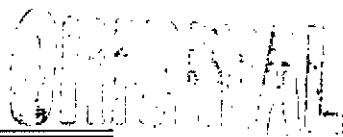
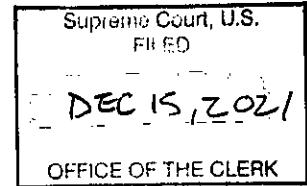


No. 21-1092



In The
Supreme Court of the United States



◆◆◆◆◆
AARON EVAN PERRY,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

◆◆◆◆◆
**On Petition For Writ Of Certiorari To The
Tennessee Court Of Criminal Appeals**

◆◆◆◆◆
PETITION FOR WRIT OF CERTIORARI

◆◆◆◆◆
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QUESTIONS PRESENTED FOR REVIEW

Whether, as private corporations and law enforcement agencies increasingly cooperate to investigate and prosecute retail crimes, the distinction between State and private actors has blurred and this Courts review is necessary to provide guidance to the lower courts review of Tennessee's agency law and to address important questions of public interest about the constitutional protections afforded to citizens who are subject to search or seizure by private loss prevention employees? (Does Tennessee's agency law give private loss prevention employees the right to infringe upon United States citizens Constitutional Rights?)

PARTIES TO PROCEEDING

All parties appear in the caption of the case on the cover.

RELATED CASES

State of Tennessee v. Aaron Evan Perry, Case No. 45785, 45786

State of Tennessee v. Aaron Evan Perry, Case No. 82CC1-2020-CR-73412

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UNITED STATES CONSTITUTION

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PETITION FOR WRIT OF CERTIORARI

Aaron Perry who was incarcerated October 10, 2017 – November 1, 2019 (see State v. Perry, No. E2019-02210-CCA-R3-CD, 2021 Tenn. Crim.) at Roger D. Wilson Detention Facility, 5001 Maloney Ville Rd, Knoxville, TN 37918, November 1, 2019 – May 6, 2020 Washington County Detention Center, 114 W Jackson Blvd, Jonesborough, TN 37659, May 6, 2020 – December 3, 2020 Sullivan County Detention Facility, 140 Blountville Bypass, Blountville, TN 37617, respectfully petitions this court for a writ of certiorari to review the judgment of the Supreme Court of Tennessee at Knoxville.

OPINIONS BELOW

The decision of the Supreme Court of Tennessee at Knoxville, to deny Aaron Evan Perry application to appeal pursuant to Rule 11 of Tennessee Rules of Appellate Procedure on September 22, 2021 (State of Tennessee v. Aaron Evan Perry, No. E2019-02210-SC-R11-CD) That order is attached, see App. 70.

JURISDICTION

Mr. Perry's application for permission to appeal was denied September 22, 2021. Mr. Perry invokes this court's jurisdiction 28 U.S.C. 1257, having timely filed this petition for a writ of certiorari within 90 days of the Tennessee Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED**United States Constitution Amendment IV**

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

United States Constitution Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Mr. Aaron Perry, was charged via indictment with twelve counts of identity theft, in violation of T.C.A. 39-14-150. T.R., Vol. 1, p. 1-6. Mr. Perry went to trial before the honorable Scott Green, Knox County Criminal Court, Division III, and a jury on October 28, 2019.

After the close of the State's proof at trial, the court granted Mr. Perry's motion for judgment of acquittal as to counts five through eleven of the indictment. R., Vol. 3, p. 294-95; T.R., Vol. 2, p. 170.

The Jury returned a not guilty verdict on count three of the indictment. T.R. Vol. 2, p. 173-74. It found Mr. Perry guilty of the lesser included offense of fraudulent use of a credit card, in violation of T.C.A. 39-14-118, on counts one, two, four, and twelve. T.R., Vol. 2, p. 169-78. Mr. Perry was sentenced to eleven months and twenty-nine days to serve on each count of conviction, with the sentences for counts two, four, and twelve served concurrently to count one.

