IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC96087
	)	
	)	
JOSEPH F. PERRY,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF LIVINGSTON COUNTY, MISSOURI
FORTY-THIRD JUDICIAL CIRCUIT
THE HONORABLE THOMAS N. CHAPMAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Joseph F. Perry, was convicted of the class C felony of possession of a controlled substance, Section 195.202,[1] after a jury trial in Livingston County, Missouri. L.F. 52.[2] The Honorable Thomas N. Chapman signed a final judgment and sentenced Mr. Perry as a prior and persistent offender to eight years' imprisonment. L.F. 57-59.

Jurisdiction of this appeal originally lay in the Missouri Court of Appeals, Western District. Mo. Const. art V, § 3; Section 477.070. This Court thereafter granted respondent's application for transfer, thus jurisdiction lies in this Court. Mo. Const. art. V, §§ 3 and 10; Rule 83.04.

[1] All statutory citations are to RSMo 2000, unless otherwise noted.

[2] The Record on Appeal consists of a Legal File ("L.F."), Trial Transcript ("Tr."), and Hearing Transcript ("Hr'g Tr.").

STATEMENT OF FACTS

Chillicothe police officer Jodi Huber saw Mr. Perry driving his car on October 24, 2013. Hr'g Tr. 20. She knew Mr. Perry, his vehicles, and his residence. Tr. 131. Officer Huber was interested in seeing what Mr. Perry was doing on that date because she believed he had sold methamphetamine in the past. Hr'g Tr. 20. Officer Huber and Mr. Perry have a history, she having arrested him before. Hr'g Tr. 36. She had sought to make a case on Mr. Perry for at least two years. Hr'g Tr. 38.

Although the tags on Mr. Perry's vehicle checked out okay, Officer Huber followed him that day "because [she] was under the assumption that he was suspended." Hr'g Tr. 21-22. The only reason she came in contact with him is because she believed he was suspended. Hr'g Tr. 49. She formed this hunch from a conversation she had with another officer two weeks prior. Hr'g Tr. 22; Tr. 134.

While following him, Officer Huber asked dispatch to verify Mr. Perry's driving status, but dispatch could not make any determination on whether he was still valid. Hr'g Tr. 21,24; Tr. 135-36. She tailed Mr. Perry around town for upwards of four minutes. Hr'g Tr. 24; Ex. 1. Even after Mr. Perry dropped off a passenger, she continued to pursue him. Hr'g Tr. 25; Ex. 1. Officer Huber was "hunting him[,]" and would have stopped him for any infraction. Hr'g Tr. 43.

Mr. Perry ultimately parked his vehicle in the driveway of his fiancée's house. Hr'g Tr. 25; Tr. 137. Officer Huber had "just a suspicion[]" that criminal activity might be going on inside this residence. Tr. 137. She parked in the street

immediately adjacent to the driveway, blocking traffic. Hr'g Tr. 25-26; Ex. 1. Officer Huber was in her patrol vehicle, donning her duty uniform, complete with gun and badge. Hr'g Tr. 34.

Officer Huber jumped out of her vehicle and said, "Hey Joe, can I talk to you?" right as Mr. Perry was exiting his vehicle. Hr'g Tr. 25, 44; Tr. 139. Mr. Perry agreed to speak with her and she probed, "Do you have a valid driver's license? I believe you're suspended?" Hr'g Tr. 27; Tr. 139. Mr. Perry said he was not suspended. Hr'g Tr. 27. Officer Huber walked toward Mr. Perry, asked him for his driver's license, and he complied. Hr'g Tr. 27; Tr. 140. As she held on to Mr. Perry's license, Officer Huber attempted to run it through dispatch, but could not make contact because of her faulty radio. Hr'g Tr. 28; Tr. 140.

