No. 123,797

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TYLER BRANDON MCDONALD,
Appellant.

SYLLABUS BY THE COURT

1.

To comport with the Fourth Amendment to the United States Constitution, public-safety encounters must be supported by objective, specific, and articulable facts which suggest the stop is necessary to serve a caretaking function.

2.

A law enforcement officer is not required to possess reasonable suspicion of criminal activity prior to performing a public-safety stop.

3.

A three-part test is utilized to assess the legality of a public-safety stop: (1) If there are objective, specific, and articulable facts from which an officer would suspect that a person is in need of assistance then the officer may stop and investigate; (2) if an individual requires assistance the officer may take appropriate action to render assistance; and (3) once an officer is assured the individual is no longer in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure triggering the protections provided by the Fourth Amendment.

Appeal from Geary District Court; CHARLES A. ZIMMERMAN, magistrate judge. Opinion filed February 3, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Tony Cruz, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before CLINE, P.J., ISHERWOOD and HURST, JJ.

ISHERWOOD, J.: The State charged Tyler Brandon McDonald with possession of marijuana, possession of paraphernalia, and criminal use of weapons after Geary County Sheriff's Deputy James Regalado discovered the contraband in McDonald's vehicle. Prior to trial, McDonald sought to suppress the evidence as the product of an unlawful detention. Regalado noticed McDonald's car in a lot in the park after dark and became concerned because of incidents involving self-harm that occurred in that area. Regalado stopped, activated his rear lights, and approached the vehicle. When the deputy knocked on McDonald's window and McDonald rolled it down, Regalado smelled marijuana, which led to a search and recovery of the evidence sought to be suppressed. The district court held Regalado's actions did not violate the Fourth Amendment to the United States Constitution because the interaction fell within the deputy's community caretaking function. On appeal, McDonald argues the district court erred when it denied his motion to suppress because Regalado did not have objective, articulable facts to suspect McDonald needed help. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 2019, Geary County Sheriff's Deputy James Regalado was on routine patrol just after 9 p.m. inside a park near Milford Lake when he noticed a car in one of the park's secluded lots. The park was still open but, given the later hour and time of year, it was already dark outside. As the deputy drove past, he noticed that the

instrument panel slightly illuminated the interior of the vehicle but only to the extent that he could determine there was a single occupant in the front seat. Regalado immediately became concerned given incidents of self-harm that occurred around the lake. He personally observed at least one critical episode of that nature in the area.

Regalado parked his patrol vehicle on the street around 20 feet from the rear of the other vehicle, but not in a way that it compromised the other vehicle's ability to exit. Given the time of day and the secluded nature of the area, Regalado activated the rear emergency lights in his patrol vehicle to distinguish his car from that of a member of the public, as well as for his own safety if any other officers needed to locate him quickly.

As Regalado approached, he saw McDonald sitting in the driver's seat and heard him talking on a phone. The deputy knocked on the passenger side window to get McDonald's attention. When McDonald rolled it down, Regalado identified himself as a Geary County Sheriff's Deputy and asked whether McDonald was all right. As the two spoke Regalado detected the odor of marijuana emanating from the vehicle. Based on that stench, Regalado requested McDonald's identification and called another deputy for backup. After Deputy Cory Shoemake arrived on the scene, Regalado searched the vehicle and discovered marijuana, drug paraphernalia, and a firearm.

The State charged McDonald with one count each of possession of marijuana, possession of drug paraphernalia, and criminal use of weapons. Prior to trial, McDonald moved to suppress the evidence found during the search of his vehicle and argued that Regalado violated his rights under the Fourth Amendment to the United States Constitution when he contacted McDonald in the parking lot. The State countered that Regalado executed a lawful public-safety stop/welfare check that ultimately led to the recovery of the evidence.

The district court held an evidentiary hearing on McDonald's motion but ultimately declined to grant the relief requested. In support of its conclusion the court found Regalado's testimony was credible, and that he did not detain McDonald as McDonald could have freely left at any point during the encounter before detection of the marijuana odor. It further determined the stop was justified as a lawful public-safety stop/welfare check and that, in fact, had Regalado decided not to stop and McDonald ultimately harmed himself, the Sheriff's Department may be exposed to liability for a failure to act.

