Kan. 757, Syl. ¶ 4, 869 P.2d 624 [1994] ); *State v. Smolin*, 221 Kan. 149, 152–53, 557 P.2d 1241 (1976). Instead, the theory of aiding and abetting merely extends liability to a person other than the principle actor. *State v. Robinson*, 293 Kan. 1002, 1038, 270 P.3d 1183 (2012). Therefore, the State argues the mere fact **Phongmany** was not charged with aiding and abetting in the complaint does not make a jury instruction on aiding and abetting legally inappropriate.

The State is correct. The Kansas Supreme Court has held "a trial court may give instructions on aiding and abetting even though the defendant was not charged with aiding and abetting." *State v. Butler*, 257 Kan. 1043, 1065, 897 P.2d 1007 (1995), *modified* 257 Kan. 1110,916P.2d 1 (1996). Here, the instruction was legally appropriate when viewed in isolation from the facts, and the district court used an instruction taken directly from the pattern instructions. See *Butler*, 257 Kan. at 1066 (use of pattern instructions strongly recommended and, absent the need for modification, should be followed by the trial court). Therefore, the instruction on aiding and abetting was legally appropriate, and **Phongmany's** argument fails.

Next, we turn to determine if the instruction was factually appropriate. The Kansas Supreme Court has deemed this inquiry "closely akin" to the review of the sufficiency of the evidence in a criminal case: whether, after review of all the evidence, viewed in a light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Deference must be given to the findings made by the district court, and this court should not reweigh the evidence or credibility of witnesses. *Plummer*, 295 Kan. at 161–62 (citing *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 [2011]; *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 [2011] ).

**Phongmany** argues the instruction was not factually appropriate. He claims although evidence was presented to show trading marijuana for other narcotics is possible,

there was no evidence presented to show this happened in the case at hand. **Phongmany** also argues there was no evidence presented to show he was connected to the target residence, where illegal drugs and firearms were seized. Lastly, **Phongmany** argues there was no evidence of a third-party driver or another individual in the vehicle whom he could have aided or abetted. Based on this lack of evidence, **Phongmany** claims the instruction on aiding and abetting lacked sufficient factual basis.

The State counters **Phongmany** himself made aiding and abetting an issue in his opening argument, where he argued another unknown Asian male had been driving the Honda. However, the State produced evidence that **Phongmany's** driver's license and immigration papers were found in the Honda, the vehicle was registered to an individual with the same last name, and his right thumbprint was found on the baggy of marijuana found in the car. Therefore, the State argues there were sufficient facts to demonstrate **Phongmany** was involved in the crime, either as a principal or an aider and abettor; thus, the instruction was factually appropriate.

***9** When the evidence is viewed in a light most favorable to the prosecution, the State is correct in asserting there was sufficient evidence to instruct the jury on aiding and abetting. See *Plummer*, 295 Kan. at 161–62. **Phongmany** raised the possibility of another unknown Asian male fleeing from police. The State's counter-theory **Phongmany** was the Asian male who fled does not prevent an instruction of aiding and abetting. There was sufficient evidence, circumstantial and direct, for the jury to consider he aided or abetted another principal actor. *State v. Holt*, 285 Kan. 760, 773, 175 P.3d 239 (2008) (jury could have concluded through the totality of the evidence that the defendant was either an aider or abettor to the principal actor [citing *State v. Clemons*, 251 Kan. 473, 485, 836 P.2d 1147 (1992) ] ); see *State v. Yardley*, 267 Kan. 37, 41–42, 978 P.2d 886 (1999) (jury could have concluded through circumstantial evidence that the defendant was with the principal actor, even if the defendant was not the principal actor). Here, police found **Phongmany's** driver's license, his immigration papers, and his thumbprint on the baggy of marijuana in the Honda. Even if **Phongmany** was not the driver of the car who fled from police, this amount of circumstantial evidence was sufficient to link **Phongmany** to the unknown principal actor as an aider and abettor in possessing marijuana with intent to distribute. Additionally, we note the aiding and abetting instruction went to the crime of possession of marijuana with intent to distribute, not to the activity in the house.

There was no error by the district court in giving the aiding and abetting instruction with **Phongmany's** defense. With no error, we do not need to address the fourth prong of the test outlined in *Smyser*.

## CONCLUSION

**Phongmany's** conviction is affirmed. We find the district court did not err in denying **Phongmany's** motion to suppress as the car was properly searched after the K–9 dog unit indicated on the car while parked in the public street in front of the house after the driver ran off. The district court properly limited **Phongmany's** cross-examination of the police officers as to why they were at the house, as this information was not relevant or probative to what was found in his car. Finally, the district court properly gave the aiding and abetting instruction when **Phongmany** raised the issue of someone else driving the car.

Affirmed.

**All Citations**

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Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Rebecca A. **BLACKBURN**, Appellant.