During her failed attempts to reach dispatch, Officer Huber surmised Mr. Perry "started acting suspicious." Hr'g Tr. 29. She testified that he turned away from her, put his hand in his front pocket, and "pulled out what appeared to be a plastic bag and he had it in his clenched fist." Hr'g Tr. 29. Officer Huber ordered, "Hey, Joe, come here for a minute[,]" to which he replied, "I got to get this bike out of the back of my truck." Hr'g Tr. 29. Mr. Perry indeed grabbed a child's bike from the back of his truck and set it on the ground. Hr'g Tr. 29; Tr. 141. Officer Huber again commanded Mr. Perry to "come here[,]" which he ignored. Hr'g Tr. 29; Tr. 141. He walked the bike to the front of his vehicle and asked someone inside the house to come get it. Hr'g Tr. 29; Tr. 141.

As she pursued him around the front of the truck, Officer Huber once more repeated her directive to "come here[.]" Hr'g Tr. 29; Tr. 141. Mr. Perry threw down the bike and took off running. Hr'g Tr. 29; Tr. 142. Officer Huber chased him and yelled, "Joe, stop running[]" several times. Hr'g Tr. 30, 32; Tr. 144. She testified Mr. Perry attempted to jump a chain link fence, momentarily pausing as he climbed over. Hr'g Tr. 31; Tr. 146. Seeing another officer shortly thereafter, Mr. Perry surrendered. Hr'g Tr. 32; Tr. 147.

A search incident to arrest yielded no contraband on Mr. Perry's person. Tr. 148-49. As Officer Huber and others retraced and searched the path he had been running, a plastic bag was found inside a hollow post on the fence he climbed. Tr. 150. The bag contained a substance that field-tested positive for methamphetamine. Tr. 150.

Mr. Perry was subsequently charged by felony information with possession of a controlled substance with intent to distribute, pursuant to Section 195.211, as a prior and persistent offender. L.F. 18.

Trial counsel for Mr. Perry filed a pretrial motion to suppress evidence, which asserted that the bag of methamphetamine recovered from the fence post was the product of an unconstitutional search and seizure. L.F. 14-16. The trial court heard this motion on May 6, 2014. L.F. 5. This motion was denied. L.F. 5-6.

Trial counsel filed a second motion to suppress evidence on March 10, 2015. L.F. 21-30. This motion alleged that the methamphetamine was the fruit of

Mr. Perry's unlawful detention. L.F. 21-30; Tr. 17. The trial court heard argument on this motion immediately prior to trial and denied the motion. Tr. 17-18.

At a March 13, 2015 jury trial, trial counsel's continuing objection to all matters contemplated by the pre-trial motion to suppress was overruled. Tr. 194-95. The jury found Mr. Perry guilty of possession of a controlled substance. Tr. 259; L.F. 52.[3]

At the May 12, 2015 sentencing, the prosecutor argued that Mr. Perry's status as a prior and persistent offender rendered "[t]he range of punishment in this case enhanced to the B range is 5 to 15 years in the Department of Corrections." Hr'g Tr. 97. The trial court inquired of trial counsel, "5 to 15…Does that sound[ ] right?" Hr'g Tr. 98. Trial counsel acknowledged that as correct. Hr'g Tr. 98. Accordingly, the trial court, per respondent's recommendation, sentenced Mr. Perry to eight years' imprisonment. Hr'g Tr. 98, 100-101; L.F. 57-59. This appeal follows.

[3] The jury found Mr. Perry not guilty of possession of a controlled substance with intent to distribute under Section 195.211, as was originally charged. L.F. 18.

POINTS RELIED ON

I.

The trial court clearly erred in overruling Mr. Perry's motion to suppress evidence and his continuing objection to all matters argued in the motion to suppress at trial and admitting the methamphetamine evidence in derogation of his right to be free from unreasonable search and seizure secured by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution, in that where Officer Huber's nonconsensual encounter with Mr. Perry prior to and after he stopped his vehicle in the driveway was an unlawful seizure made without reasonable suspicion that Mr. Perry was engaged in criminal activity, the methamphetamine subsequently seized was illicit fruit of this unlawful seizure.

State v. Gabbert, 213 S.W.3d 713 (Mo. App. W.D. 2007);

State v. Grayson, 336 S.W.3d 138 (Mo. banc 2011);

U.S. v. Villa-Gonzalez, 623 F.3d 526 (8th Cir. 2010);

Florida v. Royer, 460 U.S. 491 (1983);

U.S. Const. amends. IV and XIV; and

Mo. Const. art. I, § 15.

