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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001144-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 16-CR-00230

ANTHONY GARRETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND SPALDING, JUDGES.

ACREE, JUDGE: The Commonwealth appeals the June 17, 2017 order of the Montgomery Circuit Court suppressing evidence obtained in a search of Appellant Anthony Garrett's vehicle. Because the police conducted the search without a warrant under circumstances that did not justify any exception to the Fourth Amendment's warrant requirements, we affirm.

FACTS AND PROCEDURE

The evidence supporting the circuit court's findings of fact was introduced through testimony of the arresting officer, Joshua Smith, the only witness to testify. That evidence is as follows.

After dark on Labor Day, September 5, 2016, Officer Smith saw a "suspicious vehicle" parked near a Mount Sterling intersection. When counsel asked what was particularly suspicious about the vehicle, Officer Smith said, "None other than being parked in the area with the headlights off." (Video Transcript (VT) 3/21/17; 1:51:30). That area is an unpaved but partially graveled strip of land, about the width of two cars, adjacent to the road surface at the intersection. Although there were two street lights in this area, only one was working. (Record (R.) at 73; VT 3/21/17; 1:52:22 (Officer Smith: "To the best of my knowledge, *one* of those lights was off." (emphasis added))).[1]

The officer did not know whether the area was public or private property but said it was common for vehicles to park there during the day. However, during his two months working for the Mount Sterling Police Department, Officer Smith had never seen vehicles park there at night. He explained his decision to approach the vehicle was based on his belief it was

[1] The Commonwealth represented to the Court that both lights were out, contrary to this clear testimony and the circuit court's finding.

parked in a high crime area. The Uniform Citation states the time as 10:02 PM. From his police cruiser, Officer Smith contacted dispatch to "run the tags for that vehicle." (VT 03/21/17; 1:23:20).

The officer testified that, "to be perfectly honest, ma'am, I had no idea what Mr. Garrett was up to . . ."; he said, "I made contact with him to see what he was, to see what his activities were." (VT 03/21/17; 1:26:08). After running the vehicle's license plate, Officer Smith approached the vehicle's driver side on foot. Although Garrett's vehicle was parked closer to the creek than to the parallel roadway, there was still sufficient room for Officer Smith's partner, Officer Aaron Roberts, to approach the vehicle's passenger side where Stephanie Hendrix was seated. While Officer Roberts observed Hendrix, Officer Smith spoke with Garrett and asked him for identification. Garrett fully cooperated and handed the officer his driver's license. (VT 03/21/17; 1:27:00).

Officer Smith then returned to his vehicle with Garrett's license and "ran Mr. Garrett's name over the radio through dispatch." (VT 3/21/17; 1:57:20). The time would have been approximately 10:14 PM.[2] Officer Smith said he "was advised Mr. Garrett possibly had a warrant."[3] The record does not indicate how

[2] Officer Smith testified that approximately twenty minutes elapsed between calling into dispatch with Garrett's information and receiving the "no warrants" message from dispatch at 10:34 PM. (VT 03/21/17; 1:42:27).

[3] The circuit court asked questions to clarify the officer's testimony about the mere "possibility" of a warrant for Garrett's arrest. During that colloquy, it was established that the administration of the civil warrant process was transitioning from a manual and paper-based format to an

much time elapsed before Officer Smith returned to Garrett's car and "detained Mr. Garrett for, to, until dispatch could confirm his warrant"; he asked Garrett to "step out of the vehicle and I [Officer Smith] placed him in handcuffs." (VT 3/21/17; 1:27:30). Again, Garrett was fully cooperative.

Some twenty minutes after contacting dispatch, Officer Smith "was pulling him [Garrett] to the back of the vehicle attempting to talk to him, [when] she [Hendrix] started to make those erratic moves." (VT 3/21/17; 1:43:27). Officer Smith did not observe Hendrix's movements himself but testified to what he had been told – that "Officer Roberts observed the passenger attempting to conceal or reach for an item between the seats[,]" but he did not see or identify the item. (VT 3/21/17; 1:27:55). As noted earlier, Officer Roberts did not testify.

Although Officer Smith earlier testified that he placed Garrett in handcuffs upon removing him from his vehicle because of a possible warrant, he later offered an alternative scenario. He testified that he and Garrett were talking and walking to the rear of Garrett's vehicle when Hendrix began moving suspiciously. The circuit court was persuaded by this second account, finding that

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electronic and paperless eWarrant system. The same transition for criminal warrants had occurred six years earlier in the Spring of 2011. The court confirmed that Officer Smith handcuffed Garrett while he was awaiting confirmation of "civil warrants as in . . . child support." (VT 3/21/17; 1:56:05). Dispatch's incomplete search indicated an old civil warrant, but the complete search revealed it was no longer active or outstanding on the night in question. (VT 3/21/17; 1:58:15). There was no testimony regarding any criminal warrant.

"because of the erratic movements of . . . Hendrix, he [Officer Smith] placed . . . Garrett in handcuffs to ensure officer safety and assist Officer Roberts; simultaneously, Officer Smith learned that there was no warrant for [Garrett's] arrest." (Order of Suppression, R. at 74). These three events were so close in time that Officer Smith called them "simultaneous" and "one continuum."

After refreshing his memory with his computer-aided dispatch ("CAD") report,[4] Officer Smith gave a specific time when he received the "no warrants" confirmation from dispatch. He testified that at "approximately 2234 [10:34 PM] is whenever they gave us a, what we call a '10-4 check' meaning that everything is okay, and then we continued on the scene." (VT 3/21/17; 1:29:30). That is to say, thirty-two (32) minutes had elapsed from the time given on the Uniform Citation as the start of the investigation, at 10:02 PM.

