No.

IN THE

SUPREME COURT OF THE UNITED STATES

RACHEL A. LEATHERMAN, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, Rachel A. Leatherman, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39. The petitioner was permitted to proceed as an indigent by the Supreme Court of Kentucky, the Court of Appeals of Kentucky and the trial court.

*ROY ALYETTE DURHAM, II
JULIA K. PEARSON
*Counsel of Record
Assistant Public Advocate
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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Rachel A. Leatherman, being first duly sworn, depose and say that I am the Petitioner in the above-styled case, and in support of my motion to proceed without being required to pay fees, costs, or giving security, I state that I am because of my poverty I am unable to pay the costs of said proceedings or to give security. I believe I am entitled to redress.

I further swear the responses I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you presently employed? Yes ( ) No (x)

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month you received.

August, 2009.

1.00 per day for work in Horticulture, at KCIW PeWee Valley

2. Have you received within the last 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

Some miscellaneous cash for gas money, from taking metal scraps to recycle, last year. I can no longer do this, because I no longer have a vehicle that can carry metal scraps.

3. Do you own any cash or checking or savings accounts?

I do not have a bank account of any kind.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

We have a 2002 model motorcycle. This is our only vehicle.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I have no dependents.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rachel A Leatherman

Rachel A. Leatherman

SUBSCRIBED AND SWORN TO BEFORE ME BY RACHEL A. LEATHERMAN

Notary Public Leaalynn M. Le
Commonwealth of Kentucky – State at Large

My commission expires:
7-11-2015

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AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 29.2

I, Roy Alyette Durham II, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel of record for Petitioner in the above-styled action.

3. The attached Petition for Writ of Certiorari, Motion For Leave To Proceed *In Forma Pauperis,* Affidavit of Indigency, Certificate of Service and Appendix were mailed from the United States Post Office, on Wilkinson Street, Frankfort, Kentucky 40601, by having the post office postmark the Petition on May 15, 2012, and mail it to the Supreme Court by first class mail.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. William K. Suter, Office of the Clerk of the United States Supreme Court, One First Street, N.E., Washington, D.C. 20543.

Respectfully submitted,

*ROY ALYETTE DURHAM, II
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*Counsel of Record
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Julia.Pearson@ky.gov

Subscribed and sworn to before me by Roy Alyette Durham, II on this 15th day of May, 2012.

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: Notary ID No. 419126 My Commission Expires 5/3/2014

No.

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court's order denying her Motion to Suppress Evidence which was amended after the trial and included information presented at trial but not at the suppression hearing violated Petitioner's right to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution.

List of All Parties

Petitioner is Ms. Rachel A. Leatherman. Counsel for Ms. Leatherman is the *Hon. Roy Alyette Durham, II and the Hon. Julia K. Pearson, Assistant Public Advocates, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601.

Respondent is the Commonwealth of Kentucky, represented by Gregory Fuchs, Assistant Attorney General and Hon. Jack Conway, Attorney General, Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40601

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APPENDIX

PETITION FOR A WRIT OF CERTIORARI

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

RACHEL A. LEATHERMAN,

Petitioner,

-v-

COMMONWEALTH OF KENTUCKY,

Respondent.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky (Kentucky's intermediate appellate court) affirming Petitioner's convictions and sentences is a published opinion, *Leatherman v. Commonwealth*, 357 S.W.3d 518, (Ky. App. 2011), and is attached as part of the Appendix, A-1 to A-12. The Kentucky Supreme Court denied Petitioner's Motion for Discretionary Review in an order entered on February 15, 2012. That order is attached at Appendix A-13.

Petitioner was found guilty of Possession of a Controlled Substance (cocaine), Tampering with Evidence and Driving under the Influence (drugs).

The jury recommended a total of eight years. Prior to that, the trial court denied Petitioner's Motion to Suppress the Evidence in an opinion, attached as part of the Appendix, A-14 to A-17. After the trial, the court entered an opinion denying the motion, which is attached at Appendix A-18 to A-20.

JURISDICTION

The Kentucky Supreme Court denied discretionary review of the Kentucky Court of Appeals Opinion affirming Ms. Leatherman's convictions on February 15, 2012. (See Appendix A-13).This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). This petition has been filed within ninety days of that opinion, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendment to the United States Constitution.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 2006, Rachel Leatherman was indicted for Possession of a Controlled Substance in the First Degree, Tampering with Physical Evidence and Driving an Automobile under the Influence. The incident from which the charges arose occurred on June 28, 2006.

On that evening, a man who identified himself as Vernon Wilkey called 911 and said, "a lady in a dark blue--looks like a Buick LeSabre" with Washington state license plates was walking around in his neighbor's yard "writing stuff down and she'd talked to him and mentioned something about tar heroin and all that stuff."

Deputy Eddie McGuire was unsuccessful in searching the neighborhood for the car. On his way back to Paducah, the deputy testified, he saw a car with its left turn signal flashing and going slower than he was. McGuire found unusual the amount of time the turn signal flashed and the amount of time the car stayed in the right lane without moving into the left. Once he overtook the car, McGuire noticed a white female was driving what looked like a Buick LeSabre with Washington state license plates. After Deputy McGuire pulled in behind her, the woman pulled over to the shoulder. McGuire thought that action was as suspicious as the left turn signal blinking, so he pulled over and activated his emergency lights.

McGuire said as he walked up to the vehicle, he noticed that the driver's pants were unbuttoned and unzipped, but were belted. He asked the

driver to step to the back of the vehicle. Sometime after that, McGuire and Deputy Jason Walters searched the car for contraband, but came up with nothing. Later, Officer Gretchen Dawes arrived to search the woman. That search also turned up no drugs or contraband. Neither Officer Dawes nor Deputy Walters testified at the suppression hearing.

After the search, McGuire said he placed the woman, Petitioner, Rachel Leatherman, in handcuffs and put her in his cruiser. He was certain she was wearing a watch, but only thought it was on her right arm. McGuire then transported Petitioner to a local hospital for a blood draw. McGuire's story was that as he assisted her out of the car, he noticed Petitioner had dropped her watch and a small baggie containing a substance consistent with a rock of cocaine. McGuire confiscated the baggie. Once he booked Petitioner, he ran a field test for heroin. That test came back negative. A later test was positive for cocaine.

After trial counsel filed a Motion to Suppress the Evidence, the court held a suppression hearing on November 27, 2006. The court denied the motion on January 11, 2007. It then entered an order substituting a second order on January 18, 2008. After trial, the court entered a supplemental order, on January 28, 2008.

The trial court improperly relied upon after acquired information

Testimony about Petitioner's "unusual and disturbing" behavior

In the January 18 order, the trial court found as facts that: 1) police dispatch received a call from a man who reported that a white female in what looked to be a dark blue Buick LeSabre with Washington license plates was in his neighbor's yard and had mentioned tar heroin; and 2) a Sheriff's Deputy observed a vehicle matching that description "driven by a white female in a right hand traffic lane with her left turn signal activated. The vehicle did not turn but pulled to the right side of the roadway and stopped", after which the Deputy pulled in behind her and activated his emergency lights.