II.

The trial court plainly erred in sentencing Mr. Perry under a materially false belief of the possible range of punishment, because sentencing Mr. Perry under this false belief deprived him of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the court held the mistaken belief that the range of punishment for Mr. Perry, convicted of a class C felony as a prior and persistent offender, was between five and fifteen years' imprisonment, when Mr. Perry could have actually received a minimum sentence of up to one year in the county jail or incarceration in the Department of Corrections for a term less than five years.

State v. Troya, 407 S.W.3d 695 (Mo. App. W.D. 2013);

State v. Williams, 465 S.W.3d 516 (Mo. App. W.D. 2015);

State v. Cowan, 247 S.W.3d 617 (Mo. App. W.D. 2008);

State v. White, 222 S.W.3d 297 (Mo. App. W.D. 2007);

U.S. Const. amend. XIV;

Mo. Const. art. I, § 10;

Mo. Rev. Stat. § 558.016; and

Mo. Sup. Ct. R. 30.20.

ARGUMENT

I.

The trial court clearly erred in overruling Mr. Perry's motion to suppress evidence and his continuing objection to all matters argued in the motion to suppress at trial and admitting the methamphetamine evidence in derogation of his right to be free from unreasonable search and seizure secured by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution, in that where Officer Huber's nonconsensual encounter with Mr. Perry prior to and after he stopped his vehicle in the driveway was an unlawful seizure made without reasonable suspicion that Mr. Perry was engaged in criminal activity, the methamphetamine subsequently seized was illicit fruit of this unlawful seizure.

Preservation and Standard of Review

Trial counsel for Mr. Perry filed a pretrial motion to suppress evidence, which asserted that the bag of methamphetamine recovered from the fence post was the product of an unconstitutional search and seizure. L.F. 14-16. The trial court heard this motion on May 6, 2014. L.F. 5. This motion was denied. L.F. 5-6.

Trial counsel filed a second motion to suppress evidence on March 10, 2015. L.F. 21-30. This motion alleged that the methamphetamine was the fruit of

Mr. Perry's unlawful detention. L.F. 21-30; Tr. 17. The trial court heard argument on this motion immediately prior to trial and denied the motion. Tr. 17-18.

At a March 13, 2015 jury trial, trial counsel's continuing objection to all matters contemplated by the pre-trial motion to suppress was overruled. Tr. 194-95. Trial counsel included this claim of error in Mr. Perry's motion for new trial. L.F. 53-54. This issue has been preserved for review. Rule 29.11(d).

"At a hearing on a motion to suppress, the state bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled." *State v. Grayson*, 336 S.W.3d 138, 142 (Mo. banc 2011) (internal quotations and citation omitted). "When reviewing the trial court's overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling." *Id.*

"The Court defers to the trial court's determination of credibility and factual findings, inquiring only whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous." *Id.* (internal quotations and citation omitted). "By contrast, legal 'determinations of reasonable suspicion and probable cause' are reviewed *de novo*." *Id.* (quoting *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996)).

Analysis

"The Fourth Amendment of the United States Constitution guarantees that '[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.'" *Grayson*, 336 S.W.3d at 143; U.S. Const. amend. IV. The Fourth Amendment is applicable to state actors via the Fourteenth Amendment Due Process Clause. *Id.* at 143 n.2 (citing *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)). Because Article I, Section 15 of the Missouri Constitution is coextensive with the identical protection against unreasonable searches and seizures afforded by the Fourth Amendment, the same analysis applies under both provisions. *Id.*

A. Mr. Perry was unreasonably and unlawfully seized by Officer Huber.

i. Officer Huber's encounter with Mr. Perry was a nonconsensual seizure.

"For Fourth Amendment purposes, a 'seizure' occurs 'whenever a police officer accosts an individual and restrains his freedom to walk away.'" *State v. Norfolk*, 366 S.W.3d 528, 533 (Mo. banc 2012) (quoting *Terry v. Ohio*, 392 U.S. 1, 16 (1968)). "'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" *Id.* (quoting *Terry*, 392 U.S. at 19 n.16).

