

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2012-CA-01237-COA**

**IN THE INTEREST OF S.M.K.S., A MINOR**

**APPELLANT**

**v.**

**YOUTH COURT OF UNION COUNTY,  
MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 07/20/2012  
TRIAL JUDGE: HON. FREDERICK ROBBINS ROGERS  
COURT FROM WHICH APPEALED: UNION COUNTY YOUTH COURT  
ATTORNEYS FOR APPELLANT: DAVID G. HILL  
TIFFANY LEIGH KILPATRICK  
ATTORNEY FOR APPELLEE: STEPHEN P. LIVINGSTON  
NATURE OF THE CASE: CIVIL - JUVENILE JUSTICE  
TRIAL COURT DISPOSITION: FOUND THAT MINOR HAD COMMITTED  
A DELINQUENT ACT  
DISPOSITION: AFFIRMED - 01/07/2014  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**BEFORE LEE, C.J., ROBERTS AND CARLTON, JJ.**

**ROBERTS, J., FOR THE COURT:**

¶1. The Union County Youth Court found that thirteen-year-old S.M.K.S.<sup>1</sup> was a delinquent child because he resisted arrest for disorderly conduct. S.M.K.S. appeals, and claims there was insufficient evidence for the youth court's decision. Finding no error, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2. The events that led to S.M.K.S.'s appeal occurred on April 29, 2011, in New Albany,

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<sup>1</sup> "Only the initials of the child shall appear on the record on appeal." Miss. Code Ann. § 43-21-651(1) (Rev. 2009).

Mississippi. Officers with the New Albany Police Department received a report that shots had been fired in the vicinity of Madison Street or Garfield Street. The report also indicated that the suspects had been driving a tan Oldsmobile Cutlass. When Sergeant Ben Kent heard the radio dispatch, he was alone in his patrol car. Sergeant Kent immediately activated his blue lights and his siren, and drove toward a set of duplex apartments on Cleveland Street, which is in the vicinity of both Madison Street and Garfield Street. Sergeant Kent knew that someone who lived in one of the duplex apartments drove a tan Cutlass. When Sergeant Kent arrived at the duplex, he found the tan Cutlass and “several people in the yard.”

¶3. Based on the report that someone had been firing a weapon, Sergeant Kent got out of his patrol car and drew his pistol. He focused his attention on S.M.K.S.’s sixteen-year-old brother. S.M.K.S. was in Sergeant Kent’s peripheral vision. Sergeant Kent sought to ensure that neither S.M.K.S. nor S.M.K.S.’s older brother was armed. To that end, Sergeant Kent told S.M.K.S. and S.M.K.S.’s brother to display their hands. Neither S.M.K.S. nor S.M.K.S.’s brother complied. Next, Sergeant Kent told them to put their hands on the car. S.M.K.S.’s older brother started walking to the front porch of one of the duplex apartments. According to Sergeant Kent, S.M.K.S. said, “I’m not putting my hands on the car.”

¶4. Sergeant Kent testified that he holstered his pistol and “grabbed [S.M.K.S.’s] right wrist with [his] right hand, and [he] used the straight[-]arm bar to put [S.M.K.S.] over the hood of the car to gain his compliance so that [Sergeant Kent] could pat [S.M.K.S.] down to check whether . . . he had weapons.” Other members of the New Albany Police Department arrived around that time. Officer Gabe Wilson drove up to the scene seconds before Officer Brent Baker and Officer Stewart Dodds arrived. Meanwhile, S.M.K.S. continued to struggle

with Sergeant Kent. According to Officer Wilson, S.M.K.S. was “doing everything [he could] to keep from putting his hands behind [his back]. He’s kicking. He’s yelling. He’s punching. He’s doing whatever he can to try to keep the officers from taking control.” Officer Baker and Officer Wilson took S.M.K.S. to the ground. Officer Baker used his taser on S.M.K.S. S.M.K.S. stopped struggling, and Officer Wilson handcuffed him and put him in a patrol car. Sergeant Kent turned his attention toward S.M.K.S.’s brother while Officer Dodds attempted to keep onlookers away from the other officers.

¶5. According to the officers, “another incident broke out” after S.M.K.S. was tased. Officer Wilson described the scene as “mass chaos.” According to Officer Dodds, it was the “most hostile environment” he had experienced during his four years as a police officer. Additional officers responded, including Lieutenant Mark Golding and Detective Chris Robertson. Ultimately, officers took S.M.K.S., S.M.K.S.’s brother, and an adult into custody.

