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**KANSAS SUPREME COURT
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**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

GERALD E. CLEVERLY
Defendant-Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Butler County, Kansas
The 13th Judicial District,
The Honorable Jan Satterfield
Butler County District Court Case No. 12 CR 45

Approved

FEB 03 2015

Attorney General of Kansas
BY nc S. Ct. Rule 6.10

Joseph M. Penney, S.Ct. # 24181
Assistant Butler County Attorney
201 West Pine, Ste. 104
El Dorado, KS 67042
(316) 321-6999
(316) 321-4120 facsimile
jpenney@bucoks.com

Attorney for Appellee
STATE OF KANSAS

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(316) 321-6999
(316) 321-4120 facsimile
jpenney@bucoks.com

Attorney for Appellee
STATE OF KANSAS

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I.

NATURE OF THE CASE

After denying a motion to suppress filed by Appellant Cleverly, the District Court convicted him of possession of methamphetamine based on a trial on stipulated facts. This is his direct appeal from that conviction.

II.

ISSUES ON APPEAL

- I. The law enforcement officers did not improperly detain Cleverly; no evidence should be suppressed.**
- II. Assuming arguendo that there were earlier Fourth Amendment violations, the methamphetamine found during the consent search of the cigarette packs was not fruit of the poisonous tree thereof.**

III.

FACTS OF THE CASE

While on duty as a motor patrol officer, Officer Brent Buckley with the El Dorado Police Department noticed a blue pickup truck with two occupants. Neither occupant was wearing a seatbelt. (R. V, 6-7). Officer Buckley initiated a traffic stop based on the misdemeanor violation, and as he did, he noted both occupants made a number of furtive motions downward in the truck, prior to his making contact with them. (R. V, 8-9). The officer defined furtive moments as a movement made after the police cruiser lights came on that appear random or do not appear to have an associated legitimate purpose. (R. V, 8, 19). At the time law enforcement made contact with the passenger, who was identified as Gerald Eugene Cleverly, he still was not wearing a seatbelt. (R. V, 28). Officer Buckley dealt mainly with the driver, a Chris Jones, and another officer, Sam Humig, dealt with the passenger. (R. V, 9). Officer Humig received Cleverly's identification

information to run through dispatch. (R. V, 28). At or around the time that was happening, Officer Buckley issued a citation to the driver and asked for consent to search the vehicle. (R. V, 28-29). During the vehicle search, Cleverly was asked to exit the vehicle. (R. V, 29). After Cleverly exited the vehicle, Officer Humig noted that he could not clearly see Cleverly's waistband based on the shirt he was wearing and performed a *Terry* pat-down. (R. V, 28). No evidence was located as a result of the pat-down. (R. V, 28). Cleverly took some items with him including cigarette packs when he exited the vehicle and he placed them on the hood of the police car. (R. V, 32). Officer Humig had prior experience with individuals using cigarette packs to conceal controlled substances. (R. V, 35).

During the search of the car, Officer Buckley located a hollow glass tube with scorch marks that he recognized as a type of meth pipe - something typically used to smoke methamphetamine. (R. V, 11). The paraphernalia was located in the middle of the two-seater cab, under the pile of laundry. (R. V, 10). At least some of the furtive movements noted by the officer when he made the traffic stop were taking place in the area of the pile of laundry. (R. V, 23-24).

After the pipe was located in the vehicle, Officer Humig had a conversation with Cleverly about controlled substances. (R. V, 33). Humig also asked for consent to complete a search of Cleverly's person, and Mr. Cleverly agreed. Nothing was found as a result of this search. (R. V, 34). Humig then asked for consent to look inside the cigarette packs. (R. V, 35). In response to the request, Cleverly picked up the cigarette packages and handed them to the Officer. Humig looked inside at least one of the packs,

and discovered methamphetamine in three plastic bags tucked between the cigarette box and the liner where the cigarettes would sit. (R. V 35-36).

Cleverly was charged with one count of possession of methamphetamine. (R. I, 4). Cleverly moved to suppress the evidence collected in the cigarette box, and the court denied the same. (R. V). Thereafter, the parties submitted the matter for a bench trial on stipulated facts; the district court convicted Cleverly of possession of methamphetamine. (R. I, 26-27).

IV.

