Commonwealth of Kentucky
Supreme Court
No. 2008-SC-0567-DG

BRANDON LEON WATKINS — **APPELLANT**

v.

Appeal from Todd Circuit Court
Hon. Tyler L. Gill, Judge
Indictment No. 06-CR-103

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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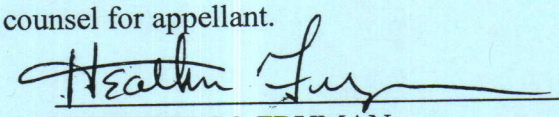
CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 5th day of June, 2009, to Hon. Tyler Gill, Todd Circuit Court, Courthouse, 200 West 4th Street, P.O. Box 667, Russellville, Kentucky 42276-0667; sent via electronic mail to Hon. Gail Guiling, Commonwealth's Attorney, 329 West 4th Street, P.O. Box 1133, Russellville, Kentucky 42276-1133; and sent via messenger mail to Hon. Linda Roberts Horsman, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, counsel for appellant.



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INTRODUCTION

This is an appeal from the trial court's decision to overrule the Appellant's motion to suppress evidence obtained during a search of a vehicle's trunk after the Appellant abandoned the vehicle and fled on foot. The Court of Appeals affirmed the trial court's ruling that the Appellant lacked standing to challenge the search and that he did not have a reasonable expectation of privacy in the vehicle that he abandoned by the side of the highway.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth believes that the issues in this matter are fully briefed and does not request oral argument.

STATEMENT CONCERNING CITATIONS TO THE RECORD

The Commonwealth agrees that the video time/date stamp was obscured during the suppression hearing by a stack of white paper. For the purpose of consistency the Commonwealth will refer only to the hour and minute counts for citations to the video record on February 27, 2007. The Commonwealth will substitute "xx" for the second count.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF FACTS

This matter is before the Court on discretionary review from the Court of Appeal's decision affirming the denial of a motion to suppress before the Todd Circuit Court. The trial court held a suppression hearing, in chambers, on February 27, 2007. After an initial ruling on the record, the trial court entered an Order, Findings of Fact, and Conclusions of Law denying the Appellant's, Brandon Watkins' ("the Appellant"), motion on March 22, 2007. TR 92 - 99. The Appellant entered a conditional guilty plea on March 13, 2007 to the charges of speeding (26 miles per hour over); failure to comply with instructional permit; fleeing and evading police (second degree, on foot); possession of marijuana; and possession of a controlled substance (cocaine, first degree, second offense). TR 83. On March 29, 2007, he was sentenced to a six year term of imprisonment. TR 100.

The charges arose from an incident on November 18, 2006, when Officer Brian Atkinson ("Officer Atkinson") observed the Appellant speeding. TR 44. When Officer Atkinson attempted to stop the Appellant, he gained speed and attempted to evade the officer. TR 43. After turning in the median multiple times, the Appellant's rear tire blew out, leaving the Appellant stranded in the median. TR 43. The Appellant then attempted to escape on foot and was eventually apprehended by officers from the Elkton Police Department. TR 43 -44. Portions of this incident were recorded by the camera in Officer Atkinson's police vehicle. VR 2; 11/18/06. Contrary the Appellant's implication that he carefully parked the vehicle before leaving the scene, the video clearly shows that the vehicle's tires failed and that the Appellant then fled the scene as quickly as possible. The Appellant left the vehicle in the condition that it was in when it would not physically drive any further.

After learning that a suspect had been captured, Officers Atkinson and Moberly went back to the median where the vehicle had been abandoned. VR 1; 2/27/07; 9:13:xx. At some point the officers learned that the vehicle was owned by an unknown female in another town by checking the tags. Id. at 9:17:xx. After assessing the situation and observing the vehicle, the officers decided to have the vehicle towed. VR 1; 2/27/07; 9:14:xx. Since Elkton does not have its own impound lot, the officers conducted an inventory search while waiting for the arrival of the tow truck. VR 1; 2/27/07; 9:16:xx. The officers discovered a cooler in the trunk that contained marijuana and cocaine. TR 44.

Meanwhile, the Appellant, while in custody, initially denied that the vehicle was his and then later stated that he had traded drugs in order to obtain the vehicle. VR 1; 2/27/07; 9:21:xx. The Appellant also told police that he would help them get "bigger fish" if they would let him go. TR 93. An officer spoke to the police department in Hopkinsville about locating the vehicle's owner. VR 1; 2/27/07; 9:44:xx. Through this discussion they learned that the Hopkinsville department was familiar with the woman, but that they could not locate a phone number. Id. Arrangements were made to attempt to contact that individual in person. Id.

