RENDERED: AUGUST 29, 2019
TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000229-DG

GARY D. WARICK — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NOS. 2016-CA-001825-MR AND 2017-CA-000177-MR
FLOYD CIRCUIT COURT CASE NO. 14-CR-00102
JOHNSON CIRCUIT COURT CASE NO. 14-CR-00225

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE HUGHES

VACATING AND REMANDING

Appellant Gary D. Warick entered a conditional *Alford* plea to one count of possession of a controlled substance, third degree, in Johnson County, and a conditional *Alford* plea to one count of possession of marijuana in Floyd County. In each case, he reserved his right to appeal the denial of his motion to suppress evidence which was obtained as a result of a traffic stop. In the consolidated appeal of the two cases, the Court of Appeals upheld the denial of the motions to suppress based on Warick's lack of Fourth Amendment "standing." This Court granted discretionary review. Because the Court of Appeals erroneously analyzed Warick's claim that the searches and seizures were illegal under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, we vacate its decision. However,

because we also conclude that the Floyd Circuit Court's suppression order is factually insufficient for an appellate court's review of Warick's claim that his detention was unlawful and that the evidence obtained against him must be excluded as fruit of the poisonous tree, we remand the case to the Floyd Circuit Court for entry of sufficient findings of fact.

FACTS[1] AND PROCEDURAL BACKGROUND

Warick and two passengers, Brian K. Bertram (Bertram) and Jessica C. Bertram, ordered at the drive-thru window at Dairy Queen in Prestonsburg, Floyd County, Kentucky, on June 5, 2014, at approximately 12:50 p.m. When Warick pulled to the side to wait for the order to be prepared, he backed into a parking space with the rear of his vehicle near a grassy area. Meanwhile, a Dairy Queen employee called the Prestonsburg police to report a possible DUI based on having seen an open container of beer in Warick's car.

Officer Tussey arrived on the scene within a couple of minutes of being dispatched, and Lieutenant Clark and Assistant Chief Hall arrived shortly afterward. Sergeant Dixon arrived next, approximately ten to fifteen minutes after Tussey.

Tussey approached Warick's driver's side and observed an open container of beer in the car's console. In response to Tussey's questioning, Warick twice denied drinking. Warick exited the vehicle at Tussey's request and field sobriety tests were performed. Warick passed the tests which

[1] As the trial court did not make detailed findings of fact, we rely largely on the parties' briefs to provide background.

included a preliminary breath test that registered 0.00. Tussey's pat-down search of Warick revealed he was carrying approximately $3,000 cash in his pockets.

Bertram was fidgety in the car, and at some point, he was removed from the vehicle.[2] A search of Bertam's person revealed a marijuana cigarette and a hypodermic needle.[3]

Tussey called for a K-9 unit. When the K-9 unit arrived and was being led to the car to do a sniff search, the dog alerted to the grassy area behind Warick's car. The officers discovered a baggie of marijuana and a pill bottle about 10-15 feet away from the vehicle. The pill bottle, labeled as containing an antibiotic for Warick, actually contained seven oxycodone pills.

The officers then obtained and executed a search warrant for the car. The search revealed three cell phones and a napkin which the officers said appeared to be a drug ledger. Dixon testified that one of the cell phones showed incoming texts which appeared to discuss obtaining drugs. Warick was arrested.

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[2] The sequence of events related to Bertram being removed from the car and searched are at the crux of Warick's claim. Although Dixon's testimony at the suppression hearing and the Commonwealth's statement of facts may be considered in harmony with Warick's assertion that the purpose of the traffic stop was complete before Bertram was removed from the vehicle, such detailed findings are not part of the trial court's order denying the motion to suppress (see *infra*). Because the trial court serves as the fact finder, we will not adopt Warick's or the Commonwealth's statement of facts, nor make findings ourselves.

[3] Bertram was arrested on an outstanding warrant and later charged with public intoxication.

Emit Thompson, of the Attorney General's Office and a Drug Enforcement Administration Task Force Officer, was also present during the search and seizure. As a result of the Floyd County case, Thompson obtained a search warrant for Warick's home in Johnson County. Upon execution of the warrant on June 6, officers discovered drug paraphernalia, marijuana, marijuana seeds, and marijuana plants.

