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**Appendix in Support of**

**Application for Extension of Time**

**To File Petition for Writ of Certiorari**

# *Massey v. State*

Court of Criminal Appeals of Texas

April 26, 2023, Delivered

No. PD-0170-22

**Reporter**
667 S.W.3d 784 *; 2023 Tex. Crim. App. LEXIS 278 **

JAMES CALVIN MASSEY, Appellant v. THE STATE OF TEXAS

**Notice:** PUBLISH

**Prior History:** **[**1]** On State's Petition for Discretionary Review From the Second Court of Appeals, Tarrant County.

*Massey v. State, 649 S.W.3d 500, 2022 Tex. App. LEXIS 1521, 2022 WL 623491 (Tex. App. Fort Worth, Mar. 3, 2022)*

**Judges:** YEARY, J., announced the judgment of the Court and filed an opinion in which KELLER, P.J., and KEEL and SLAUGHTER, JJ., joined. NEWELL, J., filed a concurring opinion in which HERVEY, RICHARDSON, and SLAUGHTER, JJ., joined. WALKER and MCCLURE, JJ., dissented.

**Opinion by:** YEARY

## Opinion

**[*785]** After legally detaining Appellant for lack of a proper registration sticker on his truck, an officer conducted an investigative pat-down search of Appellant's person. When Appellant forcefully resisted that search, the officer tased and handcuffed him. The officer subsequently discovered methamphetamine on the ground near where Appellant had been standing.

In the trial court, Appellant filed a motion to suppress the methamphetamine. In response to that motion, the trial court decided that the officer's investigative pat-down search (also known as a *Terry* search) **[*786]** was illegal.[1] But the trial court nevertheless concluded that the taint of the illegal *Terry* search was attenuated by Appellant's commission of the dual offenses of resisting search and evading detention.[2] As a result, the trial court denied his motion.

The Second Court **[**2]** of Appeals reversed Appellant's conviction. It explained that Appellant's commission of resisting search and evading detention in response to the officer's unlawful pat-down did *not* constitute "a severe departure from the common, if regrettable, range of responses" that should be expected. It therefore concluded that these offenses did not "constitute intervening circumstances" for purposes of an attenuation-of-taint analysis, under *Utah v. Strieff, 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016)*. *Massey v. State, 649 S.W.3d 500, 518 (Tex. App.—Fort Worth 2022)*. We granted the State's petition for discretionary review to examine the court of appeals' decision.[3]

### I. Background

Appellant pled guilty to possession of methamphetamine in an amount more than one gram but less than four grams.

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[1] Whether the investigative pat-down search was valid under the criteria announced by the United States Supreme Court in *Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*, is not before us. For purposes of resolving the State's petition for discretionary review, we assume without deciding that it was not valid.

[2] *See* *Tex. Penal Code § 38.03(a)* ("A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer . . . from effecting . . . [a] search . . . of the actor . . . by using force against the peace officer[.]"); *id.* *§ 38.03(b)* ("It is no defense to prosecution under this section that the . . . search was unlawful."); *id.* *§ 38.04(a)* ("A person commits an offense if he intentionally flees from a person he knows is a peace officer . . . attempting lawfully to . . . detain him.").

[3] The Court granted the State's first ground for review, which asked: "When a defendant commits a new offense immediately following an illegal search or seizure, does the new offense cease to be an intervening circumstance attenuating taint unless it is violent and/or unforeseen?" We also granted the State's third ground for review: "Is an officer in a public place not in a 'lawful place' under the plain view analysis merely because a *Fourth Amendment* violation occurred?" But our resolution of the State's first ground renders discussion of the State's third ground moot.

Pursuant to a plea agreement, he was sentenced to five years' confinement in the penitentiary. *TEX. HEALTH & SAFETY CODE § 481.116(c)*.[4] Appellant preserved his right to appeal the trial court's ruling on his pretrial motion to suppress the methamphetamine, which he contended was obtained illegally because the arresting officer, among other things, conducted an illegal pat-down search.

At a hearing on Appellant's motion to suppress, Sergeant Richard Lukowsky was called to testify. Lukowsky worked with **[*787]** the Azle Police Department, just outside of Fort Worth. In addition **[**3]** to his testimony, his body-cam footage was admitted showing his interactions with Appellant on the day of the arrest.

The evidence showed that Lukowsky was patrolling at 11 a.m., on February 16, 2020, when he spotted a pickup truck without a proper registration sticker. Lukowsky followed the truck into a gas station/convenience store parking lot. By the time Lukowsky caught up with Appellant, Appellant was already out of his truck, near the entry to the store.

Lukowsky asked Appellant "to step over to where [Lukowsky] was." Appellant complied and walked over. Appellant then asked what was going on, and Lukowsky told Appellant that "his registration was out" on his truck.[5] With Appellant's permission, Lukowsky retrieved Appellant's wallet from the truck and handed it to Appellant, who in turn handed his driver's license back to Lukowsky.

According to Lukowsky, in the course of that exchange, he noticed that Appellant's hands were shaking more than what he considered normal for such an encounter, and Appellant otherwise appeared very nervous. Knowing that this was a "high drug area," that narcotics arrests had been made at this location on "several" occasions, and that he was by himself, **[**4]** Lukowsky instructed Appellant "to turn around so [he] could pat [Appellant] down just for [Lukowsky's] safety."

At first, Appellant seemed ready to comply, turning around and raising his arms slightly at the elbow. But when Lukowsky began to pat on the outside of the right-hand pocket of Appellant's cargo shorts, Appellant reached down toward his left-hand pocket. Lukowsky grabbed Appellant's hand and ordered him not to go into his pocket. But Appellant persisted in moving toward the pocket, "ripped" away from Lukowsky's hand,[6] and turned around to face Lukowsky, while slowly backing away from him.

At this point, Lukowsky called for backup and drew his weapon, intending to handcuff Appellant. Appellant told Lukowsky "something along the lines" of "I'm not going to go with you," and "you're just going to have to shoot me." Eventually Appellant approached and began to move around an air pump machine, which he grasped in such a way that Lukowsky could not see his left hand.

At that point, an off-duty Fort Worth police officer arrived and tried to assist Lukowsky in taking Appellant into custody. Lukowsky ordered Appellant to comply several times, and after he then warned Appellant and the **[**5]** off-duty officer that he was about to tase Appellant, Lukowsky carried through on his warning and tased Appellant, who then fell to the ground. With the continuing help of the **[*788]** off-duty Fort Worth officer, Lukowsky handcuffed Appellant.

Lukowsky then discovered a bag of methamphetamine on the ground next to the air pump machine. As Lukowsky's body-cam footage confirms, the bag had not been there only moments before. Lukowsky believed that Appellant had retrieved it from his left-hand pocket unseen and then dropped it as a result of being tased.

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[4] At the same time, Appellant was adjudicated guilty on a prior indictment for a prior commission of the same offense, for which he had previously been placed on deferred adjudication. For that prior offense, Appellant was given another five-year sentence, and the two sentences were ordered to run concurrently. The court of appeals held that the trial court's decision to proceed to adjudicate this prior conviction for possession of methamphetamine was supported by additional evidence, other than Appellant's commission of the later offense. The State showed that Appellant failed to report to his probation officer for three consecutive months. So, the court of appeals' holding about whether evidence obtained after the illegal pat-down must be suppressed applies only with respect to the more recent conviction. *Massey, 649 S.W.3d at 512*. We refused Appellant's petition for discretionary review, in which he challenged the court of appeals' resolution of his appeal of the prior conviction.

[5] At first, Lukowsky testified that Appellant's truck did not have a registration sticker. But, as explained earlier, at another point in his testimony, he claimed that he informed Appellant that "his registration was out" on his truck. Whether the registration sticker was entirely missing or merely expired makes no difference to the issues we address in this opinion. Suffice it to say that, for the sake of this opinion, we operate on the presumption that Appellant's initial detention was legal based on the status of his truck's registration.

[6] Lukowsky used the descriptor "ripped" in his testimony. From the body-cam video, the trial court gleaned that Appellant "resisted the search by tensing his left arm, pulling away from Sgt. Lukowsky, and physically grabbing Sgt. Lukowsky's left arm." Trial Court's Findings of Fact and Conclusions of Law at 4. Our review of the body-cam footage bears this description out.

In its written findings of fact and conclusions of law, the trial court found that the initial detention of Appellant was justified—because of the absence of a valid registration sticker on Appellant's truck. In spite of that, the court found that Lukowsky's initial *Terry* pat-down search of Appellant was illegal because he lacked reasonable suspicion to justify it. But the trial court also found that Appellant's conduct in response to Lukowsky's illegal *Terry* pat-down search constituted the offenses of: (1) resisting search, and (2) evading detention. And as a result, the trial court concluded, the "taint" from the primary misconduct was effectively "purged" **[**6]** by Appellant's commission of the new offenses.

The court of appeals rejected the trial court's conclusions. *Massey, 649 S.W.3d at 516-18*. Citing court opinions from other jurisdictions, the court of appeals essentially held that "milder cases of resisting arrest [do] not constitute intervening circumstances" for purposes of an attenuation of taint analysis. *Id. at 518*. The court explained that "[o]ther courts have held that simply running away from the detaining officers or attempting to dispose of evidence will not necessarily dissipate the taint." *Id.* To hold otherwise, the court observed, would simply encourage the police to engage in improprieties in the hope that a suspect's adverse reaction (so long as it was not too extreme) would generate incriminating evidence. *Id.* Having found no intervening circumstance, the court of appeals then emphasized the temporal proximity of the discovery of the evidence of the primary misconduct over the purposefulness and flagrancy of the police misconduct and concluded that the taint was not attenuated. *Id.* (citing *State v. Jackson, 464 S.W.3d 724, 732 (Tex. Crim. App. 2015)*).

## II. Analysis

### A. Attenuation of Taint

The federal exclusionary rule requires the suppression of evidence obtained either directly or derivatively ("fruit of the poisonous **[**7]** tree") from police conduct that violates the *Fourth Amendment*. *Strieff, 579 U.S. at 237*. But whether the discovery of evidence was the "fruit" of *Fourth Amendment* misconduct is not a strictly "but/for" inquiry. *Jackson, 464 S.W.3d at 731*. Suppression of evidence is a "last resort," not a "first impulse." *State v. Mazuca, 375 S.W.3d 294, 300 (Tex. Crim. App. 2012)* (quoting *Hudson v. Michigan, 547 U.S. 586, 591, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)*). Accordingly, the United States Supreme Court has identified exceptions to the exclusionary rule, one of which is the attenuation-of-taint doctrine. *Strieff, 579 U.S. at 238*.