The Appellant objected to the search of the vehicle stating that no recognized exception to the warrant requirement applied to the scenario. TR 73 - 77. The trial court held a suppression hearing in chambers on February 27, 2007. At the suppression hearing the parties agreed that Officer Atkinson's report would be considered, as that officer had a family emergency and was unable to attend. VR 1; 2/27/07; 9:55:xx. Officer Rodney Moberly and Chief Bruce Marklin both testified about the events that occurred on November

18, 2006. TR 92.

Officer Moberly testified that it was necessary to secure the vehicle due to its position in the roadway. VR 1; 2/27/07; 9:13:xx. After discussion with Officer Atkinson they decided that the vehicle should be towed. Id. at 9:14:xx. They conducted an inventory search prior to the arrival of the tow truck. Id. at 9:16:xx. Officer Moberly stated that officers routinely inventory vehicles towed or impounded to secure any property located inside the vehicle. Id. at 9:26:xx.

Chief Marklin stated that it is the policy of the department to tow a vehicle that is in the "travel portion" of the roadway. Id. at 9:36:xx. Since the tow company is a private company, the department records any damage to the vehicle, as well as any property of value, on the wrecker slip. Id. 9:40:xx. The purpose of this procedure is to protect the wrecker company and the police department from any liability. Id. Typically, the wrecker driver takes one copy of the slip and the officer keeps one copy. Id. Officer Atkinson, however, was a very new officer on November 18, 2006, and it appeared that the wrecker driver had taken both copies of the tow or impound inventory. Id. at 9:41:xx. Chief Marklin stated that he had spoken to the wrecker company about this issue and they believed that they could find the wrecker slip if it were necessary. Id.

The trial court ruled from the bench on February 27, 2007 (TR 92) and later entered written findings of fact and conclusions of law. TR 92 - 99. The trial court found that the officers were taking an inventory of the vehicle pursuant to department policy when they discovered the cooler. TR 94. In addition, the court found that it was the department's policy to take an inventory of any vehicle that was impounded. TR 94. The trial court also

found that the vehicle constituted a hazard due to its position on the roadway. TR 96. Furthermore, the trial court noted that it was necessary to search every vehicle prior to handing the vehicle over to a private tow company because of the presence of rolling methamphetamine labs in the area. TR 98. The trial court also found that the Appellant had abandoned the vehicle and, citing to United States v. Anderson, 924 F. Supp. 286 (1996), concluded that the Appellant had abandoned any expectation of privacy that he might have had in the vehicle. TR 95.

ARGUMENT

The decision of the trial court to deny the Appellant's Motion to Suppress evidence discovered in the trunk of the vehicle should be affirmed. The Appellant does not have standing to challenge the search of the vehicle because he abandoned it, and he no longer had any reasonable expectation of privacy. Even if there had been an expectation of privacy, the search was valid because it was conducted as an inventory search. In addition, the officers had probable cause to conduct a warrantless search of the vehicle. Even if the search of the trunk had not been valid, the evidence would have inevitably been discovered since additional facts were revealed that would have created probable cause to conduct the search.

In this matter the trial court made written findings of fact and conclusions of law. TR 92. In matters concerning the suppression of evidence, the trial court's findings of fact are conclusive if supported by substantial evidence. RCr. 9.78. As a general matter, determinations of reasonable suspicion and probable cause are reviewed *de novo* on appeal. Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657, 1661, 134 L.Ed.2d 911 (1996).

A reviewing court should, however, take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. Id. at 699, 1663. See also United States v. Roark, 36 F.3d 14, 16 (6th Cir.1994).

The Appellant does not argue that the trial court's factual findings are erroneous. Instead, he argues that, under those facts, the search of the vehicle was improper. As shown below, the Appellant has failed to show that the trial court's findings of fact were not supported by evidence and, those findings are binding. Consequently, the Appellant is not entitled to the relief that he requests.

I.

