Commonwealth of Kentucky
Court of Appeals
2012-CA-001836

Commonwealth of Kentucky — Appellant

v.

Appeal from the Jefferson Circuit Court
Action No. 10-XX-0086

Lyric Angus — Appellee

Brief for Appellee Lyric Angus

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Certificate

The undersigned does hereby certify that copies of this brief were served upon the following individuals by United States mail on September 6, 2013: Honorable Mary M. Shaw, Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202; Honorable Erica Williams, Judge, Jefferson District Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202; Honorable Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601; and Honorable David A. Sexton, Assistant Jefferson County Attorney, Fiscal Court Building, 531 Court Place, Suite 900, Louisville, Kentucky 40202. The undersigned does also certify that he has not withdrawn the record on appeal from the Clerk of the Jefferson Circuit Court or Kentucky Court of Appeals.

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Michael R. Mazzoli

STATEMENT CONCERNING ORAL ARGUMENT

Although this appeal involves important questions of jurisdiction and constitutional law, Ms. Angus believes that the Court can fully consider this matter without the aid of oral argument, and she therefore does not ask the Court to schedule such proceedings.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

ARGUMENT

1. **The Double Jeopardy Clause forbids the prosecution from appealing a judgment of acquittal, even if the verdict is incorrect or is attributable to the erroneous exclusion of evidence at trial.**

Statement of Points and Authorities (continued)

2. **The district court correctly held that Ms. Angus was in custody and entitled to Miranda warnings before she could properly be questioned or required to perform field sobriety tests.**

COUNTERSTATEMENT OF THE CASE

In late May 2010, an anonymous tipster complained to University of Louisville police about a late-model Camaro being driven by a resident of one of the student-housing facilities. (R. pg. 38, Dist. Ct. Audio CD's, CD No. 1: 11/17/10; Cox test. at 00:19:00.) University police officer Robert Cox spotted the automobile in the apartment complex's parking lot and, using motor vehicle and apartment records, linked the car to twenty-year-old student Lyric Angus. (*Id.* at 00:21:50.)

With further research, Officer Cox learned that Ms. Angus's driving privileges had been limited, following a conviction for driving under the influence, to the terms of a hardship license. (R. pg. 38, CD No. 1: 11/17/10; Cox test. at 00:24:00.) (The issuance of a hardship license was confirmed at trial by a Transportation Cabinet witness, though the precise terms of the license were never put into the record. (*Id.*, Prather test. at 00:10:50.)) When Officer Cox checked Ms. Angus's automobile, he did not see the "hardship decal" that state law required her to display on the rear window. (*Id.*, Cox test. at 00:24:00 – 00:25:00); *see* KRS 189A.430(3). Officer Cox decided he would arrest Ms. Angus and take her to jail. (*Id.* at 00:43:10.)

The arrest took shape in the apartment parking lot during the late evening of June 1, 2010. Officer Cox, armed but in plain clothes, kept watch on the Camaro from his vehicle. (CD No. 1: Cox test. at 00:22:40, 00:44:00.) In another car nearby sat University of Louisville police officer David James, armed and in uniform, accompanied by recruit Jordan Brown. (*Id.* and R. pg. 38, CD No. 2: 11/17/10; James test. at 00:06:00.) At about 9:00 p.m. they saw Ms. Angus leave one of the

apartments and get into the Camaro. (CD No. 1: Cox test. at 00:36:20.) As she maneuvered the car out of the parking spot and toward her own apartment a short distance away, Officers Cox and James closed in on her from opposite directions, their warning lights flashing. (*Id.* and CD No. 2: James test. at 00:08:00.) Ms. Angus pulled into a parking spot with the car's front tires facing the sidewalk curb; Officer James moved in immediately behind her, stopping a few inches away from the Camaro's rear bumper, and Officer Cox pulled in behind James. (CD No. 1: Cox test. at 00:36:20; CD No. 2: James test. at 00:08:00.)