Under the attenuation-of-taint doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the discovery of evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Id.* (quoting *Hudson, 547 U.S. at 593*). To determine whether this connection is sufficiently **[*789]** "remote or has been interrupted," the United States Supreme Court has required courts to consider three factors known as the *Brown* factors: (1) the temporal proximity between the misconduct and discovery of the evidence; (2) the presence of any intervening circumstances; and (3), the purpose and flagrancy of the police misconduct. *Id. at 239* (quoting *Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)*). Also, this Court said, in **[**8]** *Mazuca*, that either the first factor ("temporal proximity") or the third factor ("purpose and flagrancy") will take on greater significance in any given case, depending upon whether the second factor (any "intervening circumstances") is present. *Jackson, 464 S.W.3d at 732* (quoting *Mazuca, 375 S.W.3d at 306-07*). So, when there *is* an intervening circumstance as contemplated by *Brown*, the *Brown* inquiry emphasizes the third factor—the purpose and flagrancy of the police misconduct. *Id., at 733* ("[G]iven such an intervening circumstance, *Mazuca* dictates that a reviewing court should emphasize the third *Brown* factor, which asks whether the police purposefully and flagrantly disregarded Appellee's *Fourth Amendment* rights.").

### B. A "New Offense" as an Intervening Circumstance

Many courts, including this Court, have recognized that "new offenses" committed by a person who is the focus of alleged police misconduct are necessarily intervening circumstances as contemplated by *Brown*. In addition, many of those courts seem to have concluded that the commission of a new offense, when considered as an intervening circumstance, will almost invariably outweigh both of the other two *Brown* factors and establish a *per se* attenuation of taint, at least with respect to evidence of the new offense itself. **[**9]** Thus, if a defendant commits a new offense in response to police misconduct, the police misconduct will almost never result in suppression of evidence of the *new* offense that was committed in reaction or in response to it.

In *State v. Iduarte, 268 S.W.3d 544 (Tex. Crim. App. 2008)*, for example, a suspect pulled a gun on a police officer who had entered his apartment without a warrant during a domestic-dispute call. The trial court found that "the officer's

actions overstepped the limits of his authority." Although the new offense would likely not have occurred "but for" the alleged police misconduct, this Court decided that acquisition of evidence pertaining to this new aggravated assault "was not causally connected to the officer's allegedly illegal entry." *Id. at 551*. The Court explained:

> [The exclusionary rule] does not . . . provide limitless protection to one who chooses to react illegally to an unlawful act by a state agent. If that were allowed, the genuine protection that the exclusionary rule provides would be undermined. Here, evidence of the charged offense did not exist before the officer's challenged actions because the charged offense had not yet occurred; the evidence showed a subsequent independent criminal act that was not causally **[**10]** connected to an unlawful entry by a state agent. Therefore, the exclusionary rule does not apply to this case.

*Id.* The Court essentially treated the suspect's illegal response to the police officer's alleged misconduct as an intervening circumstance that was sufficient, by itself, to break the causal connection—even without reference to the other two *Brown* factors.[7]

**[*790]** Other courts, both before and since this Court decided *Iduarte*, have ruled similarly, that evidence of the commission of an offense in response to unconstitutional police conduct will not be suppressed under the exclusionary rule.[8] Like this Court in *Iduarte*, these courts seem to have reached that conclusion without explicitly considering any *Brown* factors other than the second one—"presence-of-intervening-circumstances."[9] They almost seem to treat that intervening circumstance offense as all-by-itself *determinative* of whether the exclusionary rule applies.[10]

### C. A "New Offense" as an Intervening Circumstance Exposing a "Different Offense"

Of course, the question in this case is not whether to suppress evidence of Appellant's *new* offenses of **[**11]** resisting arrest and evading detention.[11] Insofar as we **[*791]** know, Appellant has not even been formally charged with either of

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[7] *See* George E. Dix & John M. Schmolesky, 40 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 7:59, at 383 (3d ed. 2011) (explaining that, "[i]f a defendant is charged with criminal activity committed in the wake of unlawful law enforcement behavior, several courts have held that the defendant's criminal conduct itself constitutes a significant intervening circumstance in determining whether the taint of the officers' illegal conduct tainted the evidence of the defendant's criminal act. That criminal conduct may even be itself sufficient to automatically attenuate the taint."); *see also id.*, at 386 (suggesting, near the end of Section 7:59, that this understanding was adopted by this Court in *Iduarte*).

[8] *E.g.*, *People v. Villarreal, 152 Ill.2d 368, 380, 604 N.E.2d 923, 929, 178 Ill. Dec. 400 (1992)*; *State v. Mierz, 127 Wash.2d 460, 471-75, 901 P.2d 286, 291-94 (1995)*; *United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982)*; *State v. Brocuglio, 264 Conn. 778, 790, 826 A.2d 145, 153 (2003)*; *United States v. Schmidt, 403 F.3d 1009, 1016 (8th Cir. 2005)*; *State v. Herrerra, 211 N.J. 308, 336, 48 A.3d 1009, 1026 (2012)*; *State v. Suppah, 358 Ore. 565, 577, 369 P.3d 1108, 1115 (2016)*; *People v. Tomaske, 2019 CO 35, 440 P.3d 444, 449 (Colo. 2019)*.

[9] *See, e.g.*, *United States v. Bailey, 691 F.2d at 1017* ("Unlike the situation where in response to unlawful police action the defendant merely reveals a crime that already has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct."); *State v. Mierz, 127 Wash.2d at 475, 901 P.2d at 293* ("Encouraging citizens to test their beliefs through force simply returns us to a system of trial by combat. The proper location for dealing with such issues in a civilized society is in a court of law."); *see also, e.g.*, ***Martinez v. State, 91 S.W.3d 331, 340 (Tex. Crim. App. 2002)*** ("Appellee's argument [that failure to give statutorily required warnings prior to his grand jury testimony should result in exclusion of evidence that he perjured himself], carried to its extreme logical conclusion, would provide legal protection to the murderer of a police officer, who proves that the officer detained him without articulable suspicion prior to the murder.").

[10] *But see* *State v. Tapia, 2018- NMSC 017, 414 P.3d 332, 340-41 (N.M. 2018)* (applying a full-blown *Brown* attenuation-of-taint analysis to conclude that the new offense of signing a false name on a traffic citation did not necessitate excluding evidence of that forgery on the ground that the initial traffic stop had been unlawful).

[11] There are a total of four offenses to be considered in this case: 1) the initial offense of driving without a valid registration sticker; the subsequent offenses of 2) resisting search and 3) evading detention; and 4) the ultimately discovered offense of possession of methamphetamine. Under *Iduarte*, exclusion of evidence of the offenses of 2) resisting search and 3) evading detention would not be required even if there was police misconduct preceding those offenses, under the "new offenses" rationale. But that does not necessarily resolve the question of whether evidence of 4) methamphetamine possession—an offense that was already underway even before the traffic stop occurred, but which did not come to light until after Appellant had committed offenses 2) and 3)—may also be admitted absent consideration of the full panoply of *Brown* factors.

those offenses. Instead, the question is whether Appellant's commission of those new offenses constitutes an intervening circumstance under *Brown*, so as to attenuate the taint of police misconduct with regard to evidence of still *another*, different offense—possession of a controlled substance—discovered subsequent to the alleged police misconduct.

In similar circumstances, some courts have seemed to consider the new offense—committed in response to the original alleged police misconduct—as independently determinative in favor of attenuation. Those courts appear to conclude that the new offense brakes the causal connection, not only between the alleged police misconduct and the new offense committed in response to it, but also between the misconduct and the subsequent discovery of evidence of even *another*, different offense.[12] But we ultimately conclude that, at least until the United States Supreme Court says otherwise, the admissibility of this category of evidence—of a still different offense—should be considered with continued reference to all three of the *Brown* ***[**12]*** factors. This approach, we think, is to be preferred, since it considers the temporal proximity of the discovery of the evidence to the original misconduct, the intervening circumstance of the new offense, and also the purpose and flagrancy of the primary misconduct leading to the discovery of the "different offense" evidence.

**D. Addressing The Court of Appeals' View**

In refusing to regard Appellant's offenses here as an intervening circumstance at all, the court of appeals observed:

> [I]f the crime is petty and relatively predictable as a product of an unlawful detention or search, the evidence revealed is better viewed as an extended derivation of the illegal police action. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such *Fourth Amendment* violations in future cases. LaFave, *Crimes committed in response to illegal arrest or search as* ***[*792]*** *a fruit*, 6 Search & Seizure § 11.4(j) (6th ed.).

*Massey, 649 S.W.3d at 517-18*. But we find it anomalous to, on the one hand, treat a new offense—however petty or predictable—as a nearly invariably determinative intervening circumstance **[**13]** in weighing the admissibility of evidence of the new offense itself, but then, on the other hand, to refuse to treat the new offense as an intervening circumstance *at all* with regard to evidence showing the commission of another, different offense, unless the new offense is serious or unpredictable.

The way we see it, when evidence pertaining to a different offense is discovered subsequent to some police misconduct, but after the commission of a new offense by the accused, the new offense is still an intervening circumstance—regardless of its seriousness or predictability. The reasons that would justify an almost invariable rule for cases involving only evidence of the new offense itself—committed in response to police misconduct—do not apply, at least not as firmly, when the evidence discovered relates to a different offense. Therefore, we conclude that a faithful deference to the United States Supreme Court's decision in *Brown* requires this Court, under these circumstances, to conduct an attenuation-of-taint analysis, giving full consideration to all three of the *Brown* factors, but with particular emphasis placed on the third factor, which asks how purposeful or flagrant the police **[**14]** misconduct may have been. *See Mazuca, 375 S.W.3d at 306-07* ("Under this scenario [where there is an intervening circumstance], the intervening circumstance is a necessary, but never, by itself, wholly determinative factor in the attenuation calculation, and the purposefulness and/or flagrancy of the police misconduct . . . becomes of vital

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[12] *See United States v. Bailey, 691 F.2d at 1017-18* (treating, in a drug possession case, the appellant's arrest for unlawfully fleeing detention as an intervening circumstance that justified a search incident to that arrest, and finding that the offense purged any taint from the initial illegal detention itself, without reference to any other *Brown* factor); *United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997)* (rejecting, in an illegal possession of a firearm case, the appellant's argument that the initial unlawful stop should result in suppression of the gun he subsequently drew on the officers because it "overlook[ed] whether his own illegal acts after the initial stop [would] trigger an exception to the exclusionary rule of the 'fruit of the poisonous tree' doctrine," and concluding that such an exception would apply, while making no reference to the particular *Brown* factors); *United States v. Sledge, 460 F.3d 963, 966 (8th Cir. 2006)* (deciding that evidence of cocaine possession is not subject to suppression when the defendant illegally fled from an arguably illegal detention, without any reference to the *Brown* factors); *Kavanaugh v. Commonwealth, 427 S.W.3d 178, 181 (Ky. 2014)* (deciding that evidence of cocaine possession following an alleged illegal *Terry* stop was not subject to suppression when the appellant assaulted the officer before the cocaine was discovered, and concluding that the intervening assault attenuated the taint of the illegal *Terry* stop without reference to other *Brown* factors); *Wilson v. United States, 102 A.3d 751, 753-54 (D.C.C.A. 2014)* (deciding, in a possession of cocaine prosecution, that the cocaine was not subject to suppression after the appellant resisted what he claimed to be an unlawful arrest since his resistance constituted an intervening offense which, by itself, purged the taint of any misconduct).

importance.").

