Commonwealth of Kentucky
Supreme Court

Case No. 2012-SC-820

PLEAS LUCIAN KAVANAUGH — **APPELLANT**

v.

Appeal from Fayette Circuit Court
Hon. Pamela Goodwine, Judge
Indictment No. 2010-CR-727

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I hereby certify that the record on appeal was returned to the Clerk of this Court and that a copy of the Commonwealth's Brief was mailed, 1st Class, U. S. Mail, postage pre-paid this 16th day of January, 2014 to: Hon. Pamela Goodwine, Circuit Judge, Fayette Circuit Court, 120 N. Limestone, 5th Floor, Room 534, Lexington, KY 40507-115; sent via electronic mail to: Hon. Ray Larson, Commonwealth's Attorney; and sent via state delivered messenger mail to: Hon. Robert C. Yang, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

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INTRODUCTION

Pleas Lucian Kavanaugh, hereinafter referred to as appellant, entered a conditional guilty plea to one count of criminal attempt to possession of a controlled substance and one count of menacing. The appellant received a sentence of twelve (12) months, but the imposition of sentence was suspended and the appellant was placed on conditional discharge for a period of one (1) year.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument is necessary in this appeal, as the issues are plainly set forth in the briefs and the circuit record. However, should this court decide that oral argument would be helpful, the Commonwealth will gladly appear before the Court to present its case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On March 6, 2010, Officer Richard Rice, Lexington Division of Police, was on regular patrol, going north on Upper Street. Officer Rice was around the 550 block of Upper when he noticed a dark colored car parked on the side of the road. The car had taillights on and no other lights. (VR: 12/14/10; 2:07 - 2:10). Officer Rice drove past the car and did not see anyone inside. Officer Rice then drove around the block and pulled in behind the vehicle. Thinking that there was some criminal activity afoot, Officer Rice called in the location of the vehicle and tag number. Officer Rice thought the vehicle was possibly stolen, there was a narcotics transaction going on, or prostitution. Officer Rice also thought that maybe a burglary was in progress with someone waiting in the car. (Id. At 2:10 - 2:13).

As Officer Rice was calling in the tag of the vehicle, he noticed two people sitting in the car. At this time, Officer Rice exited his vehicle to investigate why these people were sitting in a vehicle at 3:40 AM. (VR: 12/14/10; 2:10 - 2:11). Officer Rice approached the vehicle. There was a female in the driver's seat and Kavanaugh was in the passenger seat. Officer Rice introduced himself and explained why he was there. The female, Faith Kimeli, said that she had just dropped a friend off and had been at a club. The officer asked for identification and Ms. Kimeli complied. The whole time Officer Rice was talking to Ms. Kimeli, Kavanaugh never made eye contact with the officer. More concerning to the officer, Kavanaugh kept reaching into his coat. (Id. At 2:11 - 2:13).

The fact that Kavanaugh was reaching into his coat raised Officer Rice's suspicion. The officer thought Kavanaugh might have a weapon. When Officer Rice asked Kavanaugh for his identification, Kavanaugh turned away and said he didn't have any identification. Officer Rice asked Kavanaugh his name and Kavanaugh said why. All the time the officer was asking him questions, Kavanaugh kept digging in his pocket. (VR: 12/14/10; 2:13 - 2:15).

Officer Rice believed that Kavanaugh could have a weapon so he asked him to step out of the vehicle for officer safety and also for Ms. Kimwiley's safety. Kavanaugh stepped out and started around the back of the car toward Officer Rice. Officer Rice was on the sidewalk. Kavanaugh pulled out a small black item form his pocket. Kavanaugh didn't pull it out all the way, officer Rice just saw the end of something small and black. Officer Rice thought this object could have been a weapon. Officer Rice said, "Let me see your hands, take your hands out of your pockets." (VR: 12/14/10; 2:15 - 2:16). Kavanaugh put the item back in his pocket and stepped toward Officer Rice. Officer Rice explained to Kavanaugh that he wasn't under arrest and because of his actions and for officer safety, the officer was going to frisk him for a weapon. (Id. at 2:16 - 2:18).