Neither officer observed any weapons or contraband at this point; Hendrix's movements alone caused the officers to conclude she was trying "to conceal an item or reach for a weapon, um, [so] we [Officer Roberts and Officer Smith] pulled her out of the vehicle." (VT 3/21/17; 1:28:21).

[4] The CAD report was not introduced into evidence. The Commonwealth's Memorandum in Opposition to Defendant's Motion to Suppress references the CAD report as "Commonwealth's Exhibit 3" but the Commonwealth only introduced two exhibits. Both are nighttime photos of the scene. (R. 41-42). The next pages of the record are Defense Exhibits 1 through 3, daytime photos of the scene. (R. 43-45).

There is no evidence the officers patted down Hendrix or Garrett for weapons. Officer Smith said only that they conducted an "officer safety search" of the area around where Hendrix had been seated "to see if contraband is being hidden or a firearm being manipulated"[5] but "mainly [for] a weapon . . . ." (VT 3/21/17; 1:48:00). No evidence indicates either Garrett or Hendrix had drugs on their person.[6] The best evidence of the time offered by the officer for when the search began was, in effect, the same time he received word there was no warrant for Garrett's arrest. That would have been at or immediately after 10:34 PM.

This "officer safety search" yielded contraband in the form of cannabis and scales, so the officers undertook a more thorough search of the vehicle and, in total, discovered 5.3 grams of marijuana, 1.96 grams of cocaine, and the aforementioned scales. In addition, the circuit court entered a finding that "[c]ash in the amount of $1,234.95 was found on Defendant Anthony Garrett."[7] A

[5] This phrase was part of Garrett's counsel's question on cross-examination. Officer Smith agreed with the statement and added that the officers were looking primarily for a weapon, as quoted.

[6] More accurately, the officers discovered no drugs on the persons of Garrett or Hendrix at the scene. After Hendrix was arrested and transported to the Montgomery County Regional Jail, she was discovered to be holding a quantity of methamphetamine. (VT 3/21/17; 2:02:48).

[7] Only tenuous support for this finding can be gleaned from the confusing testimony of Officer Smith. That testimony differed both from the circuit court's finding and the officer's preliminary hearing testimony. At the preliminary hearing, the officer referred to his CAD report and said the cash "was located inside of the vehicle." (VT 9/22/16; 11:38:55). During the suppression hearing, the court asked, "Where was the cash found?" After apologizing for his delay in answering (about 18 seconds while he examined his records), the officer responded, "I believe it was in the passenger's seat ma'am. Er, actually I apologize." (VT 3/21/17; 1:33:02). After 21

quarter hour or so after beginning the vehicle search, at 2250, *i.e.*, 10:50 PM, Officer Smith arrested Garrett and Hendrix. (VT 3/21/17; 1:29:40).

On March 21, 2017, upon Garrett's motion to suppress, the circuit court conducted a hearing. On June 15, 2017, the circuit court entered an order suppressing all the evidence discovered in the warrantless search.

The circuit court found as fact that when the search was conducted, neither Garrett nor Hendrix was under arrest; there was no evidence that either officer observed contraband or a weapon in plain view or plain smell; and "[t]here were no exigent circumstances." (R. 75). The search was not consensual. (R. 77; VT 3/21/17; 1:58:38).

The circuit court then applied the law to these facts, stating:

> The United States Supreme Court created an automobile exception with Carroll v. United States, 267 U.S. 132

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more seconds elapsed while he further examined his records, the officer said, "I believe it was on Mr. Hendrix's person." When the court questioned his identification of a "Mr. *Hendrix*," the officer corrected himself, stating, "I apologize. Mr. *Garrett*." Later, when asked whether all the cash was found on Garrett or split between Garrett and Hendrix, Officer Smith said, "To the best of my knowledge, it was gonna be all on Mr. Garrett, in that area, in his area." The circuit court asked for clarification, "Are you saying around the driver's seat?" The officer responded, "Yes, ma'am. To the best, to the best of my knowledge, it was gonna be in that area, center console, driver's seat, and on his person." (VT 3/21/17; 1:50:16). If this large amount of cash was found on Garrett's person before the vehicle search, it might have been considered a factor in the officers' reasonable suspicion or probable cause. That is, in combination with other factors, it may have helped justify a detention (reasonable suspicion) rather than constitute fruit of a warrantless search. Because Officer Smith gave no timeframe to the discovery of cash, and because he did not identify it as a factor supporting his suspicion of criminal activity, *where* the cash was found is irrelevant. It is doubly so here because the circuit court suppressed the evidence of the search and, so, we are not concerned that substantial evidence does not support the finding regarding where the cash was found.

> (1925) and Chambers v. Maroney, 399 U.S. 42 (1970); however, in enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, that Court still insists upon probable cause as the minimum requirement for reasonable searches permitted by the United States Constitution.
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> . . . .
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> However, there was no permission for the search, no evidence of a crime in plain view, and no exigent circumstances. Additionally, *there was not probable cause* to believe a crime had been, or was about to be, committed; nor had the Officers witnessed the Defendant commit any offenses. Therefore, once the Officers determined there was no active warrant for the Defendant's arrest, there was no basis for continued detention of Defendant Anthony Garrett and no basis for the warrantless search of his vehicle. Further, because the Officers knew there was no warrant for the Defendant's arrest prior to conducting the search, there can be no reasonable argument that the Officers were acting in good faith on what they believed to be a valid warrant of arrest under U.S. v. Leon, 468 U.S. 897, 921.