This approach more effectively serves the core exclusionary rule interest. It will deter police from deliberately engaging in misconduct in the manifest hope of *provoking* some illegal response, only to exploit that response by conducting an otherwise unwarranted search or seizure *for the purpose of* uncovering evidence of still different offenses unrelated to the suspect's illegal response. And it also fits in well with the analyses that this Court undertook in *Jackson* and *Mazuca*.

In *Jackson*, police had installed an illegal global positioning system (GPS) tracking device on the defendant's car. *464 S.W.3d at 727*. Prior to discovering drugs in the trunk of that car, however, the police had determined by radar that Jackson was speeding,[13] and they pulled him over for that (non-full-custodial-arrestable) offense. *Id.* The Court held that the independent radar verification of the speeding offense constituted **[**15]** an intervening circumstance leading up to the discovery of the evidence and then proceeded (consistently with *Mazuca*) to inquire into the purpose and flagrancy of the unlawful GPS device. *Id. at 732-33*. The Court did not stop to consider the relative seriousness of the intervening offense.

Also, in *Mazuca* itself, the Court determined that the discovery of outstanding arrest warrants for the defendant following an illegal traffic detention constituted an intervening circumstance. *375 S.W.3d at 308*. The Court made that determination without ever asking how serious the offenses underlying the outstanding arrest warrants might have been. Instead, the **[*793]** Court's primary focus became, in light of the presence of the intervening circumstance, how purposeful and flagrant the illegal traffic stop—the primary misconduct—had been. *Id. at 308-10*.

None of the cases from other jurisdictions—that the court of appeals cited as persuasive authority—compellingly support its preferred approach. *Massey, 649 S.W.3d at 517-18*. Although they discuss the "seriousness" of the "new offense" as a consideration in the intervening circumstance factor, none clearly *hold* that a "new offense" will *only* be regarded as an intervening circumstance if it is sufficiently serious. Almost all of them appear **[**16]** to conduct a full-blown *Brown* analysis, referencing all three factors. None clearly support the proposition that, if the "new offense" is not serious, or is a predictable response to the primary misconduct, then it becomes unnecessary to consider and weigh the third *Brown* factor—the purposefulness and flagrancy of the police misconduct.[14] And to the extent, if any, that they might arguably support such a proposition, they are inconsistent with *Mazuca* and *Jackson*.

In short, we agree with the State that the court of appeals erred to conclude that, because Appellant's new offenses were both "petty" and "relatively predictable" as a reaction to Lukowsky's misconduct, they simply do not count as intervening circumstances in the *Brown* attenuation-of-taint analysis. *Massey, 649 S.W.3d at 517-18*. The court of appeals should have acknowledged that *any* "new offense" may constitute an intervening circumstance, even when it leads to evidence of some offense *other than*, and different from, the "new offense" itself. And as a result, the court of appeals should have focused its attention less on the first "temporal proximity" *Brown* factor and more on the third "purpose-and-flagrancy" *Brown* factor. *See Jackson, 464 S.W.3d at 732* (quoting *Mazuca, 375 S.W.3d at 306-07*). It is to that proper **[**17]** analysis that we now turn.

### E. Application of Law to the Facts of this Case

It is certainly true, as the court of appeals concluded, that the temporal proximity *Brown* factor in this case "strongly favors suppression[.]" *Massey, 649 S.W.3d at 518*. Lukowsky discovered the contraband on the ground, where Appellant had apparently dropped it within about two and a half minutes (according to the body-cam video) from when the frisk began. When there is an intervening circumstance, the purposefulness and flagrancy of the police misconduct becomes vitally important. *Jackson, 464 S.W.3d at 732*. Here, Appellant's resistance to the *Terry* search was a new offense that constituted an intervening circumstance, shifting the proper emphasis onto the third *Brown* factor—the purposefulness and flagrancy of the misconduct. *Id.*

When Appellant pulled away from Lukowsky and grabbed his left arm to avoid the *Terry* search, he at least committed a resisting search offense under *Section 38.03(a) of the Texas Penal Code*. *Tex. Penal Code § 38.03(a)*. There is no question that he intentionally used force to prevent Lukowsky, whom he knew to be a peace officer, from effecting a search of his

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[13] The Court has said that a motorist pulled over for speeding is not ordinarily susceptible to a full custodial arrest for that offense. *Azeez v. State, 248 S.W.3d 182, 189-90 (Tex. Crim. App. 2008)*.

[14] *See State v. Alexander, 157 Vt. 60, 595 A.2d 282 (1991)*; *United States v. Brodie, 742 F.3d 1058, 408 U.S. App. D.C. 326 (D.C. Cir. 2014)*; ***Johnson v. United States, 253 A.3d 1050, 1058 (D.C. 2021)***; *State v. Owens, 992 N.E.2d 939, 942-43 (Ind. Ct. App. 2013)*; and *Thornton v. State, 465 Md. 122, 159-61, 214 A.3d 34, 56-57 (2019)*.

person. *See* *Finley v. State, 484 S.W.3d 926, 928 (Tex. Crim. App. 2016)* ("Finley used force against the officers by pulling against the officers' force."). Also, the fact that the *Terry* search was deemed to be **[*794]** unlawful **[**18]** is not a defense for purposes of this statutory offense. *See* *Tex. Penal Code § 38.03(b)* ("It is no defense to prosecution under this section that the arrest or search was unlawful."). We conclude that this "new offense" constituted an intervening circumstance, and we focus our inquiry primarily on the purposefulness and flagrancy of Lukowsky's misconduct in perpetrating the *Terry* search to begin with.

There is no suggestion in the record that the *Terry* search was pretextual—a deliberate ploy on Lukowsky's part to subvert Appellant's *Fourth Amendment* rights for the purpose of conducting a random search for evidence of an offense beyond the original offense for which he was detained: driving an unregistered vehicle.[15] From his testimony it appears that Lukowsky was genuinely concerned for his own safety. He was, after all, operating by himself, in a high crime area, and Appellant seemed to him to be more nervous than the circumstances warranted. That his subjective concern was not (we have assumed, for purposes of discretionary review) ultimately found to be borne out by sufficiently objective facts to justify even a limited *Terry* search for *Fourth Amendment* purposes does not make it any less sincere.

Appellant's "new offense" of resisting the search was an **[**19]** intervening circumstance. Because we also find no evidence that Lukowsky purposefully or flagrantly flouted Appellant's *Fourth Amendment* rights, we conclude that any taint from the illegal *Terry* pat-down search was attenuated. The trial court properly denied Appellant's motion to suppress the methamphetamine.

### III. Conclusion

Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment.

**DELIVERED**: April 26, 2023

**PUBLISH**

**Concur by:** NEWELL

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[15] *See* *Tex. Transp. Code § 502.473(a)* ("A person commits an offense if the person operates on a public highway during a registration period a motor vehicle that does not properly display the registration insignia issued by the department that establishes that the license plates have been validated for the period.").

## Concur

**Newell, J., filed a concurring opinion in which Hervey, Richardson and Slaughter, JJ., joined**.

I agree with the Court that the court of appeals erred to reverse the trial court's ruling on Appellant's motion to suppress. But I would uphold the trial court's denial of the motion to suppress on a more direct basis. Appellant sought to suppress drugs that officers seized in plain view off the ground and in a public place. Immediately prior to the seizure, Appellant even said of the drugs the police found, "that's not mine." Nevertheless, the court of appeals held that the plain view doctrine did not apply,[1] and we granted review to determine whether it did.[2] I would answer that question and hold that the plain view doctrine provided an independent justification **[**20]** for the warrantless seizure of the drugs in this case regardless of whether Appellant's attempt to evade the police attenuated the taint from the officer's illegal pat-down.

**[*795]** What a person knowingly exposes to the public is not a subject of *Fourth Amendment* protection.[3] The *Fourth Amendment* generally does not apply to seizures of contraband found in a public place because there is no expectation of privacy.[4] It is well-settled, as the United States Supreme Court has observed, "that objects such as weapons or contraband found in a public place may be seized by the police without a warrant."[5] Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.[6]

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[1] *Massey v. State, 649 S.W.3d 500, 521 (Tex. App.—Fort Worth 2022)*.

[2] The Court granted the State's third ground of review which asked: Is an officer in a public place not in a "lawful place" under a plain view analysis merely because a *Fourth Amendment* violation occurred?

[3] *United States v. Santana, 427 U.S. 38, 42, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)*.

[4] *State v. Betts, 397 S.W.3d 198, 203 (Tex. Crim. App. 2013)*.

[5] *Payton v. New York, 445 U.S. 573, 586-87, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)*.

[6] *Harris v. United States, 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed.*

In this case, the public nature of the area where Sgt. Lukowsky found the drugs is not in dispute. And Sgt. Lukowsky had the lawful ability to be where he was when he found them. Nevertheless, the court of appeals held that Sgt. Lukowsky was not in a lawful vantage point even though he was in a public place.[7]

The court of appeals reached this conclusion by relying primarily upon an unpublished and factually distinguishable case, *State v. Bishop*.[8] Unpublished cases do not constitute **[**21]** precedent and cannot be relied upon as such.[9] More importantly, *Bishop* involved a seizure of drugs from a defendant's pockets, not from the ground in a public place.[10] Thus, *Bishop* is significantly different from this case even if it could be considered precedent.

Yet in relying on *Bishop*, the court of appeals appears to have created a conflict with our decision in *Walter v. State*. In that case, we regarded the plain view doctrine not as an exception to the warrant requirement but rather as a recognition that a defendant lacks any expectation of privacy in an object in plain view of the public.[11] As such it would provide an independent justification for the seizure in this case rather than an exception to the application of the exclusionary rule.[12] As we explained in *Walter*, "[t]he Supreme Court has explained that the "plain view" doctrine is not really an "exception" to the warrant requirement because the seizure of the property in plain view involves no invasion of privacy and is presumptively reasonable."[13] If Appellant had no expectation of privacy in the area in which the drugs were found, there is no reason to address whether attenuation renders the exclusionary rule inapplicable. **[**22]** [14]

**[*796]** Here, there is no question the officer who seized the drugs arrived at the location lawfully.[15] His presence there did not become unlawful because of the pat-down or Appellant's attempt to avoid the search.[16] There is no reason a police officer should be precluded from observing as an officer what would be entirely visible to him as a private citizen.[17] Neither should an officer be required to leave drugs lying around in a public place when he sees them. Because this warrantless seizure was justified under the plain-view doctrine, I would uphold the trial court's denial of Appellant's motion to suppress on that basis.

With these thoughts, I concur.

Filed: April 26, 2023

Publish

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*2d 1067 (1968)*.

[7] *Massey, 649 S.W.3d at 519*.