From those facts, the court made the following conclusion of law:

> [t]he combination of a report of an unknown person, driving a Washington state licensed vehicle in a Paducah, Kentucky residential area, asking about tar heroin, later observed to signal a left turn but pull off the roadway to the right, constitutes reasonable suspicion to investigate and possibly cite for improper signal.

In its January 28 order, executed after the trial, the court's findings regarding these facts expanded to include that 1) the female "made unusual and disturbing statements about heroin" in Vernon Wilkey's neighborhood; 2) the vehicle travelling slowly in the right lane with its left turn signal activated "appeared unusual and suspicious to the deputy"; and 3) the vehicle pulling to the right side of the road without a signal "demonstrated additional unusual behavior by the defendant."

A panel of the Kentucky Court of Appeals concluded:

> Based upon the 911 call, during which the caller described a woman. . . who was committing criminal activity, and the undisputed fact that Leatherman pulled to the side of the road and stopped before Deputy McGuire activated his emergency lights, we hold that there was no constitutional violation in the investigatory stop.

Leatherman v. Commonwealth, 357 S.W.3d 518, 526 (Ky. App. 2011).

Deputy McGuire admitted at the suppression hearing that "the only information that we had was the fact that she had come up to his house and asked about heroin." He admitted at trial that he had no idea when the woman had made contact with the neighbor (or Wilkey, for that matter).

Wilkey did not testify at the suppression hearing, but the 911 call makes clear that Petitioner did not "come up to" Wilkey's house and ask[] about heroin"; rather, Wilkey reported second-hand information from a neighbor who had told him that Petitioner "mentioned something about heroin" while Petitioner was in the neighbor's yard. Wilkey testified at trial that Petitioner "didn't seem like she was really all together there." However, he did not give the 911 operator that information. Thus, when he made the stop, McGuire did not have that information either.

Deputy McGuire admitted at the suppression hearing that he "was going to" stop Petitioner "anyway" when she pulled to the shoulder. He admitted, "I suppose she assumed I was going to stop her, so she went ahead and pulled over, anyway." He admitted that Petitioner's actions "were a safe assumption" that he was going to stop her. McGuire had already testified

that he was driving faster than Petitioner's vehicle. McGuire conceded that it was possible Petitioner had activated her turn signal, but decided against moving into the left lane when she saw the cruiser in her rear view mirror. That Petitioner did not move to the left lane and collide with the cruiser is further evidence she noticed him.

A driver who travels down a highway with her turn signal flashing does not commit a traffic violation.[1] She may aggravate the drivers behind her or in the other lanes, but she does not commit a traffic violation. In fact, the action has become so ubiquitous in American culture that the late comedian George Carlin created a routine concerning people who drove "around the world to the left." Yet, McGuire and the trial court found it suspicious that Petitioner speedily obeyed the demands of Kentucky Revised Statute (KRS) 189.930, which mandates that emergency vehicles are to be given the right of way, by the operator of the motor vehicle "driv[ing] to a position parallel to, and as close as possible to, the edge or curb of the highway clear of any intersection. . ."

HGN and Clonazepam

In its January 18 order, the trial court found as a fact that Petitioner "failed all six clues of a horizontal gaze nystagmus test[2], had very glassy eyes,

---

[1]The only Kentucky authority concerning the use of turn signals is KRS 189.380, which requires motorists to signal an intention to change lanes or turn at least 100 feet before executing the maneuver.

[2]Even assuming arguendo that the other indicators had been present, McGuire improperly administered the test. The National Highway Traffic

[] appeared nervous" and told the deputy that "she was on several medications, including Clonazepam."[3] In its seventh finding of fact, the court said "[the maker of Clonazepam warns that it should not be used when driving a vehicle and that the drug causes abnormal eye movements." Those facts translated into the court's fourth conclusion of law, including that Petitioner "failing a (sic) HGN test" and "stating that she was taking medication that would cause her to fail the test, constitutes probable cause to arrest for DUI."

In its after-trial, January 28, order, the court found Petitioner's glassy eyes, and the facts that she "failed all HGN tests", "gave unusual responses to instructions given to her by the deputy," "appeared somewhat confused," "nervous," and "under the influence of drugs or alcohol." In its fifth finding of fact, the court said Petitioner "admitted. . . .that she was on a number of medications, including Clonazepam. Clonazepam is a strong anti-psychotic medication which interferes with motor performance, including driving a motor vehicle" and "also causes abnormal eye movements."

The panel of the Kentucky Court of Appeals noted that Petitioner's glassy eyes and odd behavior coupled with her admission that she was taking

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Safety Administration warns police officers to position DUI suspects so that they do not face blinking cruiser lights or oncoming traffic because the lights can create a false nystagmus (optokinetic nystagmus). The field video showed McGuire positioned Petitioner facing the blinking cruiser lights and oncoming traffic.

[3]Clonazepam is the generic equivalent of Klonopin. http://www.drugs.com/availability/generic-klonopin.html

prescription medication, including Clonazepam, was sufficient to provide Deputy McGuire with probable cause to arrest her for DUI. *Leatherman*, *supra*, 357 S.W.3d at 528.

The trial court and the panel absolutely ignored McGuire's admissions that Petitioner drove in compliance with traffic laws. In fact, the panel even cited McGuire's testimony that Petitioner was neither driving erratically nor weaving. *Id.* Petitioner produced her license and registration quickly after McGuire asked for them. Her eyes were not watery or bloodshot. Her pupils were not pinpoint or dilated. She did not have a runny nose as is common with some cocaine users. She did not have scabs or needle marks, also common with intravenous drug users. She was not coughing or short of breath; she was not sneezing or sweating. She did not complain of nausea or chest pains. Her face was not flushed. She was alert. Moreover, McGuire admitted at the suppression hearing that the HGN result by itself could not provide probable cause. Neither does nervous behavior.

As the final rung of its finding that McGuire had probable cause to arrest Petitioner for DUI, the panel cited to "the product information for Klonopin. . . .[which] states that patients taking that medication "should be cautioned about operating hazardous machinery, including automobiles, until they are reasonably certain the Klonopin therapy does not affect them adversely." *Id.*

Unfortunately, that information is also after-acquired and not something Deputy McGuire knew at the scene. The trial court made the same error when it noted Petitioner's statement that "she was taking medication that would cause her to fail the test, constitutes probable cause to arrest for DUI." Moreover, the panel and the court absolutely ignored Kentucky State Police lab technician Ryan Johnson's testimony that Clonazepam itself could cause "positive" HGN signs. The panel (and the trial court) also absolutely ignored Johnson's testimony that even if he had the equipment to test Petitioner's blood for the presence of Clonazepam, the simple presence of the drug was not an indicator that the person was under the influence such that she could be charged with, let alone convicted of, driving under the influence of an intoxicant.