(R. at 76-77) (emphasis added; paragraph numbers omitted). Based on these conclusions, the circuit court ruled that "All evidence seized as a result of the September 5, 2016 search of Defendant Anthony Garrett's vehicle, shall be suppressed, as against Defendant Anthony Garrett, and may not be used in any trial of Defendant Anthony Garrett." (R. at 77). This appeal followed.

STANDARD OF REVIEW

Because CR[8] 52.01 applies, the standard of review of a pretrial motion to suppress "remains substantively unaffected" after the transition from RCr[9] 9.78 to RCr 8.27, the rule for conducting suppression hearings. *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015). The review is twofold. "First, we review the trial court's findings of fact under a clearly erroneous standard. Under this standard, the trial court's findings of fact will be conclusive if they are supported by substantial evidence. We then conduct a *de novo* review of the trial court's application of the law to the facts to determine whether its decision is correct as a matter of law." *Whitlow v. Commonwealth*, 575 S.W.3d 663 (Ky. 2019) (quoting *Simpson v. Commonwealth*, 474 S.W.3d 544, 547 (Ky. 2015) (citations and internal quotation marks omitted)).

ANALYSIS

The Commonwealth argues the circuit court erred both in its factfinding and in applying the law. We consider the factfinding first.

1. Substantial evidence supports circuit court's relevant findings of fact.

The Commonwealth challenges certain of the circuit court's findings of fact as lacking the support of substantial evidence. "Specifically," argues the

[8] Kentucky Rules of Civil Procedure.
[9] Kentucky Rules of Criminal Procedure.

Commonwealth, "the trial court's facts state in Paragraph 9 that after learning that there was no warrant for the Defendant the Officer's [sic] searched the vehicle. These facts, as stated by the Court, are clearly erroneous." (Commonwealth brief, p. 4). We are not persuaded.

Before proceeding to consider the Commonwealth's specific challenge to the sequence of events found as fact by the circuit court, we acknowledge that some factfinding indeed does lack the support of substantial evidence. Those erroneous findings, however, favor the Commonwealth.

An example is the circuit court's finding that the officers first noticed Garrett's vehicle "[a]t approximately 11:30 p.m.[,]" (R. 73), when the Uniform Citation indicates, and Officer Smith testified clearly and consistently, that it was much earlier in the evening – 10:02 PM.[10] (VT 3/21/17; 1:23:15). The circuit court said the lateness of the hour was a factor affecting the officer's reasonable suspicion of criminal activity, but it was not as late as the court found.

Another erroneous finding of fact cited as a factor supporting the officer's reasonable suspicion Garrett was engaged in criminal activity was that his car was parked "with the lights off, the motor running," but this contradicts the

[10] Without citing to the record, the Commonwealth says the time of Officer Smith's initial contact was even later, "at approximately 23:57 hours" or 11:57 PM. (Commonwealth brief, p. 1). Having scoured this relatively small record, we found nothing to contradict Officer Smith's testimony and, therefore, we cannot comprehend how or why the circuit court and the Commonwealth misstated the time.

only testimony on that point; Officer Smith said, "I don't recall if the car was on." (VT 3/21/17; 1:26:26). There was no other evidence that the motor was running.

The circuit court also found, contrary to the officer's unrefuted testimony, that "[t]he entire event, from initial contact to charging Defendant Anthony Garrett with trafficking, and placing him in custody for transport to the MCRJ [Montgomery County Regional Jail] pursuant to same, took approximately twenty (20) minutes." (R. 75). Officer Smith's testimony was clear that "On 9/5 of 2016, at approximately 2202 hours [10:02 PM], I located a suspicious vehicle," (VT 3/21/17; 1:23:15), and that the arrest occurred at 10:50 PM, forty-eight (48) minutes later.[11] (VT 3/21/17; 1:29:40). These erroneous findings advance the Commonwealth's argument rather than undercut it. We will address these erroneous findings in the context of the circuit court's legal conclusions below. For now, we return to the Commonwealth's challenge to the sequence of events.

The Commonwealth appears to challenge the circuit court's finding that no part of the search was conducted before dispatch told Officer Smith that

[11] Other parts of the officer's testimony referring to a twenty-minute span may have confused the circuit court. First, Officer Smith testified that it was "[a]pproximately twenty-ish minutes" from "2234" when dispatch gave the officer "a '10-4 check'" meaning there was no warrant, until "Mr. Garrett was placed in custody . . . at 2250." (VT 3/21/17; 1:28:55). Later, Officer Smith testified that approximately twenty minutes elapsed between calling into dispatch with Garrett's information and receiving the "no warrants" message from dispatch at 10:34 PM. (VT 03/21/17; 1:42:27). Combined, this is approximately forty (40) minutes and that is consistent with the time signatures Officer Smith said was recorded on the CAD of forty-eight (48) minutes from initiating the investigation at 10:02 and arresting Garrett at 10:50.

Garrett had no warrants. If so, the challenge must fail. As outlined above, there is no evidence otherwise.

However, the Commonwealth also believes the circuit court improperly conflated the officers' actions after removing Hendrix from the vehicle by treating the "continuum" of events as a single thorough search. The Commonwealth says the search was conducted incrementally, as follows: (1) Officer Smith asked Garrett "to step out of the vehicle, so he could check the validity of the warrant"; (2) "Officer Roberts alerted Officer Smith of the erratic movements of the passenger"; (3) "Out of concern for officer safety, Officer Smith placed [Garrett] in handcuffs and went to the passenger side of the vehicle"; (4) The officers "then searched the area where Ms. Hendrix was reaching and located cannabis and scales"; (5) "[T]he Officer's [sic] then proceeded to search the remainder of the vehicle locating cocaine." (Commonwealth brief, p. 4).