Kavanaugh never actually allowed the frisk. Officer Rice asked Kavanaugh to turn around and put his hands behind his back. As Kavanaugh did this, he pulled out a digital recorder. Officer Rice got

Kavanaugh to put his hands behind his back, but couldn't get him to put the recorder down. Officer Rice asked Kavanaugh to put the recorder on the trunk of the car. This went on for a couple of minutes. This is when Kavanaugh turned around and grabbed Officer Rice in a bear hug. (VR: 12/14/10; 2:46 - 2:50). Officer Rice broke Kavanaugh's grip and pushed Kavanaugh back. Officer Rice asked Kavanaugh to turn around and Kavanaugh would not comply. Finally the officer got Kavanaugh to turn around when he had a Taser to his back. (Id. At 2:25 - 2:28). Officer Rice radioed for backup. (Id.). When Officer Tripp arrived, he cuffed and searched Kavanaugh. Officer Tripp found .5 grams of crack cocaine and unknown orange pill in Kavanaugh's pocket. (Id. at 2:25 - 2:31).

At the end of Kavanaugh's testimony at the suppression hearing, Kavanaugh acknowledged to the court that an officer would be concerned when he came up to a car if someone's hands were in his pockets. (VR: 12/14/10; 3:11 - 3:16). Kavanaugh also admitted that he turned around, removed himself from Officer Rice's grasp and asked why the officer took his wallet. (Id. At 3:00 - 3:05). The trial court made the following oral findings on the record. The trial court found that the taillights on a parked car raised the officer's suspicion of a stolen vehicle. While waiting for information on the tag, the officer noticed the two occupants sitting in the car at 3:42 AM. The officer approached the car and spoke with the driver. The driver was cooperative and gave the officer her information. As Officer Rice spoke with

the driver, he noticed Kavanaugh not looking at him. When Officer Rice asked for Kavanaugh's information, Kavanaugh stated he had no identification, would not give his name and had his hands in his pockets. When Kavanaugh was asked to step out of the car, he did. Kavanaugh went around the car, went into his pocket again and pulled out a small black object. Kavanaugh told the officer that he had a tape recorder and the officer asked him to put it on the car. Officer Rice told Kavanaugh he was going to frisk him for weapons. At this point Kavanaugh became combative. Kavanaugh was upset because Officer Rice pulled his wallet out and he was getting loud. Kavanaugh broke Kavanaugh's grip, turned around and touched the officer to the point that Officer Rice pulled out his Taser. Thus, the trial court determined that Officer Rice had reasonable suspicion to approach the vehicle and ask Kavanaugh to step out of the car. The trial court overruled Kavanaugh's motion to suppress. (VR: 12/14/10; 3:24 - 3:27).

On direct appeal, the Kentucky Court of Appeals affirmed the trial court's decision in a unanimous decision. The court concluded that even though Officer Rice did not technically stop the vehicle before he asked Kavanaugh to exit, the officer had reasonable and articulable suspicion that criminal activity was afoot, specifically drug activity or prostitution. Additionally, the court held that because Kavanaugh would not look at Officer Rice, was digging in his pockets and refused to give his name, this gave rise to Officer Rice's reasonable suspicion that Kavanaugh had a

weapon. The court concluded that a Terry pat-down was further justified for Officer Rice's safety because as Kavanaugh exited the vehicle, he pulled a black object from his pocket and there might have been a weapon in his pocket as well. (Slip opinion, p. 8). This court granted Kavanaugh's motion for discretionary review.

ARGUMENT

I.

THE KENTUCKY COURT OF APPEALS EMPLOYED THE PROPER STANDARD OF REVIEW IN THIS CASE.