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). The *Mendenhall* test "is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, *taken as a whole*, rather than to focus on particular details in isolation." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (emphasis supplied). "Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id.*

Commensurate with the inherent imprecision of the *Mendenhall* test, "[a]lthough not exclusive, factors indicating a seizure has occurred are: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Gabbert*, 213 S.W.3d 713, 719 (Mo. App. W.D. 2007) (internal quotations and citation omitted). To this end, "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted." *Chesternut*, 486 U.S. at 575 n.7 (citing *Mendenhall*, 446 U.S. at 554 n.6).

The circumstances attending Officer Huber's contact with Mr. Perry here "surely amount to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'"[4] *Florida v. Royer*, 460 U.S. 491, 502 (quoting *Mendenhall*, 446 U.S. at 554). By her own admission, Officer Huber was "hunting" Mr. Perry by tailing his truck in her patrol vehicle across numerous turns over several blocks for upwards of four minutes. Hr'g Tr. 24, 34, 43; Ex. 1. She continued pursuit even after he stopped momentarily to drop off a passenger. Hr'g Tr. 25. Immediately after Mr. Perry parked in his fiancée's driveway, Officer Huber stopped her patrol vehicle in the middle of the street adjacent and virtually perpendicular to the private driveway, blocking traffic in the public right-of-way and frustrating Mr. Perry's possibility for egress. Hr'g Tr. 25-26; Ex. 1. She jumped out of her vehicle and approached him on private property as he exited his vehicle. Hr'g Tr. 25, 44; Tr. 139. The uniformed Officer Huber simultaneously accosted Mr. Perry to accuse him of driving with a suspended license. Hr'g Tr. 25; Tr. 139. Upon her subsequent demand for his license, Mr. Perry promptly complied, despite confirming he was not suspended. Hr'g Tr. 27. Having secured his license, she retained it while attempting to contact dispatch to quell her hunch. Hr'g Tr. 28. Officer Huber's premonition that Mr. Perry's

[4] Because there is nothing in the record suggesting Officer Huber applied any physical force to him during their encounter, Mr. Perry does not challenge his "seizure" on this prong of the *Terry* standard. *See Norfolk*, 366 S.W.3d at 533.

license was suspended was the sole reason she initiated contact with him that day. Hr'g Tr. 49.

By an objective standard, the totality of these facts and circumstances establish Mr. Perry was not free to leave when Officer Huber demanded, he surrendered, and she kept, his license. Although not dispositive, her pursuit of Mr. Perry as a prelude to their encounter further confirms that a reasonable person would perceive her actions as an unambiguous show of authority under the circumstances. Despite that the record here cannot project her tone of voice, Officer Huber's accusation that he was driving with a suspended license betrays this use of language as an order, *viz.* compliance with her request for his license was mandatory. *See Gabbert*, 213 S.W.3d at 719. Accordingly, at that moment their encounter had lost any semblance of a consensual nature and had instead become a detention triggering Fourth Amendment scrutiny, since a reasonable person would not have felt free to disregard her mandate. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). Mr. Perry's immediate verbal and physical acquiescence to her command to produce his license functioned as a voluntary submission to an obvious show of authority. *See Gabbert*, 213 S.W.3d at 718-19. Clearly, "[w]ithout his identification card, a reasonable person is much less likely to believe he can simply terminate a police encounter." *U.S. v. Villa-Gonzalez*, 623 F.3d 526, 644 (8th Cir. 2010) (citing *Royer*, 460 U.S. at 503 n.9). Therefore, because Officer Huber had thereby restrained his liberty, Mr. Perry was "seized" within the meaning of the Fourth Amendment at the time he voluntarily submitted

to her show of authority by giving up his license and she retained it. *See id.*; *Gabbert*, 213 S.W.3d at 719.