The Commonwealth's interpretation is drawn largely from Officer Smith's *second* description of the relevant events that had Garrett in handcuffs rather than his first version, and for a different reason. Whether the second version is contradictory to or complementary of the first was a decision for the circuit court to make. *Simpson*, 474 S.W.3d at 547 (citing CR 52.01 ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.")). In

fact, the circuit court accepted the officer's second version of when and why he handcuffed Garrett. (R. 74).

The Commonwealth wants to parse the search into two separate events and suggests a lesser standard for a warrantless search applies to what it calls an "officer safety search" than applies to the more thorough vehicle search. As we explain below, no such distinction exists given the facts of this case. There is only one standard applicable to a warrantless physical search of a vehicle – "officers may search an automobile without having obtained a warrant so long as they have *probable cause* to do so." *Collins v. Virginia*, __ U.S. __, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (citing *California v. Carney*, 471 U.S. 386, 392-93, 105 S.Ct. 2066 85 L.Ed.2d 406 (1985)). As we later discuss more thoroughly, we agree with the circuit court's conclusion of law that no probable cause existed to justify a warrantless search of the vehicle.

As to the Commonwealth's argument that the circuit court's relevant factfinding lacks the support of substantial evidence, we find no merit. None of the relevant factfinding was erroneous.

2. Appellee had no duty to "preserve" issue of lack of exigent circumstances.

The most challenging kind of argument to review is one the Court has difficulty understanding. The Commonwealth's second argument, to use its own words, is that Garrett "did not preserve the issue for which the trial court

suppressed the evidence" stating, "Counsel for the Defendant did not raise issue with the search of the entire vehicle based on no exigent circumstances." (Commonwealth brief, p. 6).

Perhaps the Commonwealth is confused by the fact that the circuit court ordered Garrett to brief the issue first and allowed the Commonwealth to respond. If so, that confusion should be dispelled by an applicable quote from an oft-cited vehicle-search opinion, *Gallman v. Commonwealth*, in which the Kentucky Supreme Court said:

> All searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *The burden is on the prosecution to show the search comes within an exception*. The only remotely possible exception presented in this case is whether the warrantless search was made with probable cause to search but with exigent circumstances.

578 S.W.2d 47, 48 (Ky. 1979) (emphasis added).

Three points applicable to this review can be found in this quote. First, a defendant has no duty before the circuit court to "preserve" for appellate review which exception to the warrant requirement the Commonwealth failed to establish. Second, the Commonwealth bears the burden of proving the availability and applicability of the exception, not the defendant. The third point is a preview of the remainder of this opinion. Just as in *Gallman*, "[t]he only remotely possible exception presented *in this case* is whether the warrantless search was made with

probable cause to search but with exigent circumstances." *Id.* (emphasis added). The circuit court in this case found neither probable cause nor exigency.

The Court finds no merit in the Commonwealth's second argument that Garrett should not be allowed to argue the absence of exigent circumstances because he failed to preserve it before the circuit court.

3. Officers' consensual encounter became an unlawful detention.

The Commonwealth's remaining three arguments are: (1) only a reasonable articulable suspicion of criminal activity was needed to justify the search of the area around Hendrix's seat; (2) probable cause to search the vehicle existed; and (3) exigent circumstances justified the vehicle's immediate search. There is no merit in these arguments.

A. Initial police interaction was consensual.

The Commonwealth argues that the entire incident was lawful because "[t]he necessity of probable cause is lifted in the event that an officer has reasonable articulable suspicion of criminal activity." (Commonwealth brief, p.6). This misstates the law by suggesting the latter standard is an acceptable substitute for the former. Appellate review requires we start at the beginning.

The first step in determining whether there has been a Fourth Amendment violation, is finding whether and when a seizure or a search occurred. Both occurred here, but the initial contact in this case was neither.

Unlike most police interaction with occupants of vehicles, this incident did not begin as a traffic stop. In other words, the officers did not pull Garrett over for violating a traffic law – "[a] seizure justified . . . by a police-observed traffic violation . . . ." *Rodriguez v. United States*, __ U.S. __, 135 S.Ct. 1609, 1612, 191 L.Ed.2d 492 (2015). There was no police-observed infraction of the law. Officer Smith simply approached Garrett at 10:02 PM on Labor Day "to see what his activities were." And there is nothing wrong with that.

"Police officers are free to approach anyone in public areas for any reason[.]" *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008) (quoting *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001)). "No '*Terry*' stop occurs when police officers engage a person . . . in conversation by asking questions." *Id.* at 850 (citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). In Fourth Amendment jurisprudence, such conduct is characterized as a "consensual encounter" and is not itself a search or a seizure. *United States v. Campbell*, 486 F.3d 949, 954 (6th Cir. 2007).

The fact is that Officer Smith had no justification for a search or seizure at this point. He said he "had no idea what Mr. Garrett was up to" when he approached him, but he did so because Garrett was in a high-crime area. However, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is

committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000). This did not justify a seizure, *i.e.*, Garrett's detention, because nothing suspicious could be particularized to Garrett; his location and the surrounding circumstances were entirely consistent with law-abiding conduct and did not justify a *Terry* stop. *Moberly v. Commonwealth*, 551 S.W.3d 26, 31 (Ky. 2018) ("We consider . . . [whether] the information from which a trained officer makes inferences . . . yields a *particularized suspicion* that the *particular individual* being stopped is engaged in wrongdoing." (emphasis added) (citation omitted)). At that point in the sequence of events, there was yet to be a seizure.