Kavanaugh argues that the Kentucky Court of Appeals did not employ the correct standard of review.

A. The standard of review

As a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. However, a reviewing court should 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. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

B. The court did not overlook a material fact.

Kavanaugh argues that the Kentucky Court of Appeals overlooked a material fact when the court held that Kavanaugh was reaching into his coat,

in lieu of the trial court's determination that Kavanaugh had his hands in his pockets. Kavanaugh also argues that the court "materially modified" the trial court's finding when it determined that Kavanaugh was digging in his pockets.

In overruling Kavanaugh's motion to suppress, the trial court correctly observed that an officer would be concerned in a situation like this when a suspect has his hands in his pockets. (VR: 12/14/10; 3:11). The concern being that someone with his hands in his pocket could be hiding a weapon. (Id. at 3:15). Kavanaugh agreed that this was a legitimate concern for a police officer. (Id.). Accordingly, the presence of a hidden weapon was a legitimate, potential threat to Officer Rice's safety whether Kavanaugh was digging in his pockets or merely had his hands in his pockets. Accordingly, the Kentucky Court of Appeals court did not "materially modify" the trial court's findings or "overlook a material fact" when the appellate court determined that Kavanaugh was digging in his pockets. Kavanaugh's argument is based upon semantics and is without merit.

C. The appellate court conducted a proper *de novo* review of the trial court's application of the law to the facts.

In affirming Kavanaugh's conviction, the appellate court did conduct a *de novo* review. After the evidentiary hearing, the trial court recited the facts that supported Officer Rice's reasonable and articulable suspicion that criminal activity was afoot. On direct appeal, the Kentucky Court of Appeals

conducted a more thorough review. The appellate court cited the correct case, Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and conducted a more complete legal analysis pursuant to Terry. The court correctly concluded that Officer Rice had reasonable, articulable suspicion that criminal activity was afoot and that Kavanaugh could have been armed with a weapon. Further, the appellate court also correctly determined that Kavanaugh refused to submit to Officer Rice's authority, citing Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Brendlin was never cited by the trial court in the proceedings below.

Contrary to Kavanaugh's assertion, the appellate court did not permit the trial court to cite to non-existent law. The trial court believed that there was a 2004 case that held that Kavanaugh had an obligation to provide identification to Officer Rice. On direct appeal, the Kentucky Court of Appeals did not rely on trial court's legal analysis, but conducted its own legal analysis. This is the very definition of *de novo* review. Thus, the Kentucky Court of Appeals did conduct a proper *de novo* review of the trial court's application of the law to the facts.

Kavanaugh's argument that his refusal to give Officer Rice his name was "of no import," pursuant to McCarty is incorrect. A suspect's refusal to answer an officer's questions can be considered in assessing whether there is reasonable and articulable suspicion of criminal activity. See United States v. Mouscardy, 722 F.3d 68, 75-76 (1st Cir. 2013) (Mouscardy's conduct in

repeatedly refusing to identify himself and his disposition during the stop supported a finding that the *Terry* frisk was justified); United States v. Campbell, 549 F.3d 364, 372 (6th Cir.2008) (holding that passenger's failure to provide identification, "possibly to conceal his identity," was factor that could be considered in determining whether pat-down during *Terry* stop was appropriate).

II.

THE KENTUCKY COURT OF APPEALS CORRECTLY CONCLUDED THAT THERE WAS NO FOURTH AMENDMENT VIOLATION IN THIS CASE.

Kavanaugh argues that Kentucky law does not require a person to provide identification when requested by police, nor does it permit a warrantless search of a wallet if the person does not provide identification.

A. This argument is unpreserved.

The argument raised by Kavanaugh below and addressed by the trial court was there was a Fourth Amendment violation stemming from Kavanaugh's interaction with Officer Rice on March 6, 2010. Kavanaugh argued that there was no reasonable and articulable suspicion that a crime was being committed to seize Kavanaugh. At the evidentiary hearing, Kavanaugh argued that the *Terry* frisk violated the Fourth Amendment. The

trial court had no opportunity to address the issue regarding whether a suspect is required to disclose his name in the course of a *Terry* stop.

