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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001989-DG

K.H., A CHILD UNDER EIGHTEEN — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-XX-00031

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

ACREE, JUDGE: K.H., a minor, appeals the Fayette Circuit Court's order affirming the district court's denial of a motion to suppress evidence recovered pursuant to an investigatory stop and search of his person. K.H. frames the question as whether the district court erred by finding no constitutional violation when a police officer stopped and frisked K.H. following what he terms a

completed misdemeanor, but one not committed in the officer's presence. For reasons set forth below, we answer his question in the negative and affirm the order denying the suppression motion.

BACKGROUND

The facts are not disputed. On September 21, 2015, Kimberly Kidd called the University of Kentucky Police Department to report that two individuals were in the parking lot adjacent to her workplace "beating on [car] windows with an object" and that they had entered her unlocked car. (Record (R.) at 7.) She was witnessing the events from her office window. She described the individuals to police dispatch as two black males, one in a blue shirt and shorts with a backpack and the other in a gray hoodie and jeans with a backpack. After they entered her car, she pressed the panic button on her key fob and that caused them to flee.

Lieutenant Ramsey, Officer Johnson, and Officer Morris of the university police were dispatched to the scene. Within five minutes of Kidd's call, Officer Johnson found two individuals fitting "the exact description that the witness/victim Kimberly Kidd had given." (Video Record (V.R.) 9/22/16; 10:42:50.) Lieutenant Ramsey arrived seconds later, followed shortly thereafter by Officer Morris. They were approximately two blocks from the parking lot. Both Officer Johnson and Lieutenant Ramsey questioned the individuals.

One of those individuals was fourteen-year-old K.H. K.H. told Lieutenant Ramsey he missed the school bus, and that was why he was in the area and not at school. Relying on information conveyed by dispatch (specifically, that the suspects were "beating on windows with an object" to break into cars), Lieutenant Ramsey conducted a pat-down of K.H. K.H. was polite and "very cooperative." (V.R. 9/22/16; 10:52:52.) Lieutenant Ramsey located a metal tire iron tucked either in K.H.'s pants or front hoodie pocket. When questioned about it, K.H. said he needed to bring the tire iron to his mother's car.

K.H. was charged with possession of burglary tools, a misdemeanor, and criminal trespass in the third degree, a violation. Prosecutors originally brought the case in juvenile court. However, K.H. failed to complete the diversion terms, and he was referred to district court.

K.H. filed a motion to suppress the fruits of the investigatory stop and frisk, including the tire iron. Officer Morris and Lieutenant Ramsey testified at the hearing. Officer Morris said Officer Johnson was the first to approach K.H. but that he completed the Uniform Citation and took Kidd's written statement.

Lieutenant Ramsey testified that he approached K.H. with the information from dispatch that the person reporting the crime witnessed the suspects "using something to break into cars." (V.R. 9/22/16; 10:51:30.) This was consistent with the citation and the contemporaneously completed Juvenile

Complaint. (R. at 7, 8.) Concerned that items capable of breaking into cars could also serve as a weapon, he patted K.H. down. (*Id.*) Neither the Commonwealth nor K.H. called Kidd to testify, nor did either introduce into evidence the dispatch call initiating these events or the 911 logs.

The district court entered an order finding the stop and frisk constitutional and denying K.H.'s suppression motion. K.H. appealed the order to the circuit court which affirmed. This Court granted discretionary review.

STANDARD OF REVIEW

The standard for reviewing the denial of a motion to suppress evidence is twofold, with deference being granted to the trial court as to factual findings, but with the trial court's legal conclusions being subject to *de novo* review. *Whitlow v. Commonwealth*, 575 S.W.3d 663, 668 (Ky. 2019).

ANALYSIS

K.H. says his case presents a unique scenario in our jurisprudence – he was improperly stopped and frisked in connection with a "completed misdemeanor" that was not witnessed by the police officer. Citing a "demonstrated legislative preference for issuing citations for low-level offenses," he first argues Kentucky has already "drawn a line: *Terry*[1] stops to investigate

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

completed 'citable' misdemeanors are *per se* unreasonable and unconstitutional." (Appellant's brief, pp. 8-9 (citing KRS[2] 431.015).) We are unpersuaded.