The case proceeded to a bench trial and the district court found McDonald guilty of the marijuana and paraphernalia charges. It then sentenced him to a six-month suspended jail sentence and six months of mail-in probation.

McDonald now brings this appeal to determine whether the district court erred in denying his motion to suppress.

LEGAL ANALYSIS

The district court properly denied McDonald's motion to suppress.

The single issue McDonald presents for our review is whether the district court properly classified his encounter with Deputy Regalado as a legitimate public-safety stop. According to McDonald, despite the circumstances the deputy confronted that evening, and his awareness that an increasing number of individuals engaged in acts of self-harm at the park, he nevertheless lacked a reasonable basis to suspect McDonald might be in need of assistance and, therefore, the court erred in denying his motion to suppress on the grounds that the officer's investigation was justified as a lawful welfare check.

The standard of review for a district court's decision to deny a motion to suppress has two parts. First, the appellate court reviews the district court's factual underpinnings to determine whether they are supported by substantial competent evidence, and next it reviews the district court's legal conclusion de novo. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). We do not reweigh the evidence or reassess the credibility of witnesses. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014). The State bears the burden to prove that a challenged search or seizure was lawful. *State v. McGinnis*, 290 Kan. 547, 551, 233 P.3d 246 (2010).

The Fourth Amendment to the United States Constitution preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Kansas Supreme Court has found it reasonable to seize an individual to protect public safety. See *State v. Vistuba*, 251 Kan. 821, 825, 840 P.2d 511 (1992), *disapproved of in part on other grounds by State v. Field*, 252 Kan. 657, 847 P.2d 1280 (1993). As long as there are objective, specific, and articulable facts from which an experienced law enforcement officer would suspect that a citizen needs help or is in peril, then the officer has the right to stop and investigate. *State v. Ellis*, 311 Kan. 925, 929-30, 469 P.3d 65 (2020).

Kansas courts have recognized four types of police-citizen encounters: (1) voluntary encounters, (2) investigatory detentions, (3) public-safety stops, and (4) arrests. *State v. Phillips*, 49 Kan. App. 2d 775, 783, 315 P.3d 887 (2013). The encounter we are tasked with analyzing is the public safety-stop, or welfare check. The district court denied McDonald's motion to suppress on the grounds that Deputy Regalado's encounter with McDonald was properly classified as a valid public-safety stop.

The public-safety or welfare check rationale was first discussed and analyzed by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). It was then recognized by the Kansas Supreme Court

nearly two decades later in *Vistuba*, 251 Kan. at 824-25. The doctrine is based on the notion that the role of law enforcement officers is not limited to the detection, investigation, and prevention of criminal activity. Rather, they are also called upon to serve a community caretaking function to ensure that the safety and well-being of the public is somewhat insulated from harm. The requirement for reasonable suspicion of criminal activity is suspended in these contexts because to require the same could potentially undermine law enforcement's ability to timely render aid and protect the public. *State v. Messner*, 55 Kan. App. 2d 630, Syl. ¶ 1, 419 P.3d 642 (2018).

In applying the public-safety rationale to justify a police-citizen encounter, courts meticulously scrutinize the facts "so the protections of the Fourth Amendment are not emasculated." *Gonzales*, 36 Kan. App. 2d at 455. This court has adopted a three-part test to determine the legality of a public-safety stop. First, as long as there are objective, specific, and articulable facts from which a law enforcement officer would suspect that a citizen needs help or is in peril, the officer has the right to stop and investigate. Second, if the citizen needs aid, the officer may take appropriate action to render assistance. Third, once the officer is assured that the citizen is not in peril or is no longer in need of assistance, any actions taken beyond that point constitute a seizure, and the protections provided by the Fourth Amendment are triggered. 36 Kan. App. 2d at 456. Our analysis is largely confined to the first step in the inquiry.

The facts that the parties request us to scrutinize are rather straightforward and largely uncontroverted. It is the import of those facts and what they signify where the parties go their separate ways.