The fact that Garrett was in an automobile rather than in some other public place, such as a restaurant, does not make his presence in a supposed high-crime area more suspicious. After all, "[i]ndividuals seated in a parked automobile are no less likely than those lingering in a restaurant to '"have been talking about the World Series,"' . . . and so there is nothing about being seated in a car which is itself suspicious." *United States v. Bell*, 762 F.2d 495, 500 n.6 (6th Cir. 1985) (quoting *Sibron v. New York*, 392 U.S. 40, 62, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968)). The officers' approach was not threatening. They did not use their vehicle to block Garrett from driving away and he would have been free to do so. There is not even testimony that Officer Smith used flashing lights or a siren. So, the encounter Officer Smith initiated was consensual and no seizure had occurred.

While Officer Smith ran the vehicle license plates before getting out of his cruiser and approaching Garrett's driver side window, Garrett remained in place voluntarily. Nothing distinguished his behavior from that of any law-abiding citizen cooperating with the police.

Nothing changed when the officers approached Garrett and Hendrix on their respective sides of the vehicle. "[A]pproaching the vehicle in this manner [with one officer on each side of the car], by itself, does not make the encounter nonconsensual." *United States v. Pettis*, 591 F. App'x 393, 396 (6th Cir. 2014) (brackets in original) (quoting *United States v. Carr*, 674 F.3d 570, 573 (6th Cir. 2012) (citing *United States v. Dingess*, 411 F. App'x 853, 854 (6th Cir. 2011)).

Although Officer Smith's stated purpose for the consensual encounter was "to see what his activities were," he never asked Garrett why he was parked there or whether Garrett knew this was a high-crime area. Instead, Officer Smith asked Garrett for identification, presumably because, as Officer Smith stated, he asks everyone he approaches in vehicles "for their licenses, any type of identification[.]" (VT 03/21/17; 1:44:42).

When Garrett provided his license, the interaction remained consensual because "a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984).

These preceding rules of law in Fourth Amendment jurisprudence were established based on the standard for determining whether a seizure has occurred. The standard is that:

> a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) (citations omitted).

Officer Smith's polite tone and request for identification would not have caused a reasonable person to suspect he was not free to leave the scene. And Garrett's consent to allow Officer Smith to examine his license, in and of itself, changed nothing.[12] Similarly, Officer Smith's brief possession of Garrett's license,

[12] Because Garrett was not stopped for a traffic violation, he could have refused to provide his driver's license. *Kavanaugh v. Commonwealth*, 427 S.W.3d 178, 181 (Ky. 2014). In Kentucky, however, refusing to comply with that request "may still be considered along with other sufficient factors demonstrating reasonable suspicion." *Id.* Garrett's cooperation deprived the officer of that factor.

long enough to identify him, changed nothing. It was merely a part of the "inoffensive contact" between them. Until this point, Garrett had no objectively reasonable basis for believing he was not free to leave. But then Officer Smith did more than simply confirm Garrett's identity and hand the license back.

Consider what was about to happen in a different context. Imagine a friend admires your watch and asks to see it. You consent, take off the watch, and hand it to your friend. All is well until the friend begins to walk away. The circumstances change. Similarly, circumstances changed when Officer Smith walked away from Garrett while still in possession of his driver's license.[13]

When Officer Smith took Garrett's license back to his own vehicle, Garrett was seized for Fourth Amendment purposes. As the Sixth Circuit said:

> When a police officer takes a motorist's driver's license and walks away with it, no reasonable motorist would feel free to drive away, as this would require the motorist to either drive without a license or abandon his or her car. *Cf. Florida v. Royer*, 460 U.S. 491, 501-02, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (holding that defendant was seized within the meaning of the Fourth Amendment when government agents took defendant's driver's

[13] During the suppression hearing, the circuit court queried Officer Smith as follows:

Court:	. . . Mr. Garrett gives you his driver's license?
Officer:	Yes, Ma'am.
Court:	You take the driver's license back, [to] run it?
Officer:	Yes, ma'am.
Court:	So, then you go and tell Mr. Garrett that there may be a warrant?
Officer:	Yes, ma'am.

(VT 03/21/17; 11:57:35).

> license and plane ticket, asked defendant to accompany them to a room in the airport, and did not indicate to defendant that he was free to leave).

United States v. Black, 240 F. App'x 95, 100 (6th Cir. 2007), *cert. denied*, 552 U.S. 1129 (Jan. 07, 2008).

The Commonwealth appears to take the erroneous position that the seizure occurred upon contact with Garrett, as in a *Terry* stop. The circuit court does not expressly identify that moment as the seizure, but says:

> If there is reasonable, articulable suspicion of criminal activity; or reasonable, articulable suspicion that an individual is involved in, or wanted in connection with, a felony; an officer may stop that individual and conduct a limited search of his person for weapons, with less than full probable cause to arrest. Terry v. Ohio, 391 U.S.1 (1968).
>
> In this case, given the suspicious way in which he was parked in the grass with the lights off, the motor running and the windows cracked, the location where he parked on East Locust Street, a known high crime area, and the time of night, 11:30 p.m.; it was permissive, pursuant to Terry, Id., for the Officers to approach and briefly detain Defendant Anthony Garrett. Further, given the information regarding the possible existence of an active warrant for Defendant's arrest, it was reasonable for the Officers to detain him long enough to determine if same did, in fact, exist. Id.

(R. 76-77). It is enough, however, that the circuit court held the seizure of Garrett's person, when it did occur, did not violate his Fourth Amendment protections.