Warick moved to have the evidence against him suppressed, alleging the items were discovered because the police unduly prolonged the DUI stop.[4] The trial court denied the motion finding that the searches and seizures by the Prestonsburg Police Department resulted from a natural progression of events related to the traffic stop. Warick entered a conditional *Alford* plea in the Floyd County case to one count of possession of marijuana and was sentenced to forty-five (45) days in jail. He also entered a conditional *Alford* plea in the Johnson County case to one count of possession of a controlled substance, third degree, and was sentenced to thirty (30) days in jail.[5] As noted, his appeals from the separate Floyd and Johnson Circuit Court judgments were consolidated.

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[4] Warick filed multiple motions to suppress and an evidentiary hearing was held in Floyd Circuit Court on February 3, 2015. The record reveals that Warick filed his motion to suppress in Johnson Circuit Court on October 28, 2016 and noticed it to be heard at the next available motion hour or soon thereafter at the convenience of the court. Although there is no entry for a suppression hearing, Warick was brought to court on November 1, 2016 to argue his motion. Witnesses were not present for an evidentiary hearing. The trial court orally overruled the motion; a written order was not entered. Warick entered his conditional plea that day. Apparently, the July 8, 2015 order from the Floyd Circuit Court is the only written suppression order.

[5] Warick was on parole at the time and his parole was revoked.

Before the Court of Appeals, Warick argued that the trial court erred in its application of the law because the dog sniff search and the subsequent searches of his vehicle and his home were illegal, the searches having occurred after Tussey had accomplished the purpose of the traffic stop. The Commonwealth countered that the trial courts' judgments should be upheld because Warick did not have standing 1) to challenge the discovery of the marijuana and pill bottle containing oxycodone in the grassy area at the Dairy Queen, or 2) to raise a constitutional challenge concerning the police actions towards Bertram.[6] The Court of Appeals agreed with the Commonwealth that Warick lacked standing to challenge the dog sniff search and affirmed both lower courts' judgments. In a 2-1 decision, the Court of Appeals concluded that despite having the burden, Warick did not attempt to establish a "reasonable expectation of privacy" in the grassy area adjacent to the Dairy Queen parking lot.

This Court granted discretionary review to consider whether Warick's appeals were properly denied due to a lack of Fourth Amendment "standing" to challenge the dog sniff search and the resulting evidence against him. Although we agree with Warick that the Court of Appeals has mistaken the law to be applied to the facts of this case, and conclude he has the right to challenge the search and seizure, we also recognize that the trial court's

[6] The Commonwealth also advanced a procedural argument, lack of timely filing, as a ground for dismissal of Warick's appeals. The Court of Appeals rejected the argument, and that issue is not before this Court.

findings of fact regarding Warick's search and seizure are not sufficient for an appellate court to determine whether the trial court correctly applied the law to the facts. Accordingly, because the issue of whether Warick's Fourth Amendment rights were violated cannot be properly reviewed, we remand the case to the Floyd Circuit Court for further findings of fact sufficient to address Warick's Fourth Amendment claim.

We begin with a summary of law pertinent to the invoking of Fourth Amendment protection, and we remind the bench and bar that a "standing" analysis is improper under Fourth Amendment substantive law.

ANALYSIS

I. Warick Properly Asserted that the Officers' Actions Infringed upon His Fourth Amendment Rights.

A. The Right to Invoke Fourth Amendment Protection.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This provision means that "*each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring, joined by Thomas, J.). The exclusionary rule, the rule that "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure," was judicially created to safeguard that right. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974) (citations omitted); *see also Alderman v. United States*, 394

U.S. 165, 171 (1969) (citing *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961)). The rule excludes both the "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality," commonly referred to as the "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984) (citations omitted).

"Despite its broad deterrent purpose [against police misconduct], the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Calandra*, 414 U.S. at 348. Three exceptions to the rule "involve the causal relationship between the unconstitutional act and the discovery of evidence." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016). These exceptions are the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. *Id.* at 2061. The independent source doctrine "allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Id.* (citing *Murray v. United States*, 487 U.S. 533, 537 (1988)). The inevitable discovery doctrine "allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Id.* (citing *Nix v. Williams*, 467 U.S. 431, 443–44 (1984)). And the attenuation doctrine allows evidence to be admitted "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be

served by suppression of the evidence obtained.'" *Id.* (citing *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)).