As set forth above, Deputy Regalado was on patrol in a park near Milford Lake when he happened upon McDonald's vehicle. The deputy immediately experienced a measure of concern because it was dark, the car was parked in a rather secluded area of the park with only a single occupant inside, and Regalado was keenly aware that

individuals were known to seek refuge in the park to carry out acts of self-harm. Accordingly, he stopped his patrol vehicle in the street adjacent to the lot in which McDonald was parked and approached to make contact with the driver. As he neared the vehicle, he heard the occupant engaged in a phone call. Deputy Regalado knocked on the passenger side window to obtain the occupant's attention and when the individual rolled down the window, Regalado inquired into his well-being. It was during that exchange that the deputy detected the odor of marijuana.

The foundation for McDonald's claim is that Deputy Regalado had no reason to believe that McDonald was in peril. But that peace of mind settles in post-investigation. As a means of buttressing his contention, McDonald directs our attention to *State v. McKenna*, 57 Kan. App. 2d 731, 459 P.3d 1274 (2020), where an officer found a vehicle's occupant slumped over the steering wheel; *State v. Tilson*, No. 108,253, 2013 WL 2920147 (Kan. App. 2013) (unpublished opinion), where law enforcement officers were notified that Tilson threatened self-harm and they later located him, injured, following a single vehicle accident; and *State v. Dionne*, No. 116,009, 2017 WL 1826284 (Kan. App. 2017) (unpublished opinion), where officers made contact with Dionne as he walked down the street, yet had no reasonable factual basis for doing so.

The cases relied upon by McDonald simply illustrate the reality that scenarios which arise under the umbrella of the Fourth Amendment are varied, fact sensitive, and span a considerable spectrum. While *McKenna* unquestionably presents a circumstance when the community caretaking function is triggered, it does not stand for the proposition that an officer is only permitted to investigate when the individual at issue is incapacitated. Again, the doctrine recognizes that law enforcement officers carry the additional responsibility of shielding the public from harm. That necessarily contemplates the latitude to intervene when objective and articulable facts highlight cause for concern. To adopt McDonald's interpretation of the concept would be to disallow law enforcement

officers from investigating a matter until after a harmful, or even lethal, act comes to fruition. Such an interpretation runs contrary to longstanding caselaw.

Since *Vistuba*, Kansas courts have often examined the justifications for public-safety stops that transform into criminal investigations and arrests. In *Nickelson v. Kansas Dept. of Revenue*, 33 Kan. App. 2d 359, 102 P.3d 490 (2004), a highway patrolman observed Nickelson pull into a driveway in a rural area, stop, and turn his lights off. The officer situated his vehicle in a way that blocked Nickelson's path of travel back onto the roadway, activated the spotlight on his patrol car, and approached the vehicle to find out whether he needed assistance. Nickelson rolled down his window and the patrolman smelled alcohol, which eventually led to Nickelson's arrest and conviction for driving under the influence.

On appeal, this court referenced several factors that supported the patrolman's concern for Nickelson's welfare. Notably, Nickelson pulled off the highway in the middle of a cold night into an area where no buildings were located and following Nickelson complied with the agency's policy to check the welfare of any occupants in a vehicle that pulled off the roadway. To that end, the court found the patrolman's reasons for approaching Nickelson's vehicle justified the public-safety stop. 33 Kan. App. 2d at 365.

Similarly, in *State v. Schuff*, 41 Kan. App. 2d 469, 202 P.3d 743 (2009), officers received a report at 1 a.m. that a car drove through a dead end and stopped at the edge of a field. An officer responded, parked roughly 20 yards from the car, and approached the vehicle to verify the well-being of its occupants. When the driver rolled down the window, the officer smelled marijuana which then led to Schuff's prosecution and conviction for possession of marijuana. On review, this court determined the circumstances justified the officer's welfare check of the vehicle's occupants. 41 Kan. App. 2d at 476.

A bit of additional research further buttresses the district court's conclusion that the encounter between McDonald and Deputy Regalado fell within the ambit of a lawful public-safety stop. First, this court has found that when a person is reported to allegedly be suicidal, a law enforcement officer's conservative effort to verify their safety does not skirt the Fourth Amendment. See *City of Salina v. Ragnoni*, 42 Kan. App. 2d 405, 411, 213 P.3d 441 (2009); *Tilson*, 2013 WL 2920147, at *2-3. Also, returning to *McKenna*, this court acknowledged that the particular characteristics of a given area may contribute to the validity of a safety stop. In that case, the circumstances which gave rise to a police officer's need to make contact with McKenna occurred in an area known for significant drug trafficking activity. 57 Kan. App. 2d at 735.