No per se rule prohibiting stops to investigate a "completed misdemeanor"

For purposes of our initial analysis, we accept K.H.'s premise that the misdemeanor and violation with which he was charged were "completed" crimes. K.H. acknowledges that in *United States v. Hensley*, the Supreme Court of the United States clarified that constitutionally permissible *Terry* stop-and-frisk procedures were not limited to ongoing and imminent criminal activity. 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). As the Court said:

> We do not agree . . . that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest. To the extent previous opinions have addressed the issue at all, they have suggested that some investigative stops based on a reasonable suspicion of past criminal activity could withstand Fourth Amendment scrutiny.

Id., 469 U.S. at 227, 105 S. Ct. at 679.

However, K.H. notes that *Hensley* is limited to completed *felonies*. He is correct that the Court expressly reserved the question regarding investigatory stops relating to past, non-felony criminal activity. The Court said:

> We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a

[2] Kentucky Revised Statutes.

> reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a *completed felony*, then a *Terry* stop may be made to investigate that suspicion.

Id., 469 U.S. at 229, 105 S. Ct. at 680 (emphasis added).

Based on the door left open in *Hensley*, K.H. claims his case falls within a subset of investigatory stops that are not permissible because the crimes with which he was charged were non-felonies. We disagree.

K.H. is correct that for some time after *Hensley* was rendered, federal and state courts were divided. Some found an investigatory stop of a completed misdemeanor to be *per se* unconstitutional while others applied the same principles expressed in *Hensley* to determine whether a *Terry* stop for completed non-felonies can survive constitutional scrutiny. Kentucky has yet to address the issue.[3] K.H. first argues for adoption of the *per se* or bright-line rule prohibiting *Terry* stops for any completed non-felony. However, he does not persuade us.

Among the earliest courts to adopt the *per se* rule was the Minnesota Court of Appeals. *Blaisdell v. Commissioner of Public Safety*, 375 N.W.2d 880 (Minn. Ct. App. 1985) (*Blaisdell I*). *Blaisdell I* held that "stops to investigate

[3] In *Commonwealth v. Easterling*, No. 2017-CA-001786-MR, 2018 WL 6015931 (Ky. App. Nov. 16, 2018), *disc. rev. denied* (Ky. Aug. 21, 2019), the parties touched upon the issue of whether *Terry* stops for completed misdemeanors are unreasonable *per se*. *Id.* at *2. However, the Court declined to address the question "because the Commonwealth analyzes this case as if it involved an ongoing crime." *Id.* at *3.

completed misdemeanors violate the fourth amendment of the United States Constitution." *Id.* at 884. Several state and federal courts have cited *Blaisdell I* but rarely have they followed it.[4] The Minnesota Supreme Court itself affirmed *Blaisdell I* but did so on other grounds and was skeptical of the "*per se*" rule saying, "[I]t was . . . unnecessary for the Court of Appeals to decide the broader issue of whether all stops to investigate completed misdemeanors are impermissible" and expressing "no opinion as to the correctness of the Court of Appeals' holding." *Blaisdell v. Commissioner of Public Safety*, 381 N.W.2d 849, 849, 850 (Minn. 1986) (*Blaisdell II*). Since then, the Minnesota Court of Appeals has "repeatedly held that a stop to investigate a misdemeanor committed in 'the very recent past' is lawful." *State v. Voss*, No. A16-1753, 2017 WL 1833320, at *4 (Minn. Ct. App. May 8, 2017) (citing *State v. Stich*, 399 N.W.2d 198, 199 (Minn. Ct. App. 1987) ("No precedent holds that it is unlawful to make an immediate pursuit and stop of a person who has committed a misdemeanor in the very recent past, and we accordingly find no error in the trial court's ruling.")). "Accordingly," as said by the federal district court in Arizona, "it would appear

[4] *United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007); *United States v. Cheek*, 586 F. Supp. 2d 1099 (D. Ariz. 2008); *People v. Jimenez*, No. H044307, 2018 WL 2753130 (Cal. Ct. App. Jun. 8, 2018); *State v. Rissley*, 824 N.W.2d 853 (Wis. Ct. App. 2012); *Rodriguez v. State*, 29 So. 3d 310 (Fla. Dist. Ct. App. 2009); *State v. Simpson*, 734 P.2d 669 (Idaho Ct. App. 1987); *State v. Myers*, 490 So. 2d 700 (La. Ct. App. 1986).

that *Blaisdell* [*I*] no longer constitutes a bright line rule, even in Minnesota." *United States v. Cheek*, 586 F. Supp. 2d 1099, 1105 (D. Ariz. 2008).