THE SEARCH OF THE TRUNK AND ITS CONTENTS WAS REASONABLE BECAUSE THE APPELLANT LACKED ANY REASONABLE EXPECTATION OF PRIVACY

A warrantless search of property violates the Fourth Amendment to the U.S. Constitution only if the Appellant "manifested a subjective expectation of privacy" and if society accepts that expectation as objectively reasonable. California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); see also Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). As § 10 of the Kentucky Constitution mirrors the language of the Fourth Amendment, the analysis applied to the Fourth Amendment also applies under Kentucky's state law. In Colbert v. Commonwealth, 43 S.W.3d 777 (Ky. 2001), this Court made clear that § 10 of the Kentucky Constitution gives no greater protection against warrantless searches than the Fourth Amendment. This Court stated:

> This Court, however, has never extended these greater

> protections to the rights in property interests against warrantless search and seizure. What we have said, as recently as four years ago, is "[S]ection 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment." LaFollette v. Commonwealth, 915 S.W.2d 747, 748 (Ky. 1996) (citing Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983)).

Colbert, 43 S.W.3d at 780. It then follows that a search is constitutional under the Kentucky Constitution if it is constitutional under the Fourth Amendment.

In analyzing the reasonableness requirement of the Fourth Amendment, the Supreme Court of the United States has long held that an individual does not hold any reasonable expectation of privacy when he or she abandons, or throws away, property. For example, in California v. Greenwood, the Court stated that there was no constitutional violation when officers searched through trash left in closed plastic bags outside of the curtilage of a home. California v. Greenwood, 486 U.S. at 40 - 41. This principle remains true regardless of whether the individual had any actual expectation of privacy, since society is not prepared to accept an expectation of privacy in bags left on a public street for the purpose of trash collection. Id. at 41. The Appellant does not argue that a search of abandoned or thrown away property is constitutional, instead, he now argues that his actions did not manifest a subjective intention of disassociating himself with the vehicle and its contents. He suggests that a search of a vehicle left behind in the roadway after a police pursuit is the type of objectively reasonable privacy that is protected by the Constitution.

In this matter, the Appellant treated the vehicle that he was driving as refuse by abandoning it at the side of the road in an area, and in a manner, that the trial court found

constituted a hazard. TR 96 -97. The trial court additionally found that the Appellant abandoned the vehicle. TR 95. These findings are supported by the evidence of record and are binding findings of historical fact. The Appellant's actions manifest the same intent present as when property is left outside of the home for collection by a third party, and the same analysis should apply. The Appellant left the vehicle for collection by some other party in much the same manner that a homeowner leaves a trash can to the curb on the city's collection day. In fact, the homeowner manifests a greater objective interest in his trash since he normally intends to return the can to the home to be refilled for the following week. Here, nothing indicated that the Appellant had any purpose other than disassociating himself from the vehicle as fast as possible.

Since the Appellant's arguments primarily concern his recitation of evidence presented to the trial court, and the trial court has made findings rejecting this evidence, the Appellant's arguments are not helpful to this analysis. For example, in attempting to argue that he did not abandon his expectation of privacy the Appellant makes an effort to argue that it is significant that the vehicle was not left running. The Appellant seems to even imply that the Appellant left the scene in a careful manner after securing the car. It should be noted, however, that there is no way of determining whether the vehicle was actually turned on or off since there are no findings of fact, and no testimony, on this point. The Appellant's citation to the video record is only helpful in determining the position of the vehicle in respect to the highway. The record actually indicates that the vehicle was probably left running since it appears that an officer reached into the vehicle and turned the ignition key. VR 2; 11/18/06; 1:35:45. It should also be noted that the Appellant simply ran when the tires

failed and the car could go no further. This is not a situation in which an individual pulls into a parking lot and walks into the supermarket.

This type of argument attempts to persuade this Court to reject the findings of the trial court, which are binding under RCr. 9.78. Even if it were now proper to review this evidence, the Appellant's behavior does not manifest any subjective intent other than the Appellant's desire to quickly abandon the vehicle and, the Appellant never presented evidence that he did not intend to abandon to vehicle and disassociate himself with it in the fastest manner possible. In his effort to disassociate himself from the vehicle the Appellant denied that he owned the vehicle and later provided only vague information on the subject. VR 1; 2/27/07; 9:21:xx. Even if the Appellant believed that the vehicle would remain private, the Appellant's subjective intent is not determinative. The standard is the objective reasonableness of the expectation of privacy. California v. Greenwood, 486 U.S. at 40 - 41.