This case shares similarities with *Nickelson* and *Schuff* in that Deputy Regalado encountered an occupied vehicle under somewhat unusual circumstances. His apprehension was then heightened by the fact that he had firsthand knowledge that it was a location of choice as of late for those wishing to inflict self-harm. In that respect, Regalado's concern has, as its foundation, the same disquiet expressed in *Ragnoni*, *Tilson*, and even *McKenna*. All five prior cases, discussed here, joined now by McDonald's, provide objective, specific, and articulable foundations for their respective public-safety inquiries. The district court properly denied McDonald's motion to suppress.

Affirmed.

* * *

HURST, J., dissenting: This appeal stems from McDonald's motion to suppress evidence obtained during his encounter with the deputy at Milford State Park as explained in the majority opinion. In denying McDonald's motion to suppress, the district court appears to have found both that the deputy did not seize McDonald during the

encounter, and that the deputy's nonseizure was permitted by the public-safety exception to the Fourth Amendment's prohibition against unreasonable searches and seizures. However, a valid public-safety stop necessarily requires a finding that the deputy seized McDonald. To be clear, I find that the deputy did seize McDonald during the encounter at issue here, and further that the deputy lacked a specific, objective, and articulable reason to do so. Therefore, the deputy's seizure of McDonald was not a valid public-safety stop under the Fourth Amendment, and the district court erred in denying McDonald's motion to suppress.

1. *District Court's Determinations*

This court reviews the district court's denial of McDonald's motion to suppress using a bifurcated standard, first determining if substantial competent evidence supports the district court's factual findings and then conducting a de novo review of the district court's legal conclusions based upon those factual findings. *State v. Chapman*, 305 Kan. 365, 369-70, 381 P.3d 458 (2016). Here, the district court did not specifically enumerate the factual findings upon which it based its legal conclusions. Even assuming, however, that the district court agreed with all of the State's factual contentions made through the deputy's testimony, the district court's legal conclusions are not supported by those facts.

The district court made two seemingly contradictory legal conclusions, finding both that the deputy conducted a valid public-safety stop (which necessarily entails a seizure) but also that he never seized McDonald. The court found that the officer's "actions amounted to a public welfare stop" and reasoned that if the officer "had stopped when he could see the dome light on, and then ten minutes later the person—maybe not you, but some other person—blew their brains out, he—the sheriff's department would be sued for why he didn't take further action." McDonald's attorney sought clarification and asked, "Is the court finding that [McDonald] was detained?" The district court responded, "No . . . he was not detained."

2. *The Deputy Seized McDonald*

The Fourth Amendment to the United States Constitution preserves "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. On appeal, this court is asked only to address whether the district court properly invoked the public-safety exception to the Fourth Amendment's prohibition against unreasonable searches and seizures to deny McDonald's motion to suppress the evidence found during his encounter with the deputy. Thus, the parties seem to concede that the deputy seized McDonald during the encounter. Determining whether a law enforcement encounter constitutes a seizure of a person triggering Fourth Amendment protections depends on whether, "under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that he or she was free to refuse the requests or otherwise end the encounter." *State v. Thompson*, 284 Kan. 763, 775, 166 P.3d 1015 (2007); see *State v. Thomas*, 291 Kan. 676, 682, 246 P.3d 678 (2011); *State v. McGinnis*, 290 Kan. 547, 552, 233 P.3d 246 (2010); *State v. Pollman*, 286 Kan. 881, 887, 190 P.3d 234 (2008).

Here, the deputy testified that he intended to seize McDonald, and McDonald was not free to leave until after the deputy checked his welfare and identity. Under the circumstances, it was reasonable for McDonald to believe he was not free to leave when the deputy pulled perpendicularly behind McDonald's vehicle, activated his rear emergency lights, exited his vehicle, approached McDonald's passenger window, and asked McDonald to roll his window down. Because the parties apparently do not dispute that the deputy seized McDonald, there is no need to analyze this issue, but it is important to note that the district court's reliance on the public-safety exception to the Fourth Amendment's prohibition on unreasonable searches and seizures is only necessary if McDonald was, in fact, seized during the encounter.