[8] *Id. at 520* (citing *State v. Bishop, No. 13-16-00322-CR, 2017 Tex. App. LEXIS 2435, 2017 WL 10896881 (Tex. App—Corpus Christi 2017, no pet.)* (not designated for publication)).

[9] *Tex. R. App. P. 47.7(a)* ("*Criminal Cases*: Opinions and memorandum opinions not designated for publication by the court of appeals under these or prior rules have no precedential value but may be cited with the notation, '(not designated for publication).'").

[10] *Bishop, 2017 Tex. App. LEXIS 2435, 2017 WL 10896881 at *1*.

[11] *Walter v. State, 28 S.W.3d 538, 541 (2000)*.

[12] *See Utah v. Strieff, 579 U.S. 232, 237-38, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016)* (noting the attenuation doctrine as an exception to an application of the exclusionary rule).

[13] *Walter, 28 S.W.3d at 541* (citing *Texas v. Brown, 460 U.S. 730, 738-39, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)*.

[14] This approach appears consistent with that taken by the trial judge who noted at the hearing on the motion to suppress that the drugs at issue were not discovered by a search nor recovered by State action.

[15] *Massey, 648 S.W.3d at 512* ("Massey does not dispute that Officer Lukowsky was initially justified in detaining him for a traffic offense.")

[16] *Walter, 28 S.W.3d at 544* (holding that officer lawfully viewed marijuana in the defendant's car pursuant to a valid investigatory detention); *see also Massey, 648 S.W.3d at 513* (holding that the investigatory detention in this case was not unduly prolonged).

[17] *Walter, 28 S.W.3d at 544* (quoting *Brown, 460 U.S. at 740*).

# *Massey v. State*

Court of Appeals of Texas, Second District, Fort Worth

March 3, 2022, Delivered

No. 02-20-00140-CR, No. 02-20-00149-CR

**Reporter**
649 S.W.3d 500 *; 2022 Tex. App. LEXIS 1521 **; 2022 WL 623491

JAMES CALVIN MASSEY, Appellant v. THE STATE OF TEXAS

**Notice:** PUBLISH.

**Subsequent History:** Petition for discretionary review granted by *In re Massey, 2022 Tex. Crim. App. LEXIS 428 (Tex. Crim. App., June 22, 2022)*

Reversed by *Massey v. State, 667 S.W.3d 784, 2023 Tex. Crim. App. LEXIS 278, 2023 WL 3083159 (Tex. Crim. App., Apr. 26, 2023)*

**Prior History: [**1]** On Appeal from the 371st District Court, Tarrant County, Texas. Trial Court Nos. 1572638D, 1632168D.

*Massey v. State, 2021 Tex. App. LEXIS 9820 (Tex. App. Fort Worth, Dec. 9, 2021)*

**Counsel:** For The State of Texas (02-20-00140, 02-20-00149), Criminal - State of Texas: Joseph W. Spence; Lee Sorrells.

For James Calvin Massey (02-20-00140, 02-20-00149), Criminal - Appellant: Ray Napolitan.

**Judges:** Before Kerr, Birdwell, and Bassel, JJ. Opinion on Rehearing by Justice Birdwell.

**Opinion by:** Wade Birdwell

## Opinion

**[*507] OPINION ON REHEARING**

We grant the State's motions for rehearing, withdraw our prior opinion and judgments, and substitute the following.

The trial court found that an officer's frisk of appellant James Calvin Massey was not supported by reasonable suspicion. But the court nonetheless concluded that the drug evidence should not be suppressed for three reasons.

First, it found that Massey consented to the frisk. But Massey did no more than briefly acquiesce to the officer's command to turn around, and he began a struggle almost as soon as the search began. No reasonable trier of fact could find that this amounted to consent. The frisk was an illegal search.

Second, the trial court concluded that the taint of any illegality was attenuated when Massey committed criminal offenses after the frisk. We hold that **[**2]** Massey's alleged offenses, petty and predictable as they were, do not attenuate the taint of the illegal frisk.

**[*508]** Third, the trial court concluded that the officer found the drugs in plain view after Massey discarded them during the detention. But the officer violated the *Fourth Amendment* en route to that juncture. The State therefore may not avail itself of the plain view doctrine.

The discovery of the drugs spurred two things: a conviction for possession and, separately, the revocation of Massey's community supervision. As to the possession conviction, we hold that the erroneous denial of suppression was harmful. However, as to community supervision, the evidence supports an independent ground for the revocation, which was his failure to report to the probation department as required. Because that ground alone is sufficient to support the revocation, we affirm the revocation.

So holding, we affirm in part and reverse and remand in part.

### I. Background

In 2018, Massey was indicted for possession of a controlled substance. He pleaded guilty and received eight years of deferred adjudication.

At around 11 A.M. on February 16, 2020, Officer Richard Lukowsky was patrolling the streets of Azle when he observed **[**3]** Massey driving a truck without a registration sticker. Officer Lukowsky pursued the truck as it pulled into a gas station. Officer Lukowsky was concerned for his safety;

he associated that particular gas station with drug trafficking because police had made several felony drug arrests there.

Massey was standing at the front door of the closed gas station when Officer Lukowsky turned on his police lights and beckoned him over. Officer Lukowsky asked Massey if he had any weapons, and Massey said no. Officer Lukowsky requested Massey's driver's license. Massey gave him permission to retrieve it from the truck. Massey told Officer Lukowsky about his job and explained that he had tried to pay for a registration sticker but that he did not have enough money. Massey's hands were shaking, and he appeared nervous to Officer Lukowsky, though he was cooperative and respectful. It was daylight, and the lot was empty except for the two men. Officer Lukowsky saw nothing that would indicate the presence of a weapon.

Still, Officer Lukowsky told Massey to turn around so that Officer Lukowsky could pat him down, and Massey turned around and raised his arms slightly. But as Officer Lukowsky started patting **[**4]** down his right pocket, Massey slipped his hand into his left pocket. Officer Lukowsky grabbed Massey's left arm and told him not to reach for his pocket. Massey strained against Officer Lukowsky's grip. Massey then ripped away from Officer Lukowsky and turned to face him. Officer Lukowsky called for backup. When Massey again reached for his pocket, Officer Lukowsky drew his gun. Massey pulled his keys out of his pocket and dropped them on the ground. Officer Lukowsky shouted at him to turn and put his hands behind his back. Massey turned but began walking away, saying that if Officer Lukowsky was going to shoot him, he should go ahead. Officer Lukowsky drew a taser and screamed at Massey to stop. Massey slid behind a metal air compressor and began to fish in his pocket once more, obscured from Officer Lukowsky's view. Officer Lukowsky circled behind him and tased him in the back, and Massey crumpled. He was handcuffed and searched, and within moments, Officer Lukowsky discovered a small plastic bag of methamphetamine on the ground by the air compressor, where Massey had just stood. Before Officer Lukowsky tased **[*509]** Massey, there was no methamphetamine on the ground. Massey was arrested. **[**5]**

The State moved to adjudicate Massey's guilt for the 2018 possession charge. It was alleged that Massey had breached the terms of his community supervision by committing felony drug possession and by failing to report to the probation department.

Massey moved to suppress the drug evidence. Among his arguments for suppression was his theory that the arresting officer did not have reasonable suspicion that Massey was armed and dangerous, as is required to justify a protective frisk. Massey contended that because the discovery of the drugs flowed from an illegal frisk and Massey's reaction to that frisk, the drugs should be suppressed as the fruit of the poisonous tree.

After hearing the evidence, the trial court denied suppression. The court reasoned that Massey's own independent actions, which bordered on a resisting offense, disrupted the causative flow from the frisk to the discovery of the methamphetamine, and his actions thus attenuated the taint of a potentially illegal frisk. "[W]hether the search was legal or illegal," the trial court concluded, "Mr. Massey did not have the right to resist in the manner that is shown on the video, so I'm going to deny the motion to suppress on that **[**6]** basis." After finding that Massey violated the terms of his probation, the trial court adjudicated his guilt and sentenced him to five years' confinement.

Separately, Massey was indicted for possession of a controlled substance. After his motion to suppress was denied, he pleaded guilty and was sentenced to five years' confinement, to run concurrently with his other sentence. Massey appealed both convictions.

Before this court, the State argued for the first time that Massey consented to the search when he complied with Officer Lukowsky's instructions to turn around and submit to a protective frisk. On our own motion, we abated the case and remanded it for the trial court to prepare written findings of fact and conclusions of law with respect to consent and the other issues raised on appeal.[1]

The trial court approved the State's proposed findings of fact and conclusions of law. In them, the trial court found that Officer Lukowsky did not have reasonable suspicion to frisk Massey, but that the protective frisk was nonetheless justified by Massey's consent to the search. The trial court further concluded that even if the frisk were illegal, the taint from the illegality was attenuated **[**7]** when Massey resisted the search. Finally, the trial court concluded that even if the taint were not attenuated, the illegality would be immaterial because the drug evidence was not obtained as a result of the frisk, but by the discovery of the drugs in plain sight after Massey discarded them.

With the trial court's findings and conclusions in hand, we

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[1] *See* *Meekins v. State, 340 S.W.3d 454, 465 (Tex. Crim. App. 2011)* ("[A]ppellate courts should have the trial judge's findings of fact before disagreeing with that judge's ruling on a motion to suppress.").

now proceed to evaluate Massey's issues on appeal.

## II. Standard of Review

We apply a bifurcated standard of review to a trial court's ruling on a motion to suppress evidence. *Amador v. State, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007)*; *Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)*. In reviewing the trial court's decision, we do not engage in our own factual review. *Romero v. State, **[*510]** 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)*; *Best v. State, 118 S.W.3d 857, 861 (Tex. App.—Fort Worth 2003, no pet.)*. The trial judge is the sole trier of fact and judge of the witnesses' credibility and the weight to be given their testimony. *Wiede v. State, 214 S.W.3d 17, 24-25 (Tex. Crim. App. 2007)*. Therefore, we defer almost totally to the trial court's rulings on (1) questions of historical fact, even if the trial court determined those facts on a basis other than evaluating credibility and demeanor, and (2) questions of application of law to fact that turn on evaluating credibility and demeanor. *Amador, 221 S.W.3d at 673*; *Montanez v. State, 195 S.W.3d 101, 108-09 (Tex. Crim. App. 2006)*; *Johnson v. State, 68 S.W.3d 644, 652-53 (Tex. Crim. App. 2002)*. But when mixed questions of law and fact do not turn on the witnesses' credibility and demeanor, we review the trial court's rulings on those **[**8]** questions de novo. *Amador, 221 S.W.3d at 673*; *Estrada v. State, 154 S.W.3d 604, 607 (Tex. Crim. App. 2005)*; *Johnson, 68 S.W.3d at 652-53*.