It is not objectively reasonable to believe that vehicles abandoned on the highway in this manner will remain private. In most cases, vehicles are not parked along a busy highway without some extenuating circumstance, such as an emergency or mechanical problem. An objective examination of such circumstances shows that, even if the vehicle is carefully parked and secured, it would arouse a natural curiosity and suspicion due to its unusual location. Further, the vehicle was not located in an area in which one would naturally leave a vehicle in order to travel on foot to another destination. Instead, the vehicle was left on the edge of a median on a rather desolate stretch of roadway. The manner of the abandonment was also telling. The vehicle was likely left running and was not secured. Given the Appellant's hurry to leave and disassociate himself with the vehicle, it did not

objectively appear that he had any intention of returning to retrieve the car. Thus, the vehicle is properly placed in the same category as other abandoned property.

This Court has applied this same logic, found by the trial court in United States v. Anderson, 924 F. Supp. 286 (D.D.C 1996), and has held that a person does not have any reasonable expectation of privacy when he or she chooses to abandon a vehicle. In Hunt v. Commonwealth, 488 S.W.2d 692 (Ky. 1972), this Court held that the defendants abandoned their expectation of privacy in a rented vehicle when they fled on foot. Hunt, 488 S.W.2d at 695. In that case the defendants fled from a parked vehicle and ran into the woods upon an officer's approach. Id. at 694. This case is even more egregious as the vehicle was not parked and attended. It was abandoned after a mechanical failure in an area where vehicles are not normally parked, and in an area that posed a hazard to other vehicles.

In properly applying the Hunt analysis, the Court of Appeals referenced its decision in Blackford v. Commonwealth, No. 2005-CA-0000603-MR (2006)[1]. In that case the driver of a vehicle fled after he stepped out of a vehicle and was patted down for weapons. Blackford at 1. In Blackford the Court of Appeals cited Hunt, stating that "Kentucky has long held that an individual has no standing to challenge the validity of a warrantless search of property that has been abandoned." Id. The Court of Appeals explained:

> The evidence presented at the suppression hearing indicated that Blackford fled the scene on foot, leaving the car unsecured as he attempted to evade apprehension. No evidence indicated that Blackford

[1] This case is an unpublished decision cited pursuant to CR 76.28(4)(c) as it is referenced by the Court of Appeals and may be helpful to the Court in considering this issue.

> intended to assert or to retain his limited privacy interest in the vehicle. On the contrary, all evidence indicated that he sought both to avoid arrest and to abandon any incriminating evidence that might be found in the vehicle. Under these circumstances, as a matter of law Blackford also abandoned any reasonable expectation that the vehicle or its contents should be free from governmental intrusion.

Blackford at 2.

Hunt and Blackford are consistent with the decisions of other jurisdictions. Courts have continually found cars to be abandoned when it appeared that the operator of the vehicle left the car behind in an effort to avoid apprehension. LaFave, Search and Seizure § 2.5(a) (4th ed.). Further, whether the vehicle was running or was turned off has not been a determinative factor. In United States v. Tate, 821 F.2d 1328, 1331 (8th Cir. 1987), the defendant shot an officer and then fled, leaving a van on the highway with its windows down and the door unlocked. The court held that the vehicle was abandoned. In United States v. D'Avanzo, 443 F.2d 1224, 1225 (2nd Cir. 1971), the driver of a vehicle abandoned it and fled into a swamp. The court held that the vehicle was abandoned. See also United States v. Edwards, 441 F.2d 749 (5th Cir. 1971) (Defendant may not challenge search when he left vehicle on the highway with keys in the ignition and the lights on); People v. Washington, 413 N.E.2d 170 (1980) (defendant abandoned vehicle when he fled the scene and left the vehicle on the street unlocked); People v. Hampton, 603 P.2d 133 (Colo. 1979) (vehicle was abandoned when three suspects fled on foot leaving it behind in a parking lot with keys in the ignition); Henderson v. State, 695 P.2d 879 (Okl. Crim. App. 1985) (vehicle was abandoned when the defendant stopped car and attempted to evade police on foot).

Given the more recent Kentucky decisions, and the decisions by other jurisdictions, the Appellant now appears to have abandoned his former reliance on Joseph v. Commonwealth, 324 S.W.2d 126 (Ky. 1959). That decision has since been implicitly reversed by the Hunt decision. It is further telling that the Joseph decision pre-dates the United States Supreme Court's decision in California v. Greenwood. This Court should explicitly reverse the Joseph decision so that existing Kentucky precedent is consistent on this issue. An item may be treated as refuse and abandoned, even when it is something as large and valuable as a vehicle. It is not altogether uncommon for a vehicle to be left on the side of the road with the owner having no intention of return after an accident or a mechanical failure. It would be highly dangerous for police and transportation officials to be expected to remove these vehicles without ever examining the contents.