3. *The Seizure Was Not a Lawful Public-Safety Stop*

Because a reasonable person in McDonald's position would not have felt free to leave, the deputy's encounter with McDonald was not voluntary, and the court's next step is to determine whether the deputy was permitted to seize McDonald for public-safety reasons. See *State v. Williams*, 297 Kan. 370, 376, 300 P.3d 1072 (2013) (voluntary police encounters do not trigger Fourth Amendment protections). Police officers are often placed in a position to assess and ensure public safety, and this court does not discourage those public-safety actions. To that end, police officers may seize individuals solely for public-safety reasons when the officer believes such a stop is necessary to protect the public based on the objective, specific, and articulable facts of the situation. *State v. Ellis*, 311 Kan. 925, 929-30, 469 P.3d 65 (2020); *State v. Vistuba*, 251 Kan. 821, 824, 840 P.2d 511 (1992); *State v. Gonzales*, 36 Kan. App. 2d 446, 456, 141 P.3d 501 (2006).

These public-safety stops must be "'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 214-15, 99 P.3d 1125 (2004) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 [1973]). Additionally, the scope of a public-safety stop may not exceed the safety-related justification for the stop. *Ellis*, 311 Kan. at 932-33. This court's "[c]ases recognizing the public safety or community caretaking exception have consistently acknowledged that such actions should be scrutinized carefully so the protections of the Fourth Amendment are not emasculated." *Gonzales*, 36 Kan. App. 2d at 455.

a. *The Deputy Lacked Specific, Objective, and Articulable Facts to Justify a Public-Safety Stop*

The majority asserts that the deputy's decision to seize McDonald for public-safety reasons was supported by the deputy's assertion that there had been recent incidents of

self-harm in the area. First, there is not substantial competent evidence establishing Milford State Park as an area known for self-harm, and the district court made no such factual finding. The deputy testified that Milford Lake was an area where there were "a lot of issues . . . that people go out there to either self-harm or to conduct other illegal activities." In the deputy's five years of working for the Geary County Sheriff's Department, he testified to his involvement with one incident of self-harm at Milford State Park which was "an incident of murder/suicide." That was the total evidence submitted regarding the propensity for activities of self-harm at Milford State Park. While the district court did not make a factual finding that Milford State Park was an area commonly known for self-harm, the court did explain that the stop "was for welfare" and that the deputy "had reason to do it," and "had to make sure that everything was all right." Given the court's legal conclusion, it is reasonable to believe that the court believed the deputy's testimony that the area was known for self-harm. However, the deputy's testimony concerning one incident of murder/suicide in five years was not substantial competent evidence supporting such a factual finding. This court is not required to accept the district court's erroneous or unsubstantiated factual findings. See, e.g., *State v. White*, 289 Kan. 279, 288-89, 211 P.3d 805 (2009) (finding the district court's factual findings not supported by substantial competent evidence).

However, even assuming that the deputy's testimony was enough to support a factual finding that Milford State Park was an area known for self-harm, the State failed to identify a single objective, specific, and articulable fact about McDonald that caused the deputy to become concerned about McDonald's safety. It is imperative that the narrow public-safety exception to Fourth Amendment protections not be mutated to the point where it "emasculate[s] the constitutional protection afforded" to individuals. *State v. Ludes*, 27 Kan. App. 2d 1030, 1035, 11 P.3d 72 (2000).

The deputy testified that he encountered McDonald at about 9 p.m. in an area he described as "secluded" and "near the entrance of Outlet Park at the gathering ponds near

Milford Lake" which was in a "parking area . . . next to some information posters for the gathering ponds and lakes." The district court did not make a factual finding regarding whether this public parking area near the entrance to the gathering ponds was "secluded." Other than the assumption of Milford State Park being an area prone to self-harm activities, the deputy cited no specific, objective, and articulable facts about McDonald's conduct—being parked in the public parking area near the entrance and information posters during the park's operating hours—that supported a finding that McDonald could be in some type of peril. To find a valid public-safety seizure here undermines the Fourth Amendment's promise of freedom from unreasonable seizures.