ARGUMENTS AND AUTHORITIES

I. The law enforcement officers did not improperly detain Cleverly; no evidence should be suppressed.

A. Standard of review.

Appellate courts apply a bifurcated standard of review to the district court's ruling on a motion to suppress evidence; without reweighing the evidence, the appellate courts review the district court's findings to determine whether they are supported by substantial competent evidence, but the ultimate legal condition regarding suppression of evidence is reviewed using a de novo standard. *State v. Butts*, 46 Kan.App.2d 1074, 1079-1081, 269 P.3d 862 (2012).

B. Argument

In this case, the initial contact with Cleverly, and the individual driving the car in which Cleverly was a passenger, came about due to a traffic stop. Law enforcement effectuating a traffic stop results in a seizure of both the driver and passenger. *Brendlin v. California*, 551 U.S. 249, 258, 127 S.Ct. 2400 (2007). This is true even where the

officer only intended to investigate the driver, or essentially directed his show of authority at the driver. *Id.* Despite the officer's intent, or the fact that the traffic infraction that was the basis for the stop may have only involved the driver, the traffic stop action is necessarily a sort of "de facto" seizure of any passengers as well as the driver. The stop curtails the travel a passenger has chosen just as much as it halts the driver. *Id.* at 257. However, it is a reasonable and legal seizure so long as there is reasonable suspicion to believe a traffic infraction is, has been, or will be, committed or where the vehicle or an occupant is otherwise subject to seizure for a violation of law. See, *State v. Butts*, 46 Kan.App.2d 1074, 1081 269 P.3d 862 (2012); *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660 (1979); *Whren v. U.S.* 517 U.S. 806, 809-810, 116 S.Ct. 1769 (1996). This would appear to necessarily be the case even where the traffic violation would only involve the driver, such as a speeding infraction or illegal turn. However, in this case, both subjects had been observed committing a seatbelt misdemeanor violation (while a seatbelt offense may be the type of matter with the sort of penalty that otherwise might be otherwise associated with a traffic infraction, because 8-2503 is not listed in K.S.A. 8-2118, it is not an infraction and is actually an unclassified general misdemeanor crime pursuant to K.S.A. 21-5102(d) and K.S.A. 21-5102(b)). (R. V, 6-7). The traffic stop was justified at its inception.

Eventually, and after one of the officer's issued a traffic ticket to the driver, the stop of the vehicle was extended by the officer and the driver engaging in a consensual conversation and the driver granting permission for the officers to search his car. Once that point is reached in the interaction between the driver, Cleverly, and law enforcement, the driver and passenger at the stop may no longer be "seized" at all. "Not all personal

intercourse between policemen and citizens involves ‘seizures’ of persons.” *State v. Reason*, 263 Kan. 405, 410, 951 P.2d 538 (1997). A consensual encounter does not trigger Fourth Amendment scrutiny. *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n.16, 20 L.Ed.2d 889. There is no challenge that the continued conduct between the driver and the officers is consensual at that point. After ticketing him, the Officer asked the driver, Mr. Jones if he could take time to answer a few more questions, and the driver agreed. (R. V, 10). At this point, while his driver was voluntarily speaking to the officer, it is certainly true that, to an extent, the passenger, Mr. Cleverly, was “stuck.” The mode of travel he had chosen, being a passenger in another’s truck, was temporarily curtailed during the consensual conversation with the driver and the subsequent consent search. The search of the car also necessitated that the occupants exit. However, this was not a “seizure” of Cleverly by law enforcement. The critically important distinction is that Mr. Cleverly’s continued presence wasn’t a result of a law enforcement seizure or exercise of authority over him; it was a function of his driver exercising his right to remain at a location with his vehicle first to have a consensual conversation with the officer, then to consent and make his car available for the officer to look through. The risk that his driver might change his route, initiate a delay of some kind, or stop to engage in a conversation with a citizen or a law enforcement officer, and, perhaps, consent for a law enforcement search of his vehicle was a risk that Cleverly took in choosing to travel as a passenger in another’s vehicle. So, to the extent that his ability to carry on with his travels was impacted, it was not because of any authority over him exercised by law enforcement, but rather the circumstances of his chosen means of travel and the authority over the vehicle exercised by the driver when he consented to allow law enforcement to