We cannot agree with the circuit court that the factors Officer Smith identified were enough to support a "reasonable, articulable suspicion of criminal activity; or reasonable, articulable suspicion that [Garrett was] involved in, or wanted in connection with, a felony[.]" *Id.*

Of the factors the circuit court identified, at least two (the time of night and the motor running) were erroneous findings as discussed above. That leaves nothing more than that Garrett "was parked in the grass with the lights off . . . and the windows cracked . . . [at] night. . . [in] a known high crime area[.]" As cited earlier, these factors do not give rise to a reasonable articulable suspicion that Garrett was, or was about to be engaged in criminal activity. *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 676; *Bell*, 762 F.2d at 500 n.6. We acknowledge that a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. *Wardlow*, 528 U.S. at 124, 120 S.Ct. at 676. But these circumstances alone are not enough. There must be "a particularized and objective basis for suspecting *the particular person stopped* of criminal activity." *Navarette v. California*, 572 U.S. 393, 396, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014) (emphasis added) (citations and internal quotation marks omitted).

The location and circumstance factors existing in this case are present in many cases in which a suppression motion fails. However, in those cases, it is

the particularizing factor that distinguishes them. For example, in *Illinois v. Wardlow*, these same location and circumstance factors were present. But there was one more factor present that particularized the suspicion to the target of the seizure. As the Supreme Court said, the suspect's "nervous, evasive behavior" and "unprovoked flight" particularized the officer's suspicion to that suspect. 528 U.S. at 124, 120 S. Ct. at 676. There is no evidence Garrett was nervous or evasive before Officer Smith walked away with his license. To the contrary, the officer testified to Garrett's continual cooperation.

Similarly, in *United States v. Mundy*, 591 F. App'x 320, 321 (6th Cir. 2014), *cert. denied*, __ U.S. __, 135 S.Ct. 1575, 191 L.Ed.2d 657 (2015), a case originating in Richmond, Kentucky, officers "were patrolling a 'high-crime area' [and, u]pon turning onto a poorly lit and largely deserted street, the detectives saw a Ford Contour parked at the side of the road, not running . . . . The vehicle itself was completely dark with no interior or exterior lights, [and] it was late at night . . . ." *Id.* at 321, 323. But there was another factor that particularized the suspicion to the suspect. The arresting officer "saw legs sticking out of an apparently otherwise unoccupied parked car . . . [and, based on his experience,] believed that the position of the legs was indicative of a break-in." *Id.* at 323. The legs sticking out were those of the particular person detained. By contrast, Garrett

and Hendrix were sitting as normally in the vehicle as any law-abiding couple would.

There was no officer-observed traffic or other violation when Officer Smith walked away from Garrett, in control and possession of his driver's license. We conclude the facts found by the circuit court that are supported by substantial evidence do not support a reasonable, articulable suspicion that Garrett was then, or was about to be, engaged in criminal activity. We further find that, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877; *Royer*, 460 U.S. at 498, 103 S.Ct. at 1324 ("He may not be detained even momentarily without reasonable, objective grounds for doing so . . . ."). What had begun as a lawful consensual encounter had become an unlawful seizure.

B. *Evidence seized was "fruit of the poisonous tree."*

As stated by the Supreme Court of the United States, "To enforce the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct." *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2059, 195 L. Ed. 2d 400 (2016). This exclusionary rule justifies a court's suppression of "both the primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality,

the so-called 'fruit of the poisonous tree.'" *Id.* at 2061 (quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (internal quotation marks omitted)). The evidence suppressed in this case is fruit of the poisonous tree and must be excluded, absent an exception to this rule of jurisprudence.

Recognizing the "significant costs" of the exclusionary rule, the Supreme Court of the United States deemed its application justified only "where its deterrence benefits outweigh its substantial social costs." *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." *Id.* at 590.

As our own Supreme Court says, courts will not apply the exclusionary rule and suppress evidence "simply because it would not have come to light but for the illegal actions of the police." *Hedgepath v. Commonwealth*, 441 S.W.3d 119, 125 (Ky. 2014) (quoting *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (internal quotation marks omitted)). The more appropriate question, says our Supreme Court, "is whether . . . the evidence . . . has been come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (citation and internal quotation marks omitted). "[E]vidence is not to be excluded

if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.'" *Id.* (quoting *Segura*, 468 U.S. at 805, 104 S.Ct. 3380 (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)).

"The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence . . . ." *Strieff*, 136 S.Ct. at 2061. In *Strieff*, as in the case now before this Court, the officer made an unconstitutional investigatory stop. *Id.* at 2059. The Court addressed whether the attenuation doctrine applied when an officer "learns during that stop that the suspect is subject to a valid arrest warrant . . . ." *Id.* at 2056. Notwithstanding that Garrett – to use Officer Smith's words – only "possibly had a warrant," the analytical template used in *Strieff* is helpful.

Whether learning of a warrant (or possible warrant) or any occurrence is "a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence [requires consideration of] . . . three factors . . . . First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional [conduct]." *Id.* at 2061-62. (citation omitted). The Supreme Court has "declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the

evidence is obtained." *Id.* at 2062 (citations omitted). Both in *Strieff* and the case under review, the officer "discovered drug contraband . . . only minutes after the illegal stop." *Id.* Citing *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the Court explained that, in that case, "such a short time interval counsels in favor of suppression . . . , relying in part on the 'less than two hours' that separated the unconstitutional" police conduct and the evidentiary fruit of that conduct. *Id.* Analysis of this first factor here weighs in favor of suppression.

When the Supreme Court in *Strieff* turned to the second factor – "the presence of intervening circumstances" – it concluded the factor "strongly favors the State." *Id.* But there was a significant difference between that case and this. In *Strieff*, "the warrant was valid, it predated . . . and . . . was entirely unconnected with the stop. And once [the o]fficer . . . discovered the warrant, he had an obligation to arrest Strieff." *Id.* Garrett's warrant was never more than a possible civil warrant, not a criminal warrant, and turned out to be non-existent after all.