A similar evolution away from the *per se* rule occurred among the federal circuits. The Sixth Circuit was first to consider the question. In *Gaddis ex rel. Gaddis v. Redford Township*, the court described a bright-line prohibition against stops based on the reasonable suspicion of a "mere completed misdemeanor." 364 F.3d 763, 771 n.6 (6th Cir. 2004). Subsequent state and federal jurisprudence "prompted every other circuit to follow the *Hensley* facts-and-circumstances test in considering the misdemeanor side of the problem." *United States v. Jones*, 953 F.3d 433, 436 (6th Cir. 2020) (citations omitted).

In 2007, the Ninth Circuit declined to adopt the Sixth Circuit's *per se* rule. *United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007). That court said "a reviewing court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger . . . , and any risk of escalation . . . ." *Id.* at 1081. Other circuits followed in rejecting the *per se* rule. *United States v. Moran*, 503 F.3d 1135, 1141 (10th Cir. 2007); *United States v. Hughes*, 517 F.3d 1013, 1017-18 (8th Cir. 2008). Others found it unnecessary to decide the issue. *See United States v. Fields*, 823 F.3d 20, 26 (1st Cir. 2016) ("we need not decide that question . . . because we affirm the District Court's conclusion that no show of authority—and thus no seizure—had

occurred"); *United States v. King*, 764 F. App'x 266, 269 n.2 (3d Cir. 2019) ("we need not decide that issue because we conclude that the Trooper justifiably stopped King on suspicion of imminent or ongoing criminal activity").

Very recently, the outlier Sixth Circuit clarified that it no longer embraces the *per se* rule, if it ever did. In *United States v. Jones*, *supra*, the Sixth Circuit said the misdemeanor, bright-line "language in . . . *Gaddis* is dicta, unnecessary to [the] outcome. Later decisions of ours confirm the point." 953 F.3d at 438 (citing *United States v. Collazo*, 818 F.3d 247, 253-54 (6th Cir. 2016); *United States v. Simpson*, 520 F.3d 531, 541 (6th Cir. 2008)). *Jones*, a case that originates in Kentucky, is worth considering closely.

In *Jones*, the defendant struck his ex-girlfriend and was charged with fourth-degree assault, a misdemeanor under KRS 508.030(1)(a). *Id.* at 434-35. Jones moved the trial court to suppress evidence discovered during a *Terry* stop-and-frisk, just as K.H. did. Unlike K.H., Jones succeeded in convincing the trial court that "the Fourth Amendment bars investigatory stops prompted by a completed misdemeanor." *Id.* at 434. On appeal, the Sixth Circuit said, "Because the Fourth Amendment contains no such rule, we reverse." *Id.*

The opinion in *Jones* is the product of careful and thoughtful analysis undertaken in the context of Kentucky law. Because we find it persuasive in its thoroughness and logic, we quote it here at length and in pertinent part, as follows:

What about non-felony crimes? Does the Fourth Amendment prohibit officers from making a *Terry* stop to investigate a misdemeanor? Attentive readers of Fourth Amendment caselaw should be skeptical of such a standard. "[T]he touchstone of the Fourth Amendment is reasonableness," not "bright-line rules." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). And the Supreme Court has consistently rejected lower courts' attempts to avoid dealing with "endless variations in the facts and circumstances implicating the Fourth Amendment" by crafting "litmus-paper" tests or "single sentence or paragraph" rules. *Id.* (quotation omitted); *see also Hensley*, 469 U.S. at 226-27, 105 S. Ct. 675.