On discretionary review, Kavanaugh raised two questions. The first question presented had to do with the scope of the Terry pat-down and whether Officer Rice exceeded the scope when he pulled out Kavanaugh's wallet. The second was about the Kentucky Court of Appeals overlooking a material fact in reaching its decision. (See Kavanaugh's brief, tab 4).

Appellant will not be permitted to feed one can of worms to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky., 1976). Kavanaugh's argument that Kentucky law does not require a person to provide identification when requested by the police has not ever been raised. At the very most, in support of his argument that there was no reasonable, articulable suspicion, Kavanaugh argued that he was not required to answer Officer Rice's questions. This specific issue was not raised below and should not be reviewed by this court.

Likewise, Kavanaugh did not properly preserve his argument that Officer Rice exceeded the scope of *Terry* when the officer took his wallet out of back pocket. In his motion to suppress in Fayette Circuit Court, Kavanaugh did not argue that Officer Rice exceeded the scope of a *Terry* frisk by removing Kavanaugh's wallet. This issue was first raised on direct appeal. The Kentucky Court of Appeals declined to address the merits of the issue, concluding "that Kavanaugh did not present this issue to the trial court and

we will not now address it for the first time on appeal." (Slip opinion, p. 9) Appellant will not be permitted to feed one can of worms to the trial court and another to the appellate court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky., 1976). This issue should not be reviewed by this court.

B. There was no seizure.

Reasonable suspicion is not required to approach parked vehicles on publicly accessible property. United States v. Dyson, 639 F.3d 230, 232 (6th Cir. 2011); See also United States v. Dingess, 411 F. App'x. 853 (6th Cir. 2011) (Police officers' initial approach of defendant's vehicle was a consensual encounter, rather than a *Terry* stop requiring reasonable suspicion under the Fourth Amendment); United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (Law enforcement officers do not violate the Fourth Amendment prohibition of unreasonable seizures merely by approaching individuals on street or in other public places and putting questions to them, if they are willing to listen).

In order for a seizure to have occurred, there must either be application of physical force, even if extremely slight, or a show of authority to which the subject yields; a show of authority without any application of physical force, to which the subject does not yield is not a seizure. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991); See also United States v. Campbell, 486 F.3d 949 (6th Cir. 2007) (No seizure when suspect asked for identification). If the officer acts by a show of authority,

the individual must actually submit to that authority. Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). A suspect must do more than halt temporarily; he must submit to police authority, for "there is no seizure without actual submission," Brendlin at 127 S.Ct. 2405.

Several circuits have agreed that temporary or momentary acquiescence does not amount to submission to police authority. See United States v. Washington, 12 F.3d 1128, 1132 (D.C.Cir.1994) ("[Defendant] initially stopped, but he drove off quickly before Officer Hemphill even reached the car. Because [defendant] did not submit to Hemphill's order, he was not seized ....); see also United States v. Valentine, 232 F.3d 350, 359 (3d Cir.2000) (Even if Valentine paused for a few moments and gave his name, he did not submit in any realistic sense to the officers' show of authority, and therefore there was no seizure until Officer Woodard grabbed him.); United States v. Hernandez, 27 F.3d 1403, 1407 (9th Cir.1994) ("Hernandez requests we find he submitted to authority and was seized, despite his subsequent flight, merely because he hesitated for a moment and made direct eye contact with Sadar. We decline to hold these actions sufficient to constitute submission to authority."); United States v. Baldwin, 496 F.3d 215, 218 (2d Cir. 2007) (Baldwin's action in pulling over temporarily before fleeing did not constitute a seizure); United States v. Jeter, 721 F.3d 746 (6th Cir. 2013) (Defendant's momentary pause before fleeing did not constitute seizure under

Fourth Amendment, since defendant did not attempt to converse with police officers when they approached him or when they asked him to stop.)