It is true while "[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Bostick*, 501 U.S. at 439. However, where Mr. Perry ceded his license after Officer Huber had confronted him with her inkling that he was driving while suspended, and on private property no less, her actions clearly exceed "merely approaching an individual on the street or in another public place…[and] putting questions to him if the person is willing to listen." *Id.* at 434. Therefore, his cooperation to her mandatory request was instead only the product of coercive police conduct. *Cf. Gabbert*, 213 S.W.3d at 719 (holding that "[t]he totality of circumstances indicates that Mr. Gabbert was seized because he voluntarily submitted to [officer's] authority[]" where that officer's "use of language and tone of voice indicated to Mr. Gabbert that compliance with his request was mandatory."); *see also U.S. v. Chan-Jimenez*, 125 F.3d 1324, 1328 (9th Cir. 1997) ("A person's obedience to a show of authority is by itself insufficient to establish voluntary consent.").

Furthermore, Officer Huber's subjective intent is highly relevant to this Court finding that Mr. Perry was seized by show of authority where she unequivocally conveyed that intent to him verbally. *See Chesternut*, 486 U.S. at 575 n.7. Immediately after initiating conversation with Mr. Perry in his fiancée's driveway, Officer Huber said "Joe, do you have a valid driver's license? I believe you're suspended?" Hr. Tr. 27. "Such inquisitorial statements are not present in

the vast run of consensual encounters between police and individuals, and certainly make any encounter more coercive." *Villa-Gonzalez*, 623 F.3d at 533. Having thereby conveyed to Mr. Perry her subjective intent in accosting him because of her belief that he had committed a crime, no objectively reasonable person would believe that he was free to go. "A person may not be detained even momentarily without reasonable, *objective* grounds for doing so[.]" *Royer*, 460 U.S. at 498 (emphasis supplied). Accordingly, once he voluntarily submitted to Officer Huber's show of authority by immediately surrendering his license, Mr. Perry was at that instant seized within the meaning of the Fourth Amendment. *See Gabbert*, 213 S.W.3d at 719; *see Villa-Gonzalez*, 623 F.3d at 534.

The subjectivity of Officer Huber's conceit in contacting Mr. Perry is brought into sharper relief by her admitted history of run-ins with him. She believed him a person-of-interest in a methamphetamine sales scheme, having specifically scrutinized his house several times on patrol that day. Hr'g Tr. 20. She knew him, his residence, and his vehicles. Tr. 131. A past attempt to ensnare Mr. Perry when she stopped him failed because his license was not suspended. Hr'g Tr. 39. Indeed, Officer Huber had sought to make a case against Mr. Perry for two years and had even previously arrested him. Hr'g Tr. 36, 38. Inasmuch, theirs cannot be simply viewed as a random, isolated encounter between anonymous citizen and law enforcement. Rather, the totality of Officer Huber's subjective intent to detain Mr. Perry can reasonably be inferred in the context of their very specific past brushes, further supporting a finding that their encounter

was nonconsensual, he was not free to leave, and that he was seized for Fourth Amendment purposes.

Respondent will doubtless contend that there was no seizure where Officer Huber's entreaties for Mr. Perry to "come here" went unheeded, since he did not accede to her authority. Such argument is misguided since it misapprehends that Mr. Perry's illegal seizure had occurred prior to Officer Huber's commands, where he had already capitulated to her clearly mandatory request by surrendering his license. *See State v. Gabbert*, 213 S.W.3d at 719; *Villa-Gonzalez*, 623 F.3d at 533. Any suspicion of criminal activity that arose after she began their nonconsensual encounter was the product of an illegal seizure, and his failure to heed her commands to "come here" after he had given up, and she retained, his license are of no moment to the Court's Fourth Amendment analysis here. Therefore, and for the foregoing, Mr. Perry was seized as offensive to the Fourth Amendment at the time Officer Huber demanded, he surrendered, and she retained, his driver's license for her stated purpose of ascertaining its status.

ii. Officer Huber did not conduct a valid investigatory *Terry* stop where she did not have reasonable suspicion to believe Mr. Perry was engaged in criminal activity.

"[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot…the officer may briefly stop the suspicious person and make 'reasonable inquiries' aimed at confirming or dispelling his suspicions." *Minnesota v.*

Dickerson, 508 U.S. 366, 373 (1993) (quoting *Terry*, 392 U.S. at 30). To be reasonable, these suspicions must be "supported by articulable facts that the person stopped is engaged in criminal activity." *Grayson*, 336 S.W.3d at 143 (citation omitted). "In evaluating reasonable suspicion, courts must determine if the content of the information possessed by the police and its degree of reliability is sufficient to create a reasonable suspicion of criminal activity." *Id.* (internal quotations and citation omitted).