No. 115,956
|
Opinion filed May 19, 2017
|
Review Denied December 22, 2017

Appeal from Clay District Court; JOHN F. BOSCH, judge.

**Attorneys and Law Firms**

Heather Cessna, of Kansas Appellate Defender Office, for appellant.

Richard E. James, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Bruns, P.J., Hill and Schroeder, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** We must answer several questions in this appeal. Can a deputy stop a pickup truck at night for having a broken taillight? Can the deputy then search the truck after a drug-sniffing dog alerts near the truck? Can the deputy then arrest the driver of the truck for possession of drug paraphernalia after finding a cut straw and plastic mirror both with white residue on them in the truck? Should the trial court have suppressed the methamphetamine discovered in the driver's shoe when the deputy searched her just before arresting her? We answer the first three questions yes and the last question no. We affirm Rebecca A. **Blackburn's** conviction for possession of methamphetamine.

*The deputy noticed a taillight.*

Around 8:30 the evening of March 20, 2015, Clay County Sheriff's Deputy Jeffrey Browne noticed a pickup truck ahead of him that had a taillight emitting white light instead of red. Browne had been following the truck at a distance of about one-half of a block. Because the taillight was emitting white light, the deputy decided to make a traffic stop. The white light was the first type of light he saw from the truck. He later described the light as "pretty strong."

As the truck was stopping, Deputy Browne saw that the passengers were moving around inside the cabin of the truck. He walked up to the truck and told the driver—Rebecca **Blackburn**—the reason for the stop. **Blackburn** told him the taillight was damaged because she had previously rolled the truck. There were two passengers in the truck with **Blackburn**. Neither passenger was wearing a seat belt.

Deputy Browne returned to his patrol vehicle to make license checks on **Blackburn** and the passengers. Before checking the licenses, however, Deputy Browne asked the undersheriff to come to the scene with his drug-sniffing dog. The dispatcher told Deputy Browne that one of the passengers had a warrant for her arrest. Another officer arrived at the scene and arrested that passenger. While Deputy Browne was writing traffic citations for the seat belt violations and the broken taillight, the undersheriff arrived with his dog. It sniffed around **Blackburn's** truck and alerted at the passenger side door.

After the dog alerted, the officers removed **Blackburn** and the remaining passenger from the pickup and performed a pat-down search of both. No contraband was found as a result of the pat down. Deputy Browne searched the passenger side portion of the truck while the undersheriff searched the driver's side. During the search, Deputy Browne found a cut straw with white residue on the passenger floorboard and a "small, black, plastic mirror-type object" with white powdery residue in the glove compartment.

Deputy Browne believed these objects were drug paraphernalia—used for nasally ingesting drugs. He performed a field test for methamphetamine on the cut straw. The test did not indicate the presence of methamphetamine, but it was positive for the presence of amphetamine. Deputy Browne then searched **Blackburn's** person and had her take off her shoes. He found a baggie containing a white crystal substance, later identified by the KBI as methamphetamine, in **Blackburn's** shoe. **Blackburn** was taken into custody.

Subsequent laboratory testing also revealed that the cut straw tested positive for methamphetamine.

*2 The State charged **Blackburn** with possession of methamphetamine and operating a vehicle with a broken taillight. **Blackburn** moved to have the evidence found during the stop suppressed for two reasons. First, the deputy did not have a reasonable suspicion to make a legitimate traffic stop. In her view, the plain language of the taillight statute did not make driving with cracks in a taillight that emitted white light illegal. Therefore, the deputy lacked a reasonable suspicion to even stop the truck. Second, she contends the deputy did not have probable cause to arrest her because the field test of the straw was negative for methamphetamine. The district court denied her motion. The court later found **Blackburn** guilty after a bench trial on stipulated facts. **Blackburn** appeals the denial of her motion to suppress and the resulting conviction.

To us, **Blackburn** contends that the deputy was not justified in stopping her truck because the State could not prove that the truck's taillight could not emit red light visible at a distance of 1,000 feet as required by K.S.A 8–1706. After all, the deputy first noticed the truck just about one-half of a block ahead of him—not 1,000 feet. She also argues that since the field test of the cut straw was negative for methamphetamine then the deputy had no reason to arrest her on suspicion of possession of drug paraphernalia.

*The traffic stop here was legal.*

**Blackburn** challenges the legality of the initial traffic stop. Appellate courts have separated public encounters of police with citizens into four categories—voluntary, investigatory, public safety, and arrests. See *State v. McGinnis*, 40 Kan. App. 2d 620, 623–24, 194 P.3d 46 (2008). Here, the traffic stop for a cracked taillight falls into the investigatory detention category. An investigatory detention is permissible if the police have reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 27–28, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968); see K.S.A. 22–2402. A violation of the traffic code or a traffic ordinance can provide reasonable suspicion to stop a vehicle. *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L.Ed. 2d 89 (1996).