Although Officer Smith's inconsistent testimony could have supported a finding that Garrett was handcuffed for the mere possibility of a warrant, it is uncontroverted that the unlawful detention was extended twenty minutes to investigate that mere possibility. When he learned Garrett had no outstanding warrants, the episode should have come to an end. "If the officer does not learn facts rising to the level of probable cause, the individual must be allowed

to go on his way." *Wardlow*, 528 U.S. at 126, 120 S.Ct. at 677. Analysis of this second factor weighs in favor of suppression.

The Commonwealth argues, albeit indirectly, that there was another intervening circumstance – Hendrix's erratic movement and removal from the vehicle. The circuit court did not, nor does this Court, find that Hendrix's movement provided the probable cause necessary to seize her. Although nervousness has been considered in finding reasonable suspicion in conjunction with other factors, it is an unreliable indicator of criminal activity in circumstances such as these. Encountered by the police, "[m]any citizens become nervous . . . even when they have nothing to hide or fear." *United States v. Richardson*, 385 F.3d 625, 630-31 (6th Cir. 2004).

Based on this record, Hendrix did not move suspiciously from the time the officers initiated their investigation at 10:02 PM until thirty-two (32) minutes later when dispatch told Officer Smith at 10:34 PM that Garrett had no warrants. During this time, neither officer observed evidence of contraband or weapons. The circumstances to that point in time failed to provide a reasonable, articulable suspicion of criminal activity, much less probable cause. To support either, the Commonwealth needed to offer into evidence more than Officer Smith's general testimony that Officer Roberts saw "erratic movements."

Officer Smith did not see these movements himself and, so, could not testify to the specific conduct that caused Officer Roberts to call for Officer Smith's help. Officer Roberts did not testify and, therefore, did not provide those missing specifics that might have convinced a court that the officers' subsequent conduct was justified. This "demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981) (emphasis in original) (quoting *Terry*, 392 U.S. at 21 n.18, 88 S.Ct. at 1880 n.18). The evidence here is too general in nature to justify setting aside Garrett's Fourth Amendment protections. Without more specific evidence regarding Hendrix's movement, pulling her from the vehicle was not so much an intervening circumstance as it was another unconstitutional seizure.

No intervening circumstances between the unlawful detention and the discovery of contraband were sufficient to support the attenuation doctrine. Analysis and application of the second factor favors suppression.

The third factor considers "the purpose and flagrancy of the official misconduct[.]" *Strieff*, 136 S. Ct. at 2063. "The exclusionary rule exists to deter police misconduct [and] . . . [t]he third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant." *Id.*

Unfortunately, *Strieff* gives little guidance to distinguish flagrant police conduct from non-flagrant police conduct. The Court does say, "to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." *Id.* at 2064. Mostly, however, the Court's determination of non-flagrancy was reached after merely providing context. The Court said, "the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. [The officer] saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations. . . . [T]here is no evidence that [the officer's] illegal stop reflected flagrantly unlawful police misconduct." *Id.* at 2063 (The unlawful stop occurred at the end of a week-long surveillance of the suspected drug house.).

We are confident the Supreme Court did not intend to conflate the definition of flagrant conduct with that of intentional conduct. *But see* Joëlle Anne Moreno, *Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 Berkeley J. Crim. L. 36, 51 (2016) ("When flagrancy is defined as a hidden mental state it becomes unknowable."). Otherwise, the "purposeful or flagrant" factor would only weigh in favor of suppression when the defense proves the officer intended to violate the Fourth Amendment – a subjective standard. Such an interpretation of flagrancy would excuse *all* unintentional Fourth

Amendment violations no matter how much the conduct deviates from that of a reasonably well-trained police officer. And that would run afoul of the objective standard articulated in *United States v. Leon*.

In *Leon*, the Supreme Court said, "suppression is appropriate only if the officers . . . could not have harbored an objectively reasonable belief in the existence of probable cause." 468 U.S. 897, 926, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677 (1984). Interpreting *Leon*, Kentucky's Supreme Court said it "imposed a standard of objective reasonableness on police activity and retained the suppression remedy when police conduct falls below that standard." *Crayton v. Commonwealth*, 846 S.W.2d 684, 688 (Ky. 1992).

There is no reason for giving the word "flagrant" a meaning different than that in common usage. The Merriam-Webster dictionary defines "flagrant" as "conspicuously offensive," giving as an example "*flagrant errors*"; it offers as a second definition conduct that is "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality."[14]

We do not attribute bad faith or ill motive to the officers in this case. However, the fact that their investigative "hunch" was corroborated by the

[14] *Flagrant*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/flagrant (last visited September 5, 2019). Another reliable dictionary defines "flagrant" as "shockingly noticeable or evident; obvious; glaring: *a flagrant error*." Random House Dictionary of the English Language, Unabridged 728 (2d ed. 1987). No definition indicates intent is a component in the definition of flagrant, nor does any synonym found in Roget's International Thesaurus 962 (4th ed. 1977).

evidence they seized does not mean the steps preceding the seizure were not flagrant errors in their police work. *Nichols v. Commonwealth*, 186 S.W.3d 761, 764 (Ky. App. 2005) (mere hunch that criminal activity is afoot will not validate the seizure) (citing *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883). These errors included: taking Garrett's license to run a warrant check when he did nothing inconsistent with lawful conduct; detaining him (perhaps in handcuffs) for twenty minutes because of a "possible" civil warrant while dispatch dealt with an administrative glitch; handcuffing Garrett for officer safety with no reason to believe the officers' safety was at risk (other than Hendrix's movement after half an hour of sitting still); pulling Hendrix from the vehicle to search it for a weapon without probable cause and without patting down either Garrett or Hendrix in search of a weapon; and searching the vehicle without a warrant or probable cause.