Officer James walked up to Ms. Angus, rapped on the window, and ordered her to get out of the car. (CD No. 2: James test. at 00:09:00.) After she emerged from the car, Officer James asked her, "Have you been drinking?" Ms. Angus answered, "Yes – am I going to jail?" "Yes," answered Officer James. (*Id.* at 00:13:20; CD No. 2: Angus test. at 00:48:00.) Ms. Angus was then taken aside by Officer Cox and recruit Brown while Officer James searched her car (CD No. 1: James test. at 01:11:00); when Ms. Angus asked Officer Cox, "Am I going to jail?," he also answered, "yes." (*Id.*: Cox test. at 00:39:00.) None of the officers gave *Miranda* warnings to Ms. Angus at any time. (*Id.* at 00:50:45; CD No. 2: James test. at 00:15:45); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Officer Cox later testified that Ms. Angus had never been at liberty to walk away from the arresting officers at any moment during the June 1 encounter. (CD No. 1: Cox test. at 00:43:45.) Officer James said the same. (CD No. 2: James test. at 00:26:10.) For her part, Ms. Angus was convinced from the outset that any attempt to leave the scene would

be stopped by force, and that she had no choice but to stay and submit to the officers' questions. (*Id.*: Angus test. at 00:47:00, 00:50:00, 00:53:00.)

Before conducting any field sobriety tests, Officer James decided he would arrest Ms. Angus for driving under the influence. (CD No. 2: James test. at 00:15:00.) Nevertheless, he ordered Ms. Angus to perform a variety of balancing routines, most of which were administered by recruit Brown. (*Id.* at 00:14:00; CD No. 1: Cox test. at 00:39:00.) Both Officers James and Cox heard Ms. Angus report that she had been assaulted earlier the same evening, and they both noticed the bleeding cut over her eye, but they discounted this as having any effect on Ms. Angus's balance or coordination. (CD No. 1: Cox test. at 00:58:30; CD No. 2: James test. at 00:27:30.) Ms. Angus was handcuffed and taken to the University police station and from there to the jail, where a breathalyzer test was completed. (CD No. 1: Cox test. at 00:33:35.) (The test results were attached to the uniform citation, but were not introduced as evidence at trial.)

A bench trial was convened by Jefferson District Judge Erica Williams on November 17, 2010. While the Commonwealth's first witness, Officer Cox, was on the stand, counsel for Ms. Angus moved to suppress all evidence gathered after the stop of her vehicle, contending that the evidence was obtained in violation of the *Miranda* safeguard. (Colloquy, CD No. 1 at 00:49:00 (citing RCr 9.78).) Ms. Angus's attorney renewed the objection after the Commonwealth's other witness, Officer James, concluded his testimony. (*Id.*, CD No. 2 at 00:29:00.) The Commonwealth did not, on either occasion, challenge the procedural

correctness of defense counsel's mid-trial objection under RCr 9.78; both when the objection was made and when it was renewed, the prosecutor advanced directly to the merits of the constitutional question. (CD No. 1 at 00:50:10; CD No. 2 at 00:36:20-00:39:00, 00:41:40-00:42:45.) After taking testimony from Ms. Angus about the arrest (CD No. 2, Angus test. at 00:47:00-00:55:30), the judge adjourned the trial for the rest of the day to consider how to rule on the motion to suppress. (R. pg. 38, CD No. 3: 11/17/10; 00:10:45.)

When the proceedings resumed the next morning, the district court granted the motion. (R. pg. 38, CD No. 4: 11/18/10; colloquy at 00:02:00.) The court ruled that the initial stop was lawful (*id.* at 00:00:30), but held that the surrounding circumstances made it clear that, very soon after she got out of her car, Ms. Angus was in the officers' custody and was entitled to *Miranda* warnings before any further questioning of her could be proper. (*Id.* at 00:01:00.) The district court identified several key facts that contributed to her decision, including the presence of multiple police cars, the creation of a barrier preventing Ms. Angus from moving her automobile, and the number of officers on the scene. (*Id.* at 00:01:30.) The judge gave particular emphasis to the fact that "Ms. Angus asked, 'Am I going to jail?', and the response was, 'Yes.' " (*Id.* at 00:01:15.) "At that moment," the judge said, "no reasonable person would believe that they are free to go when an officer has told you, 'You are going to jail.'" (*Id.* at 00:01:20.)

"So once in custody, *Miranda* is required," the judge continued: "thus all statements subsequent are suppressed." (CD No. 4: colloquy at 00:01:45.) The same principles called for exclusion of the police officers'

testimony about Ms. Angus's field sobriety tests, the judge explained. (*Id.* at 00:01:50.) Citing *Hourigan v. Commonwealth*, 962 S.W.2d 860 (Ky. 1998), the judge ruled that because Ms. Angus was in custody when performing exercises that were testimonial in nature, "*Miranda* is required, and that did not happen here, so those will be suppressed too, the field sobriety tests." (CD No. 4: colloquy at 00:01:50); *see Hourigan*, 962 S.W.2d at 863-864.