After the Kentucky Court of Appeals affirmed Petitioner's convictions and sentences, she filed a motion for discretionary review with Kentucky's highest court, the Kentucky Supreme Court. That motion was denied on February 15, 2012. (See Appendix p. A-13). Petitioner now petitions this Court for a writ of certiorari seeking relief.

REASONS FOR GRANTING THE WRIT

THE KENTUCKY COURT OF APPEALS' OPINION HAS PROVIDED A SPLIT IN AUTHORITY AS TO WHETHER AFTER-ACQUIRED INFORMATION IS PERMISSIBLE IN THE FOURTH AMENDMENT CONTEXT

In *Whiteley v. Warden*, 401 U.S. 560 (1971) this Court stated:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise legal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.
>
> In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to corroborate the informer's tip that Daley and Whiteley committed the crime. [footnote omitted] Therefore, Petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded at his trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Likewise, in *United States v. Hensley*, this Court held that the investigatory stop of a vehicle based upon a police officer's objective reliance on a police flyer issued in the absence of a reasonable suspicion violates the Fourth Amendment. The Court stated:

> Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible **if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop,** and if the stop that in fact occurred was not significantly more

> intrusive than would have been permitted the issuing department.

469 U.S. 221, 233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); emphasis added, internal citation omitted.

Under the above precedent, after-acquired information cannot be used to transform an illegal stop into a legal stop. It is clear, however, that the trial court used after acquired-information to deny Petitioner's Motion to Suppress the Evidence. It is also clear that the Kentucky Court of Appeals continued the error by using that after-acquired information to affirm Petitioner's convictions and sentences, in violation of the Fourth and Fourteenth Amendments.

In his 911 call, the **only** information Deputy McGuire had when he stopped Petitioner, Vernon Wilkey said a neighbor relayed a conversation in which Petitioner had simply "mentioned" tar heroin. Wilkey did not tell the dispatcher that Petitioner had tried to buy heroin from him. He did not tell the dispatcher he was present during the conversation or overheard it. It is impossible to determine whether the neighbor related the conversation to him or whether another person who had talked to the neighbor then told Wilkey. Wilkey also did not tell the 911 dispatcher that Petitioner's pants were unzipped and unbuttoned.

Deputy McGuire admitted that he spoke with Wilkey and obtained a written statement the day **after** he arrested Petitioner. He discovered also discovered the condition of Petitioner's pants **only after** he pulled her over

and ordered her to get out of the car. On the other hand, Wilkey's written statement (again taken the day after Petitioner's arrest), mentioned that Petitioner's pants were unzipped and unbuttoned.

The Kentucky Court of Appeals violated the dictates of *Whiteley v. Warden*, *supra*, and *United States v. Hensley*, *supra*, when it perpetuated the trial court's error in using after-acquired information in denying Petitioner's Motion to Suppress. The Court then used that same after-acquired information to affirm Petitioner's convictions and sentences. In doing so, the Court of Appeals placed itself in square conflict with other jurisdictions.

For example, the Colorado Supreme Court has said, "[i]n determining whether an investigatory stop is valid, a court must take into account the facts and circumstances known to the officer at the time of the intrusion." *People v. Revoal*, 269 P.3d 1238, 1240 (Colo. 2012), citing *People v. Padgett*, 932 P.2d 810, 815 (Colo. 1997). Similarly, the Connecticut Supreme Court has said, "[w]hen reviewing the legality of a stop, a court must examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." *State v. Lipscomb*, 258 Conn. 68, 75–76, 779 A.2d 88 (2001).

The Arkansas Supreme Court has said that after-acquired information "is irrelevant to the probable cause analysis" and "only what the police officer knew at the time of arrest enters the analysis." *Friend v. State*, 315 Ark. 143, 865 S.W.2d 275 (1993) (citing *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13

L.Ed.2d 142 (1964); *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986)). A panel of the Seventh Circuit Court of Appeals echoed the Arkansas High Court in *United States v. Odom*, 72 F.3d 1279, 1284 (7th Cir. 1995). In that case, the Court held that while the reviewing court considers "the whole picture," that picture "is limited to the moment at which the seizure occurred and thus excludes any facts learned thereafter. Regardless of how compelling the later-learned facts may be, they are not part of the 'snapshot' presented to the officer at the time of the seizure." Those after-acquired-facts "are therefore irrelevant to the reasonable suspicion equation. That much is clear from *Terry* itself, which instructs courts to consider only 'the facts available to the officer at the moment of the seizure or the search.'" *Id.*, citing *Terry v. Ohio*, 392 U.S. 1, 21–22; internal citations and emphasis omitted.

Other decisions, one from the Kentucky Supreme Court and another from the Sixth Circuit Court of Appeals, show a conflict with the Court of Appeals' decision in this case citing Petitioner's nervousness as part of its decision calculus. The Sixth Circuit said,

> [t]he district court found that other factors—Beauchamp's nervousness, evasive answers, and low pants—could be factored into the totality of the circumstances analysis. But the officer only became aware of these factors after he had seized Beauchamp. As reasonable suspicion to make a stop cannot be justified by facts that become apparent only after a seizure, these facts are irrelevant to the court's analysis. *See United States v. McCauley*, 548 F.3d 440, 443 (6th Cir.2008).

United States v. Beauchamp, 659 F.3d 560, 571 (6th Cir. 2011). And in *Strange v. Commonwealth*, the Kentucky Supreme Court said "[a]dditional

factors cited by the Court of Appeals—his apparent nervousness, that he and the van driver gave differing reasons for being there, and the bulge in the pants—did not become known until after the seizure and cannot therefore be factors articulated to justify the reasonableness of the seizure." *Strange v. Commonwealth*, 269 S.W.3d 847, 851 (Ky. 2008).

In *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968), this Court instructed reviewing courts to consider only "the facts available to the officer at the moment of the seizure or the search." What Deputy McGuire knew at the time he stopped Petitioner's automobile is that she had mentioned tar heroin to someone and that she was driving her automobile with its left turn signal blinking. The acts of "walking around" in a neighbor's yard, "writing stuff down" and simply mentioning tar heroin without any words to indicate intent to buy or sell, are not criminal acts. McGuire admitted that Petitioner was not driving contrary to traffic laws and admitted that it was "safe" for Petitioner to assume he was going to pull her over as she pulled to the side of the road. The other information was acquired after McGuire seized Petitioner. The trial court and the Kentucky Court of Appeals erred when it used that information.

This Court should grant the petition for a writ of certiorari to decide this legal question and resolve this split of authority.

CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the Supreme Court of Kentucky.

Dated: May 15, 2012

Respectfully submitted,

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*COUNSEL FOR PETITIONER

Supreme Court of Kentucky

2011-SC-000272-D
(2008-CA-000849-MR)

RACHEL LEATHERMAN — MOVANT

V.

McCRACKEN CIRCUIT COURT
NO. 06-CR-00408

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is DENIED.

All sitting. All concur.

ENTERED: February 15, 2012.