The Court has given us some of the tools to answer the question already. *Hensley* explained that the "proper way" to identify the "precise limits on investigatory stops to investigate past criminal activity" is to "apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes." *Hensley*, 469 U.S. at 228, 105 S. Ct. 675. Courts must balance "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Id.*

True, *Hensley* left open whether "*Terry* stops to investigate all past crimes, however serious, are permitted." *Id.* at 229, 105 S. Ct. 675. But it did not erect an "automatic barrier" to investigating completed misdemeanors either. *Id.* The Court left it to the lower courts to apply the traditional Fourth Amendment considerations, rather than create an "inflexible rule" if and when the question of investigating a completed misdemeanor (or other non-felony crime) came up. *Id.* at 227, 105 S. Ct. 675.

. . . . [T]he circuit cases sometimes come out on the side of the government, *Moran*, 503 F.3d at 1143,

> sometimes on the side of the defendant, *Grigg*, 498 F.3d at 1081-83; *Hughes*, 517 F.3d at 1018-19.
>
> An across-the-board prohibition on stops to investigate completed non-felonies runs into other problems, including the elusive and evolving nature of the felony-misdemeanor distinction and its disappearance in some instances. While "in earlier times the gulf between the felonies and the minor offences was broad and deep, . . . today the distinction is minor and often arbitrary." *Tennessee v. Garner*, 471 U.S. 1, 14, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) (quoting 2 F. Pollock & F. Maitland, *The History of English Law* 467 n.3 (2d ed. 1909)). Once upon a time, "felony" described the most severe crimes. "No crime was considered a felony which did not occasion a total forfeiture of the offender's lands or goods or both." *Kurtz v. Moffitt*, 115 U.S. 487, 499, 6 S. Ct. 148, 29 L. Ed. 458 (1885); *see also Garner*, 471 U.S. at 13 n.11, 105 S. Ct. 1694. Today, serious crimes are usually felonies, but not always. In Kentucky, where Jones' arrest occurred, it is a *misdemeanor* to incite a riot, possess burglar's tools, stalk someone, or flee the police. Ky. Rev. Stat. Ann. §§ 508.150, 511.050, 520.100, 525.040. And the Commonwealth treats stealing mail, driving a car without permission (for the second time), and receiving deposits at an insolvent financial institution as felonies. *Id.* §§ 514.100, 514.140, 517.100. . . . If our touchstone is reasonableness, it's odd to say that police could stop a suspect on reports he had stolen mail but not on reports he had incited a riot (or assaulted someone)—or that a valid stop to investigate a felony becomes invalid if the prosecutor charges it as a misdemeanor. All of this confirms the danger of using misdemeanor labels alone to define the coverage of the Fourth Amendment.

Id. at 436-37. We cannot improve upon this analysis, and from it we conclude the Kentucky Supreme Court would not be inclined to adopt the *per se* rule K.H. urges. We decline to reverse the suppression order based on that argument.

That takes us to K.H.'s alternative Fourth Amendment argument to "follow the analysis suggested under *Hensley*, [that] 'a court reviewing the reasonableness of a stop to investigate a past misdemeanor (or other minor infraction) must assess the potential risk to public safety associated with the nature of the offense.' *United States v. Grigg*, 498 F.3d 1070, 1083 (9th Cir. 2007)." (Appellant's brief, p. 7.)

The investigatory stop was constitutional under the Hensley analysis

Before applying the *Hensley* facts-and-circumstances test, we point out what has become obvious. Whether criminal conduct was ongoing or "completed," and whether the conduct investigated suggests the commission of a misdemeanor or a felony, are now merely factors among the totality of circumstances a court must consider when determining the constitutionality of a stop-and-frisk. This, too, is nicely elucidated in *Jones*.

When the Sixth Circuit rejected the *per se* rule regarding stops to investigate so-called "completed misdemeanors," it went on to say:

> The better rule in this setting is not bright in either direction. It does not say that officers always may make a *Terry* stop of an individual known to have completed a misdemeanor, as *Hensley* permits for completed felonies. And it does not say that officers never may make a *Terry* stop of an individual known to have completed a misdemeanor. It instead falls back on reasonableness, balancing the interests in public safety and personal liberty. The inquiry turns not on whether the suspect already completed a crime. It turns on the nature of the