Mr. Perry timely filed a motion for a new trial on November 26, 2019. T.R., Vol. 2, p. 179-82. The trial court granted the motion as to count twelve and entered a judgment of acquittal for that count. T.R., Vol. 2, p. 183-84, 189-90. The court denied the motion for the remaining counts. T.R., Vol. 2, p. 183-84.

On November 17, 2020, in the court of criminal appeals of Tennessee at Knoxville (due to technical difficulties, the oral arguments in this case were not recorded) the judgments of the trial court are reversed and the case remanded for the entry of amended judgments reflecting three convictions for attempted theft (a Class B-Misdemeanor) and six-month, concurrent sentences.

1. BELK INCIDENT

This case began when Mr. Perry attempted to purchase several gift cards at a Belk, Inc. (Belk) store Knoxville, Tennessee on October 10, 2017. Based on a hunch, the Belk loss prevention employee working that day prevented Mr. Perry from completing any transaction and took the ID and credit card, then Mr. Perry left the store, the employee called a retail theft task force officer on her cell phone to report his feeling that Mr. Perry might be committing credit card fraud. Mr. William Muenzer testified that at the time of alleged offenses he had worked as a loss prevention associate for Belk for approximately sixteen years. R., Vol. 3, p. 5. he said that his responsibilities were "to prevent any sort of loss to Belk" R., Vol. 3, p. 9.

Mr. Muenzer testified that on October 9, 2017, the day before alleged offense, he received an email from a Belk loss prevention manager in Johnson City, Tennessee, a subject either attempted to or did purchase several large Belk gift cards and is suspected of credit card fraud. R., Vol. 3, p. 6. Mr. Muenzer later that day (October 9) received a call from a sales associate at the Knox Center store stating that someone was suspected of committing credit card fraud, after review of video transaction he believed it to be the same individual. Based on this information, alone, Mr. Muenzer spoke to the Knox Center Belk Manager, who voided the transaction. R., Vol. 3, p. 7. Mr. Muenzer testified that by voiding the transaction, they were able to limit the amount of loss to Belk. R., Vol. 3, p. 7. The State asked "was there any reason you didn't call the Sheriff's

Department?” R., Vol. 3, p. 7-8 his response “I mean he – he was gone and I wouldn’t have done that anyway.” R., Vol. 3, p. 8. There was no testimony that Mr. Muenzer or anyone else verified in any way whether this transaction was legitimate or not.

On October 10, 2017, Mr. Muenzer was working at the Belk location at Turkey Creek, in West Knoxville, Tennessee. R., Vol. 3, p. 10. He said that he received a call from a sales associate who told him that someone was trying to purchase several large gift cards. R., Vol. 3, p. 10. He told the associate that they “might possibly have a case of credit card fraud” and instructed her, “to go over to that register and to handle that situation, but don’t complete any sort of purchase until I come over.” R., Vol. 3, p. 11; see also R., Vol. 3, p. 51.

After the sales associate stalled until Mr. Muenzer approached the register, he immediately took Mr. Perry’s drivers license and credit card from Ms. Lopez. R., Vol. 3., p. 53. He said that he took the items “to protect Belk.” I suspected credit card fraud and I did not know definitively if there was. I wanted to gather more information and verify the situation either way. After Mr. Muenzer took Mr. Perry’s items, Mr. Perry began to walk out of the store and Mr. Muenzer followed him to the parking lot, where Mr. Perry left without incident. R., Vol. 3, p. 62. Mr. Muenzer testified that he called Officer Varner while Mr. Perry was in the parking lot to describe Mr. Perry’s vehicle and direction Mr. Perry was headed. R., Vol. 3, p. 62. He said that he told Officer Varner: “that we had a situation that I did not know anything for sure, but we suspected it could be credit

card fraud and that the subject was exiting the building". R., Vol. 3, p. 20. Mr. Muenzer said that he used his cell phone to call Officer Varner's cell phone. R., Vol. 3, p. 46. Mr. Muenzer claimed that he "never had much contact" with the members of the retail theft task force and it was "possible" he worked with Officer Varner. R., Vol. 3, p. 45, 47.