CHIEF JUSTICE

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000849-MR

RACHEL LEATHERMAN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 06-CR-00408

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER
DENYING PETITION FOR REHEARING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; ISAAC,[1] SENIOR JUDGE.

Having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, the COURT ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: 4/12/11

CHIEF JUDGE, COURT OF APPEALS

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

357 S.W.3d 518
(Cite as: 357 S.W.3d 518)

H

Court of Appeals of Kentucky.
Rachel LEATHERMAN, Appellant,
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2008–CA–000849–MR.
Jan. 21, 2011.
Rehearing Denied April 12, 2011.
Discretionary Review Denied by Supreme Court Feb. 15, 2012.

Background: Defendant was convicted by a jury in the Circuit Court, McCracken County, Craig Z. Clymer, J., of possession of a controlled substance (cocaine), tampering with physical evidence, and operating a motor vehicle under the influence (DUI) of alcohol or drugs. Defendant appealed.

Holdings: The Court of Appeals, Lambert, J., held that:
(1) deputy possessed reasonable suspicion that defendant had, or was about to become involved in, illegal activity sufficient to justify investigatory stop of vehicle;
(2) deputy possessed probable cause to arrest defendant for DUI; and
(3) the trial court's order granting the Commonwealth's motion in limine prohibiting defendant from mentioning any statement or question she made to police deputy regarding her watch in the backseat of cruiser was not an abuse of discretion.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Criminal Law 110 ⚿1158.12

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases

The Court of Appeals standard of review from a denial of a motion to suppress is twofold; first, it must determine whether the findings of fact are supported by substantial evidence, and second, it must perform a de novo review of those factual findings to determine whether the lower court's decision is correct as a matter of law.

[2] Arrest 35 ⚿60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases
(Formerly 35k63.5(5))

Police deputy had reasonable suspicion that defendant had, or was about to become involved in, illegal activity sufficient to justify investigatory stop of vehicle; an emergency telephone call to police reported a woman driving a car with Washington license plates was committing criminal activity, deputy observed defendant, a woman, driving a vehicle with Washington license plates, and defendant pulled her vehicle to the side of the road and stopped before deputy activated the emergency lights on his cruiser.

[3] Automobiles 48A ⚿349(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(6) k. Intoxication. Most

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(Cite as: 357 S.W.3d 518)

Cited Cases

Police deputy had probable cause to arrest defendant for driving under the influence (DUI); deputy testified that defendant appeared to be under the influence of something, that she failed the horizontal gaze nystagmus (HGN) field sobriety test, she admitted that she was taking a medication that cautioned against patients operating hazardous machinery, including automobiles, while taking the medication, and defendant had glassy eyes. U.S.C.A. Const.Amend. 4; KRS 431.005(1).

[4] Criminal Law 110 ⚿632(4)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k632 Dockets and Pretrial Procedure
110k632(3) Motions
110k632(4) k. Motions in limine. Most Cited Cases

The trial court's order granting the Commonwealth's motion in limine prohibiting defendant from mentioning any statement or question she made to police deputy regarding her watch in the backseat of cruiser was not an abuse of discretion, in prosecution for possession of a controlled substance; defendant would have been permitted to introduce her statement if she had chosen to testify, and the court only precluded defendant's statement from being admitted during deputy's testimony.

[5] Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In general. Most Cited Cases

Since the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence, the Court of Appeals may reverse a trial court's decision to admit evidence only if that decision represents an abuse of discretion.

[6] Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

The Commonwealth Attorney's closing argument statements that referred to defendant's watch, which was left in the back seat of police cruiser, as an "autograph" on the drugs found behind the seat did not constitute palpable error, in prosecution for possession of a controlled substance. Rules Crim.Proc., Rule 10.26.

[7] Automobiles 48A ⚿355(6)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak355 Weight and Sufficiency of Evidence
48Ak355(6) k. Driving while intoxicated. Most Cited Cases

Evidence was sufficient to support conviction for driving under the influence (DUI), even though there was no scientific proof revealing the presence of a prescription medication in defendant's system; defendant failed the horizontal gaze nystagmus (HGN) field sobriety test, she admitted that she was taking three medications, including one that cautioned against patients operating hazardous machinery, including automobiles, while taking the medication, and witness reported that defendant and her husband visited him several months after the incident regarding his upcoming testimony and the victim stated that she was unable to remember what they discussed because she was "whacked out." KRS 189A.010.

*519 Julia K. Pearson, Frankfort, KY, for appellant.

*520 Jack Conway, Attorney General of Kentucky,

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Gregory C. Fuchs, Assistant Attorney General, Frankfort, KY, for appellee.

Before TAYLOR, Chief Judge; LAMBERT, Judge; HENRY,[FN1] Senior Judge.

FN1. Senior Judge Michael L. Henry concurred in this opinion prior to the expiration of his term of senior judge service. Release of the opinion was delayed by administrative handling.

OPINION

LAMBERT, Judge:

Rachel Leatherman directly appeals from the judgment of the McCracken Circuit Court following a jury trial convicting her of possession of a controlled substance (cocaine), tampering with physical evidence, and operating a motor vehicle under the influence of alcohol or drugs. As a result of those convictions, the trial court sentenced Leatherman to a total of eight years' imprisonment. On appeal, Leatherman challenges the trial court's failure to suppress evidence obtained in conjunction with the investigatory stop and her subsequent arrest, the trial court's granting of the Commonwealth's motion in limine that prohibited her from mentioning her statement to Deputy McGuire, and the trial court's failure to grant a directed verdict on the DUI charge. Having thoroughly reviewed the record on appeal and the parties' briefs, we affirm the judgment of conviction.

The facts leading up to Leatherman's arrest and subsequent conviction are as follows: On June 28, 2006, Vernon Wilkey made an emergency 911 call to report events in his neighborhood on Queensway Drive. The record contains an unofficial transcript of his 911 call:

DISPATCHER: Central dispatch. This is Lou. Could I help you.

MR. WILKEY: Yes, sir. This is Vernon Wilkey. I live out here on Queensway Drive.

And there is a lady in a dark blue looks like a Buick LeSabre. I'd say it's a late '80s, early '90s model. And I've got a license plate number. But she's out here walking around in my neighbor's yard and everything and writing stuff down, and she'd talked to him and mentioned something about tar heroin and all that stuff.

DISPATCHER: Talked to who?

MR. WILKEY: My neighbor next door.

DISPATCHER: And was talking to him about heroin?

MR. WILKEY: Yeah, tar heroin.

* * *

DISPATCHER: .... Okay. Do you know what she was writing down?

MR. WILKEY: No.

DISPATCHER: What address on Queensway Drive was she last seen at?

MR. WILKEY: She was just here at mine a few minutes ago at 4015.

DISPATCHER: Is she white or black?

MR. WILKEY: She's white.

DISPATCHER: Hold on just a moment, please.

* * *

DISPATCHER: What's the license plate number on that vehicle, sir?

MR. WILKEY: [License number omitted.]

* * *

DISPATCHER: What state is that?

MR. WILKEY: Seattle, Washington.