Shortly after this ruling, the prosecutor announced, "No further witnesses for the Commonwealth," and the government rested its case. (CD No. 4: colloquy at 00:03:25.) The defense then asked for a directed verdict dismissing the prosecution: "I would ask the court ... to find the defendant not guilty, as the Commonwealth has no proof whatsoever of any of these charges, and therefore she should be found not guilty and the case should be dismissed." (*Id.* at 00:03:40.) The court granted the motion, saying: "There hasn't been any evidence that can come in, and Ms. Angus is found not guilty and the case will be dismissed." (*Id.* at 00:03:55.)

The proceedings did not terminate at that point, though. One of the Commonwealth's charges against Ms. Angus was that she had operated her vehicle while her license was suspended by a DUI conviction. (CD No. 4: colloquy at 00:06:00); *see* KRS 189A.090. Shortly after the court declared Ms. Angus not guilty of driving under the influence, the prosecutor cited the court's ruling that the initial stop of Ms. Angus's car was valid, and asked whether the suspended-license charge was still pending, or had also been dismissed. (*Ibid.*) The court answered that the charge was still viable. (*Id.* at 00:06:45.) Defense

counsel protested that all the Commonwealth's evidence had been suppressed, reasoning that as soon as the police officers had blocked Ms. Angus's car in the parking lot, "at that point she's not free to go – " "That's not what I ruled," interrupted the judge. (*Id.* at 00:06:50.) Ms. Angus was in custody after she was told she was going to jail, the judge said, "but *before* that she gave her driver's license and her insurance and her registration." (*Id.* at 00:07:15) (emphasis added). The parties debated whether the testimony of the Transportation Cabinet witness had established that Ms. Angus's operation of a vehicle with a hardship decal in her possession, but not on the rear windshield, was illegal (*id.* at 00:08:30); after reviewing her notes, the judge agreed that the witness had provided the relevant dates of the hardship license's issuance and expiration, but "[t]hat's all he testified to, he didn't testify to anything else." (*Id.* at 00:09:10.) "So, on the decal," the judge asked the prosecutor, "what proof do you have?" (*Id.* at 00:09:30.) After further discussions with the parties, the judge decided that Ms. Angus was not guilty of the suspended license offense: "Based on the evidence – or lack thereof, however you want to put it – the charges that ... occurred on June 1st, 2010, ... the order is going to stand as I ruled." (*Id.* at 15:00:00, 15:30:00.)

The Commonwealth appealed Ms. Angus's acquittal, contending that the district court erred when it held Ms. Angus was "in custody" and therefore entitled to *Miranda*'s protections when confronted by the police. (*See* Jeff. Circ. Ct. Op. and Order at pg. 1, R. pg. 41.) Jefferson Circuit Judge Mary M. Shaw reconsidered the *Miranda* question *de novo* and reached the same conclusion as the district court: "The evidence clearly

shows that Angus's vehicle was blocked by the officers and that she inquired two separate times as to whether she was going to be taken to jail," the court wrote. (*Id.* at pg. 4, R. pg. 44.) "Once Angus made the inquiries about being arrested and received affirmative answers, along with her vehicle being blocked in, she was deprived of her freedom of action (i.e., liberty) in a significant way so as to be in police custody." (*Ibid.*)

The circuit court also held that the Commonwealth's appeal was itself prohibited by the Double Jeopardy Clause. (Op. and Order at pg. 5, R. pg. 45.) "T]he record indicates that the Commonwealth had no additional evidence to offer after the trial court's ruling on suppression," the circuit court found. (*Ibid.*) When the district judge then "granted Angus's motion for directed verdict and entered a subsequent acquittal" (*ibid.*), the order was entitled to the protection afforded acquittals by the Double Jeopardy Clause. (*See ibid.*) Citing this Court's ruling in *Commonwealth v. Cozzolino*, 395 S.W.3d 485 (Ky. App. 2013), the circuit court concluded that "the Commonwealth cannot appeal from a directed verdict of acquittal...." (*Ibid.*)

This Court subsequently granted the Commonwealth's motion for discretionary review, and the current proceedings followed.