Here, the facts are not in dispute. Deputy Browne, at night, saw a vehicle with a cracked taillight driving down the street. He saw white light emitting from the taillight. The white light was "pretty strong" and he noticed it before seeing any other type of light. The deputy made a traffic stop based upon what he perceived to be a possible traffic infraction.

The applicable statute, K.S.A. 8–1706(a), part of the Uniform Act Regulating Traffic Equipment of Vehicles, K.S.A. 8–1701 *et seq.*, provides that a vehicle must be equipped with two taillights that emit visible, red light at a distance of 1,000 feet. Deputy Browne first saw the pickup from the rear at a distance of about one-half of a block—less than 1,000 feet. At this distance, Deputy Browne saw that the truck was emitting white light. Did this observation provide Deputy Browne with a reasonable suspicion that the vehicle was in violation of K.S.A. 8-1706?

Reasonable suspicion exists if at the time of the stop an officer has specific, articulable facts that criminal activity has occurred, is occurring, or is about to occur. *State v. Coleman*, 292 Kan. 813, 817, 257 P.3d 320 (2011). Certainly, Deputy Browne specified his reasons for stopping the truck —the broken taillight emitting white light. The law requires two functioning taillights, not one.

We must evaluate reasonable suspicion from the viewpoint of a trained law enforcement officer. *State v. Pollman*, 286 Kan. 881, 890, 190 P.3d 234 (2008). Deputy Browne saw white light being emitted from **Blackburn's** taillight. He testified that in his experience, the white light would overpower the red light the further away the light is viewed from the source. This is a safety concern that we cannot reasonably ignore. A bright white light shining into the eyes of drivers approaching the rear of the truck could have their vision impaired; thus, creating a traffic hazard. Therefore, we hold that the white light being emitted from the taillight provided Deputy Browne with reasonable suspicion that a traffic infraction might be occurring and the stop was reasonable.

*3 For her part, **Blackburn** argues that because Deputy Browne did not observe her vehicle from a distance of 1,000 feet then there can be no reasonable suspicion that a crime occurred. Additionally, she argues under the plain language of the statute that a taillight emitting white light is not a violation of the statute. She confuses the issues.

The question of proof of the traffic violation is not before us at this stage of our analysis. At this point, we must determine if the traffic stop was reasonable. An investigatory stop only requires a minimum level of objective justification.

See *Terry*, 392 U.S. at 27–28. Deputy Browne did not have to observe the truck from a distance of 1,000 feet to have reasonable suspicion that a traffic infraction occurred or check to see if the driver knew her taillight was broken. Also, this safety statute requires two functioning red taillights—not one red and one red-and-white light.

**Blackburn** relies upon *State v. Knight*, 33 Kan. App. 2d 325, 104 P.3d 403 (2004), as support. The case is no help to her cause. In *Knight*, an officer stopped a car when the driver did not use a turn signal when exiting a parking lot onto a main street. The traffic ordinance in *Knight* only involved traffic movements while on a public street and not when moving from a private road, like a parking lot, onto a public street. Because the officer did not observe any activity which could possibly constitute a crime, the panel held that there was no reasonable suspicion for a stop. 33 Kan. App. 2d at 327.

Our facts here are distinguishable. Deputy Browne observed a possible violation of the statute—one functioning taillight and one taillight emitting white light. In *Knight*, there was no observed activity that could constitute a crime. Because of the safety concern and the possibility that what Deputy Browne observed was a crime, we hold that it was reasonable for him to investigate further and stop the truck.

*The second search of **Blackburn** occurred immediately before her arrest.*

Our determination of probable cause must be made within a factual context. Such a determination is a fact-specific inquiry. The facts known to Deputy Browne prior to his arrest of **Blackburn** are determinative. We relate what we have gleaned from the record.

Deputy Browne saw the passengers in the truck suspiciously moving around after he stopped the truck. A drug-sniffing dog had alerted by the passenger side door of the truck. A cut straw with white residue was found on the passenger side floorboard. A black, plastic, mirror-like object with white residue was found in the passenger side glove compartment. Finally, Deputy Browne knew that all three occupants in the pickup had been previously charged with drug crimes.

According to Deputy Browne, the major factor he relied upon as probable cause for the arrest was the presence of what he believed was drug paraphernalia in the truck. The items believed to be drug paraphernalia were the cut straw and the black, plastic, mirror-like object, both of which had a white powdery residue on them. Deputy Browne testified that in his training and experience a cut straw and a flat surface is used for snorting drugs. Even though the field test was negative for methamphetamine it was positive for amphetamine, which can be obtained by prescription. The deputy also stated he had never seen a cut straw used to inhale a prescription narcotic.