"An officer may receive information through another officer sufficient to authorize either an arrest or a stop." *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. banc 1992). "[E]vidence from a *Terry*-type stop is inadmissible if an officer makes the stop on the basis of information provided by another office or police department if the requesting officer or department lacked reasonable suspicion to make the stop." *Id.* at 642. "[W]here the information appears to originate with law enforcement personnel and the state uses the information to justify the stop, the state…must prove the facts which gave rise to the original suspicion." *State v. Norfolk*, 966 S.W.2d 364, 367 (Mo. App. E.D. 1998) (citation omitted).

Here, respondent offered no evidence by which the trial court could conclude Officer Huber's belief that Mr. Perry was driving while suspended was supported by reasonable suspicion. The only articulable facts on which Officer Huber grounded her suspicion that Mr. Perry was driving with a suspended license were her conversation with a fellow officer two weeks prior in which the officer

said Mr. Perry's license was suspended, and her personal observation of Mr. Perry driving. Hr'g Tr. 22; Tr. 134.

In the first instance, it is wholly unreasonable verging on absurd that Officer Huber's mere observation of Mr. Perry driving could form any basis for her belief that his license was suspended. Inasmuch, this articulable fact could not support her suspicion. Accordingly, the only possible support for Officer Huber's suspicion that Mr. Perry was driving with a suspended license was her one-off conversation with another officer two weeks prior.

However, on this record, there was no evidence of that which served to form the basis of this other officer's suspicion that Mr. Perry was driving while suspended. *See Norfolk*, 966 S.W.2d at 367. Respondent failed to produce any "evidence regarding the origin of the information on which the officers relied[]" to form this suspicion. *Id.* Neither did respondent "offer evidence of an independent basis personally observed by the officers which would have given them a reasonable suspicion sufficient to justify the stop." *Id.* In this sense, then, the reasonableness of Officer Huber's reliance on the tip she received from the other officer two weeks before could only be evaluated as if this other officer himself had stopped Mr. Perry. *See id.* Accordingly, because respondent gave no explanation for how the other officer divined what he communicated to Officer Huber, her "suspicion" that Mr. Perry was driving with a suspended license was nothing more than a hunch. Therefore, there was no evidence before the trial court

to conclude that Officer Huber's belief that Mr. Perry's license was suspended was supported by reasonable suspicion.

iii. The methamphetamine evidence must be suppressed as fruit of Officer Huber's unlawful seizure of Mr. Perry.

As discussed, *supra*, Officer Huber's contact with Mr. Perry requesting and obtaining his license was neither a consensual encounter nor a *Terry* stop supported by reasonable suspicion of criminal activity. Consequently, any evidence seized subsequent to that time must be suppressed as fruit of an unlawful seizure of Mr. Perry.

"The normal rule is that 'all evidence obtained by searches and seizures in violation of the Constitution is…inadmissible in state court.'" *Grayson*, 336 S.W.3d at 146 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). This deterrent exclusionary rule also demands suppression of the "'fruit of the poisonous tree,' that is, 'evidence discovered and later found to be derivative of a Fourth Amendment violation.'" *Id.* at 147 (quoting *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995)).

Here, the illegality of Officer Huber's contact with Mr. Perry was the cause-in-fact of the discovery of the methamphetamine in the fence post. This evidence should thereby have been suppressed as fruit of this illegal seizure.

It is true that Officer Huber's suspicions were aroused when she perceived Mr. Perry to begin acting suspiciously after she had captured his license and while she attempted to radio dispatch. Hr'g Tr. 29. It is further true that he ignored her

numerous directives to "come here," ultimately running away from her. Hr'g Tr. 29; Tr. 141-42.