search it. The restriction in movement of Cleverly being unable to continue his travels in the vehicle at that point (because the driver of the vehicle was making the choice not to move it) should not result in a finding that Cleverly was seized by law enforcement, improperly or otherwise. See, e.g. *I.N.S. v. Delgado* 466 U.S. 210, 218 104 S.Ct. 1758 (1984) (“We reject the claim that the entire work forces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites. Ordinarily, when people are at work their freedom to move about have been meaningfully restricted, not by the actions of law enforcement officials, but by the worker’s voluntary obligations to their employers.”). *United States v. Drayton* and *Florida v. Bostick* are also illustrative. In this case, passenger Cleverly continued to be in the area of the law enforcement officers because his driver’s consent to contact with law enforcement that resulted in a continued stop of his means of conveyance. In both *Drayton* and *Bostick*, law enforcement officers gained contact to the passengers on a bus by the driver stopping the bus and consenting to allow law enforcement on board. *United States v. Drayton*, 536 U.S. 194, 197, 122 S. Ct. 2105, 2109, 153 L. Ed. 2d 242 (2002), *Florida v. Bostick*, 501 U.S. 429, 429, 111 S. Ct. 2382, 2383, 115 L. Ed. 2d 389 (1991). In *Bostick*, the defendant felt he was not free to leave because there was nowhere to go on the bus and had he walked away, the bus could have departed and he would have been stranded and he would have lost any items locked away in the luggage compartment. 501 U.S. at 435. However, the court held that the police did not “seize” the passengers by their actions on the bus, noting that “the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police

had not been present. Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus[.]” *Id.* at 436. In *Drayton*, the Court reiterated this holding from *Bostick*. *Drayton*, 536 U.S. at 195-96.

The Kansas Supreme Court has applied similar reasoning with passenger cars as well. *State v. Reason*, 263 Kan. 405, 414-416 951 P.2d 538 (1997), *overruled on other grounds by State v. Berreth*, 294 Kan. 98, 273 P.3d 752 (2012). Where a person feels restricted from leaving for reasons independent from police conduct, including an inability to immediately legally continue ones chosen mode of travel in a passenger car, and for issues relating to the driver/passenger relationship and not wanting to abandon a co-occupant of the car, that does not make a police/citizen encounter, or consent to search that is given during that encounter, involuntary. *Id.* at 413, 415-416.

The Appellant complains about two particular aspects of the interaction between the law enforcement officer and Cleverly. First, that the officer conducted a pat down search of the defendant when he exited the automobile. The officer reported that this search was based on the fact that the defendant was wearing a baggy shirt and due to the way the defendant was wearing this shirt, his waistband was concealed. Nor could the officer tell if he had anything under his shirt. (R. V, 30, 41-42). The officer felt that Cleverly could clearly have had a weapon under his shirt or waistband. (R. V, 43). Courts have considered baggy clothing and a concealed waistband at least to be factors among those that may be considered in the justification of a pat down search. See, e.g. *People v. Collier*, 166 Cal.App.4th 1374, 1378 (Cal.App. 2008), *U.S. v. Gilliam*, 520 F.3d 844, 848 (8th Cir. 2000), *State v. Miglavs*, 337 Or. 1, 90 P.3d 607, 612-613 (Or. 2004), *Medrano v. State*, 936 N.E.2d 367, 79A05-0912-CR-686, (Ind.App. 10-25-2010),

unpublished. Additionally, in this case it is noteworthy that law enforcement had just witnessed the defendant commit a traffic misdemeanor (the seatbelt offense) and, when stopped for the same, had engaged in a lot of furtive movements downward. (R. V, 8). This stop occurred shortly after 1:00 a.m. and so it was also fairly dark. (R. V, 13). Law enforcement also reported having previous run-ins or circumstances in dealing with the persons associated with this stopped vehicle before. (R. V, 15).

Second, the Appellant notes that during the consent search, Cleverly asked to make a phone call, and Officer Humig replied that as soon as they were done searching he could get on the phone. (R. V, 45). Humig did this due to past experiences at traffic stops where third party individuals showed up at stops after being contacted by phone and caused disturbances or other problems during the stop. (R. V, 53). Given this past experience, the fact that the officers were on scene still conducting a sort of investigation and a search (albeit one that was, at that point, based on the drivers consent), and the fact that Cleverly had very recently been witnessed committing a traffic misdemeanor at the scene where the parties were still located, it was not unreasonable for the officer to take some steps to maintain the status quo.

And regardless of their propriety, neither of the two actions above constituted a seizure that constrained the defendant's freedom to leave or to disregard the officer. See *U.S. v. Mendenhall* 466 U.S. 544, 554 (1980). The first was an abbreviated search, not a seizure, certainly not a long term seizure that lasted until the eventual request for consent to search the cigarette packs. The second was a response by Humig to a question by the defendant which affirmed he could make a call but with a minor restriction on when.