Stated another way, when reviewing the trial court's ruling on a suppression motion, we must view the evidence in the light most favorable to the ruling. *Wiede, 214 S.W.3d at 24*; *State v. Kelly, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)*. When the trial court makes explicit fact findings, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports those findings. *Kelly, 204 S.W.3d at 818-19*. We then review the trial court's legal ruling de novo unless its explicit fact findings that are supported by the record are also dispositive of the legal ruling. *Id. at 818*. Even if the trial court gave the wrong reason for its ruling, we must uphold the ruling if it is both supported by the record and correct under any applicable legal theory. *State v. Stevens, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007)*; *Armendariz v. State, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003)*.

The *Fourth Amendment* protects against unreasonable searches and seizures by government officials. *U.S. Const. amend. IV*; *Wiede, 214 S.W.3d at 24*. A defendant seeking to suppress evidence on *Fourth Amendment* grounds bears the initial burden to produce some evidence that the government conducted a warrantless search or seizure that he has standing to contest. *State v. Martinez, 569 S.W.3d 621, 623-24 (Tex. Crim. App. 2019)*. Once the defendant does so, the burden shifts to the State to prove either that the search or seizure was conducted pursuant to a warrant or, if warrantless, was otherwise reasonable. *Id. at 624*.

## III. Grounds for Revocation [**9]

In its motion to revoke, the State alleged that Massey had violated the terms of his community supervision by possessing a controlled substance and by failing to report to the probation department for three months in 2020. The trial court found both allegations to be true and revoked Massey's community supervision based on both violations.

On appeal, Massey did not challenge the finding that he failed to report as required. In his response to the State's motion for rehearing, though, Massey argues for the first time that the evidence is insufficient to prove that he failed to report. Massey maintains that he was unaware of the requirement to report to the probation department and that, therefore, this ground is insufficient to support revocation.

Assuming for the moment that this argument is properly before us on rehearing, *see Spielbauer v. State, 622 S.W.3d 314, 319 (Tex. Crim. App. 2021)*, we cannot agree with it because the State proved **[*511]** Massey's failure to report by a preponderance of the evidence.

In a revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated at least one of the terms and conditions of community supervision. *Bryant v. State, 391 S.W.3d 86, 93 (Tex. Crim. App. 2012)*; *Rickels v. State, 202 S.W.3d 759, 763-64 (Tex. Crim. App. 2006)*. The trial court is the sole judge of the witnesses' credibility and **[**10]** the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Hacker v. State, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013)*; *Cardona v. State, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)*. If the State fails to meet its burden of proof, the trial court abuses its discretion by revoking community supervision. *Cardona, 665 S.W.2d at 493-94*.

It has long been held that one sufficient ground will support the trial court's order revoking community supervision. *Smith v. State, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009)*. To prevail on appeal, an appellant must successfully challenge all findings that support the revocation order. *Guerrero v. State, 554 S.W.3d 268, 274 (Tex. App.—Houston [14th Dist.] 2018, no pet.)*; *Garcia v. State, No. 02-15-00138-CR, 2017 Tex.*

App. LEXIS 716, 2017 WL 370924, at *2 (Tex. App.—Fort Worth Jan. 26, 2017, pet. ref'd) (mem. op., not designated for publication). "When the trial court finds several violations, we will affirm a revocation order if the State proved any one of them by a preponderance of the evidence." Garcia, 2017 Tex. App. LEXIS 716, 2017 WL 370924, at *2; Leach v. State, 170 S.W.3d 669, 672 (Tex. App.—Fort Worth 2005, pet. ref'd). Once sufficient evidence is presented of a violation of a community supervision condition, the trial court has broad discretion in choosing whether to continue, modify, or revoke the community supervision. Flournoy v. State, 589 S.W.2d 705, 708 (Tex. Crim. App. [Panel Op.] 1979); Brewer v. State, No. 02-19-00382-CR, 2021 Tex. App. LEXIS 1872, 2021 WL 924699, at *2 (Tex. App.—Fort Worth Mar. 11, 2021, no pet.) (mem. op., not designated for publication).

Sufficient evidence shows that Massey violated the condition that required him to report to the probation department. Within the record is a copy of the terms of Massey's community supervision, which required Massey to "[r]eport to the Community Supervision and **[**11]** Corrections Department of Tarrant County, Texas, immediately following this hearing, and no less than monthly thereafter, or as scheduled by the court or supervision officer and obey all rules and regulations of the department." Massey's signature appears at the bottom of the document. *See* McDaniel v. State, No. 09-11-00094-CR, 2011 Tex. App. LEXIS 8287, 2011 WL 4999459, at *1 (Tex. App.—Beaumont Oct. 19, 2011, no pet.) (mem. op., not designated for publication) (rejecting a probationer's claim that he did not know of a reporting requirement in the terms of his community supervision because the terms bore his signature). A probation officer testified that Massey had not fulfilled this reporting requirement:

> Q. And based on a review of Mr. Massey's file, does it appear as though Mr. Massey reported every month like he was supposed to?
> A. No, he did not.
> Q. Okay. And did he actually fail to report for—in March of 2020?
> A. Yes.
> Q. And did he fail to report in April of 2020?
> A. Yes.
> Q. And did he also fail to report in May of 2020?
>
> **[*512]** A. Yes.[2]

[2] It should be noted that, although this testimony is the critical evidence supporting the State's motion for rehearing concerning the revocation, it was not brought to our attention in the original briefing by the State.

Based on this record, we conclude that the State carried its burden to prove that Massey failed to report as required. *See, e.g.*, Greer v. State, 999 S.W.2d 484, 488-89 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (holding that although the evidence was "slim at best," the evidence was nonetheless sufficient to support revocation where a probation officer testified about **[**12]** failure to report based on contents of probation file).

Because the finding of failure to report is sufficient to support the revocation of Massey's community supervision, we overrule Massey's sole point to the extent that he complains of the revocation. We consider the remainder of Massey's and the State's arguments only to the extent that they pertain to Massey's separate conviction for possession of a controlled substance.

## VI. Legality of the Detention

Massey does not dispute that Officer Lukowsky was initially justified in detaining him for a traffic offense. However, Massey insists that Officer Lukowsky unlawfully prolonged the detention beyond what was justified by his initial suspicion. According to Massey, Officer Lukowsky engaged in an unlawful fishing expedition for evidence of wrongdoing, so the evidence must be suppressed.

A detention, as opposed to an arrest, may be justified on less than probable cause if a person is reasonably suspected of criminal activity based on specific, articulable facts. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968); Carmouche v. State, 10 S.W.3d 323, 328 (Tex. Crim. App. 2000). An officer conducts a lawful temporary detention when he reasonably suspects that an individual is violating the law. Crain v. State, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010); Ford v. State, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Reasonable suspicion exists when, based on the totality **[**13]** of the circumstances, the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person is, has been, or soon will be engaged in criminal activity. Ford, 158 S.W.3d at 492. This is an objective standard that disregards the detaining officer's subjective intent and looks solely to whether the officer has an objective basis for the stop. *Id.*

The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission, which is to address the traffic violation that warranted the stop and attend to related safety concerns. Rodriguez v. United States, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492

(2015). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id., 135 S. Ct. at 1614. The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. Id. at 355, 135 S. Ct. at 1615 (quoting Arizona v. Johnson, 555 U.S. 323, 333, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009)). Once the original purpose for the stop is exhausted, police may not unnecessarily prolong the detention solely in hopes of finding evidence of some other crime. Kothe v. State, 152 S.W.3d 54, 64 (Tex. Crim. App. 2004). The stop may not be used as a fishing expedition for unrelated criminal activity. *Id.*

**[*513]** "But the Supreme Court has expressly rejected placing any **[**14]** rigid time limitations on Terry stops . . . ." *Id.* "[I]nstead, the issue is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Id.* (quoting United States v. Sharpe, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605 (1985)).

Nothing about the detention here suggests that it was unlawfully prolonged by inquiries unrelated to the traffic infraction and public safety. Officer Lukowsky's actions were prompt and tied to the tasks at hand. He approached Massey, explained the reason for the detention, asked for Massey's driver's license, inquired into the reason for the missing registration sticker, and initiated a frisk—all within the first two minutes of the stop. *See* Lerma v. State, 543 S.W.3d 184, 195 (Tex. Crim. App. 2018) (concluding that the detention was not illegally prolonged where the officer took similar actions in the first five minutes of the stop, at which point additional considerations justified further intervention). The next two minutes were spent grappling with Massey, dealing with the apparent threat that he posed, and discovering the methamphetamine. *See id.* When "police are acting in a swiftly developing situation . . . the court should not indulge in unrealistic second-guessing" **[**15]** in determining whether the search was illegally extended. Sharpe, 470 U.S. at 686, 105 S. Ct. at 1575. The entire exchange unfolded in four minutes. *See* Grandberry v. State, No. 02-13-00488-CR, 2014 Tex. App. LEXIS 7277, 2014 WL 3029045, at *4 (Tex. App.—Fort Worth July 3, 2014, no pet.) (per curiam) (mem. op., not designated for publication) ("Delays of twenty-six minutes or longer have been found reasonable, depending on the balancing of the public interest served by the delay against the appellant's right to be free from arbitrary detentions and intrusions."). Thus, the investigation was not wrongly extended.

## V. Legality of the Frisk

Massey next argues that the protective frisk was illegal. Massey contends that Officer Lukowsky did not have reasonable suspicion to believe that Massey was armed and dangerous, and thus the frisk was not defensible under the Fourth Amendment.

The trial court determined that the frisk was not justified by reasonable suspicion. This determination is well supported by the record. An officer is justified in engaging in a protective frisk if he reasonably suspects that the person who he has lawfully detained is presently armed and dangerous. Furr v. State, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016). "The intrusion must be based on specific articulable facts which, in the light of the officer's experience and general knowledge, together with rational inferences from those facts, would reasonably warrant **[**16]** the intrusion." *Id.* In this case, the only articulable facts available to support a belief that Massey was armed and dangerous were that Massey (1) was nervous (2) in an area where there had been drug arrests. *See* Wade v. State, 422 S.W.3d 661, 671 (Tex. Crim. App. 2013) (deeming nervousness "not particularly probative" in evaluating reasonable suspicion); *see also* O'Hara v. State, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000) ("The Supreme Court has been 'careful to maintain' the 'narrow scope' of the pat-down exception." (quoting Ybarra v. Illinois, 444 U.S. 85, 93, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238 (1979))). There were no signs of a weapon, and Massey was at a safe distance, in broad daylight, without access to his vehicle, respectfully complying with the officer, who **[*514]** was the only other person in the parking lot—an apparently safe situation until the officer grabbed him and drew him close, into a frisk that is now alleged to be illegal. Without any articulable facts reflecting a hazard to the officer, the initiation of the frisk was unsupported by reasonable suspicion.

However, the State maintains that Officer Lukowsky was nonetheless permitted to initiate the protective frisk because Massey consented to it. As the trial court found, when Officer Lukowsky asked Massey to turn around and submit to a pat-down, Massey turned around and raised his arms slightly. According to **[**17]** the State, these gestures signified Massey's consent to the pat-down, as the trial court also found. And as to the fact that Massey began resisting the pat-down a moment after it began, the State contends that this was simply the withdrawal of his consent. Thus, by the State's account, this fleeting consent is enough to justify the initiation of the frisk.