2. TRAFFIC STOP

Following the Belk incident after Mr. Perry left the premises, he was tailed by a Knox County Sheriffs Officer "Officer Robert Hubbs" at the time of incident he worked on the retail task force next to the Belk. R., Vol. 3, p. 70-71. Officer Hubbs Testified that he was in the office with Officer Varner when she received a call from Mr. Muenzer that "they had a person who was trying to pass a stolen or forged credit card." R., Vol. 3, p. 75. Officer Hubbs said that Officer Varner left to go to Belk after receiving the call. R., Vol. 3, p. 75. He said that, after a few minutes, he realized that no one accompanied Officer Varner. She told him that Mr. Perry left the store, but that "he left his ID and driver's license all in the store." R., Vol. 3, p. 75. Officer Hubbs stated that he saw Mr. Perry exiting Belk "at a very fast pace, almost a jog." R., Vol. 3, p. 76. He said that Mr. Perry drove away "at a fairly fast rate" and then Officer Hubbs began following Mr. Perry in his cruiser, R., Vol. 3, p. 76. Officer Hubbs said that he did not pull Mr. Perry over because "we were wanting to see where he went . . . and we wanted to find out if indeed those were stolen and forged items that he had left." R., Vol. 3, p. 76.

Officer Hubbs acknowledged on cross-examination that he did not attempt to pull Mr. Perry over at this point because he "did not have legal grounds to detain him." R., Vol. 3, p. 96-97. Officer Hubbs Stated that he observed Mr. Perry run a red light at an intersection and pulled him over. R., Vol. 3, p. 76-77. Officer Hubbs stated that after Mr. Perry stopped his vehicle, Officer Hubbs "called it in on the radio" but he was worried Mr. Perry might have a gun or weapon, so he "waited a few minutes and called for another car." R., Vol. 3, p. 78.

Despite his claims that he was worried about a weapon, Officer Hubbs approached Mr. Perry's vehicle before any other officers arrived and Mr. Perry handed him his drivers license and rental agreement for the car. R., Vol. 3, p. 78-79, 84. The license Mr. Perry handed Officer Hubbs was a Michigan Drivers license with Mr. Perrys name on it. R., Vol. 4, p. 101. The rental agreement also had Mr. Perry's name on it. R., Vol. 3, p .89. Officer Hubbs acknowledged that these were the documents he would need from a driver during a traffic stop for a red light violation. R., Vol. 4, p. 101. Officer Hubbs testified on cross examination that, based on his usual practice and experience, citing someone for a red light violation would take "ten or 15 (minutes) maybe" from pulling that person over, ticketing them, and the individual leaving. R., Vol. 4, p. 114. Officer Hubbs said on direct examination that he then went back to his cruiser and began running an NCIC check on Mr. Perry. R., Vol. 3, p. 79. But then Officer Hubbs acknowledged on cross-examination that at the preliminary hearing in Mr. Perry's case, he testified that by the

time Mr. Muenzer came to the traffic stop (at least ten or fifteen minutes later if not longer), Officer Hubbs had not yet run an NCIC check on Mr. Perry's driver's license. R., Vol. 4, p. 103. Officer Hubbs also testified on cross-examination that, when he returned to his cruiser, he did not begin doing any paperwork to cite Mr. Perry for the red light violation. R., Vol. 4, p. 103. In fact, he testified that he didn't even have a ticket book. R., Vol. 4, p. 103. Officers Strzelecki and Varner arrived to the traffic stop. R., Vol. 3, p. 79. At the suppression hearing, the video recording from Officer Strezlecki's body camera was introduced into evidence. Exhibits, Vol. 2, Exhibit 5, R., Vol. 3, p. 81. The video begins with Officer Strzelecki approaching the window of Mr. Perry's car, trying to get him to exit the vehicle. See Exhibits, Vol. 2, Exhibit 5, at 00:30.