> crime, how long ago the suspect committed it, and the ongoing risk of the individual to the public safety. Under this approach, the Fourth Amendment correctly appreciates the distinction between officers who illegitimately invoke *Terry* to stop someone who ran a red light sixth [sic] months ago and legitimately use it to stop someone who assaulted a spouse in the past half hour.
>
> These dynamics are captured in two questions. Did an officer stop a suspect to investigate a completed felony? If yes, we move on to consider the reasonableness of the officer's suspicion. If the offense goes by another name, we ask whether *this* stop for *this* offense violates the Fourth Amendment. *See Hughes*, 517 F.3d at 1017; *Grigg*[,] 498 F.3d at 1081; *Moran*, 503 F.3d at 1142. *Hensley* tells us to consider several factors in balancing the security and liberty interests. Does the stop "promote the interest of crime prevention"? *Hensley*, 469 U.S. at 228, 105 S. Ct. 675. Does it further "[p]ublic safety"? *Id.* How strong is the government's interest in "solving crimes and bringing offenders to justice" in this case? *Id.* at 229, 105 S. Ct. 675. And would "[r]estraining police action until after probable cause is obtained" unnecessarily hinder the investigation or allow a suspect to "flee in the interim"? *Id.*

Jones, 953 F.3d at 437-38. When we ask whether *this* stop for *this* offense violates the Fourth Amendment, we conclude it does not.

As noted in *Jones*, the inquiry turns on the nature of the criminal activity, how long ago the suspect engaged in it, and the ongoing risk the individual poses, all of which is considered in balancing K.H.'s liberty interests against the government's interest in public safety, crime prevention, solving completed crimes, and bringing offenders to justice. *Hensley*, 469 U.S. at 229, 105

S. Ct. at 680. We also must consider whether "[r]estraining police action until after probable cause is obtained" would unnecessarily hinder the investigation or allow a suspect to "flee in the interim and to remain at large." *Id.*

The broadest view of K.H.'s criminal conduct is that he committed a property crime, which the law generally considers less reprehensible than crimes against the person of another. *See Wilson v. Commonwealth*, 438 S.W.3d 345, 351 (Ky. 2014). Beyond that, however, K.H. asks that we measure the petty nature of his property crime by the charges brought against him. We are not so inclined.

A reviewing court determines whether an officer had a reasonable and articulable suspicion that criminal activity is afoot under *Terry v. Ohio* by "examin[ing] the totality of the circumstances to see whether the officer had a particularized and objective basis for the suspicion." *Commonwealth v. Marr*, 250 S.W.3d 624, 627 (Ky. 2008). We assess those circumstances as they existed "at the time of the investigatory stop . . . ." *Boyle v. Commonwealth*, 245 S.W.3d 219, 220 (Ky. App. 2007). That assessment is unaffected by what happens afterward.

For example, if officers are engaged in an illegal stop, they "certainly cannot create reasonable suspicion *during* the course of the frisk." *Frazier v. Commonwealth*, 406 S.W.3d 448, 457 (Ky. 2013). Conversely, what charges are ultimately brought, if any, cannot operate to invalidate a lawful stop if it is based on a reasonable articulable suspicion that criminal activity was afoot at the time.

When a criminal defendant sought to impose upon police officers the burden of making on-the-spot distinctions between greater and lesser offenses, the Supreme Court of the United States said no. In *Atwater v. City of Lago Vista*, the criminal defendant suggested one way to uphold Fourth Amendment protections was to distinguish:

> between "jailable" and "fine-only" offenses, between those for which conviction could result in commitment and those for which it could not. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, [citation omitted] ("[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person"), but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene . . . . Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the [prosecutor] ultimately decide to charge? And so on.

532 U.S. 318, 348-49, 121 S. Ct. 1536, 1554-55, 149 L. Ed. 2d 549 (2001) (footnotes omitted). *Atwater* merely reaffirmed the Court's view that "the highly technical felony/misdemeanor distinction is . . . difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense." *Garner*, 471 U.S. at 20, 105 S. Ct. at 1706.

The officer who stopped K.H. was proceeding based on a report that the suspects were breaking into vehicles and had succeeded in entering the witness's car. No investigating officer could know for certain whether any property was taken or what charges ultimately would be brought. However, given that breaking into vehicles is more often than not associated with theft, it is not objectively reasonable to expect an officer to suspend such knowledge and presume his suspect took nothing of value from the vehicle.