II.

THE SEARCH OF THE TRUNK AND ITS CONTENTS WAS REASONABLE BECAUSE IT FELL UNDER AN ACCEPTED EXCEPTION TO THE WARRANT REQUIREMENT

Even if the Appellant may now challenge the search of the vehicle, the search was reasonable because it fell under an accepted exception to the warrant requirement. As the trial court concluded, this was a valid inventory search of the vehicle. TR 95. Even if the search were not an inventory search it would still be valid as it was conducted with probable cause and met the requirements of the long established automobile exception.

A. The Search Was Reasonable Because it was a Valid Inventory Search

The trial court found that the search was a lawful inventory search incident to the lawful removal of the vehicle from the highway. TR 92 -99. The Appellant now makes two distinct arguments concerning the inventory search: first, that the inventory search was not valid because the police had no defined policy and, second, that the seizure of the vehicle did not comply with the mandates of state law. The second argument is, however, not preserved for consideration by this Court and, the precedent supports the officer's decision to impound the vehicle. The first argument is refuted by the record and the trial court's findings in this matter.

1. Inventory Search of the Vehicle

The search of the vehicle, incident to the decision to tow or impound it, complied with constitutional requirements. The United States Supreme Court has stated that several concerns are alleviated by inventory searches when a person or property is taken into custody.

> A range of governmental interests support an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the stationhouse...Arrested persons have also been known to injure themselves-or others-with belts, knives, drugs or other items on their person while being detained. Dangerous instrumentalities-such as razor blades, bombs, or weapons-can be concealed in innocent-looking articles taken from the arrestee's possession.

Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). When weighed against the degree of intrusion present, these legitimate concerns render an inventory search reasonable under the Fourth Amendment. Id.

In this matter, the trial court listed similar concerns for safety and liability that were alleviated by the inventory procedure. First, the inventory alleviates liability concerns for the police and the private wrecker company. TR 98. As the trial court noted, Elkton is a small town, without extensive resources, including its own impound lot. TR 98. The police must entrust vehicles to a private company that actually exercises physical control of the property. Id. In addition, Elkton struggles with a significant methamphetamine problem that adds safety concerns when a vehicle is towed or impounded. TR 98. When weighed against these concerns, the degree of intrusion present is inherently reasonable.

Courts have noted that the presence of an institutional policy lends credibility to the purpose of the inventory search. See Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d (1987). It does not matter if the police policy to search a vehicle being towed or impounded is written or unwritten, so long as the policy is clear. Other jurisdictions have noted that none of the cases in this area require the policy to be reduced to writing. United States v. Kordosky, 921 F.2d 722, 724 (7th Cir. 1991); *see also*, United States v. Ford, 986 F.2d 57, 60 (4th Cir. 1993) (inventory search lawful where there was a standard, unwritten police policy); United States v. Walker, 931 F.2d 1066, 1068 (5th Cir. 1991) (inventory search lawful where officers testified to "unwritten inventory policy with respect to automobiles driven by an individual when arrested").

Here, Chief Marklin's testimony supported the trial court's finding that the police

department had a policy to search all vehicles prior to towing. TR 97. Chief Marklin testified that it was unwritten departmental policy to search all vehicles at the scene prior to having them towed away. VR 1; 2/27/07; 9:40:xx - 9:42:xx. Items of significance or value are itemized on the tow slip and a copy is given to the tow company while one is retained by police. Id. Contrary to the assertion of the Appellant, this is consistent with the testimony of Officer Moberly who stated that, although he did not know if the policy was written, he routinely searched vehicles if they were to be towed. VR 1; 2/27/07; 9:26:xx. In addition, the trial court heard Chief Marklin testify that the wrecker slip was missing because a new officer had mistakenly given both copies to the wrecker service. VR 1; 2/27/07; 9:41:xx; TR 94. He also stated that he had talked to the wrecker service and they believed that they still had a copy. Id. The trial court found that explanation credible. TR 94.

Thus, the purpose of the search prior to towing was to identify items of value to protect the city and the police department in the event there is a claim of missing property.

> [T]here was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. . . [T]he police were potentially responsible for the property. . . . Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property.

Colorado v. Bertine, 479 U.S. 367, 372-373, 107 S.Ct. 738,741 - 742 (1987).