*521 She said something about her and her husband staying in a motel and everything.

* * *

DISPATCHER: All right. Officers are already on the way. They'll be out there to speak with you shortly.

If she leaves before they get out there to check the area, could you give us a call back and let us know which way she goes?

MR. WILKEY: Okay.

The following day, Mr. Wilkey completed a written statement detailing what had happened:

On 6–28–2006 a Lady driven a Buick Lasaber stoped at my driveway and ask me if I would sell 2 berrlles and i said they belong to my Naber. She had her paints unbuttoned & unzipped. She acked like she was under the Influence of something. She was a dirty Blound wereing Blue shirt & Blue Jeans. [Spelling and grammatical errors in original.]

The record also includes an unofficial transcript of the dispatch tape, which reads in pertinent part as follows:

DIS: 47. 38. Suspicious person complaint, the 4000 block off of Queensway Drive off of Lesser Harris and Bottom Street. A white female in a dark blue LeSabre that's out walking around asking people about 218A.[FN2]

FN2. We assume "218A" refers to Kentucky Revised Statutes (KRS) Chapter 218A, which addresses controlled substances.

* * *

DIS: 38 and 47, that dark blue LeSabre's going to have a Washington tag. [License number omitted.] They don't know who she is, but they're going to call us back if the vehicle leaves before you arrive.

Deputy Eddie McGuire of the McCracken County Sheriff's Department responded to the call and proceeded to the Queensway Drive area. The subject of the complaint was no longer in the area, but on his way back into town, Deputy McGuire came upon a blue Buick LeSabre with Washington license plates in the right lane with the left blinker flashing. The dispatch transcript reflects: "I just passed her. Going to try to find her. See if she'll pass me again. I think she's gonna turn off now. Coming up on Cairo and 60." When Deputy McGuire pulled his cruiser behind the LeSabre, the driver turned on the right turn signal and pulled off to the right side of the road. Deputy McGuire then turned on his lights and pulled up behind the LeSabre. We note that the record contains a videotape of the cruiser cam video; unfortunately, there is no audio recording attached to the video.

Deputy McGuire approached the driver's side of the stopped vehicle and had the driver step out. The driver was Rachel Leatherman, and a records check showed that there were no active warrants for her arrest. Deputy McGuire noticed that Leatherman had glassy eyes, that her pants were unbuttoned and unzipped, and that a pant leg was rolled up. He also noticed that she was nervous and fidgety. Deputy McGuire then performed field sobriety tests. On the horizontal gaze nystagmus (HGN) test, Leatherman showed six clues that indicated impairment. A breath test and later blood tests revealed that there were no drugs or alcohol in Leatherman's system.

When Deputy McGuire asked her about the 911 call, Leatherman referred to Mr. Wilkey as a snitch. She admitted to having been in the Queensway Drive area and *522 to asking a man about some barrels. She also stated that she was on several prescription medications, including Adderall, Metoprolol, and Clonazepam. By this time a second deputy, Deputy Jason Walters, had arrived. Leatherman consented to a search of her car, during which they found a bottle of prescription medication, a full cup of beer in the console, and a recorked bottle of wine on the floor of the passenger side. They did not find any illegal drugs during the search.

Deputy McGuire requested that a female officer respond to the scene to perform a search of Leatherman. Paducah Police Officer Gretchen Dawes responded, obtained consent to search, and performed a thorough search of Leatherman, including the front and back pockets of her jeans, the rolled up pants legs, and under her T-shirt. The search is depicted in the cruiser cam video. Officer Dawes did not find any weapons or illegal drugs on her person. Following this search, Deputy McGuire arrested Leatherman for DUI, handcuffed her, and placed her in the back seat of his cruiser. The three officers then performed an-

other search of her vehicle, including the trunk. Again, no illegal drugs were found.

Once the search was concluded, Deputy McGuire drove Leatherman to Lourdes Hospital where blood was drawn for a blood test. When Deputy McGuire removed her from the cruiser at the hospital, Leatherman claims that she stated she had dropped her watch in the back seat. During this period, Deputy McGuire claims to have noticed a small baggie containing what was later confirmed to be crack cocaine in the seatbelt crack in the vicinity of Leatherman's watch. When confronted with this, Leatherman denied that the drugs were hers.

Based on the above, the McCracken County grand jury indicted Leatherman for possession of a controlled substance (cocaine) (KRS 218A.1415), tampering with physical evidence (KRS 524.100) by concealing the baggie of crack cocaine, and operating a motor vehicle under the influence of drugs (KRS 189A.010). Leatherman moved to suppress the evidence discovered as a result of her stop and arrest, arguing that the stop was based on an uncorroborated tip and that there was no probable cause to justify the arrest. Following a suppression hearing, the trial court denied the motion to suppress. It went on to deny subsequent motions to reconsider that ruling, although it did enter a substitute order. The matter proceeded to trial, after which the jury found Leatherman guilty as charged in the indictment. Following the penalty phase and in accordance with the jury's recommendation, the trial court sentenced Leatherman to two consecutive four-year terms of imprisonment for the possession and tampering convictions as well as to forty-eight hours in jail and a $200.00 fine for the DUI conviction. This appeal follows.

On appeal, Leatherman raises three issues. First, she argues that the trial court erred in denying her motion to suppress. Second, she argues that the trial court improperly granted the Commonwealth's motion in limine regarding her statements to Deputy McGuire about her watch. Third, she argues that the trial court should have granted her motion for a directed verdict on the DUI charge. We shall address each of these arguments in turn.

The first issue we shall address is whether the trial court properly denied Leatherman's motion to suppress. The trial court entered two orders addressing this issue, which we shall set forth in full below.

*523 On January 18, 2008, just prior to the trial in the matter, the trial court entered a substitute order denying Leatherman's motion to suppress: [FN3]

> FN3. The original order denying Leatherman's motion to suppress had been entered on January 11, 2007.

This matter is before the Court on Defendant's motion, through counsel, to supplement the record and to reconsider and set aside an order denying his [sic] motion to suppress evidence. The record is ORDERED supplemented with a 911 transcript. The Court now sets aside its prior order denying Defendant's motion to suppress and substitutes this order denying the motion to suppress.

FINDINGS OF FACT

1. Police dispatch received a telephone call from a person who gave his name and address, stating that a white female in a vehicle that looked like a late 80's or early 90's dark blue Buick LaSabre [sic], bearing Seattle Washington license plate number ... was "... walking around in [his] neighbors yard and everything and writing stuff down, and she'd talked to him and mentioned something about tar heroin and all that stuff."

2. A Sheriff's deputy testified that dispatch radioed the incident and stated that the white female was attempting to buy heroin.

3. The deputy observed a dark blue LaSabre [sic] with the ... Washington plate, driven by a white female in a right hand traffic lane with her left turn signal activated. The vehicle did not turn but pulled to the right side of the roadway and stopped.