The district court will also be affirmed if it made the right decision for the wrong reason or if it reached the right result even though it relied on faulty reasoning. *State v. Shehan*, 242 Kan. 127, Syl. para 4, 744 P.2d 824 (1987), *State v. Beltran* 48 Kan.App.2d 857, 876, 300 P.3d 92 (2013). Here, the district court can be upheld because an objectively reasonable officer would have had cause and the ability to restrain Cleverly and conduct, at a minimum, a pat-down search by lawfully arresting him. Both the *Terry* standard and probable cause to arrest are judged using an objective standard of reasonableness. *Beltran*, 48 Kan.App.2d at 857 (2013) *Devenpeck v. Alford*, 543 U.S. 146, 154-155, 125 S.Ct. 588 (2004). Where an objectively reasonable officer would be objectively justified in making an arrest or taking an action, then the subjective intent, justification, or reasoning of an individual officer is irrelevant. *Id.* As a result searches and seizures do not violate an individual's rights where an objectively reasonable officer would be justified in arresting that individual and the search or seizure would be justified as part of that theoretical arrest. *Beltran*, 48 Kan.App.2d at 876, 881. In the instant case, Cleverly was not wearing his seatbelt, in violation of K.S.A. 8-2503. As previously noted, pursuant to K.S.A. 21-5102(d), that violation is a general misdemeanor offense. K.S.A. 8-2503 is not an offense listed in K.S.A. 8-2118(c). See K.S.A. 21-5102(b). When law enforcement witnesses a misdemeanor crime, they may make a lawful arrest of the perpetrator. K.S.A. 22-2401(d). See also, *Beltran* 48 Kan.App.2d at 884 (“The State argued that the seatbelt violation was a general misdemeanor...and would have supported an arrest...[t]he court declined to rule on that legal assertion, although it appears to be correct...”), citations omitted. Neither officer apparently intended to make an arrest for the seatbelt violation (R. V, 16, 39). However, for the constitutional inquiry, this fact

about their subjective motivations is irrelevant. *Beltran*, 48 Kan.App.2d at 876, 885. See also, *State v. Ingram*, 279 Kan. 745, 752, 113 P.3d 228 (2005), *Scott v. United States*, 436 U.S. 128 (1978) (“the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.”). The theoretical arrest would have supported a pat-down search, and more. *Chimel v. California*, 395 U.S. 752, 762-763 (1969). The theoretical arrest would have justified restrictions on the defendant’s freedom. Indeed, an arrested person certainly would not be “free to leave.”

Note that this court need not determine if the search of the cigarette packages that Cleverly took with him when exiting the car and placed on the hood of the officer’s car itself would be a valid search under the theoretical arrest because the appellant does not challenge that search itself and merely argues that the search was tainted, and that taint was not attenuated, and/or that the evidence collected was fruit of the poisonous tree from the earlier, allegedly illegal, detention. Any detention was, however, justified by the theoretical arrest. Thus, there is nothing illegal to taint the later consent search. There is no indication, and no argument, that consent was not otherwise voluntary. See Appellant’s brief pg. 7. And regardless, a person’s *lawful* detention or arrest does not deprive that person of the ability to voluntarily consent to a search. *State v. Watson*, 423 U.S. 411, 424-25, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). In *Watson* the U.S. Supreme Court reversed the judgment of the Court of Appeals for the Ninth Circuit who held that consent given during what that Court found to be an illegal arrest was involuntary. *Id.* at 414. The Supreme Court agreed that Watson was arrested at the time he gave consent to

search, but found that arrest to be lawful. As a result of that distinction, and the totality of the circumstances, in the case the Court found that consent was voluntary. *Id.* at 423-425. See also; *United States v. Forbes* 181 F.3d 1, 6 (1st Cir. 1999) (“the fact of custody alone is never enough to demonstrate coerced consent”). See further; *U.S. v. Oguns*, 921 F.2d 442 (2d Cir. 1990); *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991); *United States v. Valencia*, 913 F.2d 378 (7th Cir. 1990); *United States v. Knight*, 58 F.3d 397 (8th Cir. 1995); *United States v. Henley*, 984 F.2d 1040 (9th Cir. 1993); *U.S. v. Shlater*, 85 F.3d 1251 (7th Cir. 1996); (examples of voluntary consent during custody, arrest or detention). Further, Kansas law certainly recognizes that a suspect’s confession can be voluntarily made during a custodian detention, even a relatively prolonged detention. See, e.g. *State v. Brown*, 285 Kan. 261, 266, 278 (confession voluntary despite defendant being handcuffed to a table for 12 hours during interrogation). Voluntary action while in legal custody would likewise be possible in granting consent to search.