Whether conduct constitutes submission to police authority will depend, as does much of the Fourth Amendment analysis, on the totality of the circumstances—the whole picture." United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also Brendlin, 127 S.Ct. at 2409 ("[W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.).

There is no dispute in this case that the car in which Kavanaugh was a passenger was parked on the side of the road. Accordingly, Officer Rice's initial approach to the vehicle was not a stop at all. Officer Rice was free to approach the car and ask questions.

Further, after the consensual encounter ended and Kavanaugh got out of the vehicle, Kavanaugh's conduct, all circumstances considered, amounted to evasion of police authority. In listening to the recording of the encounter, Kavanaugh was confrontational and noncompliant with the officer throughout the entire encounter. (VR: 12/14/10; 2:20 - 2:25). Officer Rice specifically testified that he was never able to frisk Kavanaugh because of Kavanaugh's non-compliance. (VR: 12/14/10; 2:17 - 2:18). Although Kavanaugh got out of the car, he then put his hands in his pockets and pulled

something out. This action was not in response to any police direction. When Officer Rice told him to pull his hands out of his pockets, Kavanaugh put the item back in his pockets. (VR: 12/14/10; 2:15). The fact that Officer Rice told Kavanaugh that he was going to frisk him, but Kavanaugh never allowed the frisk was the consummate act of evasion of police authority. Kavanaugh resisted putting his hands behind his back, he resisted spreading his legs and he refused to put the recorder on the trunk of the vehicle. When Kavanaugh finally put the recorder down, he turned around and put Officer Rice in a bear hug. (VR: 12/14/10; 2:18- 2:19). These facts show that Kavanaugh did not submit to Officer Rice's authority. It was not until Kavanaugh put Officer Rice in a bear hug, that Officer Rice used physical force to subdue Kavanaugh. (VR: 12/14/10; 2:18 - 2:19). It this point, Kavanaugh had assaulted an officer, was physically restrained and seized pursuant to Hodari D.

C. If there was a stop and a seizure, Officer Rice had reasonable suspicion.

1. Officer Rice had reasonable suspicion to approach.

An officer may conduct a brief investigatory stop and pat down the individual "when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). That is, the officer must have "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in

criminal activity." United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). A reasonable, articulable suspicion is defined as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In this case, Officer Rice was on routine patrol in a high crime area at approximately 3:40 AM when he noticed a car parked with only taillights illuminated. Officer Rice drove past the car and did not see anyone in the car. (VR: 12/14/10 ; 2:10 - 2:11). The officer circled around and parked behind the vehicle. Officer Rice began to radio the location and tag number of the vehicle when he noticed two people sitting in the car. Officer Rice was concerned that the vehicle was stolen because in the officer's experience, when an ignition is popped, the wires get crossed up and the lights were on. Officer Rice was also suspicious that a narcotics transaction might be in progress, or there was a prostitute and a john in the vehicle. (Id.). Additionally, Officer Rice testified that there had been a lot of burglaries in the area and this could have been a situation where someone was in the car waiting while another person was breaking into the residence. (VR: 12/14/10; 2:12). These facts gave Officer Rice a reasonable suspicion that criminal activity might be afoot.

2. Officer Rice developed a reasonable suspicion that Kavanaugh might have a weapon.

The Court recognized in Terry that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," he may conduct a limited protective search for concealed weapons. Terry, *supra*, 392 U.S., at 24, 88 S.Ct., at 1881. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. Id., at 30, 88 S.Ct., at 1884; Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612 (1972). To justify the pat-down of driver or passenger during a traffic stop, just as in the case of pedestrian reasonable suspected of criminal activity, police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. Arizona v. Johnson, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009).