At timestamp 01:17 of the video, Officer Strzelecki opened Mr. Perry's car door, over Mr. Perry questioning why he needed to get out of the car for a red light violation after he already given the officers his license and registration. Exhibits, Vol. 2, Exhibit 5. At 01:35, Officer Strzelecki responded, "well you just left the Belk. Did you not-did you just leave the Belk?" Exhibits, Vol. 2, Exhibit 5. When Mr. Perry complained that Officer Hubbs did not have the right to reach into his car window to open his door. Through the body camera footage Officer Strzelecki can be heard asking about Belk incident after Mr. Perry ask for an attorney to be present. Exhibits, Vol. 2, Exhibit 5, at 2:08. Moments later into the body camera you can hear an exchange between Officer Strzelecki and Mr. Perry, "Sir I know my rights."

(Mr. Perry) "What are-how do you know your rights? You don't know your rights because you're not following a lawful order of a police officer. I'm asking you to step out of the car" (Officer Strzelecki). Approximately ten minutes and thirty seconds into the body camera video, Mr. Muenzer arrived at the scene and provided officers with the credit card and driver's license that Mr. Perry presented at Belk. R., Vol. 4, p. 111; Exhibit 5, at 10:30. After that, Mr. Perry was formally arrested and taken into custody. R., Vol. 3, p. 89-90. Following arrest, the vehicle was searched see Exhibits, Vol. 2, Exhibit 6 (inventory of items taken from car); Officer Hubbs testified that the car was impounded because "it belonged to the rental company. It was blocking a lane of travel in the parking lot . . . , the driver was arrested" and there was no one else there to take the car. R., Vol. 3, p. 90. He also said that Mr. Perry did not "ask him to make arrangements for somebody else to take the car." R., Vol. 3, p. 90. However, on Officer Strzelecki's body camera, Officer Hubbs can be heard telling another officer, "we can leave the car here for now, or we can tow it, whichever way you want to do it." Exhibits, Vol. 2., Exhibit 5, at 11:00.

3. DIRECT APPEAL

On appeal Mr. Perry holds the drivers license and credit card presented at Belk must be suppressed because William Muenzer was acting as an agent of law enforcement at the time that he warrantlessly seized those items to assist in retail task force investigation. Under the Fourth Amendment to the United States

Constitution and article I, & 7 of the Tennessee Constitution, individuals are protected against unreasonable searches and seizures by state actor. Although the Fourth Amendment only applies to state actors, “a search by a private individual may transgress the protections of the Fourth and Fourteenth Amendments when an individual acts as an agent or instrument of the state.” *State v. Burroughs*, 926 S.W.2d 243, 245 (Tenn. 1996) (*citing Coolidge*, 403 U.S. at 487 (1971)), the Tennessee Supreme Court addressed this kind of agency relationship for the first time and, adopting the test used by the United States Courts of Appeals for the Sixth and Ninth Circuits, held that “the critical factors in the agent or instrument analysis are (1) the government’s knowledge and acquiescence, and (2) the intent of the party performing the search.” Mr. Muenzer testified that he told Ms. Lopez to refrain from completing the transaction until he arrived to the counter on October 10, 2017 prior to the seizure of credit card and ID there was not any purchase, (1) this information was passed to Officer Varner before she arrived and Mr. Muenzer called visa, (2) when Mr. Muenzer took ID and credit card to traffic stop his intent was to only help with the retail fraud investigation there was no loss for him to protect at an alleged traffic stop, his job as a loss prevention employee was to prevent Belk losses. At the October 1, 2019 suppression hearing, Mr. Muenzer testified that on October 9, 2017, he was working at the Belk store in the Knoxville Center Mall when he received an email from Rick Santino, a Belk loss prevention manager in Johnson City, Tennessee. The email detailed an incident in which a person