Our own Supreme Court notes that "theft is a felony if the property taken has a value of $300.00 or more" and asks the question, "How could the officer know that the value of the property that he suspected was stolen was less than $300.00 without making the *Terry* stop?" *Kotila v. Commonwealth*, 114 S.W.3d 226, 234 (Ky. 2003), *abrogated on other grounds by Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006), *and by Mills v. Dep't of Corr. Offender Info. Servs.*, 438 S.W.3d 328 (Ky. 2014) (citing KRS 514.030(2)[5]). For that matter, how could the officer know nothing was taken or, if something was taken, what it was? People transport, and police find, all manner of property in their vehicles including even guns and laptop computers. *Estep v. Commonwealth*, 663 S.W.2d 213, 215 (Ky. 1983) ("gun found . . . in the glove box"); *Chavies v.*

[5] The legislature amended the statute in 2009 increasing the limit for misdemeanor theft by unlawful taking to $500. 2009 Ky. Acts Ch. 106 § 6 (HB 369).

Commonwealth, 354 S.W.3d 103, 109 (Ky. 2011), *abrogated on other grounds by Roe v. Commonwealth*, 493 S.W.3d 814 (Ky. 2015) ("police saw a laptop bag in the car"). We do not expect officers to suspend their knowledge of such a fact.

It was not beyond the realm of reasonableness for the officers to believe that when they initiated their investigation they were pursuing suspects who, just five minutes before, had engaged in criminal conduct of a felonious nature. Under these circumstances, they were entitled to so proceed without the law requiring they presume less.

With this in mind, we address the propriety of the police conduct by weighing K.H.'s liberty interest against the various governmental interests at stake. *Hensley* identifies those interests. We begin with "public safety."

A property crime such as the criminal trespass K.H. committed is not free of risk to public safety. Nor are property crimes necessarily free of violence. *See, e.g.*, KRS 35.695 (prohibiting theft by state military members by use "of violence . . . to . . . property"); KRS 336.130 (addressing employees who engage in "violence . . . to person or property"). An individual matching K.H.'s description had just been seen using an object to beat on car windows – not a non-violent act. When the Tenth Circuit Court of Appeals analyzed a misdemeanor, criminal trespass stop-and-frisk, it said "a criminal trespass inherently involves some risk of confrontation with the property owner." *Moran*, 503 F.3d at 1142. Here,

fortunately, Kidd pressed a panic button on her key fob rather than initiating a confrontation.

Nevertheless, K.H. implies his crime did not implicate the government's interest in public safety at all and, therefore, his liberty interest far outweighs it. He claims when he was confronted he "was minding his own business . . . doing nothing near criminal . . . ." (Appellant's brief, p. 6.) We acknowledge that *Hensley* does say:

> [T]he exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. *Public safety may be less threatened by a suspect in a past crime* who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law.

469 U.S. at 228, 105 S. Ct. at 680 (emphasis added). However, though public safety "may be *less* threatened" when past rather than ongoing criminal conduct is investigated, the threat is not removed entirely. The Court indicated an inverse correlation exists between the length of time following the criminal activity and the threat to public safety – *i.e.*, the more time that passes, the less the threat.

Hensley described police confronting a suspect "long after[]" the alleged criminal activity, twelve days later in fact. In *Hensley*, enough time had passed that it would have been unreasonable to believe the suspect's criminal escapade was not entirely over, and that he had long since moved on to his own,

presumably lawful, business. *Id.* Close temporal and geographic proximity changes everything.

When suspects are confronted very soon after and very close to the scene of criminal activity, there is little to distinguish that confrontation from the classic *Terry* stop-and-frisk. In *Terry*, the Court said, "Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point." 392 U.S. at 28, 88 S. Ct. at 1883. In *Hensley*, twelve days' time was a sufficient indicator that the threat to public safety had dissipated and, when confronted, the suspect was going about his lawful business. The "long[-]afterward" factor is not present in K.H.'s case. As with the suspects in *Terry*, there was nothing to indicate K.H. abandoned all intent to commit a crime.

And although there is normally nothing unlawful about walking down the street, it was reasonable for the university police to have suspicions about middle-school-age individuals walking on a university campus at 9:30 in the morning of a school day, when they should have been in class at their own school.