Reasonable and articulable suspicion of criminal activity existed prior to Officer Rice's approach of the vehicle. However, after Officer Rice approached, his level of suspicion increased and he became concerned for his safety. When Officer Rice approached the vehicle, he introduced himself, explained why he was there, and put a few questions to Kimeli. The driver was cooperative. Officer Rice noticed that Kavanaugh was not making eye contact with the officer the entire time he was speaking with Kimeli. When Officer Rice asked Kavanaugh for identification, Kavanaugh looked away and said he didn't have identification. When Officer Rice asked Kavanaugh for his name, Kavanaugh would not make eye contact. Kavanaugh looked away when he responded to the officer's questions, refused to give him his name and had his hands in his coat pockets. (VR: 12/14/10; 2:13 - 2:14). Additionally, Officer Rice's encounter with Kavanaugh occurred at 3:42 AM in a high crime area. These facts gave rise to a reasonable suspicion that Kavanaugh might have a weapon in his coat. Kavanaugh even acknowledged that it would be concerning to an officer if he had a suspect with his hands in his pockets because that suspect could be hiding a weapon. (VR: 12/14/10; 3:11 - 3:15). At this point, Officer Rice had reasonable and articulable suspicion that Kavanaugh might be armed with a weapon. This suspicion justified Officer Rice's decision to ask Kavanaugh to exit the vehicle and submit to a *Terry* frisk.

Moreover, when Kavanaugh exited the vehicle, prior to Officer Rice's attempt to frisk him, Kavanaugh came toward the officer and pulled a small black object from his coat. Kavanaugh stated that he identified it immediately. Even if this was true, the fact that Kavanaugh had a recorder in his pocket indicated that he could have had something else, like a small weapon, in there as well. Officer Rice stated that Kavanaugh pulled out a small black object, revealing only the end of something small and black, and then put it back in his pocket. (VR: 12/14/10; 2:15 - 2:16). Officer Rice believed that Kavanaugh could have a weapon and was concerned for his safety and the safety of the driver. (VR: 12/14/10; 2:13 - 2:18). This would have given the officer even more suspicion of a weapon in Kavanaugh's pocket so as to justify a Terry pat-down.

3. Kavanaugh was required to disclose his name.

Just to reiterate, this issue was not raised before the trial court, on direct appeal or in his motion for discretionary review. The first time that Kavanaugh raises this argument is in his brief after discretionary review was granted by this court.

However, in Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), the United States Supreme Court held that a state may require a suspect to disclose his name in the course of a *Terry* stop. The Court also acknowledged that it is well established that an officer may ask a suspect to identify himself in the

course of a *Terry* stop. Id. 542 U.S. at 186. The Court reasoned that obtaining a suspects name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere ... Id. Identity may prove particularly important in domestic assault case because officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim. Id.

Numerous circuits have acknowledged that Hiibel stands for the proposition that an individual may be required to provide identification during the course of a *Terry* stop. See United States v. Young, 707 F.3d 598, 605 (6th Cir. 2012) cert. denied, 133 S. Ct. 2818, 186 L. Ed. 2d 878 (U.S. 2013) (The Supreme Court has noted that "questions concerning a suspect's identity are a routine and accepted part of many Terry stops.... Knowledge of identity may inform an officer that a suspect is wanted for another offense.") Koch v. City of Del City, 660 F.3d 1228 (10th Cir.2011)(Hiibel answered the question of whether an individual may be required to provide identification); United States v. Winston, 444 F.3d 115 (1st Cir.2006) (Inherently reasonable for agents to ask for identification to verify identity); United States v. Diaz-Castaneda, 494 F.3d 1146 (9th Cir.2007) (Police may ask people who have

legitimately been stopped for identification without conducting a Fourth Amendment search or seizure); United States v. Jackson, 377 F.3d 715 (7th Cir.2004) (Request for driver's license reasonable in a traffic stop supported by probable cause).