It is also irrelevant that the Appellant can now, with the benefit of hindsight, think of a less intrusive procedure that may have been applied. "Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect

police officers in the everyday course of business to make fine and subtle distinctions[.]" Colorado v. Bertine, 479 U.S. at 375 (internal citations omitted). The analysis of reasonableness of the department's policy does not turn on "the existence of alternative 'less intrusive' means." Colorado v. Bertine, 479 U.S. at 374 quoting Illinois v. Layfayette 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983) (emphasis in original).

Further, the Appellant's own citations do not support his assertion that a policy must eliminate all discretion concerning an inventory search. In fact, the U.S. Supreme Court in Florida v. Wells stated: "[N]othing in [South Dakota v.] Opperman [, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976),] or [Illinois v.] Lafayette [, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983),] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." Florida v. Wells, 495 U.S. 1, 3-4, 110 S.Ct. 1632, 1635 (1990) quoting Colorado v. Bertine, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). Thus, Florida v. Wells actually states that the inventory search must be conducted pursuant to a policy that defines the search without allowing officers to rummage for evidence of a crime.

Here, Elkton's policy was to list all the contents of the vehicle on a tow slip to eliminate the potential for liability due to allegedly lost valuables. The trial court heard the testimony concerning the policy and the reasons for its existence. The trial court found, based upon the testimony, that there was an established policy and that the vehicle was searched pursuant to that established policy to search vehicles that are towed. Those findings are now binding and the policy meets the reasonableness requirement of the Fourth

Amendment.

2. Seizure of the Vehicle

Before addressing the merits of the Appellant's next argument, it should be noted that the Appellant has not preserved any argument pertaining to the impoundment of the vehicle for consideration on appeal. The Appellant's objection before the trial court was based only on the search of the vehicle. TR 72 - 77. Although the Appellant did state that he could have had family pick up the vehicle (TR 75), he did not challenge the officer's decision to tow the vehicle to a safe and secure location. Nor did the Appellant ever challenge the officer's decision to turn the vehicle over to its registered owner. As such, he is not permitted to raise issues concerning whether the vehicle was properly towed or impounded; or, whether this procedure constituted a seizure. This Court has long held that, pursuant to RCr 10.26, it will not consider novel arguments on appellate review unless such an argument raises a question of substantial error. "An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given the opportunity to consider the merits of the theory." Shelton v. Commonwealth, 992 S.W.2d 849, 852 (Ky. App. 1998)(emphasis added).

Here, further difficulty arises from the lack of argument before the trial court because the parties did not have the opportunity to develop a record on this issue. It is not clear whether this vehicle belonged to the Appellant (who both claimed and disclaimed it at various points). Further, although a female owner is mentioned, the record is sparse concerning her relationship to the Appellant, his reason for possessing the vehicle, to whom the vehicle was ultimately released, and under what circumstances the vehicle was released.

Absent such information, it is difficult to discuss the merits of the Appellant's assertions.

Assuming, for the purpose of argument, that the Appellant had preserved this argument for review, the Appellant does not have standing to challenge the officer's decision to tow or impound the vehicle. As the trial court found, when the Appellant ran, he abandoned this vehicle and any expectation of privacy that he may have had. TR 95. It logically follows that, since the vehicle was abandoned, it may be removed by officers without constituting a seizure under the state or federal constitution. A seizure only occurs when there is some "meaningful interference" with the individual's possessory interest in property. U.S. v. Jacobson, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed. 2d 85 (1984). By abandoning the vehicle the Appellant abandoned his possessory interest in the vehicle. Further, the record leaves substantial doubt about whether the Appellant had any ownership interest in the vehicle.

Even if the procedure were a seizure it was valid because the seizure occurred with probable cause, because the vehicle had been used in a crime that occurred in front of the officer, and as part of the police care taking function. It is not disputed that the Appellant was arrested for speeding and evading in the vehicle in question. TR 43 - 44. He would not have been able to immediately return to the vehicle and remove it from its location.

The police routinely impound vehicles or have them towed for several reasons:

> Police impound vehicles for a variety of reasons. This occurs when a vehicle is found abandoned, illegally parked or in unsafe mechanical condition, and, most frequently, when the owner or operator of the vehicle has been arrested in or near the car. Generally, courts are of the view that "when a person is arrested away from home, the police may impound the personal effects that are with him at the time to ensure the

safety of those effects."