The State recognizes that a somewhat contrary result to the above argument was reached by this Court in *State v. Schmitter*, 23 Kan.App.2d 547, 554-55, 933 P.2d 762 (1997), due to the officers lack of a subjective intention to make an arrest for the seatbelt violation. *Beltran* addresses *Schmitter* and concludes that subsequent Fourth Amendment case law has essentially overturned that aspect of *Schmitter*. *Beltran*, 48 Kan.App.2d at 883-884, quoting *Devenpeck*, 543 U.S. at 153 as well as *Virginia v. Moore*, 553 U.S. 164, 167, 176, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (search following arrest for driving with a suspended license based on probable cause comports with Fourth Amendment even though Virginia law required issuance of a summons for offense except in unusual and factually inapplicable circumstances) and *Atwater v. City of Lago Vista*, 532 U.S.

318, 323, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (no Fourth Amendment violation in arresting driver for failing to wear seat belt, even though offense punishable by only a fine under Texas law).

II. Assuming arguendo that there were earlier Fourth Amendment violations, the methamphetamine found during the consent search of the cigarette packs was not fruit of the poisonous tree thereof.

A. Standard of Review.

This legal conclusion regarding suppression of evidence and imposition of the exclusionary rule is a question of law subject to unlimited review, given a sufficient record below. *State v. Hoeck*, 284 Kan. 441, 447, 163 P.3d 441 (2007), *State v. Crowder*, 20 Kan.App.2d 117, 122, 887 P.2d 698 (1994).

B. Argument

To have evidence suppressed under the fruit of the poisonous tree doctrine, defendant must show: (1) his Fourth Amendment rights were violated, and (2) a factual nexus between the illegality and the challenged evidence. *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000). Under the second prong, defendant must show "but for" causation whereby "the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." *United States v. DeLuca*, 269 F.3d 1128, 1133 (10th Cir. 2001), as cited in *State v. Ulrey* 41 Kan.App.2d 1052, 1061, 208 P.3d 317 (2009). Cleverly does not show "but for" causation. Any illegal detention did not lead to the discovery of the items in the cigarette pack. The detention was not, for example, necessary so that Cleverly would be accessible for law enforcement to later ask for consent to search the items. Cleverly was not going anywhere regardless. As noted above, Cleverly would have had independent reasons

keeping him on scene entirely separate from any law enforcement pressure or detention as a result of the driver of his selected mode of transportation choosing to continue to stop and speak with law enforcement and then let them search. See, e.g. *Reason*, 263 Kan. at 413-416. There is no indication that Cleverly would have walked away from the vehicle during the consent search of the vehicle, regardless of what law enforcement did. (R. V. 29-30).

Additionally, at the time of the relevant request for consent to search the cigarette packs, an investigatory detention would have been appropriate. At the very least, law enforcement would have reasonable suspicion to investigate matters further with Cleverly after the meth pipe had been discovered in the center of the truck seating, within both parties reach, and with the fact the occupants had made furtive movements in the area of the pipe when being stopped by law enforcement, and with Cleverly having exited the car prior to the search with cigarette packages, a type of container which Officer Humig had prior experiences with individuals using to hide controlled substances.

Were it necessary to reach the question, under an attenuation analysis, the taint of any prior illegality would also have dissipated at the time the methamphetamine was found. An attenuation analysis is generally conducted by considering (1) the time that elapsed between the illegality and the acquisition of the evidence sought to be suppressed, (2) the presence of any intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. *State v. Williams*, 297 Kan. 370, 381, 300 P.3d 1072, 1080 (2013). While the record is not developed with regard to the exact time of all the events, there does appear to be some significant lapse in time between Cleverly initially exiting the vehicle, being patted down, and requesting to make a phone call until

the search of the cigarette packs. It would appear all the former things occurred rather early in the process of the car search, and the request for consent from Cleverly did not come until after the completion of the car search. Indeed, sufficient time appeared to pass between these events for the officer and Cleverly to have an amicable conversation regarding connections that the two had through friends and family members. (R. V, 31).