4. The deputy pulled in behind the stopped vehicle and activated his emergency lights.

5. When the deputy went to the vehicle he observed the Defendant with her pants unzipped and unbuttoned. The deputy observed in plain view an open container of what he suspected to be beer and an opened but corked bottle of wine in the car.

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6. Defendant failed all six clues of a horizontal gaze nystagmus test, had very glassy eyes, and appeared nervous. When the deputy asked her if she was taking any medication that would explain her condition she stated that she was on several medications, including Clonazepam.

7. The maker of Clonazepam warns that it should not be used when driving a vehicle and that the drug causes abnormal eye movements.

8. The deputy arrested Defendant for operating a motor vehicle under the influence of drugs or alcohol and placed her in the back seat of his patrol car, which he had searched and found clean of any drugs or other items.

9. When Defendant later exited the patrol car the officer searched the back seat and found a piece of cellophane which appeared to contain a controlled substance. The cellophane was located behind the back seat adjacent to what Defendant identified as her wristwatch.

10. The suspected controlled substance lab tested as cocaine.

CONCLUSIONS OF LAW

1. The deputy did not conduct a stop of Defendant's vehicle. Defendant pulled off the roadway and stopped. The deputy then pulled in behind her *524 and activated his emergency lights so as to investigate.

2. The combination of a report of an unknown person, driving a Washington state licensed vehicle in a Paducah, Kentucky residential area, asking about tar heroin, later observed to signal a left turn but pull off the roadway to the right, constitutes reasonable suspicion to investigate and possibly cite for improper signal.

3. A report of suspicious activity by a person who identifies himself by name, telephone number, and address, is presumptively reliable.

4. Defendant's inquiring about heroin, failing a HGN test, signaling a left turn and pulling off the road to the right, and stating that she was taking medication that would cause her to fail the test, constitutes probable cause to arrest for DUI.

5. A police officer may legally search the back seat of his patrol car where the defendant was placed incident to arrest.

6. The results of the search and the plain view discovery of the wine and suspected beer is admissible as evidence at trial.

IT IS HEREBY ORDERED that Defendant's motion to suppress is DENIED.

On January 28, 2008, following the trial, the court entered a supplemental order denying the motion to suppress:

The defendant has requested the court to consider additional information and evidence supplementing the record in this case, based upon which the Court makes the following supplemental Findings of Fact and Conclusions of Law in denying defendant's Motion to Suppress:

FINDINGS OF FACT

1. The 911 dispatcher received a call from an identified public citizen, Vernon Wilkey, who reported that a white female driving a dark blue LaSabre [sic] with Washington State license plates made unusual and disturbing statements about heroin in his neighborhood.

2. 911 called deputies and alerted them to the woman, her vehicle, and her suspicious drug activity.

3. Within minutes Deputy McGuire observed a dark blue LaSabre [sic] with Washington State license plates driven by a white female exactly matching the 911 description. The vehicle was traveling slowly in the right traffic lane of Highway 60 with the left turn signal activated for an unusually long time for no apparent reason. The vehicle did not turn left, but continued on straight, which all appeared unusual and suspicious to the deputy.

4. The vehicle then pulled to the right side of the road and stopped without any signaling to do so by

the deputy. This demonstrated additional unusual behavior by the defendant. The deputy then pulled in behind the defendant's vehicle and activated his roadside stop lights. By the time the deputy stopped, he had reasonable grounds and reasonable suspicion to approach the driver. He exited his cruiser and walked to speak to the driver.

5. The deputy observed in plain view a half empty but opened container of beer and a half empty but corked bottle of wine. The defendant's eyes were glassy. He then had reasonable grounds to check the driver's sobriety. The defendant failed all HGN tests. She also gave unusual responses to instructions given to her by the deputy, she appeared somewhat confused; she appeared nervous; and she appeared to the deputy to be under the influence of drugs or alcohol.

*525 6. The defendant admitted to the deputy that she was on a number of medications, including Clonazepam. Clonazepam is a strong anti-psychotic medication which interferes with motor performance, including driving a motor vehicle. Clonazepam also causes abnormal eye movements.

7. The deputy had reasonable grounds and probable cause to arrest the defendant for DUI.

8. The defendant was transported to the hospital for the taking of a blood test. At the hospital a suspicious baggie was found next to the defendant's watch in the back seat of the deputy's patrol cruiser. The deputy knew that the patrol cruiser did not have the suspicious plastic baggie or a watch before the defendant was placed into the back seat. The defendant admitted losing her watch. The deputy had probable cause and exigent reasons to seize the baggie. The baggie appeared to contain crack cocaine. The deputy had probable cause to arrest the defendant for tampering with evidence and possession of cocaine.

CONCLUSIONS OF LAW

1. The caller who reported the defendant's unusual interest in heroin was identified. Such a report is considered more reliable than an anonymous tip.

2. The deputy had reasonable suspicion and probable cause to make an investigation stop and search of the defendant and her vehicle.

3. Discovery of the suspicious plastic baggie in the back seat of the deputy's cruiser was based on plain view discovery. The defendant and her vehicle had previously been properly detained based on the circumstances above which proceeded [sic] the discovery of the baggie.

[1] Our standard of review from a denial of a motion to suppress is twofold. First, we must determine whether the findings of fact are supported by substantial evidence. If so, those findings are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky.1998). If not, the factual findings must be overturned as clearly erroneous. *Farmer v. Commonwealth*, 169 S.W.3d 50, 53 (Ky.App.2005). Second, we must perform a *de novo* review of those factual findings to determine whether the lower court's decision is correct as a matter of law. *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996); *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky.2001); *Garcia v. Commonwealth*, 185 S.W.3d 658, 661 (Ky.App.2006); *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App.2000).

Leatherman has not contested the trial court's factual findings in its orders denying her motion to suppress. Rather, she has contested the trial court's conclusions of law based upon those findings.

[2] Our first consideration is whether Deputy McGuire had sufficient reason to stop and investigate Leatherman's automobile. We hold that Deputy McGuire had sufficient grounds to stop Leatherman and investigate the situation, as well as probable cause to arrest her.

In *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky.1998), the Supreme Court of Kentucky addressed the investigatory stop of automobiles and held:

> In order to justify an investigatory stop of an automobile, the police must have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct.

690, 66 L.Ed.2d 621 (1981); *Commonwealth v. Hagan*, Ky., 464 S.W.2d 261 (1971). In order to determine whether there was a reasonable *526 articulable suspicion, the reviewing appellate court must weigh the totality of the circumstances. *See Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

More recently, in *Johnson v. Commonwealth*, 179 S.W.3d 882, 884 (Ky.App.2005), this Court addressed the same issue, setting forth the applicable law as follows:

> It is well settled that an investigative stop of an automobile is constitutional as long as law enforcement officials have a reasonable suspicion—supported by specific and articulable facts—that the occupant of the vehicle has committed, is committing, or is about to commit an offense. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Collins v. Commonwealth*, 142 S.W.3d 113 (Ky.2004). In addition to the requirement that the stop be justified at its inception, the police officer's subsequent actions must be reasonably related in scope to the circumstances that gave credence to the initial stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983).