Under the Fourth Amendment, a search conducted without a warrant is per se unreasonable subject only to a few

specifically established and well-delineated exceptions. *Meekins v. State, 340 S.W.3d 454, 458 (Tex. Crim. App. 2011)*. One of those exceptions is a search conducted with the person's voluntary consent. *Id.* Under Texas law, the State must prove voluntary consent by clear and convincing evidence. *State v. Weaver, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011)*. The consent must be shown to be positive and unequivocal, and there must not be any duress or coercion, actual or implied. *Id.* Consent is not established by showing mere acquiescence to a claim of lawful authority. *Carmouche, 10 S.W.3d at 331*. The validity of an alleged consent to search is a question of fact to be determined from the totality of the circumstances. *Weaver, 349 S.W.3d at 526*. "Consent to search is not to be lightly inferred." *Meeks v. State, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985)*; *Corea v. State, 52 S.W.3d 311, 316 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd)*.

A person's consent to a search can be communicated to law enforcement in a variety of ways, including by words, actions, **[**18]** or circumstantial evidence showing implied consent. *Meekins, 340 S.W.3d at 458*. Thus, Texas courts have held that where law enforcement requests consent for a search or otherwise puts the question of consent to the detainee in a way that does not indicate compulsion, a person may answer that question in the affirmative by a gesture indicating that the search is permitted. For instance, in *Kendrick v. State*, the investigating officer "requested appellant's permission to conduct a pat-down," and the court of appeals held that when appellant stood up and raised his hands in response to this question, he thereby indicated his consent to the search. *93 S.W.3d 230, 234 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd)*. Likewise, in *Todd v. State*, the investigating officer asked for permission to search the appellant's vehicle. *No. 08-03-00443-CR, 2005 Tex. App. LEXIS 3691, 2005 WL 1124262, at *5 (Tex. App.—El Paso May 12, 2005, no pet.)* (not designated for publication). The defendant "threw up his arms in the direction of the vehicle," and the appellate court upheld the determination that his gesture communicated a response of consent. *Id.* In *Salinas v. State*, the officer requested permission to perform a pat-down, and the court held that appellant indicated his consent to the search in part by turning his back and raising his hands. *No. 13-15-00310-CR, 2016 Tex. App. LEXIS 4687, 2016 WL 2747770, at *1, *4 (Tex. App.—Corpus Christi—Edinburg May 5, 2016, no pet.)* (mem. op., not designated for publication). In *McAllister **[**19]** v. State*—the case **[*515]** upon which the State principally relies—the driver of a car was arrested, and his passenger asked an officer for a ride to his mother's house. *34 S.W.3d 346, 349-50 (Tex. App.—Texarkana 2000, pet. ref'd)*. The officer agreed but told the passenger he would have to be patted down before he would be allowed to get in the patrol car. *Id. at 350*. In reply, the passenger "raised his hands to about chest level." *Id.* Because the circumstances left the passenger under "no compulsion" to accept the ride or the frisk it entailed, the court held that the passenger's gesture communicated his consent to the search. *See id. at 351*; *see also O'Hara, 27 S.W.3d at 553* ("[I]f an individual volunteers to ride in a police car, he may be subjected to a routine pat-down search before being allowed in the car.").

But where the officer instead couches the issue as a command or directive to comply with a search, verbal or nonverbal responses that do not clearly indicate consent—as opposed to mere acquiescence—are seldom deemed manifestations of consent. For instance, this court rejected a claim of consent to a prolonged detention where the officer told the appellee that he would be conducting a dog-sniff search and instructed the detainee to start his truck, turn the fan on high, roll up the **[**20]** windows, and stay in the vehicle, and the appellee responded "okay" as he complied. *State v. Marino, No. 2-01-474-CR, 2003 Tex. App. LEXIS 2038, 2003 WL 851953, at *2 (Tex. App.—Fort Worth Mar. 6, 2003, pet. ref'd)* (mem. op., not designated for publication). We held the officer's framing of the issue as a command rather than a request for consent weighed against a finding of consent; "[b]y stating his intentions and instructing appellee on how to cooperate rather than requesting permission to prolong the detention for the canine sweep, Officer Sheffield indicated to appellee that he had the authority to conduct the canine sweep without appellee's consent." *Id.* We concluded that the appellee's response was nothing more than mere acquiescence to a claim of lawful authority. *Id.*

Likewise, the district court attached weight to the absence of a request for consent in *United States v. Curtis, 490 F. Supp. 3d 1183, 1196 (S.D. Tex. 2020)*, *appeal dismissed*, *No. 20-20570, 2020 U.S. App. LEXIS 42170, 2020 WL 9425159 (5th Cir. Nov. 12, 2020)*. "One thing that didn't happen is obvious—no officer or other personnel on the scene ever asked [the appellant] for permission to enter his home." *Id.* "That failure of specific request weighs against a finding of voluntary consent here." *Id.* In the absence of any request for consent, the court held that the appellant's "equivocal" interactions with officers did not demonstrate his implied consent to the search. *Id.*

Here, no witness **[**21]** testified that Massey consented to the search, and there were no written or verbal indicia of consent. The State's argument for consent rests solely on Massey's gesture of turning around. But the way that Officer Lukowsky elicited that gesture undermines any finding of consent. About two minutes into the detention, Officer Lukowsky said to Massey, "You don't have any weapons on

you, do you?" Massey replied, "No." Officer Lukowsky then directed Massey, "Just go ahead and turn around, I'm going to pat you down just for my safety." Massey initially turned around and raised his arms slightly. Officer Lukowsky did not request consent to search Massey. Rather, he infused the issue with compulsion, directing Massey to turn around and comply with a search of his person. The officer's framing of the issue militates in favor of a determination that Massey's response was merely an acquiescence to an assertion of lawful authority.

The State's case for consent only grows thinner when considering the rest of the **[*516]** encounter. As soon as Officer Lukowsky attempted to pat him down, Massey put his hand in his pocket and began pulling away. Officer Lukowsky gripped his arm, but Massey ripped free, backed **[**22]** away, and continued to defy the officer's attempts to detain and search him until he was tased. Massey's struggle against the search was so vigorous that, on appeal, the State now argues that Massey could and should have been charged with a resisting offense. A struggle is not a hallmark of genuine consent to a search.[3]

Even viewing the record in the light most favorable to the prosecution, then, a rational trier of fact could not conclude by clear and convincing evidence that Massey voluntarily consented to the search. *See* Meekins, 340 S.W.3d at 459 n.24. In the absence of a warrant or any other exception to the warrant requirement, the search was per se illegal. *See* id. at 458.

## VI. Attenuation

The State argues in the alternative that even if the search was illegal, any taint from the illegality was attenuated by Massey's subsequent criminal conduct. According to the State, Massey committed two offenses when he broke from Officer Lukowsky's grip and moved backward: resisting a search and evading detention. *See* Tex. Penal Code Ann. §§ 38.03-.04. According to the State, these intervening offenses vitiate the connection between the illegal pat-down and the discovery of the methamphetamine, such that the trial court properly denied suppression.

The principal judicial **[**23]** remedy to deter Fourth Amendment violations is the exclusionary rule, which often requires trial courts to exclude unlawfully seized evidence in a criminal trial. Utah v. Strieff, 579 U.S. 232, 237, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016). "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and . . . evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." *Id.*, 136 S. Ct. at 2061 (internal quotation marks omitted).

Appended to this rule, there are doctrines that "refine the situations in which the illegally obtained evidence can be admitted at or excluded from trial." Day v. State, 614 S.W.3d 121, 128 (Tex. Crim. App. 2020). One is the attenuation doctrine. *Id.* Under this doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Strieff, 579 U.S. at 238, 136 S. Ct. at 2061 (internal quotation marks omitted).

To determine whether the attenuation doctrine applies, we ask "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or **[**24]** instead by means sufficiently distinguishable to be purged of the primary taint." State v. Jackson, 464 S.W.3d 724, 731 (Tex. Crim. ***[*517]*** App. 2015). Neither the Fourth Amendment exclusionary rule nor our own statutory exclusionary rule, embodied in Article 38.23(a) of the Texas Code of Criminal Procedure, requires the suppression of evidence that was not "obtained" as a result of some illegality. *Id.* Depending on how removed the actual attainment of the evidence is from the illegality, the ordinary person may not consider that evidence to have been "obtained" by that illegality. Wehrenberg v. State, 416 S.W.3d 458, 469 (Tex. Crim. App. 2013).

Three factors guide our attenuation analysis. Strieff, 579 U.S. at 239, 136 S. Ct. at 2061-62. First, we look to the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. *Id.*, 136 S. Ct. at 2062. Second, we consider the presence of intervening circumstances. *Id.*, 136 S. Ct. at 2062. Third, we examine the purpose and flagrancy of the official misconduct. *Id.*, 136 S. Ct. at 2062.

[3] Indeed, the case for consent was so slight that the State did not even think to argue at the suppression hearing that Massey consented to the search. The trial court, in its initial oral findings, did not find that Massey consented to the search. It was only when the case reached the appeal stage that the State came up with this ex post facto justification. When we abated and remanded the case to the trial court for written findings and conclusions, the trial court simply approved the State's proposed finding that Massey consented to the search.

The presence or absence of an intervening circumstance dictates which of the two remaining factors should carry greater significance:

> When police find and seize physical evidence shortly after an illegal stop, in the absence of the discovery of an outstanding arrest warrant in between, that physical evidence should ordinarily be suppressed, even if the police misconduct **[**25]** is not highly purposeful or flagrantly abusive of *Fourth Amendment* rights. Under this scenario, temporal proximity is the paramount factor. But when an outstanding arrest warrant is discovered between the illegal stop and the seizure of physical evidence, the importance of the temporal proximity factor decreases. Under this scenario, the intervening circumstance is a necessary but never, by itself, wholly determinative factor in the attenuation calculation, and the purposefulness and/or flagrancy of the police misconduct, *vel non*, becomes of vital importance.

*Jackson, 464 S.W.3d at 731-32* (quoting *State v. Mazuca, 375 S.W.3d 294, 306-07 (Tex. Crim. App. 2012)*).

The courts are not of one mind as to whether and when a subsequent criminal offense, committed after an illegal seizure or search, will operate as an intervening circumstance. But the disparity in the decisions appears to have much to do with the gravity of the subsequent offense and the degree to which it is an expectable result of illegal police action. *See State v. Alexander, 157 Vt. 60, 595 A.2d 282, 285 (Vt. 1991)* (reasoning that not all subsequent crimes will act as intervening circumstances, only ones sufficiently "serious" to be "distinct"). The more serious and unforeseeable the subsequent offense is, the more apt it is to be deemed an intervening circumstance that tends to free the **[**26]** resulting evidence from any taint. *See United States v. Brodie, 742 F.3d 1058, 1063, 408 U.S. App. D.C. 326 (D.C. Cir. 2014)* (collecting examples). For example, in *Matienza v. State*, officers attempted to detain the appellant on drug charges, and he brandished a gun and pointed it at an officer. *See 699 S.W.2d 626, 626-27 (Tex. App.—Dallas 1985, pet. ref'd)*. The ensuing searches revealed cocaine. *Id. at 627*. The court of appeals rightly upheld the denial of the appellant's motion to suppress this evidence, reasoning that his extreme act served as an intervening circumstance that tended to purge the resulting evidence of any taint. *Id. at 628*.