B. Fourth Amendment "Standing" Subsumed under Substantive Fourth Amendment Doctrine.

A criminal defendant "may only claim the benefits of the exclusionary rule [or the 'fruit of the poisonous tree doctrine[7]], if [his] own Fourth Amendment rights have in fact been violated." *United States v. Salvucci*, 448 U.S. 83, 85 (1980). Although the aforementioned principle is often referred to as Fourth Amendment "standing," the United States Supreme Court held in *Rakas v. Illinois* that whether a defendant can show a violation of his own Fourth Amendment rights "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing," 439 U.S. 128, 140 (1978) (citations omitted), and provided this guidance:

> Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Id.

In *Rawlings v. Commonwealth*, 581 S.W.2d 348 (Ky. 1979),[8] this Court

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[7] *See Costello v. United States*, 365 U.S. 265, 280 (1961).

[8] *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (certiorari granted) (affirming), presented another timely opportunity for the United States Supreme Court to express its view of a "standing" analysis relevant to a Fourth Amendment violation. *Rawlings*, *id.* at 104, stated:

addressed a Fourth Amendment "standing" issue soon after *Rakas* was decided. Considering *Rakas*, *Rawlings* acknowledged a "prefer[ence] to speak in terms of substantive right under the Fourth Amendment" because the "concept of 'standing' is theoretically separate from a defendant's rights under the Fourth Amendment." *Id.* at 349. *Rawlings* nevertheless continued to use the "standing" terminology in its substantive analysis. *See id.* at 349-50.

Without performing an extensive review, it is safe to say that use of the "standing" concept and terminology continues in Kentucky's Fourth Amendment jurisprudence. For example, the Commonwealth cites *Ordway v. Commonwealth*, 352 S.W.3d 584, 592 (Ky. 2011), in the instant case for the premise that a defendant bears the burden of establishing his standing to challenge a search under the Fourth Amendment. Another example is *Meece v. Commonwealth*, also decided in 2011, which summarized the elements necessary to enforce the exclusionary rule as including a "defendant must show that: (1) he or she has standing to challenge the original violation . . . ." 348 S.W.3d 627, 659 (Ky. 2011) (citation omitted);[9] s*ee also Staton v.*

> In holding that petitioner could not challenge the legality of the search of [a] purse, the Supreme Court of Kentucky looked primarily to our then recent decision in *Rakas v. Illinois* . . . where we abandoned a separate inquiry into a defendant's "standing" to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a "legitimate expectation of privacy" in the area searched.

[9] *Meece* identified the three elements necessary to satisfy the exclusionary rule as follows:

> In its Fourth Amendment context, in order for a defendant to invoke "the fruit of the poisonous tree doctrine," a "defendant must show that: (1) he or she has

Commonwealth, 2016-CA-001382-MR, 2018 WL 296971 (Ky. App. Jan. 5, 2018), quoting *Meece*. Nevertheless, in a recent unpublished opinion, *Schmuck v. Commonwealth*, this Court again recognized *Rakas*'s authority when considering the Commonwealth's suppression motion argument that the defendant lacked standing to assert an expectation of privacy. 2015-SC-000511-MR, 2016 WL 5247755, at *4 (Ky. Sept. 22, 2016) ("Nearly forty years ago, the Supreme Court of the United States rejected using the standing doctrine to analyze whether a defendant had a legitimate expectation of privacy.").[10] Consequently, we identified a three-step analysis for the trial court to conduct on remand to determine whether to suppress the evidence at issue, the first step being to determine whether the defendant had a reasonable expectation of privacy. *Id.*

The continued use of "standing" to describe the right to invoke the Fourth Amendment exclusionary rule is not an anomaly confined to Kentucky. For example, *Byrd v. United States*, recently described the "standing" question as a common one.

> It is worth noting that most courts analyzing the question presented in this case, including the Court of Appeals here, have described it as one of Fourth Amendment "standing," a concept the Court has

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> standing to challenge the original violation, i.e., the tree; (2) the original police activity violated his or her rights; and (3) the evidence sought to be admitted against him or her, i.e., the fruit, was obtained as a result of the original violation."

[10] *Matlock v. Commonwealth*, 2016-SC-000066-MR, 2017 WL 639393, at *2 (Ky. Feb. 16, 2017), on the other hand, refers again to the defendant's "standing" requirement.

> explained is not distinct from the merits and "is more properly subsumed under substantive Fourth Amendment doctrine."

138 S. Ct. 1518, 1530 (2018) (citation omitted).

Byrd also recognized one reason why the Fourth Amendment "standing" terminology remains in use, cautioned against its confusion with the U.S. Constitution's Article III standing, and provided explicit guidance in addressing a motion to suppress. *Byrd* states:

> The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits. Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim.