Reasonableness "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996).

Based upon the prior 911 call, during which the caller described a woman driving a car that displayed Washington state license plates who was committing criminal activity, and the undisputed fact that Leatherman pulled to the side of the road and stopped before Deputy McGuire activated his emergency lights, we hold that there was no constitutional violation in the investigatory stop. However, the law is clear that a stop may only continue long enough for the officer to determine whether his suspicions were correct.

On this issue, the United States Supreme Court has held:

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: *an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.* Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.
>
> *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325–26, 75 L.Ed.2d 229 (1983) (internal citations omitted, emphasis added).

Here, Deputy McGuire noted that Leatherman exhibited glassy eyes and that she was acting nervous and fidgety. He also noted that she had a cup of beer and an opened, but recorked, bottle of wine in the vehicle. That certainly provided Deputy McGuire with grounds to determine whether Leatherman was driving under the influence by performing field sobriety tests. Leatherman then demonstrated six *527 clues on the HGN test.[FN4] Accordingly, because of the open containers of alcohol and the results of the HGN test, the deputies were justified in performing a breathalyzer test to determine whether Leatherman was under the influence of alcohol. We note for the record that the test was negative and that later blood tests were also negative for alcohol or drugs. Finally, consent searches of her automobile and her person did not reveal any heroin or any other illegal substance. However, there is no dispute that the deputies discovered a bottle of prescription medication, and Leatherman admitted that she was on several medications, including Clonazepam, which did constitute sufficient grounds for her continued detention. Our conclusion is supported by this admission, as well as Deputy McGuire's testimony related to his observations of Leatherman.

FN4. "Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotatory. (The

> Sloane–Dorland Ann. Medical–Legal Dict. (1987) p. 504.) An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN." *People v. Ojeda*, 225 Cal.App.3d 404, 406, 275 Cal.Rptr. 472, 472–73 (1990).
>
> The horizontal gaze nystagmus (HGN) test is one of the tests law enforcement officers perform either in the field or at the police station when they suspect an individual is under the influence of alcohol or some other drug. The prosecution often introduces the results of the HGN test in DWI prosecutions. This test is based on the theory "that alcohol and drug use increases the frequency and amplitude of HGN and cause it to occur at a smaller angle of deviation from forward." Although alcohol and drug use "may increase the HGN, it can also be produced by other pathological, chemical or natural causes." 3 Barbara E. Bergman and Nancy Hollander, Wharton's Criminal Evidence § 13:49 (15th ed.2009).

[3] We must next consider whether Deputy McGuire had the requisite probable cause to arrest Leatherman without a warrant.

KRS 431.005(1) permits a peace officer, including a sheriff's deputy, to make an arrest in the following situations:

(a) In obedience to a warrant; or

(b) Without a warrant when a felony is committed in his presence; or

(c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or

(d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or

(e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010 or KRS 281A.210.

There is no dispute that Deputy McGuire did not have a warrant for Leatherman's arrest. Therefore, his authority to arrest Leatherman would fall under subsection (e).

In *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003), the United States Supreme Court addressed warrantless arrests and the concept of probable cause. The Court recognized as a general matter that, "[a] warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause[,]" *id.*, 540 U.S. at 370, 124 S.Ct. at 799, and then addressed the question as to "whether the officer had probable cause to believe that ***528** Pringle committed that crime [possession of cocaine]." *Id.* It went on to provide a comprehensive discussion of the probable-cause standard:

> The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection. On many occasions, we have reiterated that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.

Id., 540 U.S. at 370–71, 124 S.Ct. at 799–800 (internal citations, quotations, and brackets omitted). Finally, the Court instructed that "[t]o determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Id.*, 540 U.S. at 371, 124 S.Ct. at 800.

Similarly, the Supreme Court of Kentucky has stated:

> As the United States Supreme Court has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Williams v. Commonwealth, 147 S.W.3d 1, 7–8 (Ky.2004).

In the present case, we hold that Deputy McGuire had probable cause to arrest Leatherman for DUI. Deputy McGuire testified that Leatherman appeared to be under the influence of something, despite his observation that she was not driving erratically or weaving. Furthermore, Leatherman failed the HGN test, which reveals intoxication by alcohol or some other drug, although she later passed the breathalyzer test. Finally, the product information for Klonopin (Clonazepam) attached to Leatherman's brief states that patients taking that medication "should be cautioned about operating hazardous machinery, including automobiles, until they are reasonably certain the Klonopin therapy does not affect them adversely." Therefore, the observation of Leatherman's glassy eyes and odd behavior coupled with her admission that she was taking prescription medication that included a warning about driving was sufficient to provide Deputy McGuire with probable cause to arrest her for DUI. Therefore, Deputy McGuire's warrantless arrest of Leatherman did not deprive her of her constitutional rights against illegal search and seizure.

[4] Next, we shall address Leatherman's argument that the trial court erred in granting the Commonwealth's motion in limine prohibiting her from mentioning any statement or question she made to *529 Deputy McGuire regarding her watch in the backseat of the cruiser. Leatherman contends that she should have been permitted to elicit testimony from Deputy McGuire that she had asked him about her watch before he actually discovered it or the drugs in the backseat of the cruiser. Because Deputy McGuire was permitted to testify that Leatherman admitted the watch was hers, she argues that the jury was left with the impression that the drugs were also hers. She goes on to argue that her statement to Deputy McGuire about her watch did not constitute hearsay because it was not offered to prove the truth of the matter asserted in the statement—that she had lost her watch. Rather, it was offered to show the effect it had on Deputy McGuire in that he looked behind the seat to retrieve the watch (where he found the drugs) and to establish his inconsistent statements from earlier proceedings. The Commonwealth, in turn, argues that the trial court did not abuse its discretion in disallowing the introduction of this statement during Deputy McGuire's testimony.

In support of this argument, Leatherman cites to *Schrimsher v. Commonwealth*, 190 S.W.3d 318 (Ky.2006). In *Schrimsher*, the Supreme Court of Kentucky addressed the application of Kentucky Rules of Evidence (KRE) 106, also known as the rule of completeness, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Describing the rule, the *Schrimsher* Court held that,

> [A] party purporting to invoke KRE 106 for the admission of otherwise inadmissible hearsay statements may only do so to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning. The issue is whether the meaning of the included portion is altered by the excluded portion.

Schrimsher, 190 S.W.3d at 330–31 (footnote, citation, and internal quotation marks omitted).

Regarding Leatherman's reliance on *Schrimsher*, the Commonwealth argues that she was attempting to explain an earlier statement, not complete an incomplete out-of-court statement to prevent the jury from being misled. The Commonwealth also argues that Leatherman is precluded from raising the issue of the discrepancy in Deputy McGuire's statements during the course of the proceedings because there was no foundation in place that would permit her to impeach his prior statements and because the argument was different from the one presented below, citing *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky.1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky.2010).

[5] Kentucky law is well settled that a trial court's decision to admit evidence is subject to an abuse of discretion standard.