Though we cannot say the government's interest in public safety alone outweighs K.H.'s liberty interest, we also cannot say such interest was not at stake. Together with the other interests we consider, it does add weight to the government's side of the balance.

Does the stop "promote the interest of crime prevention"? *Hensley*, 469 U.S. at 228, 105 S. Ct. at 680. *Hensley* explains that "the governmental interest in crime prevention and detection, necessarily implicated in a stop to investigate ongoing or imminent criminal conduct, may not be present when officers are investigating past criminal conduct." *Moran*, 503 F.3d at 1142. As indicated by the phrase "*may* not be present," no jurisprudence says the government's interest in crime prevention is categorically eliminated from consideration when past criminal conduct is investigated. It is not eliminated here.

When Kidd called police, she reported seeing individuals attempting to break into other vehicles before successfully entering her car. Her vehicle was not their first target and there is nothing in the record to indicate it was their last. That is, there is no indicator that once the individuals were away from the car alarm that prompted their hasty departure, they would not continue attempting break-ins elsewhere.

As with the government's interest in public safety, timing and geography are important factors. Near in time and place, officers spotted individuals fitting "exactly" the description Kidd provided. The kind of indicators present in *Hensley* – elapse of time and significant distance from the site of criminal conduct – is not present in this case to provide assurance that the suspects had ended their criminal conduct and were going about their lawful business. To

the contrary, the suspects were near in time and place and, as middle-schoolers on a college campus, they were out of place, raising a reasonable suspicion that they had not yet fully returned to a course of lawful behavior.

Now consider the confrontation. No physical force was used to subjugate K.H.'s liberty. He voluntarily acquiesced to the simple show of authority associated with police uniforms and vehicles without exercising or even testing "his freedom to walk away . . . ." *Terry*, 392 U.S. at 16, 88 S. Ct. at 1877. The Supreme Court of the United States has "recognized that some seizures significantly less intrusive than an arrest have withstood scrutiny under the reasonableness standard embodied in the Fourth Amendment [because] . . . the intrusion on the citizen's privacy 'was so much less severe' than that involved in a traditional arrest that 'the opposing *interests in crime prevention* and detection and in the police officer's safety' could support the seizure as reasonable." *Michigan v. Summers*, 452 U.S. 692, 697-98, 101 S. Ct. 2587, 2591, 69 L. Ed. 2d 340 (1981) (emphasis added) (citing *Dunaway v. New York*, 442 U.S. 200, 209, 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979)). In this case, the modest intrusion upon K.H.'s privacy, facilitated by his own cooperation, suggests the government's interest in preventing K.H. from committing his next car break-in outweighs his liberty interest.

Moving to "the strong government interest in solving crimes and bringing offenders to justice[,]" we note the concern that "[r]estraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee *in the interim* and to remain at large." *Hensley*, 469 U.S. at 229, 105 S. Ct. at 680 (emphasis added). Once again, then, time is a factor. Although keener with felonies than with misdemeanors, "the public interest that the crime be solved and the suspect detained *as promptly as possible*" remains important, and "outweigh[s] the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *Id.* (emphasis added).

Misdemeanors perpetrated by unknown suspects that are not *promptly* solved, rarely are. Given the limits of law enforcement resources, solving a stale misdemeanor simply does not merit or receive priority relative to other demands on the police. This is a consideration in the analysis of the government intrusion when it occurs on the heels of the report of criminal activity.

We can add another consideration when a juvenile is involved, as here. "The primary purpose of the Juvenile Code is to provide treatment for juvenile offenders in order to rehabilitate them." *Johnson v. Commonwealth*, 967 S.W.2d 12, 14 (Ky. 1998) (citing KRS 600.010(2)(d); KRS 605.100). Treatment

and rehabilitation will not occur unless the juvenile is apprehended. If, under circumstances such as these, the law prohibited an officer's swift or immediate confrontation of a juvenile suspected of criminal activity, it is too likely no confrontation will ever occur. The legislative purpose of the Juvenile Code will be thwarted entirely, and a juvenile offender might be encouraged by his successful avoidance of the criminal/juvenile justice system.

Recognizing that each of these governmental interests is present in varying degrees, we next balance them against the previously described mildly intrusive nature of K.H.'s confrontation with police to determine if the stop itself was constitutionally unreasonable. We conclude it was not.