Id. at 1530–31 (internal citations and parenthetical omitted). Consequently, we again recognize the Supreme Court's guidance, and we do not address Warick's "standing" in this appeal, but look to the merits of his Fourth Amendment claim.

C. The Court of Appeals Failure to Consider Warick's Complete Fourth Amendment Argument.

"[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations omitted). If so, that

Fourth Amendment *violation* constitutes the poisonous tree. *See Alderman*, 394 U.S. at 171-72 ("The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself . . . ."). Under the fruit of the poisonous tree doctrine, evidence obtained from the violation may be excluded. *See Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

> Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was "'come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

Segura, 468 U.S. at 804-05 (1984) (citation omitted).

The Commonwealth argues that Warick is attempting to exercise others' Fourth Amendment rights by seeking suppression of the evidence found in the grassy area, an area to which Warick cannot establish an expectation of privacy, and evidence which was obtained through a search of Bertram, a search Warick deems violative of Bertram's Fourth Amendment rights. Indeed, Warick does make the argument that passenger Bertram's nervousness did not justify the police asking Bertram to exit the vehicle and then conducting a pat-down search. However, citing *Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Florida v. Royer*, 460 U.S. 491 (1983); *Illinois v. Caballes*, 543 U.S. 405 (2005); *Davis v. Commonwealth*, 484 S.W.3d 288 (2016); *Turley v. Commonwealth*, 399 S.W.3d 412 (Ky. 2013), and other cases, Warick primarily

claims that after the police verified he was not under the influence, the purpose of the stop being satisfied, his detention afterward was unlawful and all evidence against him obtained after his unlawful detention was "poisonous fruit" that must be excluded. The Court of Appeals considered the issue resolved when it agreed with the Commonwealth that Warick could not challenge the dog sniff search given that he did not show he had a reasonable expectation of privacy in the grassy area searched.

The parties present here the same arguments made before the Court of Appeals.[11] Because a driver of a private passenger vehicle has an expectation of privacy, *see Epps v. Commonwealth*, 295 S.W.3d 807, 812 (Ky. 2009) (*overruled on other grounds by Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016)), we agree with Warick that he is properly asserting that the officers' actions infringed upon his own Fourth Amendment rights. Warick is not challenging the grassy area search and Bertram's search as unlawful, independent searches, nor is he attempting to invoke on his behalf the violations of others' Fourth Amendment rights.[12]

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[11] Although we do not reach the merit of the arguments, we note that before this Court, the Commonwealth cites *Hardy v. Commonwealth*, 149 S.W.3d 433, 435-36 (Ky. App. 2004); *United States v. Green*, 111 F.3d 515, 520-21 (7th Cir. 1997); and *Utah v. Strieff*, 136 S. Ct. 2056 (2016); and additionally argues that even if Warick's detention was illegal, it does not follow that all evidence recovered following the illegality must be suppressed because an intervening circumstance broke the chain from illegal detention to seizure of the items. According to the Commonwealth, because everything — the subsequent search warrant for Warick's vehicle and items found on Bertram — flowed from the discovery in the grassy area alongside the parking lot, Warick's appeal must fail because he did not possess the requisite reasonable expectation of privacy in the restaurant's grassy area.

[12] We do not disagree with the Court of Appeals' conclusion that Warick did not have a privacy interest in the Dairy Queen grassy area in which the marijuana and pill

Warick claims that his own Fourth Amendment rights were violated: he was unlawfully detained when he was held beyond the time necessary for issuing a citation[13] and then the officer searched his passenger, Bertram, which led to the K-9 unit being brought to the site and the discovery of incriminating evidence. In Warick's view, the evidence obtained after the officers completed the traffic stop, the purpose of which was to determine if he was driving under the influence, was tainted fruit which could not be used against him. Simply put, the Court of Appeals overlooked that argument and instead of focusing on the alleged illegal detention of Warick, improperly focused on the grassy area search as the primary alleged illegality. Consequently, we must vacate the Court of Appeals' decision. Additionally, because a review of the record reveals the trial court's suppression order does not contain findings of fact sufficient for proper appellate review of Warick's claim, this case must be remanded to the trial court for entry of further findings.

II. The Trial Court's Order Overruling the Motion to Suppress Does Not Contain Findings of Fact Sufficient to Resolve Warick's Claim.