However, only when "a new factual predicate for reasonable suspicion is found during the period of *lawful* seizure[]" will an otherwise invalidated seizure retain its lawful character. *Grayson*, 336 S.W.3d at 145-46 (emphasis supplied) (citation omitted). Here, the factual predicate arousing Officer Huber's reasonable suspicion of criminal activity, *viz.* Mr. Perry turning his back, reaching into his front pocket, and holding what appeared to be a plastic bag in his clenched fist, occurred after he was already unlawfully seized by his capitulation to her demand for, and her retention of, his license. Inasmuch, because it only arose outside any period of lawful seizure, such newfound justification could not, *ipso facto*, cure an otherwise invalidated contact. *Cf. Grayson*, 336 S.W.3d at 145-46; *see also State v. Hicks*, 515 S.W.2d 518, 521 (Mo. 1974) ("After-the-event-justification is not permissible."). Therefore, the methamphetamine evidence must be suppressed as fruit of Mr. Perry's illegal seizure.

B. The abandonment doctrine is inapplicable where Mr. Perry was unlawfully seized prior to discovery of the methamphetamine.

"[A] person has no standing to complain of the search of seizure of property that he has voluntarily discarded, left behind, or otherwise relinquished his interest so that he no longer retains a reasonable expectation of privacy with regard to it at the time of the search or seizure." *State v. Mosby*, 94 S.W.3d 410,

418 (Mo. App. W.D. 2003) (citation omitted). "Where…an individual drops, throws, or otherwise discards contraband while being followed or pursued by a police officer, the contraband is deemed to have been abandoned, and Fourth Amendment protections no longer apply." *Id.* (citing, *inter alia*, *California v. Hodari D.*, 499 U.S. 621, 623 (1991)).

"The law is well-settled that abandonment will be found only when incriminating evidence has been abandoned voluntarily, and that abandonment is not voluntary if it results from an illegal seizure." *Grayson*, 336 S.W.3d at 151 n.7 (citing *U.S. v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) ("an abandonment must be voluntary, and an abandonment that results from fourth amendment violations cannot be voluntary"); *U.S. v. Austin*, 66 F.3d 1115, 1118 (8th Cir. 1995) (same); *U.S. v. Segars*, 31 F.3d 655, 658 (8th Cir. 1994) ("abandonment cannot be the product of unlawful police conduct"); *State v. Solt*, 48 S.W.3d 677, 682 (Mo. App. S.D. 2001) (same)).

For the reasons articulated in section A, *supra*, the totality of circumstances attending their encounter compel a finding that Mr. Perry was illegally seized by Officer Huber when he yielded to her show of authority and she obtained his license. Accordingly, even where Mr. Perry subsequently discarded the methamphetamine in the hollow fence post, such relinquishment could not be voluntary where it was the product of unlawful police conduct. *See Grayson*, 336 S.W.3d at 151 n.7. Consequently, and where Officer Huber's pursuit began while he was still illegally seized, Mr. Perry did not abandon this contraband as a matter

of law. Therefore, respondent having failed to show an independent basis by which to purge the taint of Mr. Perry's illegal seizure, the methamphetamine evidence must be suppressed. *See id.* at 150-51.

C. The trial court clearly erred in overruling Mr. Perry's motion to suppress evidence and admitting the methamphetamine obtained as fruit of his unlawful seizure.

Because respondent failed to carry its burden to prove by a preponderance of evidence that the methamphetamine was not obtained as fruit of Officer Huber's illegal seizure of Mr. Perry, the trial court's denial of his motion to suppress this evidence should leave this Court with a definite and firm impression that a mistake has been made. Therefore, the trial court clearly erred in overruling Mr. Perry's motion to suppress evidence, and he respectfully requests that this Court reverse his conviction and sentence for possession of a controlled substance.

II.

The trial court plainly erred in sentencing Mr. Perry under a materially false belief of the possible range of punishment, because sentencing Mr. Perry under this false belief deprived him of his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the court held the mistaken belief that the range of punishment for Mr. Perry, convicted of a class C felony as a prior and persistent offender, was between five and fifteen years' imprisonment, when Mr. Perry could have actually received a minimum sentence of up to one year in the county jail or incarceration in the Department of Corrections for a term less than five years.