If the State is permitted to seize every individual parked in a public parking area of an open public park after dark where one "incident of murder/suicide" had occurred in the past five years, and one police officer described it as an area where there are "a lot of issues . . . that people go out there to either self-harm or to conduct other illegal activities," then the State can effectively carve out entire zones in a community where occupants are not afforded Fourth Amendment protections. Even assuming the deputy's statements constitute substantial competent evidence supporting a factual finding that Milford State Park is, in fact, an area known for self-harm, the district court erred in its legal conclusion that the deputy had objective, specific, and articulable facts supporting McDonald's seizure. There is no evidence that the time of day the deputy encountered McDonald, 9 p.m., related to the likelihood that McDonald may be engaged in self-harm. Nor was there evidence that the people who go to the park to "either self-harm or to conduct other illegal activities" occurred in the public parking lot where McDonald was parked. Moreover, McDonald was alone—which is unlike the only specific incident of self-harm, a murder/suicide, cited by the deputy as his reason for being concerned about McDonald's safety. Simply, nothing about McDonald's specific conduct—even assuming Milford State Park is an area known for self-harm—provides objective, specific, and articulable facts supporting the deputy's authority to properly seize McDonald for a public-safety reason. A proper public-safety stop requires more.

None of the cases relied upon by the majority support its decision to create an entire area of a community where the Fourth Amendment simply does not apply. In all five of the cases, the police officer(s) identified at least some specific, articulable facts—far beyond what the deputy offered here—to justify the public-safety seizure of the individual. See *State v. McKenna*, 57 Kan. App. 2d 731, 735, 459 P.3d 1274 (2020); *City of Salina v. Ragnoni*, 42 Kan. App. 2d 405, 406, 411, 213 P.3d 441 (2009); *State v. Schuff*, 41 Kan. App. 2d 469, 470, 476, 202 P.3d 743 (2009); *Nickelson v. Kansas Dept. of Revenue*, 33 Kan. App. 2d 359, 365, 102 P.3d 490 (2004); *State v. Tilson*, No. 108,253, 2013 WL 2920147, at *1-3 (Kan. App. 2013) (unpublished opinion).

In *Nickelson*, the seized individual had pulled his vehicle off the highway at 1 a.m. on a cold night in a remote area where "no farm buildings, outbuildings, businesses, or residences" were around. 33 Kan. App. 2d at 365. Moreover, the Kansas Highway Patrol had a policy of performing a welfare check on any vehicle pulled off the side of the road. Similarly, in *Schuff*, the seized individual had driven off the paved road and parked in a remote area next to a field around 1 a.m. Moreover, a concerned citizen had called the police to alert them to the possibly endangered occupants of the vehicle that had driven off the paved road in a remote area. 41 Kan. App. 2d at 470, 476. Unlike the specific, objective facts in *Nickelson* and *Schuff*, which made officers concerned that someone needed help or was in peril, McDonald was lawfully parked in the parking lot of a public park while it was still open and could be seen moving around inside his vehicle. In other words, none of the factors validating the public-safety stops in *Nickelson* or *Schuff*—such as the lateness of the hour (1 a.m.), the car being parked off the roadway (not in a parking lot), the remoteness of the area, the lack of public or private amenities nearby, or a report from a concerned citizen requesting an officer to investigate—were present in this case. The majority describes where McDonald parked as "secluded," but the testimony is clear that he was legally parked in a parking lot at a public park during operating hours—not in a field after driving off the road or the shoulder of a highway (which is not a legal parking spot). And although it was dark, it was only about 9 p.m. at the time of the

encounter and the park was still open. Nothing here, other than the park itself, which the officer personally associated with one incident of murder/suicide, demonstrated McDonald was in some type of peril.

Additionally, the deputy had no specific, articulable reason to believe McDonald was in danger of self-harm. In *Ragnoni*, the seized individual's ex-wife reported to the police that he was suicidal. 42 Kan. App. 2d at 406. Similarly, in *Tilson*, the seized individual had been reported to the police as suicidal by his friend and was found wandering near an intersection after crashing his car. 2013 WL 2920147, at *1-3. Here, on the other hand, no one reported to the deputy—or anyone else—that McDonald was suicidal. Nor was McDonald wandering about the streets after having wrecked his car. Again, the factors upon which this court upheld the public-safety stops in *Ragnoni* and *Tilson* are absent from this case. I do not concede that the State established that the Milford State Park itself is a place where people routinely engage in self-harm—but even assuming it had—that alone is not enough to seize all of its occupants without some fact specific to the occupant that leads an officer to believe they are in danger of self-harm.