After Warick filed his motion to suppress, the Floyd Circuit Court held an evidentiary hearing.[14] When the motion was orally argued, Warick relied on

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bottle containing oxycodone were discovered if probable cause justified the search of passenger Bertram and that search reasonably led to the K-9 unit search.

[13] A citation was not issued in this case.

[14] Dixon, who arrived after Bertram had been searched, was the only Prestonsburg police officer to testify at the suppression hearing. At defense counsel's request and with the Commonwealth's apparent agreement that further testimony by Tussey was not needed, Tussey's transcribed preliminary hearing testimony was filed

Illinois v. Caballes, 543 U.S. 405, 407 (2005), for the premise he was unlawfully detained.[15,16] The Commonwealth countered that Warick was not illegally detained because the DUI investigation turned into a drug investigation when the illegal drugs and paraphernalia were found on his passenger, Bertram.

The trial court, from the bench, orally overruled Warick's motion to suppress. The oral ruling is substantially similar to the trial court's written order denying the motion. The order states:

> The Court finds that the search and seizure by the Prestonsburg Police Department resulted from the natural progression of events

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in the record for the trial court's consideration when deciding the suppression motion. Although the Commonwealth agreed with defense counsel's request, as noted in *Tabor v. Commonwealth*, 613 S.W.2d 133 (1981), we do not condone allowing an officer to testify as the primary live witness regarding events he did not witness (here, Dixon testified he was not present for the initial investigation of the driver and passenger). Review of the suppression hearing video does not reveal Tussey's presence in the courtroom.

In *Tabor*, the defendant moved to suppress his confession on the grounds it was involuntarily given. During the hearing, the Commonwealth called no witnesses and introduced no evidence to contradict the defendant's version of the circumstances surrounding the confession. The only evidence offered at the hearing was the defendant's testimony that he was coerced into signing a confession. On appeal, the defendant claimed his motion should have been granted because the prosecution failed to meet its burden of establishing the voluntariness of his statement. This Court agreed and concluded that at a hearing on a motion to suppress pursuant to RCr 9.78 (superseded by RCr 8.27 January 1, 2015), the prosecution must affirmatively establish the voluntariness of a confession by a preponderance of the evidence. Furthermore, we stated that "[p]olice officers present when the confession was given should be called to testify at the hearing, or their absences accounted for." *Id.* at 135.

We note that Tussey testified at the April 6, 2016 evidentiary hearing regarding Warick's motion to suppress due to a defective warrant.

[15] Warick's suppression motion initially relied on *Arizona v. Gant*, 556 U.S. 332 (2009), to argue he was unlawfully detained while the officers brought the drug sniffing dog to search his vehicle.

[16] Warrick, *pro se*, filed a supplement in support of the memorandum which was prepared by his counsel and a "memorandum of law in regard to search issues" citing *Gant*, *Caballes*, and other authorities including *United States v. Robinson*, 414 U.S. 218 (1973), and *Knowles v. Iowa*, 525 U.S. 113 (1998).

> related to the traffic stop. The police viewed an open alcohol container in Defendant's vehicle. That led to a pat down of the Defendant and his passenger. The passenger was found to be in possession of drug paraphernalia and some marijuana. The police then called for a drug dog which arrived in a reasonable time. The drug dog did not find anything in the vehicle, but a pill bottle with Defendant's name on the label containing some pills was found near the car. Thereafter a search warrant was obtained for the car. Therefore, the search and seizure was reasonable.[17]

The record establishes that the trial court patiently dealt with Warick's "never say die" attitude as Warick continued to argue, seemingly at every opportunity, that probable cause to detain him did not exist beyond the time for writing a citation. Responding to Warick's arguments, the trial court expressed its satisfaction that the order overruling Warick's motion to suppress sufficiently detailed the officers' ongoing investigation as a series of steps, one step leading to another, and explained the probable cause related to those steps. However, we conclude that the order does not provide sufficient factual findings to provide for meaningful review of Warick's primary argument on appeal. "When assessing the . . . circumstances relevant to a Fourth

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[17] Warick, *pro se*, subsequently filed a motion to reconsider, a supplement with additional authority, and a memorandum of law in support of the motion. The latter two filings requested the trial court to enter findings of fact and conclusions of law pursuant to CR 52.