Relevant Facts

At the May 12, 2015 sentencing, the prosecutor argued that Mr. Perry's status as a prior and persistent offender rendered "[t]he range of punishment in this case enhanced to the B range is 5 to 15 years in the Department of Corrections." Hr'g Tr. 97. The trial court inquired of trial counsel, "5 to 15…Does that sound[ ] right?" Hr'g Tr. 98. Trial counsel acknowledged that as correct. Hr'g Tr. 98. Accordingly, the trial court, per respondent's recommendation, sentenced Mr. Perry to eight years' imprisonment. Hr'g Tr. 98, 100-101; L.F. 57-59.

Standard of Review

Trial counsel failed to object to the trial court's mistaken belief as to the range of punishment. Hr'g Tr. 97. Therefore, this claim may be reviewed only for plain error pursuant to Rule 30.20.

Rule 30.20 gives this Court authority to review unpreserved claims for "plain errors affecting substantial rights" if it finds "that manifest injustice or miscarriage of justice has resulted therefrom." *State v. White*, 222 S.W.3d 297, 300 (Mo. App. W.D. 2007). When "a court sentences a defendant based on a mistaken belief of the available range of punishment, it commits evident, obvious, and clear error, and such error results in a manifest injustice if left uncorrected." *State v. Williams*, 465 S.W.3d 516, 519 (Mo. App. W.D. 2015) (citing *State v. Troya*, 407 S.W.3d 695, 700-701 (Mo. App. W.D. 2013)).

Analysis

Mr. Perry was found guilty of the class C felony of possession of a controlled substance, Section 195.202. Tr. 259; L.F. 52. Ordinarily, the range of punishment for a class C felony is up to seven years in the department of corrections or up to one year in the county jail. Section 558.011. However, Appellant was charged as a persistent offender pursuant to Section 558.016, due to the fact that he had two prior felony convictions. L.F. 18. Section 558.016.7 reads, in relevant part, "the total authorized *maximum* [term] of imprisonment for a persistent offender…are…for a class C felony, any sentence authorized for a class

B felony." (emphasis supplied). Accordingly, while Mr. Perry's status as a persistent offender did raise his possible maximum sentence to that of a class B felony, *viz.* fifteen years, the minimum sentence he was facing remained that of a class C felony. Therefore, the court in the present case was patently incorrect when it determined the range of punishment to be between five and fifteen years imprisonment, since Mr. Perry could in fact have been sentenced to a term of imprisonment less than five years or to a county jail sentence of up to one year.

Respondent may argue that, although the trial court sentenced Mr. Perry based on a misunderstanding of the range of punishment, no prejudice inhered due to the fact that his eight year sentence would still be within the proper range of punishment. This argument is without merit. Missouri law is clear that "[a] sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome… This is so even if it is likely the court will return the same sentence." *Troya*, 407 S.W.3d at 700 (quoting *State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. W.D. 2008)). Inasmuch, Mr. Perry is entitled to a new sentencing hearing in which the court will consider the appropriate range of punishment.

The trial court plainly erred in sentencing Mr. Perry under a materially false belief that the minimum sentence for which he was eligible was five years. Therefore, Mr. Perry requests that this Court remand his case to the trial court for

a new sentencing hearing wherein the trial court must consider the correct range of punishment.

CONCLUSION

For all of the reasons stated in his first Point Relied On, because the trial court clearly erred in overruling his motion to suppress methamphetamine evidence obtained as fruit of an unlawful seizure, Mr. Perry respectfully requests that this Court reverse his conviction and sentence for possession of a controlled substance.

For all of the reasons stated in his second Point Relied On, because the trial court plainly erred in sentencing him under a materially false understanding of the minimum sentence for which he was eligible, Mr. Perry respectfully requests that this Court remand this matter to the trial court for a new sentencing hearing wherein the trial court must consider the correct range of punishment.

Respectfully submitted,

/s/ Jedd C. Schneider

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Certificate of Compliance and Service

I, Jedd C. Schneider, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,383 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

On this 10th day of July, 2017, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Robert J. Bartholomew, Assistant Attorney General, at Jeff.Bartholomew@ago.mo.gov.

/s/ Jedd C. Schneider

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Jedd C. Schneider