We find the facts of Garrett's case in stark contrast with those in *Strieff*. To elaborate further, in *Strieff*, "[w]hile [the officer's] decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a 'negligibly burdensome precautio[n]' for officer safety." *Id.* (quoting *Rodriguez v. United States*, 575 U.S. ----, ----, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 (2015)). But the warrant check in *Strieff* was only deemed negligibly burdensome to a citizen when balanced against the need for officer safety. Officer Smith testified that he was only concerned for officer safety *after*

he initiated the warrant check, when Officer Roberts alerted him to Hendrix's movement. Officer Smith's check for outstanding warrants for Garrett was not conducted for officer safety.

Additionally, if Officer Smith's earlier testimony is to be believed, he handcuffed Garrett before confirming whether there was a warrant for his arrest. This violates the rule that a "detention . . . must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference.'" *Davis v. Commonwealth*, 484 S.W.3d 288, 292 (Ky. 2016) (quoting *Turley v. Commonwealth*, 399 S.W.3d 412, 421 (Ky. 2013) (quoting *United States v. Davis*, 430 F.3d 345, 353 (6th Cir. 2005) (citation omitted))). Even presuming Garrett was not handcuffed until later, as the circuit court found based on Officer Smith's later testimony, there is still another problem. "[*A*]*ny* prolonging of the stop [whether constitutional or not] beyond its original purpose is unreasonable and unjustified; there is no '*de minimis* exception' to the rule . . . ." *Davis*, 484 S.W.3d at 294 (emphasis in original). Officer Smith unlawfully detained Garrett for twenty minutes while dispatch dealt with its administrative snafu. Because the totality of circumstances justified nothing more than a consensual interaction between Garrett and law enforcement, the delay while everyone waited for confirmation of a civil warrant was unreasonable and unjustified.

Furthermore, the circuit court found, and this Court agrees, that the officers' warrantless removal of Hendrix from the vehicle could not be justified because there was no probable cause. *See Wong Sun*, 371 U.S. at 480, 83 S. Ct. at 413 441 (1963) (Court must ask "whether the officers could, on the information which impelled them to act, have procured a warrant"). The subsequent search of the vehicle, ostensibly for a weapon, without first conducting a "pat down" of either Hendrix or Garrett, smacks of pretext.

"A protective search . . . must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002) (citing *Terry*). And even though we allow "the police to conduct an area search of the passenger compartment to uncover weapons," we do so only if the police "possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." *Michigan v. Long*, 463 U.S. 1032, 1051, 103 S.Ct. 3469, 3482, 77 L.Ed.2d 1201 (1983); *Docksteader v. Commonwealth*, 802 S.W.2d 149, 151 (Ky. App. 1991); *see also Terry*, 392 U.S. at 27, 88 S. Ct. at 1883 (must be "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual"). The priority in assuring officer safety is separating the weapon from a person the officer fears might use it. There was no evidence to

support an objectively reasonable belief that either Garrett or Hendrix was potentially dangerous. The fact that the officers made searching the vehicle their priority rather than frisking their suspects supports only the opposite inference.

And there are other contrasts between this case and *Strieff*. The Court in *Strieff* concluded the officers' investigation "was not a suspicionless fishing expedition in the hope that something would turn up." *Strieff*, 136 S.Ct. at 2064 (citation and internal quotation marks omitted). We cannot reach that same conclusion in this case. Although the flagrancy factor requires "more severe police misconduct . . . than the mere absence of proper cause for the seizure[,]" *id.*, the police misconduct here[15] surpasses that measure.

4. Exigent circumstances will not justify a search absent probable cause.

The Commonwealth's final argument is that Hendrix's movements constituted exigent circumstances that justified the challenged police conduct.

[15] As with the word "flagrant," use of the word "misconduct" does not necessarily always mean intentional conduct. In *Tower v. Glover*, the Supreme Court recognized that misconduct may be intentional or merely negligent. 467 U.S. 914, 921, 104 S. Ct. 2820, 2825, 81 L. Ed. 2d 758 (1984). The varying degrees of scienter may or may not call for disparate treatment of the offender. For example, in *Tower*, the Court compared American public defenders with English barristers and said they "enjoyed . . . a broad immunity from liability for negligent misconduct. . . . Nevertheless, it appears that even barristers have never enjoyed immunity from liability for intentional misconduct . . . ." *Id.* When the goal is to deter police conduct that violates the Fourth Amendment, it is implausible that the Supreme Court of the United States intended to excuse all unintentional misconduct no matter the extent to which it deviates from the objective standard of a reasonably well-trained police officer, simply because it found "an isolated instance of negligence" was not sufficiently flagrant to justify suppressing all fruits of one particular illegal search and seizure. *Strieff*, 136 S.Ct. at 2063.

However, the Commonwealth tacitly acknowledges what our Supreme Court said in *Guzman v. Commonwealth*: "In [the] absence of consent, the police may not conduct a warrantless search or seizure without *both* probable cause and exigent circumstances." 375 S.W.3d 805, 808 (Ky. 2012) (emphasis added) (citing *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002)). Because this Court agrees with the circuit court that probable cause was absent here, the presence or absence of exigent circumstances is irrelevant. This argument is moot.

CONCLUSION

For the foregoing reasons, we affirm the Montgomery Circuit Court's June 17, 2017, order suppressing evidence.

DIXON, JUDGE, CONCURS.

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