ARGUMENT

The lower courts' *Miranda* rulings are easily defended on the merits, but they are not the logical starting point for considering the Commonwealth's appeal. Rather, priority belongs to the dispositive constitutional issue in this case: the fact that, after a defendant has been acquitted, the Commonwealth cannot lawfully appeal the judgment or

any subsidiary ruling in the case, whatever the merit (or failings) of the decision the prosecution wishes to challenge. That, indeed, is the lesson offered by this Court in *Cozzolino*, 395 S.W.3d at 487, and that is where this legal discussion should start.

1. The Double Jeopardy Clause forbids the prosecution from appealing a judgment of acquittal, even if the verdict is incorrect or is attributable to the erroneous exclusion of evidence at trial.

"An acquittal," explained this Court in *Cozzolino*, "requires either the judge or jury to evaluate and weigh the evidence related to guilt and to determine that it is legally insufficient to sustain a conviction." *Id.*, 395 S.W.3d at 487 (quoting *Derry v. Commonwealth*, 274 S.W.3d 439, 444 (Ky. 2008)). Such a ruling meets the definition of "acquittal," explained the United States Supreme Court, because "it actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith v. Massachusetts*, 543 U.S. 462, 467-468 (2005) (citations and punctuation omitted).

Ms. Angus was acquitted at the end of her bench trial. The sequence of events makes this plain: the district court ruled on the defense motion to suppress (CD No. 4: colloquy at 00:01:45), the prosecutor announced that there were "no further witnesses for the Commonwealth" (*id.* at 00:03:30), the defense attorney asked the court to "find the defendant not guilty" (*id.* at 00:03:40), and the court announced, "Ms. Angus is found not guilty and the case will be dismissed." (*Id.* at 00:03:55.) (The Commonwealth's brief is therefore misleading, if not outright dishonest, when it declares that the district

court did not "use[] words like 'not guilty'" to describe the disposition of the case. (Appellant's br. at pg. 11.))

This trial court's acquittal of Ms. Angus is fatal to the Commonwealth's appeal. "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal." *Cozzolino*, 395 S.W.3d at 488 (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978)). This is the essence of the constitutional protection against double jeopardy. U.S. Const. amend. V *and* Ky. Const. § 115; *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

The Commonwealth tries to escape the application of this mandate by arguing that, when the district court suppressed "**all** the evidence police gleaned at the traffic stop," the court could not then acquit Ms. Angus, because an acquittal requires a court to weigh the evidence related to guilt, and the court's suppression ruling meant "there was no evidence to weigh." (Appellant's br. at pg. 10 (emphasis in original).) This theory is repeated insistently throughout the prosecution's brief. (*See id.* at pp. 11 (exclusion of all evidence means Ms. Angus "cannot ... complain that somehow the trial court engaged in a weighing of the sufficiency of the evidence"), 12 (all the evidence having been suppressed, "there was necessarily no weighing of the sufficiency of the evidence"), 14 (trial was terminated "before there could ever be a weighing of the evidence"), 15 (judge "did not evaluate the evidence" because her suppression ruling "precluded any and all of the Commonwealth's proof from even being considered in the first place"), *ibid.* (trial court

"necessarily could not 'evaluate and weigh the evidence' ... as there was no evidence to 'evaluate and weigh'").

The Commonwealth's argument combines an untruthful factual account with spurious legal reasoning, and it ultimately comes to nothing.

The Commonwealth's facts are wrong: the district judge manifestly did *not* exclude *all* of the prosecution's evidence. As the judge made clear when she corrected the defense attorney, her suppression order excluded evidence gathered *after* Ms. Angus was placed in custody, and thus materials acquired *before* that moment, including Ms. Angus's driver's license, were *not* excluded. (CD No. 4: colloquy at 00:06:45.) The defense attorney appeared to concede that Ms. Angus's admission (to Officer James) that she'd been drinking also came before Ms. Angus was placed in custody. (*Id.* at 00:13:00.) The Transportation Cabinet witness's testimony was likewise unaffected by the suppression ruling, something the judge demonstrated when, in the course of deciding the suspended license charge, she expressly cited the testimony as proof for the Commonwealth. (*Id.* at 00:09:10.) The judge certainly excluded *most* of the prosecution's evidence, but *not all* of it, and her verdict of acquittal therefore manifested her conclusion that the Commonwealth's admissible evidence weighed too little to prove Ms. Angus guilty beyond a reasonable doubt.