LaFave, 2 Criminal Procedure § 3.7(d) (2d ed.). In addition, the United States Supreme Court has recognized that officers may legally tow and impound vehicles that create safety concerns solely as a function of the police's community care taking function. South Dakota v. Opperman, 428 U.S. 364, 368 - 369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976). In Opperman the Court stated:

> [A]utomobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in care taking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. *The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.*

South Dakota v. Opperman, 428 U.S. at 368 - 369, 96 S.Ct. 3092 at 3097, 49 L.Ed.2d 1000 (emphasis added). In this matter, therefore, the impounding of the vehicle complies with the requirements of the Fourth Amendment. There is no requirement that the vehicle be removed to a "secure police impoundment lot" as suggested by the Appellant. Brief of Appellant, p. 9. Rather, as Opperman states, the goal is to remove the vehicle to a place where it will not create a traffic hazard.

The Appellant has relied upon Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979) for the proposition that the impoundment of the vehicle was unlawful (although

he does not argue with particularity whether this argument is based upon the state or federal constitution). Before the Court of Appeals, the Appellant argued that the impounding violated the mandates of the Kentucky Constitution. Wagner, however, has been overruled or abrogated by a line of cases holding that Section 10 of the Kentucky Constitution provides no greater protection against searches and seizures than the Fourth Amendment to the United States Constitution.

Although the precise language in Wagner involving an inventory search and seizure has not been explicitly overruled, this Court has expressed grave doubt about its continued applicability:

> Were § 10 of the Kentucky Constitution applicable to the facts herein, the legality of the impoundment of appellant's vehicle would be questionable under this Court's decision in Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979), (overruled on other grounds by Estep v. Commonwealth, Ky., 663 S.W.2d 213 [1983]). In light of Estep, the holding in Wagner as to automobile impoundment without a warrant is questionable.

Helm v. Commonwealth, 813 S.W.2d 816, 819 n.2 (Ky. 1991). In addition, in Colbert v. Commonwealth, 43 S.W.3d 777 (Ky. 2001), the Court made clear that Section 10 of the Kentucky Constitution gives no greater protection against warrantless searches than the Fourth Amendment. See § I Infra.

Even if the Wagner decision were still valid, the seizure of the vehicle and inventory search complied with the requirements of Wagner. The Appellant was the sole occupant of the vehicle, the vehicle was registered to an unknown female who could not be immediately located (TR at 94), and the Appellant was believed to be the person who had

been taken into custody. At times, the Appellant simply denied any ownership interest in the vehicle. VR 1; 2/27/07; 9:21:xx. The Appellant could not provide the officers with an address, nor did he offer the name of any person who could have picked up the vehicle. Id. at 9:26:xx. At other times the Appellant stated that he traded the vehicle for drugs. Id. at 9:21:xx. Under these circumstances it cannot be reasonably argued that the vehicle was improperly impounded as the officers had reason to believe that the vehicle may have been stolen or involved in other criminal activity.

In addition, the trial court found, the vehicle constituted a hazard if left on the side of the highway. TR at 96. This is the second condition enunciated in Wagner. Wagner v. Commonwealth, Ky., 581 S.W.2d 352, 356 (1979). The hazardous condition is apparent in the video record. The car had pulled all the way through the median and onto the opposite lanes. VR 2; 11/18/06; 1:28:44. The hood appears to extend all the way onto the roadway while the front wheels rest on the gravel shoulder. Id. Although it cannot be determined whether approaching vehicles were forced to take corrective action (such as switching lanes), as the traffic passes vehicles do appear to slow down. Id. at 1:29:13.

B. The Search Was Reasonable Because it Complied with the Automobile Exception

Moreover, although the trial court did not extend its findings of fact and conclusions of law beyond a discussion of an inventory search, this search was further supported by probable cause.[2] A warrantless search of a vehicle is reasonable under the

[2] This alternative basis for upholding the search is properly examined by this Court as it as it supports the trial court's ruling. See e.g. Clark v. Young, 692 S.W.2d 285, 289 (Ky. App. 1985); Friend v. Rees, 696 S.W.2d 325, 226 (Ky. App., 1985); Holt v. Peoples Bank, 814 S.W.2d 568, 571 (Ky. 1991).

Fourth Amendment if the search is supported by probable cause. Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280, 39 A.L.R. 790, 69 L.Ed. 543 (1925). Probable cause exists if "upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." Carroll v. U.S., 267 U.S. at 284. In this matter, probable cause was created under the circumstances presented to the officers.