Warick cited recently-decided *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), as additional authority to support his argument that he was unlawfully detained because the purpose of the stop was completed before the passengers were taken out of the car and searched. During the hearing on the motion to reconsider, Warick particularly disagreed with the trial court's contemporaneous recounting of the events flowing from the possible DUI complaint as "you are patted down, the passenger is patted down." Warick explained that he was taken out of the car first and the DUI stop was completed before the passengers were taken out of the car, that timing is the whole point of the matter, and that under *Rodriguez* there was no ground to hold him or to go past the completion of the purpose of the stop. The trial court disagreed with Warick's "time" argument and overruled the motion.

Amendment claim, there is a 'demand for specificity in the information upon which police action is predicated.'" *Moberly v. Commonwealth*, 551 S.W.3d 26, 31 (Ky. 2018) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 n.18 (1968)).

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

392 U.S. at 21–22 (footnote and citations omitted).

Warick's suppression motion relied particularly on *Caballes* (a traffic stop prolonged beyond the time needed for the officer to complete his traffic-based inquiries is unlawful) and his motion to reconsider on *Rodriguez*[18] (police may not extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff), to support his Fourth Amendment

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[18] *Rodriguez* cites *Caballes* and provides guidance for deciding when a traffic stop becomes unlawful. This Court's published cases considering *Rodriguez* now include *Davis v. Commonwealth*, 484 S.W.3d 288 (Ky. 2016) (Fourth Amendment violated when the officer conducted a traffic stop and, after the driver had successfully passed his field sobriety tests, conducted a dog-sniff of the vehicle without additional articulable suspicion to authorize the extended detention to search for drugs); *Commonwealth v. Smith*, 542 S.W.3d 276 (Ky. 2018) (Fourth Amendment violated when, instead of diligently pursuing the purpose of the traffic stop, the officer immediately asked the driver about drugs and launched the dog's sniff search); *Moberly v. Commonwealth*, 551 S.W.3d 26, 31 (Ky. 2018) (Fourth Amendment violated when the stop was prolonged for the time needed to retrieve the dog and conduct the sniff search because the driver's odd behaviors, including nervousness and sweating, and prior charge information did not create a reasonable articulable suspicion that the driver was engaged in other ongoing illegal activity); and *Commonwealth v. Lane*, 553 S.W.3d 203 (Ky. 2018) (Fourth Amendment violated when police officers, working in tandem, suspended their attention from the traffic citation and immediately launched the dog's sniff search which prolonged the stop beyond its original purpose).

argument that the traffic stop was prolonged beyond the time required to fulfill its purpose. As noted *supra*, Warick also cites other cases from this Court including *Davis v. Commonwealth*, 484 S.W.3d 288, 292 (Ky. 2016), this Court's first application of *Rodriguez*, and *Turley v. Commonwealth*, 399 S.W.3d 412, 421 (Ky. 2013) (an officer cannot detain a vehicle's occupants beyond completion of the purpose of the initial traffic stop unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity is ongoing) to support this argument.

Warick maintained throughout the proceedings that the purpose of the traffic stop was complete before the passengers were removed from the vehicle and searched. Warick acknowledges that *Terry* allows an officer to pat-down a passenger during a traffic stop if the officer has reasonable suspicion that he may be armed and dangerous, but contends there was no reason here for an officer to perform a *Terry* frisk of Bertram.

"When factual issues are involved in deciding a [suppression] motion, the court shall state its essential findings on the record." RCr 8.20(2) (effective January 1, 2015).[19] These essential findings — a statement of the facts necessary to the motion — are required for proper review on appeal. *See*

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[19] RCr 9.78 preceded RCr 8.20. Criminal Rule 9.78 provided, in pertinent part, as follows:

> If . . . a defendant moves to suppress . . . the fruits of a search, the trial court shall conduct an evidentiary hearing . . . and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion . . . and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

Simpson v. Commonwealth, 474 S.W.3d 544, 547 (Ky. 2015) (citations omitted) (describing appellate review of the denial of a suppression motion as consisting of 1) determining whether the trial court's findings of fact are supported by substantial evidence, and if so, they are conclusive; and 2) deciding *de novo* whether the trial court correctly applied the law to the facts).

Findings of fact by the trial judge detailing the sequence of events at Warick's traffic stop (*i.e.*, the timing of each officer's arrival, the actions taken by each officer in relation to Warick and his passenger, the timing of those actions in relation to the time necessary to complete the purpose of the stop, whether the traffic stop was complete before Bertram was taken from the vehicle and searched, and whether there was reasonable and articulable suspicion that criminal activity was ongoing to allow Bertram's removal from the vehicle and to extend the stop)[20] are crucial to proper review of the trial court's disposition of the motion. Accordingly, this matter is remanded to the Floyd Circuit Court for additional findings of fact necessary for proper resolution of Warick's Fourth Amendment claim.