And what legal difference would it have made if the judge *had* excluded *all* of the Commonwealth's evidence prior to declaring Ms. Angus not guilty? None: indeed, the very *paradigm* of a case in which an acquittal is proper is one where the prosecution has *no* evidence. *See,*

e.g., Robey v. Commonwealth, 943 S.W.2d 616, 620 (Ky. 1997) ("There was no evidence to indicate that [the defendant's] privilege to be in the apartment had been withdrawn prior to the time he committed the independent criminal act," thus defendant's "motion for a directed verdict on the burglary charge should have been sustained."). The Commonwealth would surely agree that "there must be evidence of substance" to find a defendant guilty, and thus "the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Commonwealth v. Benham*, 816 S.W.2d 186, 187-188 (Ky. 1991). If "a mere scintilla" is not enough to survive a directed verdict of acquittal, how could *less than a scintilla* fare any better? Were the law as the Commonwealth frames it, the government would be in danger of acquittal if it offers *any* evidence, but immune from acquittal if it offers *no* evidence (thus giving the trial judge "no evidence to evaluate and weigh," *cf.* Appellant's br. at pg. 15); and thus the prosecution could try a defendant an infinite number of times (and suffer a directed verdict of acquittal every time) as long as the government never offered any proof against the defendant. Something so absurd is not a viable interpretation of the Double Jeopardy Clause, but a mockery of it.

The Commonwealth's chief complaint in this case, of course, is not really that the trial court erred when it dismissed the charges against Ms. Angus; the Commonwealth does not try to argue that the evidence actually admitted in the trial was sufficient to survive a directed verdict of acquittal. Rather, the Commonwealth objects to the suppression ruling which made the later acquittal inevitable. (*See* appellant's br. at

pp. 6-10.) But the acquittal must stand and the Commonwealth cannot appeal it, even if the suppression ruling was incorrect.

The protection against double jeopardy is not conditioned on the correctness of the trial court's legal or factual conclusions. The Kentucky Constitution, for instance, expressly forbids the Commonwealth from appealing "from a judgment of acquittal in a criminal case"; it does not authorize differential treatment of acquittals based on the perceived reasonableness of the trial court's ruling. Ky. Const. § 115. The double jeopardy prohibition applies with full force even to an acquittal which is "due to an error of the court committed upon [the defendant's] motion," *Commonwealth v. Mullins*, 405 S.W.2d 28, 29 (Ky. 1966) (quoting *Commonwealth v. Ball*, 104 S.W. 325, 326 (Ky. 1907)), even if the acquittal is "based upon an egregiously erroneous foundation." *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (quoting *Fong Foo*, 369 U.S. at 143). "A mistaken acquittal is an acquittal nonetheless," the United States Supreme Court observed just a few months ago, "and we have long held that 'a verdict of acquittal could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution.'" *Evans v. Michigan*, __ U.S. __, 133 S.Ct. 1069, 1074 (2013) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)) (internal punctuation omitted).

These principles dictate that the Commonwealth cannot appeal an acquittal, even one that results from a mistaken decision to exclude the government's evidence. In *Sanabria v. United States*, the Supreme Court described a ruling which was "properly to be characterized as an erroneous evidentiary ruling[] which led to an acquittal for insufficient

evidence," and declared that the "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.*, 437 U.S. at 68-69 (footnote omitted). The intervention of the Double Jeopardy Clause means that the government cannot "obtain relief from all of the adverse rulings – most of which result from defense motions – that lead to the termination of a criminal trial in the defendant's favor," the Court wrote. *Id.* at 77-78. "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a midtrial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests," the Court warned, "and would vitiate one of the fundamental rights established by the Fifth Amendment." *Id.* at 79 (citation omitted).