To be clear, we stress the limited, fact-specific nature of our holding. Just as with stops for past felonious conduct, not all investigatory stops based on past misdemeanor conduct are reasonable. As has been so since even before *Terry*, there is no ready test for determining reasonableness other than by balancing the need to seize against the invasion which the seizure entails. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1879. "The question is whether in all the circumstances of this on-the-street encounter, [the individual's] right to personal security was violated by an unreasonable search and seizure." *Id.*, 392 U.S. at 9, 88 S. Ct. at 1873. "The standard takes into account 'the totality of the circumstances—the whole picture.'" *Navarette v. California*, 572 U.S. 393, 397, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d

680 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981)). As the jurisprudence has evolved, this standard applies to all warrantless seizures. Whether the criminal conduct being investigated is past or present, whether it smacks of felony or misdemeanor, these are simply factors to be weighed in "the totality of the circumstances—the whole picture." *Id.*

The officers' testimony at the suppression hearing demonstrated that K.H. was stopped for reasons "more substantial than inarticulate hunches[.]" *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880. They gave clearly articulable, objectively reasonable grounds that exceeded "the level of suspicion the standard requires" which is "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause[.]" *Navarette*, 572 U.S. at 397, 134 S. Ct. at 1687 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989)). We conclude the investigatory stop of K.H. was not unreasonable.

The search of K.H.'s person was not unreasonable

The entire stop-and-frisk "scheme is justified in part upon the notion that a 'stop' and a 'frisk' amount to a mere 'minor inconvenience and petty indignity,' which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion." *Terry*, 392

U.S. at 10-11, 88 S. Ct. at 1874 (footnotes omitted). As for the "frisk" component, the Supreme Court said:

> The theory is well laid out in the Rivera opinion:
> . . . . '[T]he right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act.'

Id., 392 U.S. at 11 n.5, 88 S. Ct. at 1874 (quoting *People v. Rivera*, 14 N.Y.2d 441, 445, 447, 252 N.Y.S.2d 458, 461, 463, 201 N.E.2d 32, 34, 35 (1964), *cert. denied*, 379 U.S. 978, 85 S. Ct. 679, 13 L. Ed. 2d 568 (1965)).

Law enforcement officers are permitted to conduct a reasonable search for weapons for their protection regardless of whether they have probable cause to effect an arrest. *Adkins v. Commonwealth*, 96 S.W.3d 779, 786-87 (Ky. 2003). However, there must be "specific and articulable" facts which, with "rational inferences[,]" support a reasonable suspicion that an individual is armed and dangerous. *Baker v. Commonwealth*, 5 S.W.3d 142, 146 (Ky. 1999) (citation omitted); *see also Frazier v. Commonwealth*, 406 S.W.3d 448, 453-54 (Ky. 2013).

In the case at bar, the circuit court found, "in addition to the clothing description matching, the indication that Ms. Kidd saw the suspects using an instrument to break into cars mean[ing] that it was large and long enough to gain

leverage to either go through or pry loose glass and metal. (VR 9/22/2016 11:05:00-11:05:42)." (R. at 109.) In the words of the officer who conducted the frisk, Lieutenant Ramsey, "Something like that, if it can break into a vehicle, or break a window, it can obviously cause some harm to myself." (V.R. 09/22/2016; 10:51:35.)

K.H. portrays himself as less than dangerous because he was "fourteen (14) years old, wearing a school backpack, standing on a street corner." (Appellant's brief, p. 10.) But his subjective view is not the view we assess. "The pertinent inquiry before us is whether the facts available to [Lieutenant Ramsey] at that moment would convince a reasonable person that the action taken was appropriate. *Baker*, 5 S.W.3d at 146." *Frazier*, 406 S.W.3d at 454. Lieutenant Ramsey proceeded with knowledge that, mere minutes earlier, an individual fitting K.H.'s description was seen "beating on [car] windows with an object" that, if used to strike a person, would have caused physical injury. Based on these facts, we cannot say that the *Terry* frisk was unreasonable.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Circuit Court's order affirming the district court's denial of a motion to suppress evidence and finding the investigatory stop and frisk of K.H. was not unreasonable.

ALL CONCUR.

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