The trial court found that Officer Atkinson observed the Appellant driving the vehicle at a high rate of speed. TR 93. When Officer Atkinson attempted to stop the vehicle he was forced to engage in a pursuit, during which the Appellant made several turns attempting to evade the officer. TR 43 - 44; 93. The vehicle suddenly stopped (TR 93), apparently due only to a blown tire (TR 43), and the Appellant fled into a nearby wooded area on foot. TR 93. An inquiry into the license tag on the vehicle revealed that it was owned by an unknown third party female who could not immediately be contacted. TR 94; VR 1; 2/27/07; 9:17:xx & 9:44:xx. Officers were also generally aware that the area had a problem with illegal drugs, particularly methamphetamine, and, that methamphetamine is sometimes created in vehicles known as rolling methamphetamine labs. TR 98. This information, supported by the testimony in the record, is sufficient probable cause and creates a reasonable suspicion that contraband may be concealed inside the vehicle.

The Appellant argues that information concerning the vehicle's owner was not sought until after the search had been conducted. The record suggests that an attempt was made prior to the search, but that distinction is not entirely clear. In any event, the discussions with the Appellant concerned his involvement with illegal drugs. Even if the

information concerning drug use was not obtained until after the search, probable cause would have still existed for the search due to the officers' knowledge of drug trafficking and the Appellant's attempt to flee, which clearly indicated some guilty conscience. Other jurisdictions have held that probable cause existed under very similar circumstances. See e.g. U.S. v. Pittman, 411 F.3d 813 (7th Cir., 2005) (probable cause existed when both occupants bolted and one was discovered to have an arrest warrant outstanding); People v. Hering, 327 N.E.2d 583 (Ill. App., 1975) (probable cause exists when the defendant fled during a stop and could not explain his actions); State v. Barry, 533 P.2d 1308 (Kan. 1975) (probable cause existed when there was a high speed chase and the defendant carried a pistol in his waistband.).

Probable cause is not destroyed by the officer's apparent failure to articulate the correct label at the time of the search. The United States Supreme Court has held that an officer's subjective reason for finding probable cause (except for the facts that he knows) is irrelevant to the existence of probable cause. Devenpeck v. Alford, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004). "The test is not whether the officer's subjective belief is constitutionally adequate to support his action but whether or not the facts known to the officer at the time of his action can validate his actions under any permissible constitutional standard." Gray v. Commonwealth, 28 S.W.3d 316, 319 (Ky. App. 2000).

C. The Court Is Not Bound by the Officers' Designation as a Search Incident to Arrest

Although the Appellant dedicates a portion of his brief to the search incident to arrest exception, neither the trial court nor the Commonwealth have asserted that the

search of the trunk was incident to the arrest of the Appellant. Admittedly, Officer Atkinson's report does seem to indicate some confusion on the part of that officer, (TR 43); however, as previously stated, the subjective knowledge of the officer is not determinative of probable cause. See also Whren v. U.S., 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (Subjective intentions of officer are irrelevant in Fourth Amendment analysis). In addition, courts have long recognized that the role of the police officer is not the role of attorneys and judges. Police officers cannot, and have not, been expected to engage in extensive legal analysis in the field. See Davis v. Commonwealth, 120 S.W.3d 185 (Ky.App. 2003). The fact that the officer may not have put the incorrect label (or multiple labels) in his report does not invalidate the legitimacy of this search, nor does it limit this court's analysis to the label that was inadvertently applied.

III.

THE RULING OF THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE THE EVIDENCE WOULD HAVE INEVITABLY BEEN DISCOVERED

Further assuming that the search of the vehicle was not supported by a valid exception to the warrant requirement, the ruling of the trial court should be affirmed because the evidence would have inevitably been discovered through other lawful means. See e.g. Hudson v. Michigan, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). The Appellant was validly arrested on charges of speeding, failure to comply with the requirements of an instructional permit, fleeing and evading in the first degree, and fleeing and evading related to the foot pursuit. TR 1. The Appellant has not made any objections related to these charges. Absent the search of the vehicle, the Appellant would have been held on these charges. During the

investigation the Appellant made several incriminating or suspicious statements that would have eventually led officers to seek a valid warrant to search the vehicle. For example, the Appellant stated that the vehicle was not his and later stated that he had traded it for drugs. VR 1; 2/27/07; 9:21:xx. In addition, the Appellant indicated that he knew others involved in the drug trade and that he would be willing to help officers if they let him go. TR 93. As the situation evolved, the probable cause for the search became increasingly firm. Eventually, the officers would have lawfully searched the trunk of the vehicle and discovered the evidence.

CONCLUSION

Wherefore, for the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the opinion of the Court of Appeals that affirmed the ruling of the Todd Circuit Court.

Respectfully submitted,

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