These double jeopardy principles likewise bar the prosecution from appealing acquittals which, to use the Commonwealth's words, are obtained by way of a motion that the defendant "*could have easily raised ... prior to trial.*" (Appellant's br. at pg. 13 (emphasis in original)). (As this Court has frequently recognized, RCr 9.78 allows suppression requests to be made during trial, *see Cozzolino*, 395 S.W.3d at 487 *and Matlock v. Commonwealth*, 344 S.W.3d 138, 139 (Ky. App. 2011), and the Commonwealth does not claim otherwise in its brief.) The United States Supreme Court made clear in its recent opinion that the defendant's choice to raise an objection during trial rather than before trial does not affect the double jeopardy analysis. *Evans*, 133 S.Ct. at 1079-1080. In *Evans*, the government argued that the defendant "could have asked the court to resolve" the pivotal legal question "before jeopardy attached, so

having elected to wait until trial was underway to raise the point, he cannot now claim a double jeopardy violation." *Id.* at 1079. The Supreme Court answered that, if the motion is allowed by the relevant procedural rules, a defendant "cannot be penalized for requesting from the court a ruling on the merits of the prosecution's case" during trial. *Ibid.* "[W]hether [the defendant] could have also brought a distinct procedural objection earlier on," said the Court, "is beside the point." *Id.* at 1080.

This Court explained in *Cozzolino* why the double jeopardy rule prohibits the Commonwealth from appealing judgments like the one in Ms. Angus's case. "To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'" *Id.*, 395 S.W.3d at 488 (quoting *Scott*, 437 U.S. at 91). Moreover, as the United States Supreme Court has observed, "retrial following an acquittal would upset a defendant's expectation of repose, for it would subject him to additional 'embarrassment, expense and ordeal' while 'compelling him to live in a continuing state of anxiety and insecurity.'" *Evans*, 133 S.Ct. at 1075 (quoting *Scott*, 437 U.S. at 187).

Ms. Angus was acquitted by Jefferson District Court; the Commonwealth's appeal of that decision is prohibited by the Kentucky and federal Constitutions. The Jefferson Circuit Court correctly ruled that the Commonwealth's appeal offends the Double Jeopardy Clause, and its approval of the trial court's ruling merits this Court's affirmation.

2. The district court correctly held that Ms. Angus was in custody and entitled to *Miranda* warnings before she could properly be questioned or required to perform field sobriety tests.

"Our standard of review of a ... decision on a suppression motion following a hearing is twofold," this Court has explained. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2000). "First, the factual findings of the court are conclusive if they are supported by substantial evidence. The second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." *Ibid.* (citations omitted). When the issue on appeal concerns *Miranda* warnings, "[t]he question of 'custody' is reviewed *de novo* on the application of the law to the facts, though the trial court's findings of historical fact are conclusive if supported by substantial evidence." *Alkabala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 920 (Ky. 2008).

Miranda's basic policy is clear: "[A] person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned" of the rights to remain silent and to have an attorney present. *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Miranda*, 384 U.S. at 444). If a law enforcement officer conducts a custodial interrogation without first giving *Miranda* warnings, the statements must be excluded from trial. *Berkemer v. McCarty*, 468 U.S. 420, 428 (1984).

"Routine traffic stops" are not categorically exempt from the *Miranda* rule. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U.S. at 440. This rule is

particularly applicable to field sobriety tests, the Kentucky Supreme Court observed: "[F]ield sobriety tests ... are testimonial in nature and, consequently, the real issue" when deciding whether a defendant was entitled to *Miranda* warnings before a field sobriety test "is whether the accused was in custody" when the tests were performed. *Hourigan*, 962 S.W.2d at 864.

The "custody" determination requires more than simply asking whether the citizen's encounter with the police was or was not a "routine traffic stop." The Kentucky Supreme Court described the actual test: "In order to determine if a person was in custody, a court must determine 'whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave.' " *Beckham v. Commonwealth*, 248 S.W.3d 547, 551 (Ky. 2008) (quoting *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006)). This was the legal standard applied by the trial court (colloquy, CD No. 4 at 00:01:20) and by the circuit court, too. (Opinion at pp. 2-3, R. pp. 42-43.)

The Kentucky Supreme Court listed a series of "factors that suggest a seizure has occurred and that a suspect is in custody:"

> the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; [] the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled[;] ... the purpose of the questioning; [] whether the place of the questioning was hostile or coercive; [] the length of the questioning; ... whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so[;] whether the suspect possessed unrestrained freedom of movement during questioning[;] and whether the suspect initiated

> contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.

Smith v. Commonwealth, 312 S.W.3d 353, 358-359 (Ky. 2010) (citations omitted).