¶6. In May 2011, the Union County prosecuting attorney filed a petition alleging that S.M.K.S. resisted arrest in violation of Mississippi Code Annotated section 97-9-73 (Rev. 2006) “by refusing to put his hands on the [patrol] car and struggling with the officers.” On July 20, 2012, the youth court conducted a hearing on the prosecution’s petition. Sergeant Kent, Officer Wilson, Officer Baker, Officer Dodds, Officer Jason McDaniel, Lieutenant Golding, and Detective Robertson all testified regarding their involvement in the events that led to S.M.K.S.’s arrest. Latrina Bynum testified for S.M.K.S. Bynum lived in the duplex apartment next to S.M.K.S.’s mother. Bynum testified that S.M.K.S. complied with Sergeant Kent’s instructions to put his hands on the car. Bynum further testified that S.M.K.S. did not

struggle with Sergeant Kent. According to Bynum, Sergeant Kent behaved aggressively from the moment he arrived at the duplex apartments. Bynum also testified that Sergeant Kent immediately told S.M.K.S., “You MF, I told you I was going to get you.”

¶7. The youth court found that S.M.K.S. was a delinquent child based on his resisting arrest.<sup>2</sup> The youth court placed S.M.K.S. on probation for six months and ordered that he seek counseling for anger management. S.M.K.S. appeals.

### STANDARD OF REVIEW

¶8. We apply the following limited standard of review in youth-court cases:

We consider all the evidence presented to the youth court in the light most favorable to the State. If the evidence is such that, beyond a reasonable doubt, reasonable [minds] could not have reached the youth court's conclusion, we must reverse. However, if the evidence in the record supports the youth court's adjudication, considering the reasonable[-]doubt standard, then we must affirm.

*In re L.C.A.*, 938 So. 2d 300, 303 (¶6) (Miss. Ct. App. 2006) (internal citations omitted).

### ANALYSIS

¶9. S.M.K.S. claims that the youth court erred when it found that he was a delinquent child. According to S.M.K.S., there was insufficient evidence for the youth court to find that he resisted arrest. S.M.K.S. also argues that there was no probable cause for Sergeant Kent's initial arrest.

¶10. The County's petition alleged that S.M.K.S. resisted arrest in violation of section 97-9-73. To prove that S.M.K.S. resisted arrest, there must have been sufficient evidence that

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<sup>2</sup> During closing arguments, the prosecutor asked the youth court to “take judicial notice that [S.M.K.S.'s] brother has already admitted to shooting the gun in this case[,] and [he] has already been adjud[icated] delinquent for shooting the gun.”

(1) Sergeant Kent was attempting a lawful arrest, and (2) S.M.K.S. resisted or obstructed his arrest by force, threats, violence, or any other means. *See id.* “The offense of resisting arrest presupposes a lawful arrest. A person has a right to use reasonable force to resist an unlawful arrest.” *Chambers v. State*, 973 So. 2d 266, 271 (¶13) (Miss. Ct. App. 2007). “Under certain circumstances, a law[-]enforcement officer may rely on probable cause to place a child into custody.” *In re L.C.A.*, 938 So. 2d at 304 (¶9). “[A] law[-]enforcement officer may take a child in custody if . . . grounds exist for the arrest of an adult in identical circumstances.” Miss. Code Ann. § 43-21-303(1)(a)(i) (Rev. 2009).

¶11. With utmost respect, we disagree with the dissent’s conclusion that it was unreasonable for Sergeant Kent to suspect that S.M.K.S. could have been armed. Sergeant Kent had heard recent reports from dispatch that shots had just been fired from a tan Cutlass. Sergeant Kent knew that someone who owned a tan Cutlass lived at a duplex apartment in the vicinity of the area where the gunshots were reported. When Sergeant Kent arrived at the duplex, he found S.M.K.S. and others standing very close to a tan Cutlass. It was lawful for Sergeant Kent to approach S.M.K.S. for the purpose of investigating the report that shots had been fired from the tan Cutlass. “[A] police officer may approach an individual for purposes of investigating possible criminal behavior, even in the absence of probable cause to arrest.” *McFarlin v. State*, 883 So. 2d 594, 598 (¶9) (Miss. Ct. App. 2004) (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). We also respectfully disagree with the dissent’s conclusion that Sergeant Kent “immediately effectuated a seizure” of S.M.K.S. when Sergeant Kent first approached him. Simply being armed, in and of itself, is not the equivalent of a seizure; particularly when an officer has reason to believe that shots had been fired. Because