> Since the trial court's unique role as a gatekeeper of evidence requires on-the-spot rulings on the admissibility of evidence, we may reverse a trial court's decision to admit evidence only if that decision represents an abuse of discretion. And for a trial court's decision to be an abuse of discretion, we must find that the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Clark v. Commonwealth, 223 S.W.3d 90, 95 (Ky.2007) (internal quotation marks and footnotes omitted). Similarly, "[a] trial court's ruling under KRE 106 (*i.e.*, the "rule of completeness") is discretionary." *Schrimsher*, 190 S.W.3d 318, 330 (Ky.2006).

While we disagree with the Commonwealth's "can of worms" argument, we ultimately*530 agree that the trial court did not abuse its discretion in declining to admit this statement during Deputy McGuire's testimony. We note that the trial court indicated that it would permit Leatherman to testify to her statement regarding the watch had she opted to take the stand in her own defense. Furthermore, Leatherman did not attempt to impeach Deputy McGuire's prior statements regarding the discovery of the watch and drugs through laying a proper foundation. Even if we were to hold that this ruling was made in error, we must hold that it constitutes harmless error as the ruling is not "inconsistent with substantial justice." RCr 9.24. Permitting the introduction of this out of court would not have changed the outcome due to the strength of the rest of the testimony that was introduced, including the close proximity of the watch and the drugs as well as the search of the area prior to Leatherman's placement in the cruiser.

[6] Furthermore, we perceive no palpable error under RCr 10.26 in the Commonwealth Attorney's statements during closing argument. Leatherman contends that she established palpable error in the Commonwealth Attorney's reference to her watch as an "autograph" on the drugs and as well as in what she describes as an impermissible comment on her silence in the following passage from the trial:

> The simple issue under this case is whether a jury is going to hold her accountable or give her a pass for reasons that have not been presented, no justifications, no excuses, no contradictions of the facts and the testimony you heard.

We disagree with Leatherman's assertion that such argument violated her constitutional rights or rose to the level of palpable error justifying any further review.

[7] Finally, we shall consider Leatherman's argument that the trial court erred in denying her motion for a directed verdict on the DUI charge. Leatherman contends that the Commonwealth failed to introduce sufficient proof to permit the matter to go to the jury because there was no scientific proof revealing the presence of a prescription medication in her system.

The Supreme Court of Kentucky succinctly set forth the directed verdict rule in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky.1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

See also *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky.2010).

The applicable statute in this case is KRS 189A.010, which addresses the crime of driving under the influence. Specifically related to this case, the Commonwealth was required to prove that Leatherman was operating her motor vehicle "[w]hile under the influence of any other substance or combination of substances which impairs one's driving ability." KRS 189A.010(1)(c). The evidence elicited at trial established that Leatherman admitted to Deputy McGuire that she was taking three prescription medications, including Clonazepam, which contains a warning regarding*531 driving while on that medication. Deputy McGuire also testified as to his observations of Leatherman's behavior, including the results of the HGN test showing intoxication. Furthermore, Mr. Wilkey testified at trial that Leatherman and her husband visited him several months after the incident regarding his upcoming testimony. He reported that Leatherman told him that she was unable to remember what they discussed because she was "whacked out." This evidence is more than a mere scintilla and is of sufficient substance to permit the question of guilt to go to the jury. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky.1983).

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY
McCRACKEN CIRCUIT COURT
DIVISION NO. II
INDICTMENT NO. 06-CR-00408

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. **FINAL JUDGMENT/SENTENCE OF IMPRISONMENT**

RACHEL AHMANN LEATHERMAN — DEFENDANT

The Defendant having been convicted by a Jury of the crimes of Count 1 – First Degree Possession of a Controlled Substance – Cocaine, First Offense; Count 2 – Tampering with Physical Evidence; and Count 3 – Operating a Motor Vehicle Under the Influence of Alcohol or Drugs; and the Court noted the Jury's recommendation of sentence of Count 1 – four (4) years; Count 2 – four (4) years; and Count 3 – forty eight (48) hours incarceration, $200.00 fine, and thirty (30) days license suspension.

On March 19, 2008, the Defendant appeared in open Court with her counsel, Hon. Chris McNeill. The Court inquired of the Defendant and counsel whether they had any legal cause why judgment should not be pronounced, and afforded the Defendant and his counsel opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment. The Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole and to the nature and circumstances of the crime and the history, character and condition of the Defendant, and having given the Defendant and counsel an adequate opportunity and reasonable period of time within which to controvert same, and Defendant

and counsel having examined said report and made corrections, objections, or additions thereto, all of which were noted by the Court, and the Court having considered probation or conditional discharge, is of the opinion that imprisonment of the Defendant is necessary because:

1) There is a substantial risk that during a period of probation or conditional discharge the Defendant will commit another crime; or

2) The Defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

3) A disposition under this Chapter (KRS 433) will unduly depreciate the seriousness of the Defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant, and the Court then advised the Defendant of his right to appeal the conviction. The notice of appeal may be filed with the Clerk of this Court by the Defendant herself, an attorney the Defendant has hired, or Court appointment counsel if the Defendant cannot afford counsel of his own, but the notice must be filed within thirty (30) days of the entry of this final judgment.

It is therefore **ORDERED** and **ADJUDGED** by the Court that the Defendant is guilty of the crimes of Count 1 – First Degree Possession of a Controlled Substance – Cocaine, First Offense; Count 2 – Tampering with Physical Evidence; and Count 3 – Operating a Motor Vehicle Under the Influence of Alcohol or Drugs; and it is further **ORDERED** and **ADJUDGED** that the Defendant is sentenced to Count 1 – four (4) years; Count 2 – four (4) years; and Count 3 – forty eight (48) hours incarceration, $200.00 fine, and thirty (30) days license suspension.

It is further **ORDERED** and **ADJUDGED** that the Defendant is remanded to the custody of the Department of Corrections.

IT IS HEREBY ORDERED that the Defendant shall be given credit for presentence confinement time of ninety one (91) days.

Defendant's date of birth is July 28, 1960.

Further, the Court finds that: (a) the Defendant is a poor person as defined by KRS 453.190(2); (b) Defendant is unable to pay court costs; and (c) Defendant will be unable to pay court costs in the foreseeable future, and therefore, **IT IS ORDERED** by the Court that court costs and fees totalling $770.00 are **WAIVED**.

FURTHER any bond posted may be released upon entry of this Order.

ENTERED from the Bench March 19, 2008 and **DATED** this 24 day of March, 2008.

CRAIG Z. CLYMER, JUDGE
McCracken Circuit Court
Division No. II

CLERK'S CERTIFICATE

The foregoing Judgment was entered the 24 day of March, 2008, and copies were mailed to:

Commonwealth Attorney
Department of Public Advocacy (Hon. Chris McNeill)
Cabinet of Corrections
Probation & Parole
McCracken County Jail
McCracken County Sheriff

MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: Karen Conaby D.C.