After she was ordered out of her car by Officer James, Ms. Angus asked him whether she was going to jail, and he answered "yes." Officer Cox told Ms. Angus the same thing a moment later. The Commonwealth waves off this evidence, saying that a person's "subjective awareness of her obvious criminal culpability" is immaterial (Appellant's br. at pg. 8), but this misses the point entirely. First, the United States Supreme Court has made it eminently clear that a critical issue bearing on the custody question is whether a subject was "*informed that his detention would not be temporary.*" *Berkemer*, 468 U.S. at 441-442 (emphasis added). "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Stansbury*, 511 U.S. at 325. So, though it might not be significant that Ms. Angus was subjectively worried she would be taken to jail, it is obviously and objectively important that the police officer *told* her she was about to be incarcerated. And second, the Commonwealth is simply wrong to claim that a defendant's subjective impressions and responses have no bearing whatsoever on the question of custody. Although it is true that *Miranda*'s objective inquiry means that "a suspect's *subjective* views are not directly relevant to whether he or she was in custody[,] ... a suspect's subjective views *may* be considered as circumstantial evidence of 'the atmosphere and how that would impact a reasonable person's perception' of the questioning." *United States v.*

Pelletier, 700 F.3d 1109, 1115 (7th Cir. 2012) (quoting *United States v. Ambrose*, 668 F.3d 943, 959 (7th Cir. 2012) (emphasis in original).

In the present case, the officers' plan to put Ms. Angus in jail was conveyed to her explicitly, unequivocally: yes, she was going to jail. Everything else at the scene corroborated this acknowledged plan: several armed officers appearing simultaneously in multiple cars, parking their vehicles in such a way that any movement by Ms. Angus was impossible, interrogating her almost immediately, teaming up by having one officer question her while the other searched her car, using an intimidating tone of voice (according to Ms. Angus), eventually handcuffing her and ultimately, as they promised, taking her to jail. This was not a case where the lower courts declared a person was in custody merely because of her "subjective belief" that she could not leave the scene; rather, the courts properly concluded that, as one federal opinion put it, "no reasonable person could argue" that Ms. Angus "could simply have ... turned [her] back on the car and the three officers, and walked away. Indeed, it would have been poor police work to allow the defendant to walk away at that time." *United States v. Green*, 776 F.Supp. 565, 567 (Dist. D.C. 1991).

The Commonwealth's brief lastly tries a new argument, one the lower courts never heard: the claim that the trial court applied the exclusionary rule too broadly and suppressed more evidence than was appropriate. (*See* appellant's br. at pg. 9.) (The Commonwealth implies that this issue was debated in the circuit court, but there is no mention of the argument in the Commonwealth's Statement of Appeal. (*See* R. pp. 8-9).) There is support for the claim that *physical* evidence derived

from a *Miranda* violation need not be excluded unless the unwarned statement was also involuntary, *see United States v. Patane*, 542 U.S. 630, 634 (2004), but it is not clear that there *was* any such evidence excluded. When describing her suppression ruling, the district judge said that "once in custody, *Miranda* is required, thus *all statements subsequent* are suppressed," and that under *Hourigan*, "field sobriety tests are testimonial if the defendant is in custody, then *Miranda* is required, and that did not happen, so *those are suppressed*, too." (Colloquy, CD No. 4 at 00:01:30 (emphasis added).) The evidence identified by the district court as being suppressed was testimonial proof rightly subject to the exclusionary rule. The physical evidence in the record was extremely sparse: the prosecution never offered proof of the blood alcohol test, and the only other physical evidence in the case was a vodka bottle purportedly found in Ms. Angus's car. (The officers' opinions about the smell of Ms. Angus's breath might perhaps be considered an admissible derivative of physical evidence.) It is difficult to see how a narrower application of the exclusionary rule would have made any difference to the trial court's determination that Ms. Angus should be found not guilty of the charges against her.

The trial court's factual findings regarding the custody question (CD No. 4 at 00:01:00) are all supported by substantial evidence, and *de novo* consideration of these findings leads forcefully to the legal conclusion that Ms. Angus was "deprived of [her] freedom of action in [a] significant way" and should have been warned that she had the rights to remain silent and to have an attorney present. *Stansbury*, 511 U.S. at

322. If this Court sees it fit to consider the matter, the rulings of Jefferson District Court and Jefferson Circuit Court should be affirmed.

CONCLUSION

Ms. Angus asks the Court to affirm the rulings below.

Respectfully submitted,

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