Sergeant Kent was investigating a report that shots had just been fired from a car that matched the description of the car that S.M.K.S. was near, it was reasonable for Sergeant Kent to conduct a pat-down search for his own safety and ensure that S.M.K.S. was not armed. When it is reasonable for a police officer to believe that someone “may be armed and dangerous, the officer may conduct a very limited search of the outer clothing in order to determine whether the individual is, in fact, armed.” *Id.* But before Sergeant Kent approached S.M.K.S. to conduct a pat-down search, Sergeant Kent instructed him and his brother to display their hands. They both refused to do so. Sergeant Kent then ordered S.M.K.S. to put his hands on the car. Again, S.M.K.S. refused to comply. Under the circumstances, Sergeant Kent had the authority to arrest S.M.K.S. for violating Mississippi Code Annotated section 97-35-7(1)(i) (Rev. 2006), which provides that one is guilty of committing a breach of the peace under the following circumstances:

Whoever, with intent to provoke a breach of the peace, or under such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace, fails or refuses to promptly comply with or obey a request, command, or order of a law[-]enforcement officer, having the authority to then and there arrest any person for a violation of the law, to . . . [a]ct or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command.

Sergeant Kent had the authority to temporarily detain S.M.K.S. and his older brother to further investigate the report that someone had fired shots from a tan Cutlass. He also had the authority to pat down people near the tan Cutlass to ensure that none of them were armed. Because S.M.K.S. refused to comply with Sergeant Kent’s reasonable instructions, Sergeant Kent had the authority to arrest S.M.K.S.

¶12. Multiple law-enforcement officers testified that S.M.K.S. resisted arrest. Although there were inconsistencies regarding which officers actually took S.M.K.S. to the ground, and Bynum testified that S.M.K.S. did not resist arrest, it was within the youth-court judge's discretion to weigh the evidence. With the benefit of hindsight, it is possible that the events that led to S.M.K.S.'s arrest may have been avoided if Sergeant Kent had taken a different approach and immediately announced that he had received a report that shots had been fired from a tan Cutlass. But our standard of review does not involve second-guessing a police officer's investigation of reports that at least one person had been shooting a firearm from a car that matched the description of the car that S.M.K.S. was near. Instead, we are required to view the evidence in the light most favorable to the State and ascertain whether the youth-court judge abused his discretion when he found S.M.K.S. had resisted arrest for disorderly conduct. We find that the youth-court judge did not abuse his discretion when he found that S.M.K.S. qualified as a delinquent child.<sup>3</sup> Consequently, we find no merit to this issue.

**¶13. THE JUDGMENT OF THE UNION COUNTY YOUTH COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**LEE, C.J., GRIFFIS, P.J., BARNES, MAXWELL, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY ISHEE, J.**

**IRVING, P.J., DISSENTING:**

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<sup>3</sup> A delinquent child is a child over ten years old who has committed a delinquent act. Miss. Code Ann. § 43-21-105(i) (Supp. 2013). A child commits a delinquent act when he or she behaves in a way that would qualify "as a crime under state or federal law, or municipal or county ordinance." Miss. Code Ann. § 43-21-105(j) (Supp. 2013).

¶14. The majority finds that the Union County Youth Court properly adjudicated S.M.K.S. a delinquent child because he resisted arrest for disorderly conduct. I disagree, as I would find that Sergeant Kent illegally seized S.M.K.S., thus making S.M.K.S.’s subsequent arrest illegal. Therefore, I dissent. I would reverse and render the judgment of the youth court adjudicating S.M.K.S. a delinquent child.