But conversely, if the crime is petty and relatively predictable as a product of an unlawful detention or search, the evidence revealed is better viewed as an extended derivation of the illegal police **[*518]** action. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such *Fourth Amendment* violations in future cases." LaFave, *Crime committed in response to illegal arrest or search as a fruit*, 6 Search & Seizure § 11.4(j) (6th ed.). The supreme courts of Delaware and New Hampshire have held that milder cases of resisting arrest did not constitute intervening circumstances. *Jones v. State, 745 A.2d 856, 872-73 (Del. 1999)*; *State v. Beauchesne, 151 N.H. 803, 868 A.2d 972, 982-83 (N.H. 2005)*; *accord Commonwealth v. Augustus, No. 1603-15-1, 2016 Va. App. LEXIS 76, 2016 WL 1002095, at *6-7 (Va. Ct. App. Mar. 11, 2016)* (reaching **[**27]** a similar conclusion, reasoning that "a non-violent or non-threatening crime" was less apt to be deemed an intervening circumstance); *see also United States v. Gaines, 668 F.3d 170, 174-75 (4th Cir. 2012)*. Other courts have held that simply running away from the detaining officers or attempting to dispose of evidence will not necessarily dissipate the taint. *See Brodie, 742 F.3d at 1063*; *Johnson v. United States, 253 A.3d 1050, 1058 (D.C. 2021)* ("Here, appellant's flight, on foot, did not constitute . . . a serious risk to the public safety when compared to the cases cited by the government."); *State v. Owens, 992 N.E.2d 939, 942-43 (Ind. Ct. App. 2013)*; *Thornton v. State, 465 Md. 122, 214 A.3d 34, 56-57 (Md. 2019)*.

Massey's alleged offenses—resisting search and evading detention on foot—fall into this latter category. Massey was not violent, he had no weapons, and his alleged offenses consisted largely of trying to free himself from the grip of an illegal search. Because neither offense marked a severe departure from the common, if regrettable, range of responses to an unlawful frisk, they do not constitute intervening circumstances.

In the absence of intervening circumstances, the "physical evidence should ordinarily be suppressed, even if the police misconduct is not highly purposeful or flagrantly abusive of *Fourth Amendment* rights. Under this scenario, temporal proximity is the paramount factor." *Jackson, 464 S.W.3d at 732*. Only a minute passed between the illegal frisk and the **[**28]** time that Massey was tased. Another minute passed between the tasing and the discovery of the methamphetamine.

Because the dominant factor of temporal proximity strongly favors suppression, we hold that Massey's alleged offenses during the detention did not attenuate the taint of Officer Lukowsky's illegal frisk.

## VII. Plain View

The State next ventures that the evidence is admissible because Officer Lukowsky discovered it in plain view. It is the State's position that because the contraband was found in the open at a public place, it is admissible under the plain view doctrine.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S. Ct. 2022, 2037, 29 L. Ed. 2d 564 (1971)*. "But it is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure." *Id., 91 S. Ct. at 2037*. "The problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." *Id., 91 S. Ct. at 2037*.

**[*519]** Three requirements must be met to justify the seizure of an object in plain view: (1) law enforcement officials must lawfully **[**29]** be where the object can be plainly viewed; (2) the incriminating character of the object in plain view must be immediately apparent to the officials; and (3) the officials must have the right to access the object. *State v. Betts, 397 S.W.3d 198, 206 (Tex. Crim. App. 2013)*. In determining whether the officer had a right to be where he was, the officer must not have violated the *Fourth Amendment* in arriving at the place from which the evidence could be plainly viewed. *Walter v. State, 28 S.W.3d 538, 541 (Tex. Crim. App. 2000)*. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Vaughn v. State, 459 S.W.2d 869, 871 (Tex. Crim. App. 1970)* (quoting *Harris v. United States, 390 U.S. 234, 236, 88 S. Ct. 992, 993, 19 L. Ed. 2d 1067 (1968)*).

As we have determined, Officer Lukowsky violated the *Fourth Amendment* en route to the vantage point where he discovered the methamphetamine. "[I]n light of the unjustified pat[-]down, the State cannot invoke the 'plain view' doctrine . . . ." *State v. Bishop, No. 13-16-00322-CR, 2017 Tex. App. LEXIS 2435, 2017 WL 1089681, at *6 (Tex. App.—Corpus Christi—Edinburg Mar. 23, 2017, no pet.)* (mem. op., not designated for publication); *see State v. Rodriguez, 529 S.W.3d 81, 90-91 (Tex. App.—Eastland 2015)*, *aff'd*, *521 S.W.3d 1 (Tex. Crim. App. 2017)*; *Paulea v. State, 278 S.W.3d 861, 867 n.5 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd)*.

In its motion for rehearing, the State notes that when Officer Lukowsky discovered the methamphetamine, he was in a public place where he otherwise had the right to be. The State suggests that because Officer Lukowsky was lawfully present in a public place when he discovered the methamphetamine, he had a right **[**30]** to be in the position where he observed the methamphetamine, which should pave the way for admission under the plain view doctrine.

But "[t]he *Fourth Amendment* 'protects people, not places.'" *Love v. State, 543 S.W.3d 835, 840 (Tex. Crim. App. 2016)* (quoting *Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967)*), *abrogated in part on other grounds*, *Holder v. State, No. PD-0026-21, 639 S.W.3d 704, 2022 Tex. Crim. App. LEXIS 72, 2022 WL 302538, at *2 (Tex. Crim. App. Feb. 2, 2022)*. What a person "seeks to preserve as private, even in an area accessible to the public [such as the public phone booth at issue in *Katz* itself], may be constitutionally protected." *Id.* (quoting, with editorial alteration, *Katz, 389 U.S. at 351, 88 S. Ct. at 511*). We are unpersuaded that the setting of a public place should cinch the issue for the State or undo the effect of the illegal frisk.

The State cites *State v. Milos*, a Nebraska case with facts somewhat similar to those present here, for the proposition that Officer Lukowsky's presence in a public place should save the evidence from suppression under the plain view doctrine. *See 294 Neb. 375, 882 N.W.2d 696 (Neb. 2016)*. But unlike this case, the *Milos* court determined that no *Fourth Amendment* violation had occurred prior to discovery of the contraband. *Id. at 704*. By contrast, we have determined that Officer Lukowsky violated the *Fourth Amendment* in reaching his viewpoint, and again, the officer must not have violated the *Fourth Amendment* in arriving at the position from which the evidence could be plainly viewed. *See Walter, 28 S.W.3d at 541*. That distinction limits **[**31]** the utility of any analogy between the cases.

**[*520]** A better comparator is *Bishop*, the facts of which are also similar to those present here. *2017 Tex. App. LEXIS 2435, 2017 WL 1089681, at *1*. Like Massey, Bishop was in a public place (a roadway), and among the only facts available to support a reasonable suspicion that Bishop was armed were his nervousness and a recent history of criminal activity in the area. *Id.* Like Massey, Bishop repeatedly put his hands in his pockets, and the officer subjected him to an unjustified frisk. *Id.* Like Massey, the controlled substances were not discovered through the officer's probing during a search but by viewing the drugs after the defendant's actions, taken in response to his exchange with the officer, revealed the drugs: Bishop turned around in response to the officer's commands and put his hands on the patrol car, whereupon the officer saw the contraband protruding from his pocket; Massey discarded the contraband in response to the officer's illegal frisk,

whereupon the officer saw the contraband on the ground. In Bishop, the officer had every right to be present in the public place where he discovered the contraband, but the plain view doctrine was nonetheless held to be unavailable because the officer **[**32]** violated the *Fourth Amendment* in that public place. See *id. 2017 Tex. App. LEXIS 2435, [WL] at *6*.

The only meaningful difference between Bishop and this case is that the illegal search spurred Massey to discard the contraband, but that fact does not make the contraband admissible. Useful reference can be made to the abandonment doctrine. "[N]o person can reasonably expect privacy in property he abandons." *State v. Martinez, 570 S.W.3d 278, 286 (Tex. Crim. App. 2019)*. The issue is not determined in the strict property-right sense but rather centers on whether the person voluntarily discarded, left behind, or otherwise relinquished his or her interest in the property so that he or she could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. Id. "Abandonment consists of two components: (1) a defendant must intend to abandon property, and (2) a defendant must freely decide to abandon the property." Id. "Even if a defendant intended to abandon the property, such abandonment is not freely made—it is not voluntary—if it is the product of police misconduct." Id. Because police misconduct was the catalyst for Massey's attempt to dispose of the contraband, the fact that Massey discarded the evidence in a public place does not permit it be salvaged.

The State next **[**33]** insists that a resort to the plain view doctrine should be available because "[e]ven if Officer Lukowsky violated Appellant's *Fourth Amendment* rights during the pat-down, Officer Lukowsky did not objectively violate the *Fourth Amendment* in arriving at the location." The State urges us to use an "objective" standard in which Officer Lukowsky's "'subjective intent' for being at that specific location" is disregarded. The State cites the Supreme Court's pronouncement that "there is no reason [the police officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen." *Texas v. Brown, 460 U.S. 730, 740, 103 S. Ct. 1535, 1542, 75 L. Ed. 2d 502 (1983)*; *Walter, 28 S.W.3d at 544*. According to the State's thinking, any private citizen passing by could have freely observed the methamphetamine on the ground just as Officer Lukowsky did, and thus the plain view doctrine should apply.

**[*521]** Disregarding the officer's subjective intent is one thing; we place no reliance on Officer Lukowsky's intent in our analysis, for "a police officer's subjective motive will never invalidate objectively justifiable behavior under the *Fourth Amendment*." *Walter, 28 S.W.3d at 542*. Disregarding the officer's misdeed is quite another thing; we will not, in the name of objectivity, abstract the situation and ignore the violation that the officer **[**34]** personally committed in conducting the seizure and search. The evidence was not discovered by an innocent passerby, but by an officer who contravened the *Fourth Amendment* in reaching the position where he discovered the contraband. *See Vaughn, 459 S.W.2d at 871*. The plain view doctrine is therefore inapplicable.