In this case, Officer Rice initially asked Kavanaugh for identification while Kavanaugh was in the passenger seat of the vehicle. Kavanaugh replied that he did not have identification. Officer Rice asked Kavanaugh his name. Kavanaugh would not give his name. (VR: 12/14/10; 2:14). After the officer asked Kavanaugh to exit the car, Officer Rice still did not have Kavanaugh's name. Officer Rice explained that he looked in Kavanaugh's wallet because Kavanaugh wouldn't give the officer his information. (VR: 12/14/10; 2:25). Hiibel stands for the proposition that Kavanaugh was required to disclose his name in the course of a *Terry* stop.

Moreover, in Hiibel, the United States Supreme Court specifically rejected the argument put forth by Kavanaugh. The Court concluded that the language in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), which is the basis for Kavanaugh's entire argument, was dicta and not controlling in answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop. See Hiibel, 542 U.S. at 187. Thus, Hiibel answered the question of whether an individual may be required to provide identification during the course of a *Terry* stop in the affirmative.

4. Officer Rice did not exceed the scope of the frisk when he removed Kavanaugh's wallet.

Again, Kavanaugh's argument that Officer Rice exceeded the scope of *Terry* when he took out Kavanaugh's wallet was not raised until Kavanaugh's direct appeal. The Kentucky Court of Appeals declined to address the issue because it had not been raised before the trial court.

However, if this court should address this issue, the United States Supreme Court has acknowledged that a *Terry* stop may consist of other permissible investigative measures, such as confirmation of identification. Michigan v. Summers, 452 U.S. 692, 700 n. 12, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). The officer's removal of Kavanaugh's wallet did not exceed the scope of Terry as Officer Rice was merely trying to ascertain Kavanaugh's identity. The officer removed Kavanaugh's wallet because Kavanaugh refused to give Officer Rice his name. When Kavanaugh objected to the officer getting in his wallet, the recording of the encounter clearly reflects the officer telling Kavanaugh something like, "I want to see something with your name on it." (VR: 12/14/10; 2:20 - 2:24). Officer Rice did not exceed the scope of Terry in removing Kavanaugh's wallet. The trial court acted correctly in denying Kavanaugh's motion to suppress.

D. Kavanaugh assaulted Officer Rice.

The Sixth Circuit Court of Appeals has held that if a suspect's response to an illegal stop is a new and distinct crime, such as flight or use of force,

any evidence recovered incident to the arrest for the subsequent crime is not tainted by the unlawfulness of the initial detention. United States. v. Beauchamp, 659 F.3d 560 (2011) citing to United States v. Castillo, 238 F.3d 424 (Table), 2000 WL 1800481, at 5-6 (6th Cir. Nov. 28, 2000) (unpublished opinion). See also U.S. v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 1250, 63 L. Ed. 2d 537 (1980) (acknowledging that chain of causation proceeding from the unlawful conduct may be so attenuated or interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality).

If there was an illegal stop and seizure of Kavanaugh in this case, it was sufficiently attenuated by Kavanaugh's assault on Officer Rice. As Officer Rice was attempting to frisk Kavanaugh, Kavanaugh became physically combative. It is undisputed by both parties that Kavanaugh broke the officer's grasp and faced the officer, despite Officer Rice's instruction to turn around and put his hands behind his back. (VR: 12/14/10; 3:00 - 3:05). Officer Rice testified that Kavanaugh broke out of the his grasp and gave the officer a bear hug, assaulting Officer Rice. (Id. At 2:18 - 2:20). This intervening circumstance, a break in the seizure and use of force on Officer Rice, dissipated any taint from the alleged unlawful seizure. The contraband was discovered in Kavanaugh's pocket in a search incident to arrest **after** this intervening circumstance. This evidence was not tainted by any alleged unlawfulness of the initial detention. The trial court acted correctly in overruling Kavanaugh's motion to suppress.

CONCLUSION

Wherefore, based upon all of the foregoing, Kavanaugh's conviction should be affirmed.

Respectfully submitted;
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