There are also at least two important intervening circumstances. First is the consent itself. *State v. Crowder*, 20 Kan.App.2d 117, 122, 887 P.2d 689 (1994). The prior circumstances were not so severe as to overwhelm Cleverly's will. Indeed, the request for consent to complete a full search of Cleverly's person and certain items of his property after Cleverly had been subject to a pat-down, without his consent, could have signaled to him that unlike, apparently, the simple pat-down, law enforcement truly did require his permission for the requested, more in-depth, search. Second is the fact that by the time Humig actually spoke to Cleverly about controlled substances and asked to conduct the searches, an objective officer would have had independent reasonable suspicion, and perhaps even probable cause, which would justify a continued investigatory stop, having found the meth pipe, with the vehicle occupants pre-stop behaviors, and Humig's prior law enforcement experience with cigarette packs. While the Appellee finds no Kansas case to be directly on point, it would seem appropriate for the eventual development of reasonable suspicion to be an intervening circumstance in the attenuation of a prior illegality, at least where the development of reasonable suspicion is unrelated to the prior misconduct or illegal detention.

Review of the purpose and flagrancy of the officers' actions reveals them not to be motivated by maliciousness. Nor were the actions particularly flagrant. When

Cleverly asked about the phone call, Officer Humig affirmed his ability to make a call, just after the officers had completed their search of the vehicle. This was motivated by past experiences at traffic stops where third party individuals showed up on scene after apparently being contacted by phone and caused disturbances or other problems during the stop. (R. V, 53). Thus, Officer Humig's purpose with this response was to avoid problems or disturbances at the scene and maintain the status quo as much as possible, at least until the consent search of the automobile was completed. Further, while this Court may well find the officer's reasoning somewhat thin, the purpose of the pat-down search was for officer safety purposes, and it was, at least, based on something. This is not a case where the pat-down was improperly initiated for evidence collection purposes, rather than officer safety concerns. See *Schmitter*, 23 Kan.App.2d at 557-558. This is also not a case like *State v. White*, 44 Kan.App.2d 960, 972, 241 P.3d 591 (2010), where the law enforcement officer engaged in "routinely" conducting pat-downs without suspicion. In fact, Humig noted during the hearing that the only appropriate purpose for a Terry pat down is to check for weapons or something that was somehow a threat. (R. V, 40). He also recognized that he could not simply pat down everyone he met. (R. V, 43). The Officer acted in good faith here, and any mistakes of law made were reasonable errors. *Heien v. North Carolina*, 547 U.S. ____ (2014). There is also nothing in the record to indicate the officer ever drew a weapon, used physical force, threatened physical force, or even spoke in a commanding tone of voice at any point during the encounter.

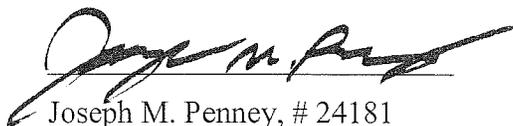
Even if there was a prior illegality, the evidence collected after the consent search of the cigarette packs should not be excluded under the fruit of the poisonous tree doctrine.

V.

CONCLUSION

The Appellant's motion to suppress evidence was properly denied by the district court. That judgment should be affirmed.

Respectfully Submitted,

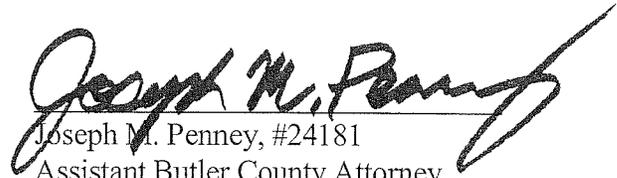
A handwritten signature in black ink, appearing to read "Joseph M. Penney", written over a horizontal line.

Joseph M. Penney, # 24181
Assistant Butler County Attorney
201 W. Pine
El Dorado, KS 67042
(316) 321-6999

Derek Schmidt
Attorney General
120 SW 10th, 2nd Floor
Topeka, KS 66612 6661

CERTIFICATE OF SERVICE

I hereby certify that the original and sixteen (16) copies of the Brief of State were duly mailed, postage prepaid through the U.S. Mail to Derek Schmidt, Attorney General for the State of Kansas, Criminal Litigation Division, 120 S.W. 10th, 2nd Floor, Topeka, Kansas 66612-1597 and two (2) copies were duly mailed, postage prepaid through the U.S. Mail to Randall L. Hodgkinson, Kansas Appellate Defender Office, Jayhawk Tower 700 Jackson, Suite 900, Topeka, KS 66603 on the 30th day of January, 2015.


Joseph M. Penney, #24181
Assistant Butler County Attorney