## VIII. Harm

Having found error, we now turn to the question of harm. The admission of evidence that was obtained in violation of the *Fourth Amendment* is an error of constitutional magnitude. *Hernandez v. State, 60 S.W.3d 106, 106 (Tex. Crim. App. 2001)*. Because the error is constitutional, *Rule 44.2(a)* requires us to reverse the conviction unless we determine beyond a reasonable doubt that the trial court's denial of suppression did not contribute to the conviction. *See Tex. R. App. P. 44.2(a)*; *Love, 543 S.W.3d at 846*. In applying the "harmless error" test, we ask whether there is a "reasonable possibility" that the error might have contributed to the outcome. *Love, 543 S.W.3d at 846*. If the denial of the motion to suppress contributed in some measure to the State's leverage in the plea-bargaining process and may have contributed to the appellant's decision to relinquish his constitutional rights of trial and confrontation, we cannot conclude beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Chidyausiku v. State, 457 S.W.3d 627, 631-32 (Tex. App.—Fort Worth 2015, pet. ref'd)*; *see Holmes v. State, 323 S.W.3d 163, 174 (Tex. Crim. App. 2010)* (op. on reh'g).

As to Massey's decision **[**35]** to plead guilty to the possession offense, the State's victory-in-error at the suppression hearing gave the State the ability to offer an essential piece of evidence in a prosecution for possession of a controlled substance: the controlled substance itself. *See Falero v. State, No. 02-19-00205-CR, 2020 Tex. App. LEXIS 3439, 2020 WL 1949018, at *1 n.3 (Tex. App.—Fort Worth Apr. 23, 2020, pet. ref'd)* (mem. op., not designated for publication) ("If the State's primary evidence in support of Falero's conviction—the methamphetamine—should have been suppressed, then Falero would be entitled to a reversal of the trial court's judgment . . . ."). The error had an evident suasive effect on Massey's decision to plead guilty, given that he decided to enter this plea shortly after the denial of his motion to suppress. *See Wheeler v. State, 573 S.W.3d 437, 446 (Tex. App.—Fort Worth 2019)* ("Wheeler pleaded guilty only after the trial court denied his motion to suppress, indicating that the trial court's denial was a factor in his

decision to plead guilty."), *aff'd*, *616 S.W.3d 858 (Tex. Crim. App. 2021)*.

We therefore cannot conclude beyond a reasonable doubt that the erroneous denial of suppression did not contribute to Massey's decision to plead guilty. To that extent, we sustain Massey's sole point as it pertains to Massey's conviction for possession of a controlled substance.

## IX. Conclusion

In appellate cause number 02-20-00140-CR, **[**36]** we affirm the trial court's judgment revoking Massey's community supervision. In appellate cause number 02-20-00149-CR, we reverse the trial court's judgment of conviction and remand the case to the trial court for further proceedings consistent **[*522]** with this opinion.[4]

/s/ Wade Birdwell

Wade Birdwell

Justice

Publish

Delivered: March 3, 2022

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End of Document

[4] We deny the State's motion for en banc reconsideration as moot.

CASE NO. 1572638D COUNT NO. ONE
INCIDENT NO./TRN: 9217340456

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE 371ST DISTRICT COURT |
| | § | |
| V. | § | |
| | § | |
| JAMES CALVIN MASSEY | § | TARRANT COUNTY, TEXAS |
| | § | |
| STATE ID NO.: TX07424652 | § | |

# JUDGMENT ADJUDICATING GUILT

| | | | |
|---|---|---|---|
| Judge Presiding: | HON. MOLLEE WESTFALL | Date Sentence Imposed: | 9/28/2020 |
| Attorney for State: | SHAREN WILSON<br>BRENT HUFFMAN 24043735 | Attorney for Defendant: | RAY NAPOLITAN 24076583 |

Date of Original Community Supervision Order: 7/17/2019

Statute for Offense: 481.115(c) HSC

Offense for which Defendant Convicted:
**POSSESSION OF A CONTROLLED SUBSTANCE OF ONE GRAM OR MORE, BUT LESS THAN FOUR GRAMS, NAMELY: METHAMPHETAMINE**

Date of Offense: 10/23/2018

Degree of Offense: 3RD DEGREE FELONY

Plea to Motion to Adjudicate: Not True

Findings on Deadly Weapon: N/A

Terms of Plea Bargain: (if any): or ☐ Terms of Plea Bargain are attached and incorporated herein by this reference
OPEN PLEA

Punishment and Place of Confinement: 5 YEARS Institutional Division, TDCJ

Date Sentence Commences: (Date does not apply to confinement served as a condition of community supervision.)
9/28/2020

THIS SENTENCE SHALL RUN N/A.

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A.

| Fines: | Restitution: | Restitution Payable to: |
|---|---|---|
| $526.00 | $0.00 | (See special finding or order of restitution which is incorporated herein by this reference.) |
| **Court Costs:** | **Reimbursement Fees:** | |
| $374.00 | $0.00 | |

☐ **Defendant is required to register as sex offender** in accordance with Chapter 62, Tex. Code Crim. Proc.

**(For sex offender registration purposes only)** The age of the victim at the time of the offense was N/A

Time Credited: 14 Days

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A Days Notes: N/A

Was the victim impact statement returned to the attorney representing the State? N/A

*(FOR STATE JAIL FELONY OFFENSES ONLY)* Is Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

The Court previously deferred adjudication of guilt in this case. Subsequently, the State filed a motion to adjudicate guilt.

The case was called for hearing. The State appeared by her District Attorney as named above.

**Counsel / Waiver of Counsel (select one)**

☒ Defendant appeared in person with counsel.

☐ Defendant appeared without counsel and knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

After hearing and considering the evidence presented by both sides, the Court FINDS THE FOLLOWING: (1) The Court previously found Defendant qualified for deferred adjudication community supervision; (2) The Court deferred further proceedings, made no finding of guilt, and rendered no judgment; (3) The Court issued an order placing Defendant on deferred adjudication community supervision for a period of **8 Years**; (4) The Court assessed a fine of **$800.00**; (5) While on deferred adjudication community supervision, Defendant violated the conditions of community supervision, as set out in the State's **AMENDED** Motion to Adjudicate Guilt, as follows:
PARAGRAPH ONE AND TWO

Accordingly, the Court GRANTS the State's Motion to Adjudicate. FINDING that the Defendant committed the offense indicated above, the Court ADJUDGES Defendant GUILTY of the offense. The Court FINDS that the Presentence Investigation, if so ordered, was done according to the applicable provisions of Subchapter F, Chapter 42A, Tex. Code Crim. Proc.

The Court ORDERS Defendant punished as indicated above. After having conducted an inquiry into Defendant's ability to pay, the Court ORDERS Defendant to pay the fines, court costs, reimbursement fees, and restitution as indicated above.

**Punishment Options (select one)**

☒ **Confinement in State Jail or Institutional Division.** The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court ORDERS Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fines, court costs, reimbursement fees, and restitution due.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court ORDERS Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Defendant shall be confined in the county jail for the period indicated above. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fines, court costs, reimbursement fees, and restitution due.

☐ **County Jail—State Jail Felony Conviction.** Pursuant to §12.44(a), Tex. Penal Code, the Court FINDS that the ends of justice are best served by imposing confinement permissible as punishment for a Class A misdemeanor instead of a state jail felony. Accordingly, Defendant will serve punishment in the county jail as indicated above. The Court ORDERS Defendant committed to the custody of the County Sheriff immediately or on the date the sentence commences. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fines, court costs, reimbursement fees, and restitution due.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a FINE ONLY. The Court ORDERS Defendant to proceed immediately to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay the fine, court costs, reimbursement fees, and restitution ordered by the Court in this cause.

☐ **Confinement as a Condition of Community Supervision.** The Court ORDERS Defendant confined **N/A Days in N/A** as a condition of community supervision. The period of confinement as a condition of community supervision starts when Defendant arrives at the designated facility, absent a special order to the contrary.

**Fines Imposed Include (check each fine and enter each amount as pronounced by the court):**

☒ General Fine (§12.32, 12.33, 12.34, or 12.35, Penal Code, Transp. Code, or other Code) **$526.00** (not to exceed $10,000)
☐ Add'l Monthly Fine for Sex Offenders (Art. 42A.653, Code Crim. Proc.) **$ 0.00** ($5.00/per month of community supervision)
☐ Child Abuse Prevention Fine (Art. 102.0186, Code Crim. Proc.) **$0.00** ($100)
☐ EMS, Trauma Fine (Art. 102.0185, Code Crim. Proc.) **$0.00** ($100)
☐ Family Violence Fine (Art. 42A.504 (b), Code Crim. Proc.) **$ 0.00** ($100)
☐ Juvenile Delinquency Prevention Fine (Art. 102.0171(a), Code Crim. Proc.) **$0.00** ($50)
☐ State Traffic Fine (§ 542.4031, Transp. Code) **$0.00** ($50)
☐ Children's Advocacy Center Fine - as Cond of CS (Art. 42A.455, Code Crim. Proc.) **$ 0.00** (not to exceed $50)
☐ Repayment of Reward Fine (Art. 37.073/42.152, Code Crim. Proc.) **$ 0.00** (To Be Determined by the Court)
☐ Repayment of Reward Fine - as Cond of CS (Art. 42A.301 (b) (20), Code Crim. Proc.) **$ 0.00** (not to exceed $50)
☐ DWI Traffic Fine (a/k/a Misc. Traffic Fines) (§ 709.001, Transp. Code) **$0.00** (not to exceed $6,000)

**Execution of Sentence**

☒ The Court ORDERS Defendant's sentence EXECUTED. The Court FINDS that Defendant is entitled to the jail time credit indicated above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk, or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any, concerning Defendant's credit for time served is incorporated herein by this reference.

**Furthermore, the following special findings or orders apply:**

**Furthermore, the following special findings or orders apply:**

**FINE IN THE AMOUNT OF $526.00 AND COURT COSTS IN THE AMOUNT OF $374.00, PAYABLE TO AND THROUGH THE CRIMINAL DISTRICT CLERK'S OFFICE OF TARRANT COUNTY, TEXAS**

**ATTACHMENT A, ORDER TO WITHDRAW FUNDS**

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**Date Judgment Entered: 9/30/2020**

X _____

JUDGE PRESIDING

Clerk: **JGP**

CASE NO. 1572638D COUNT ONE
INCIDENT NO./TRN: 9217340456

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|---|---|---|
| THE STATE OF TEXAS | § | IN THE 371ST DISTRICT COURT |
| | § | |
| v. | § | |
| | § | |
| JAMES CALVIN MASSEY | § | TARRANT COUNTY, TEXAS |
| | § | |
| STATE ID NO.: TX07424652 | § | Date: 09/28/2020 |

Right Thumbprint

X_____

PERSON TAKING PRINT

Clerk

# JUDGMENT AND SENTENCE FINGERPRINT PAGE

NO THUMBPRINT PROVIDED, DEFENDANT'S PLEA WAS TAKEN VIA VIDEO/Z00M AND WAS TOLD TO REPORT TO TARRANT COUNTY JAIL TO BEGIN SENTENCE. DEFENDANT FAILED TO REPORT AND A WARRANT HAS BEEN ISSUED FOR HIS ARREST.