CONCLUSION

For the reasons stated above, the Court of Appeals' decision is vacated, and this case is remanded to the Floyd Circuit Court for additional findings of

[20] *See also Smith*, 542 S.W.3d 276, and *Moberly*, 551 S.W.3d 26, discussing the role of nervousness in assessing a reasonable suspicion to search for drugs.

fact and further proceedings consistent with this Opinion.

All sitting. Minton, C.J.; Keller, and Lambert, JJ., concur. Buckingham, J., dissents by separate opinion in which VanMeter and Wright, JJ., join. Wright, J., dissents by separate opinion in which Buckingham and VanMeter, JJ., join.

BUCKINGHAM, J., DISSENTING: Because I would affirm the convictions, I respectfully dissent. The majority has remanded this case for additional findings of fact concerning the sequence of events that led to the charges against Warick. Specifically, the majority concludes that the trial court's findings of fact are insufficient to allow our review of whether the traffic stop had been completed before Bertram (the front seat passenger) was forced to exit the vehicle and whether there was a reasonable and articulable suspicion that criminal activity was ongoing to allow Bertram's removal from the vehicle.

I conclude that the undisputed facts are sufficient for our review and that the trial court did not err in denying Warick's suppression motion because 1) the traffic stop had not concluded before the passenger was searched, and 2) Warick had no reasonable expectation of privacy that would require the suppression of the evidence seized from the grassy area behind the vehicle.

Accepting the facts as stated by Warick himself in his brief, we know the following: The Dairy Queen employee saw an open beer in the console of the vehicle and called the police. Officer Tussey arrived first, and two other officers arrived seconds later. Officer Tussey dealt with Warick, and the other two

officers dealt with the passenger. In other words, Warick states that these events were occurring simultaneously.[21] There is no indication that Officer Tussey had completed his DUI investigation before the other two officers had begun their investigation relating to the passenger.

"[A]n officer cannot detain a vehicle's occupants beyond completion of the purpose of the initial traffic stop unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity [is] afoot." *Davis v. Commonwealth*, 484 S.W.3d 288, 292-93 (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))). Here, while Officer Tussey was investigating a possible DUI based on the open beer in the vehicle, the other two officers likewise observed the open beer on the console. They also observed that the passenger was nervous and fidgety.

There is a heightened danger to police officers during traffic stops when there are passengers in addition to the driver in the stopped car. *Maryland v. Wilson*, 519 U.S. 408, 414 (1997). Therefore, "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." *Id.* at 415.[22] Thus, the officers had the right to order Bertram to exit the vehicle.[23]

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[21] Warick states on page 2 of his brief that "[w]hile Ofc. Tussey was dealing with Mr. Warick, Lt. Clark and Asst. Chief Hall had Mr. Bertram get out of his vehicle because he appeared nervous.

[22] While the two officers here may not have made the traffic stop themselves since they arrived "seconds" after Officer Tussey, it cannot seriously be contended that the above principle would not apply to them as well.

[23] See also *Owens v. Commonwealth*, 244 S.W.3d 83, 83 (Ky. 2008), vacated on other grounds by *Owens v. Kentucky*, 556 U.S. 1218 (2009)("an officer has the

Because there was an open beer in the vehicle's console; because the passenger forced to exit the vehicle was seated in the front passenger seat and appeared nervous and fidgety; and because it was apparent that someone in one of the front seats had probably committed a violation of the open container law[24], the officers had every right to require the passenger to exit the vehicle. They wanted to know who had committed the offense; in other words, they were investigating the violation of the open container law. Because of their lawful and diligent investigation efforts, the officers discovered that the passenger was intoxicated, thus validating their reasons for extending the traffic stop for this lawful purpose.

I see no improper police conduct in requiring the passenger to exit the vehicle and frisking him. And assuming the conduct of the police is not improper at this point, the K-9 search, the subsequent discovery of controlled substances in the grassy area, and the search of Warick's resident were clearly not improper.

I agree with the trial court that the searches and seizures in this case resulted from "a natural progression of events related to the stop." This was, as argued by the Commonwealth, a DUI investigation that turned into a drug investigation. In fact, the investigation, which began as a DUI investigation by Officer Tussey and an open container violation investigation by the other two

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authority to order a passenger to exit a vehicle pending completion of a minor traffic stop").