Finally, in *McKenna*, the seized individual was found parked at 2 a.m. in a residential neighborhood purported to be a high drug-trafficking area with her window down, dome light on, slumped over, and unresponsive when an officer shined a spotlight on her. Here, McDonald was in the parking lot of a public park during operating hours, and the deputy did not observe McDonald to be unresponsive or slumped over indicating a possible need for medical care. In fact, as the majority notes, the deputy heard McDonald speaking on the phone and saw him moving before he reached McDonald's window and detected the odor of marijuana. Far from believing McDonald was unresponsive or in peril like the individual in *McKenna*, the deputy was aware that McDonald was awake and speaking on the phone. To permit McDonald's seizure here would be to authorize the seizure of anyone in a dangerous or high drug-trafficking area—even those not slumped over and unresponsive in their cars at 2 a.m.—because the

alleged dangerous nature of the public park (as an area where people engaged in self-harm) is the only fact McDonald's seizure shares in common with the seizure in *McKenna*.

b. *The Deputy's Stop Exceeded Any Purported Public-Safety Reasons*

Even assuming the deputy had an objective, specific, and articulable reason to believe McDonald was in danger of self-harm or other peril, the scope of a public-safety stop may not exceed the safety-related justification for the stop. *Ellis*, 311 Kan. at 932-33; see *Gonzales*, 36 Kan. App. 2d at 455. The deputy's hunch that McDonald may be in peril was extinguished when he heard McDonald speaking on the phone—which occurred well before the deputy detected the odor of marijuana. Accordingly, once the deputy became aware that McDonald was not in peril, his further detention and questioning of McDonald (during which he detected the odor of marijuana) was beyond the scope of the alleged safety-related justification for the stop. See *State v. Morales*, 52 Kan. App. 2d 179, 186, 363 P.3d 1133 (2015) (rejecting a public-safety justification for a seizure because the officer's alleged safety-related reason for conducting the stop had "evaporated"). The deputy's suspicion was insufficient "to override [McDonald's] right to be left alone," and, in any event, that elusive hunch had evaporated before the deputy detected the odor of marijuana. See *Ludes*, 27 Kan. App. 2d at 1035.

c. *The Deputy's Stop of McDonald Was Not Divorced from Detection or Investigation*

Public-safety stops cannot be used for investigation purposes. See, e.g., *Morales*, 52 Kan. App. 2d at 183 ("[P]ermitting the public safety rationale to serve as a pretext for an investigative detention runs the risk of emasculating our Fourth Amendment protection."); see also *State v. Marx*, 289 Kan. 657, 663, 215 P.3d 601 (2009). The deputy acknowledged at the suppression hearing that as he walked up to

McDonald's vehicle—before checking on McDonald's safety—he radioed in McDonald's license plate number. He further testified that if McDonald had declined to speak to him, the deputy would have "check[ed] who he was" by "running a license plate" to "make sure I didn't have a BOLO at that time." The deputy's public-safety stop was not totally divorced from investigation or detection when he ran McDonald's tags before checking on McDonald's welfare. See, e.g., *Morales*, 52 Kan. App. 2d at 186-87 (running a license plate immediately upon pulling behind someone was inconsistent with conducting a public-safety stop); see also *State v. Messner*, 55 Kan. App. 2d 630, 635-38, 419 P.3d 642 (2018) (obtaining the defendant's driver's license during a public-safety stop to check for warrants exceeded public-safety stop).

CONCLUSION

Even assuming that the deputy could or did establish that Milford State Park was an area known for self-harm, the State failed to present objective, specific, and articulable facts regarding McDonald's conduct at the park to support seizing him for public-safety reasons. I cannot join the majority's declaration that Milford State Park is a Fourth Amendment-free zone after dark. McDonald's motion to suppress should have been granted. There is no denying the benefits afforded by a police officer's properly performed community caretaking function, but it is imperative that the right to be free from unreasonable searches and seizures not be swallowed by those efforts. I respectfully dissent.