¶15. Sergeant Kent responded to a “shots fired” call from dispatch. The only identifying information relayed to Sergeant Kent through the call was that the suspects were in a tan Cutlass. The dispatcher relayed no information regarding the driver or the occupants of the Cutlass. Sergeant Kent, as a result of patrolling the streets of the City of New Albany, recalled that he had seen a tan Cutlass parked at a duplex on Cleveland Street. However, Sergeant Kent did not know the owner of the Cutlass nor the identity of the person who drove the Cutlass. Based on the limited information that he had, Sergeant Kent went to the duplex on Cleveland Street. Once he arrived, he exited his car with his gun drawn and zeroed in on thirteen-year-old S.M.K.S. and his older brother. Why? Because they were positioned near the tan Cutlass—S.M.K.S. on the sidewalk and his older brother in the yard. According to Sergeant Kent, he told S.M.K.S., “Let me see your hands.” However, there is no evidence that S.M.K.S.’s hands were concealed in any manner, nor is there any testimony regarding where S.M.K.S.’s hands were when Sergeant Kent made this request. There is no testimony regarding whether S.M.K.S. complied with Sergeant Kent’s initial request. Nevertheless, S.M.K.S. was subsequently arrested when he refused to comply with Sergeant Kent’s second request to “put [his] hands on the car.”

¶16. As our supreme court stated in *Jones v. State*, 798 So. 2d 1241, 1247 (¶12) (Miss.



2001), “[t]he threshold question is whether [the officer] had probable cause to initiate an arrest.” In my opinion, Sergeant Kent did not even have reasonable suspicion to briefly detain S.M.K.S., much less probable cause to arrest him. As such, the arrest of S.M.K.S. was unlawful.

¶17. In order for S.M.K.S.’s initial detainment to have been lawful, Sergeant Kent needed “reasonable suspicion, grounded in specific and articulable facts that [allowed him] to conclude [that S.M.K.S. was] wanted in connection with criminal behavior.” *Eaddy v. State*, 63 So. 3d 1209, 1213 (¶14) (Miss. 2011) (quoting *Walker v. State*, 881 So. 2d 820, 826 (¶10) (Miss. 2004)) (internal quotation marks omitted). When Sergeant Kent approached S.M.K.S. with his gun drawn and giving commands, he immediately effectuated a seizure, which “occurs only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen.” *Harrell v. State*, 109 So. 3d 604, 606 (¶7) (Miss. Ct. App. 2013) (citations and internal quotation marks omitted).

¶18. The majority says, “It was lawful for Sergeant Kent to approach S.M.K.S. for the purpose of investigating the report that shots had been fired from the tan Cutlass.” Maj. Op. at (¶11). I do not disagree, and if that had been all that Sergeant Kent did, I would agree that his actions would have been lawful. But that is not what happened. Sergeant Kent approached with his gun drawn and pointed at S.M.K.S., an unarmed thirteen-year-old child, while shouting a demand to the child to “let me see your hands.” It is interesting that Sergeant Kent never says where S.M.K.S.’s hands were, but attempts, by the language employed, to convey the impression that they were in fact concealed. Further, Sergeant Kent did not say or suggest that he noticed a bulge in S.M.K.S.’s pocket, which would support a

reasonable assumption that S.M.K.S. may have had a gun concealed. For sure, if such a bulge existed, Sergeant Kent would have noticed and mentioned it. It is noteworthy that Sergeant Kent does not say, *take your hands out of your pocket and hold them up or put them up*, which is the typical law-enforcement jargon that is used when a suspect's hands are concealed.

¶19. The majority goes on to say, “Simply being armed, in and of itself, is not the equivalent of a seizure; particularly when an officer has reason to believe that shots had been fired.” Maj. Op. at (¶11). I could not agree more if all the majority means is that there was nothing wrong with Sergeant Kent having his service weapon with him when he went to investigate the shooting, as it is always proper police protocol for an officer to be armed when investigating a shooting incident. However, approaching an innocent thirteen-year-old child with the weapon trained on the child, while shouting a command to the child, is without a doubt a seizure of the child. To find, as does the majority, that it was lawful for a law enforcement officer to pull his weapon and aim it toward an unarmed thirteen-year-old child who was standing in a yard near a vehicle from which a shot had been recently fired—when there was nothing unusual about the child's appearance, actions, or conduct to suggest that he may have been armed or had recently been involved in criminal conduct—is to strain reason and stretch the holding of *Terry v. Ohio*, 392 U.S. 1 (1968), beyond defensible boundaries. For all Sergeant Kent knew, S.M.K.S. could have been the neighbor's child from down the street who just happened to be in his friend's yard.