[24] Kentucky Revised Statutes (KRS) 189.530(2).

officers, led to a drug investigation. Even Warick states in his brief that the investigation that centered on him was occurring simultaneously with the investigation centered on the passenger.

Furthermore, even assuming (contrary to Warick's recitation of facts) that the investigation of the passenger occurred after the investigation of Warick had concluded, the traffic stop itself had not concluded with the investigation of Warick for possible DUI. Warick blew a "triple zero" on the PBT device, there was an open beer on the vehicle's console, and the finger clearly pointed at the "nervous and fidgety" passenger who was ultimately arrested for public intoxication.

While Warick states that the other two officers focused on the passenger while Officer Tussey focused on him, the Commonwealth states in its brief that it was Officer Tussey who removed the passenger from the vehicle. The difference in this regard is not important. Even if Officer Tussey had been the only officer at the scene, he could have completed his DUI investigation of Warick before turning to the passenger to determine who had committed the open container violation.

Finally, I agree with Justice Wright's dissenting opinion wherein he states, in agreeing with the majority of the Court of Appeals panel, that the convictions should stand because Warick had no reasonable expectation of privacy in the grassy area behind the vehicle. The majority contends that if the traffic stop had concluded and a determination had been made that Warick was not under the influence, then Warick's detention afterward was unlawful

and any evidence seized thereafter was "poisonous fruit" that must be suppressed. Here, however, the evidence was not seized from the vehicle or from any of its occupants; rather, it was discovered by the K-9 unit in a public area in which Warick had no reasonable expectation of privacy.

In my opinion, there are various scenarios that demonstrate the fallacy in the majority's position. For example, what if the traffic stop concluded with no indication of any criminal activity, but the officers (or the K-9 unit) discovered the pill bottle belonging to Warick after he had departed from the scene? Couldn't Warick have been charged in this scenario even though the traffic stop had been completed with no charges having been made?

Another example is this: A suspected drug dealer is subject to a traffic stop because the officers believe he has illegal controlled substances in the vehicle. The officers noted the defendant had an expired license plate and used it as a pretext to stop the vehicle. The defendant is questioned, and his vehicle is searched. Nothing is found in the search, but the defendant is given a traffic citation for an expired license plate. The traffic stop has been completed, and the defendant begins to drive away when the officer (or his K-9 unit) spots a bag containing pills in a bottle with the defendant's name on it a few feet off the road near the point where the stop had been made. Was this an illegal search since it was discovered by the officer after the traffic stop was complete?

While the majority correctly notes that a passenger has an expectation of privacy, I know of no authority that holds there is a reasonable expectation of privacy in a public area such as in the grass near a fast-food restaurant.

Without belaboring the point, I agree with Justice Wright that there was no reasonable expectation of privacy in the grassy area behind the vehicle and that the evidence was not subject to being suppressed regardless of whether the traffic stop had been completed or not.

VanMeter and Wright, JJ., join.

WRIGHT, J., DISSENTING: While I agree with the majority's excellent analysis of the Fourth Amendment issues in this case, I respectfully dissent for reasons that follow. As the majority recognizes, the first step in deciding whether evidence should be suppressed is "to determine whether the defendant had a reasonable expectation of privacy." The Supreme Court of the United States "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Since there was no reasonable expectation of privacy in the grassy area at Dairy Queen where the drugs were found, I would affirm.

The drugs seized in the grassy area led to a search warrant of Warick's home. They were not found in a constitutionally-protected area in which Warick had a reasonable expectation of privacy. Rather they were found in a grassy area near the parking lot in which Warick's car was parked, ten to fifteen feet away from his car.

Lacking a reasonable expectation of privacy, other Fourth Amendment concerns do not attach. Here, the trial court found that the initial stop was

proper due to officers' viewing an open alcohol container in Warick's car. Therefore, the trial court found the initial search and seizure of Warick was appropriate. The only evidence connected to Warick was taken from the grassy area ten to fifteen feet away from Warick's car in the Dairy Queen parking lot. As noted by the majority, the *first* step is to determine whether Warick had a reasonable expectation of privacy. Clearly, he did not have such an expectation in items he placed in the grassy area adjacent to the parking lot of a fast food restaurant. I would affirm the result of the Court of Appeals on these grounds.

Buckingham and VanMeter, JJ., join.

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