*4 The drug paraphernalia possession crime is set out in K.S.A. 2016 Supp. 21–5709(b)(2), which provides: "It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to: ... (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body."

When determining probable cause, the facts are viewed from the perspective of a trained law enforcement officer. Reasonable inferences from the facts are permitted. *State v. Payne*, 273 Kan. 466, 474, 44 P.3d 419 (2002). We need not repeat what we stated above about the furtive movements of the passengers, the alert of the drug dog, and the white residue found on two items. But considering these circumstances, it was reasonable for Deputy Browne to conclude the cut straw and the black, mirror-like object were drug paraphernalia.

Next we must also look at the legal term "possession." When dealing with controlled substances, possession means "having joint or exclusive control over an item with knowledge of and intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control." K.S.A. 2016 Supp. 21–5701(q).

A useful case on this point is *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L.Ed. 2d 769 (2003). In *Pringle*, a police officer stopped a car with three occupants. A search of the car revealed multiple baggies of cocaine. The police arrested all three occupants. The United States Supreme Court found that probable cause existed for the arrest because it was reasonable to infer a common enterprise among the occupants of the vehicle. 540 U.S. at 372. In reaching this decision, the Court relied upon the fact that the officer had no information linking a specific passenger to the cocaine. 540 U.S. at 374.

Here, the facts are analogous to *Pringle*. The cut straw and mirror-like object were found on the passenger floor board and in the glove compartment. Deputy Browne's inference

that **Blackburn** had at least knowledge of the presence of the cut straw and mirror-like object is reasonable. " '[A] car passenger ... will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.' [Citation omitted.]" *Pringle*, 540 U.S. at 373. Deputy Browne had no information that would single out a passenger in the truck as the owner of the paraphernalia; thus, it is reasonable for him to believe that **Blackburn** had possession of the drug paraphernalia. See 540 U.S. at 374. The facts known to the deputy at the time of arrest support probable cause to believe that **Blackburn** had possession of the drug paraphernalia. With probable cause, an arrest is legally possible.

To the contrary, **Blackburn** argues that a field test performed on the cut straw eliminates Deputy Browne's probable cause. Indeed, Deputy Browne performed a field test to determine if there was methamphetamine on the cut straw. The field test did not indicate the presence of methamphetamine but did indicate the presence of amphetamine.

The field test being negative for methamphetamine does not eliminate Deputy Browne's probable cause, and we question whether it even weakens it. We are concerned with probable cause here, not a determination of guilt. In determining whether probable cause exists we look at both inculpatory and exculpatory facts. See *State v. Edgar*, 296 Kan. 513, 525, 294 P.3d 251 (2013). The fact that the cut straw did not test positive for methamphetamine but positive for amphetamine does suggest that the cut straw had been used to inhale amphetamine. Probable cause is based upon the relative weight of probabilities. Even with the negative field test, Deputy Browne was reasonable in his belief that the cut straw had been used to ingest drugs. The suspicion was reasonable: the straw and mirror-like object, both with a white substance on them, were drug paraphernalia.

*5 **Blackburn** also argues that there were innocuous reasons for having a cut straw and a mirror-like object. Her argument concerning the straw is not persuasive because it was a cut straw *with white residue on it*. From the perspective of a trained law enforcement officer, it is much more likely that a cut straw with white residue is drug paraphernalia than there being an innocuous reason for it being in the truck.

Turning to the mirror-like object, **Blackburn** argues there are many reasons to possess a mirror and cites *Knight* as authority. In *Knight*, this court held there was no reasonable suspicion for a stop when a person bought water, two packs of cold medicine, and salt in a single purchase. These items are used in the manufacturing of methamphetamine. The court held that salt was so ubiquitous a substance that even with the purchase of the other items it did not amount to reasonable suspicion. 33 Kan. App. 2d at 327–28. **Blackburn** argues that possessing the mirror-like object is analogous to purchasing salt in *Knight*.

We are not convinced. Here, the facts are distinguishable from *Knight*. At times, it is referred to as a "mirror-like object" and other times as a "mirror." If we assume the item is a mirror, we acknowledge that there are many noncriminal reasons to carry a mirror. But here, the mirror was found close to a cut straw. Both items had white residue on them. While in *Knight* it was unreasonable to suspect from the purchase of salt, water, and cold medicine that a person is manufacturing methamphetamine, it is not unreasonable to suspect that a cut straw and mirror with white residue on them are drug paraphernalia. The proximity of the objects connected with the presence of the white residue, when considered together with all the other facts we have mentioned is a far cry from being similar to someone buying salt at a grocery store.

In light of all the facts known to Deputy Browne prior to arresting **Blackburn**, a reasonable officer could believe that **Blackburn** had possessed drug paraphernalia. Therefore, we hold there was probable cause for the arrest.

Affirmed.

**All Citations**

394 P.3d 904 (Table), 2017 WL 2212115

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