purchased or attempted to purchase several gift cards; Mr. Santino suspected credit card fraud had occurred, but Mr. Muenzer did not recall whether Mr. Santino told him the customer's name nor possible stolen credit card. Later that day, a sales associate reported to Mr. Muenzer that a customer who had already left the building had purchased several large gift cards. Upon examining store footage not transaction Mr. Muenzer informed the store manager, and she voided the transaction, thereby voiding the gift cards and limiting Belk's loss. When asked why he did not call the police, Mr. Muenzer stated "He was gone and I wouldn't have done that anyway." Law enforcement officers illegally detained Mr. Perry at the traffic stop because they were not pursuing the red light violation for which they had probable cause, but were instead investigating the Belk incident without a lawful basis to do so. Officer Hubbs contradicting testimony of a traffic stop began once he tailed Mr. Perry while he was leaving the premises, Officer Hubbs stated "Mr. Perry drove through the parking lot at a fairly fast rate", then testified that he didn't have probable cause to further detain Mr. Perry was why he didn't immediately pull him over. Officer Hubbs stated that Mr. Muenzer showed up at the traffic stop ten if not fifteen minutes after Mr. Perry had gave him his license and rental agreement. When determining the reasonableness of the traffic stop, see *United States v. Blair*, 524 F.3d 740, 752 (6th Cir. 2008) (holding that two minute continued detention for purpose of bringing K9 unit to traffic stop – after traffic stop should have been completed – was unreasonable); see also *United States v. Peralez*, 526 F.3d

1115, 1119-20 (8th Cir. 2008) (holding that duration of traffic stop was unreasonably extended where officer admitted that, for thirteen minutes of the sixteen minute stop, he asked the defendant questions that were unrelated to the traffic violation) (cited as example of impermissible delay by *State v. Donaldson*, 380 S.W.3d 86, 94, n. 8 (Tenn. 2012); *United States v. Macias*, 658 F.3d 509, 518-22 (5th Cir. 2011) (holding that eleven minute delay in running computer checks of defendant's license and registration after traffic stop was unreasonable because delay caused by officer questioning defendant about matters unrelated to the scope of the stop). Officer Hubbs stated "He was worried Mr. Perry had a weapon so he informed two other units but did not wait for back up to approach vehicle and was given license and rental agreement by Mr. Perry. Officer Hubbs states Mr. Perry was frantic and nervous. Although when asked why he was nervous on Officer Strezlecki's body camera, Mr. Perry can be seen hands on the wheel with both driver and passenger door opened and when asked by Officer Strezlecki why he was nervous Mr. Perry response "because you guys are opening my car doors for a red light violation". The State looks to argue further detention. Without article facts and proof of a criminal act at Belk they don't have probable cause for further detention, especially without implementing Mr. Muenzer as an instrument of law enforcement. There was no criminal act for law enforcement to gather information if Mr. Muenzer was preventing a loss to Belk he would not need to help further their investigation, once suspect left Belk premises without anything stolen or damaged. Mr.

Muenzer compromises his loss prevention job by assisting the retail task force with information that was gathered off mere suspicion a hunch. Officers lacked any basis other than the red light violation to stop and detain Mr. Perry. Officer Hubbs knew that Officer Varner had responded to a call from Mr. Muenzer that “they had a person who was trying to pass a stolen or forged credit card.” R., Vol. 3, p. 75. However, the specifics of what Mr. Muenzer told Officer Varner were “that we had a situation that I did not know anything for sure, but we suspected it could be credit card fraud and that the subject – I had the ID and the credit card and that subject was exiting the building.” R., Vol. 3, p. 20. Although Mr. Muenzer suspected something was afoot, he didn’t provide officers with any specific articulable facts that a crime had occurred or was occurring. (example October 9, 2017 they suspected fraud without customer name, alleged stolen credit card information, these things are obtainable for a loss prevention employee in order to provide officers with articulable facts that a crime had occurred or is occurring.) The warrantless search of Mr. Perry’s vehicle was not justified as a search incident to arrest or as an inventory search. The State did not have probable cause that Mr. Perry’s vehicle would contain evidence relating to his arrest. In *Arizona v. Gant*, 556 U.S. 332 (2009), the United States Supreme Court held that “police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” There is no question that, at the time