¶20. Despite the majority's efforts to place Sergeant Kent's actions within the bounds of the law, it is clear that they are not. Sergeant Kent asked no questions of S.M.K.S., or

anyone else, before pointing the gun toward S.M.K.S. and demanding that S.M.K.S. surrender his freedom. It is not reasonably debatable that, based on Sergeant Kent's show of authority, S.M.K.S. was not free to terminate the interaction with Sergeant Kent. This initial seizure of S.M.K.S. was illegal because Sergeant Kent did not have the requisite probable cause to seize him. While Sergeant Kent certainly had the right to approach and question S.M.K.S. about the Cutlass—and even frisk him to make sure that he did not have a weapon concealed—he did not have the right to immediately seize S.M.K.S. at gunpoint. For example, it would have been entirely proper for Sergeant Kent to inquire if S.M.K.S. knew how long the Cutlass had been parked there, who owned it, who drove it there, or where that person had gone. Based on Sergeant Kent's own testimony, the only articulable fact that he had was that the suspects were in a tan Cutlass. Sergeant Kent had no specific and articulable facts to suspect that S.M.K.S., a thirteen-year-old child, had been driving the Cutlass. Nor did he have any reason to suspect that S.M.K.S. had ever been a passenger in the Cutlass, much less a recent passenger. Further, he had no reason to suspect that S.M.K.S. was involved in any way with criminal behavior.

¶21. Rather than attempting to engage S.M.K.S. in a conversation to ascertain information about the driver of the Cutlass, Sergeant Kent immediately arrested S.M.K.S. by pulling a gun on him. Clearly, Sergeant Kent's strategy was to arrest first and talk later, as his actions demonstrated that he thought it was proper to arrest anyone who was in the vicinity of the tan Cutlass, no matter that any such person may have been a chance passerby or an innocent child playing in a nearby yard.

¶22. This Court has affirmed that

[a] warrantless arrest is lawful if at the moment the arrest was made, the officers had probable cause to make it—if at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.

*Bondgard v. State*, 81 So. 3d 1181, 1185-86 (¶16) (Miss. Ct. App. 2011) (quoting *United States v. Johnson*, 445 F.3d 793, 796 (5th Cir. 2006)). Here, Sergeant Kent certainly had no probable cause to believe that S.M.K.S. had committed any offense. From the record, it is clear that Sergeant Kent began the arrest of S.M.K.S. without any evidence that S.M.K.S. had been involved in a crime. There was no evidence to suggest that S.M.K.S. was the owner of the tan Cutlass or that he was involved in the previous alleged shooting. Therefore, Sergeant Kent lacked a sufficient basis to arrest S.M.K.S. without a warrant.

¶23. The majority concludes that Sergeant Kent was attempting to lawfully arrest S.M.K.S. for disorderly conduct pursuant to Mississippi Code Annotated section 97-35-7(1)(i) (Rev. 2006), which provides:

Whoever, with intent to provoke a breach of the peace, or under such circumstances as may lead to a breach of the peace, or which may cause or occasion a breach of the peace, fails or refuses to promptly comply with or obey a request, command, or order of a law enforcement officer, having the authority to then and there arrest any person for a violation of the law, to . . . [a]ct or do or refrain from acting or doing as ordered, requested or commanded by said officer to avoid any breach of the peace at or near the place of issuance of such order, request or command, shall be guilty of disorderly conduct[.]

¶24. However, without evidence that Sergeant Kent, upon his arrival on the scene, had the authority to immediately arrest S.M.K.S. for a violation of the law, S.M.K.S. had every right to resist the arrest, and it cannot be legitimately argued that S.M.K.S. was not immediately placed under arrest when Sergeant Kent got out of his patrol car with his weapon drawn and

trained on S.M.K.S., as an arrest occurs when the pursuit to make the arrest begins. *Pollard v. State*, 233 So. 2d 792, 793 (Miss. 1970). When Sergeant Kent pointed his gun at S.M.K.S. and demanded that he show his hands, S.M.K.S. was under arrest even though he had done nothing illegal or given Sergeant Kent any justification for seizing his person. The majority's finding that Sergeant Kent was making a lawful arrest of S.M.K.S. for disorderly conduct is the equivalent of finding that an officer may illegally assault a citizen and then lawfully arrest the citizen for disorderly conduct when the citizen resists the unlawful assault. That has never been the law, nor should it ever be the law.

¶25. For these reasons, I dissent.

**ISHEE, J., JOINS THIS OPINION.**