officers searched Mr. Perry's vehicle, he was in handcuffs in the back of police transport. See R., Vol. 3, p. 89-90. The officers did not, pursuant to Gant, have probable cause to believe evidence of the red light violation or any alleged offense related to the driver's license and credit card presented at Belk would be in the vehicle. The lower courts argue that Mr. Perry resembled alleged suspects in an on-going scheme of fraud in the previous Belk locations mentioned on October 9, 2017. Not once were any article facts and or proof of Mr. Perry being connected to offenses at other Belks presented at trial. Mr. Muenzer did not retrieve alleged stolen credit card or identification that were allegedly used in these other locations nor did he have information of any resent fraudulent transaction on the matter. The only information that there was a discrepancy between whether the individual in their possession was Will Andrews or Aaron Perry and whether something illegal just happened at Belk. Without credit card information and ID, that was seized at Belk by Mr. Muenzer Officer Hubbs has no probable cause for further detention during traffic stop in doing so Mr. Muenzer satisfy the two critical factors needed to establish being an instrument of law enforcement. See *State v. Burroughs*, 926 S.W.2d 243 (Tenn. 1996). (1) Officer Varner was aware that no purchase was commenced and was aware Mr. Muenzer called visa after seizing ID and credit card, with that information retail task force pursued further detainment through alleged red light violation . . . (2) Mr. Muenzer presented ID and credit card to retail theft task force to assist with investigation. There were no assets of Belks to

protect at the traffic stop he acted as an instrument to law enforcement and provided them with illegally obtained evidence.

REASONS FOR GRANTING WRIT

To avoid the continuous deprivation of the Fourth and Fourteenth amendment rights of Mr. Perry. The state has refused to re-examine Tennessee's agency law under the Fourth and Fourteenth Amendments and Article I & 7 since *State v. Burroughs*, 926 S.W.2d 243 (Tenn. 1996).

The lower courts refuse to acknowledge the clear erroneous utilization of loss prevention employee William Muenzer denying he acted as an instrument to law enforcement, outside of his duties listed in the loss prevention manual submitted into evidence at trial there was no reason for devaluing or denying a purchase. His prior to not having article, facts or proof of credit card fraud on October 9, 2017 at other Belk locations outside of a blurred description and similar attire. Mr. Muenzer didn't have knowledge of any fraudulent purchases prior to October 10, 2017 only suspicion. From that point he seized Mr. Perry's ID and credit card and called Officer Varner to inform her of incident her knowledge that Mr. Muenzer obtained from visa was enough information to have Officer Hubbs detain Mr. Perry for an alleged traffic violation and have him sit until they completed an investigation. On October 10, 2017 Mr. Muenzer prevented asset loss

by denying purchase. His investigation through visa was information he gathered to assist retail fraud task force in their investigation on Mr. Perry. Mr. Muenzer proved to be an instrument of law enforcement when he did not call his store manager but called Officer Vanner on her cell phone. As well as bringing ID and credit card to alleged traffic stop, there was no loss for Mr. Muenzer to protect Belk from during a traffic stop. For these reasons, my case should be granted review.

CONCLUSION

For the foregoing reasons, Mr. Perry respectfully requests that this court issue a writ of certiorari to review the judgment of the Tennessee Court of Appeals at Knoxville.

Originally filed December 15, 2021
Re-filed February 2022

Respectfully submitted,

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