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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)
(1); Ariz. R. Crim. P. 31.19(e).
Court of Appeals of Arizona, Division 2.

THE STATE OF ARIZONA, Appellee,
v.
JUAN MAURICIO LERMA, Appellant.

No. 2 CA-CR 2017-0265
|
Filed October 25, 2018

Appeal from the Superior Court in Pima County

No. CR20033881

The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General, Joseph T. Maziarz, Chief Counsel By Gracynthia Claw, Assistant Attorney General, Phoenix, Counsel for Appellee

Hernandez & Hamilton PC, Tucson, By Clay Hernandez and Carol Lamoureux, Counsel for Appellant

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

MEMORANDUM DECISION

ESPINOSA, Judge:

***1 ¶1** Juan Lerma appeals his convictions for possession of a dangerous drug for sale and possession of drug paraphernalia, claiming the trial court erred in denying his motion to **suppress** evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We review the trial court's factual findings on a motion to **suppress** for an abuse of discretion, but review constitutional issues and legal determinations de novo. *State v. Evans*, 237 Ariz. 231, ¶ 6 (2015); *State v. Booker*, 212 Ariz. 502, ¶ 10 (App. 2006). In our review, "we consider only the evidence presented at the **suppression** hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Gonzalez*, 235 Ariz. 212, ¶ 2 (App. 2014).

¶3 In November 2003, a Tucson Police Department detective received a tip from a California law enforcement agency that a named individual was trafficking methamphetamine from a Tucson residence. Based on this tip, police began surveillance there. At 1:45 p.m., a man, later identified as Juan Lerma, arrived in a green SUV and went inside for approximately thirty minutes. When he left, Arizona Department of Public Safety Sergeant Morlock, accompanied by an FBI agent, followed the SUV to a restaurant parking lot and observed Lerma talking on his cell phone while sitting in the vehicle. Less than five minutes later, a pickup truck arrived; it parked directly next to Lerma's SUV and the driver got into the passenger side and shut the door. Initially, the two men "were sitting upright" and "appeared to be engaging in some sort of conversation." Then, "within a very short period of time," both men reclined their seats almost below the window level and out of sight to the point it was not possible "to clearly observe what it was they were doing."

¶4 Based on the information about the suspected drug trafficking at the residence Lerma had just left and "observations to that point," the surveilling officers decided to investigate further. Officer Morlock moved his unmarked vehicle to a position behind the SUV "[i]n such a way that [it] was blocked from moving out of the parking space," and he and the FBI agent approached on each side from behind. As Morlock neared the driver's window, gun drawn but holding it down at his side, he observed Lerma reclined in his seat with a "lap full" of cash. Morlock, a twenty-year law-enforcement veteran and a narcotics supervisor for twelve years, believed at that point "there was a narcotics transaction that was taking place." He opened the SUV's door, ordered Lerma out of the vehicle and to the ground, and frisked and handcuffed him.

¶5 Within "very few minutes, even seconds," other officers arrived, and one of them saw three suspicious packages appearing to contain "a crystal substance" and marijuana inside the now-open driver's side door pocket. While that officer photographed the SUV, Lerma was placed in a patrol car and a drug-detection dog was brought to the scene within "maybe 10 minutes" of Lerma being removed from his vehicle. After the dog alerted to the presence of drugs, officers discovered, in addition to the packages in the door that did contain marijuana and methamphetamine, an athletic bag under the driver's seat containing approximately 1.5 pounds of methamphetamine. Lerma was arrested and subsequently charged with the offenses noted above.

***2** **¶6** Before trial, Lerma filed a motion to **suppress** the evidence found in his SUV, claiming it resulted from an illegal search and that he had been unlawfully arrested and transported to the police station before the dog was brought to the scene. Following a hearing, the trial court denied the motion, and after Lerma failed to appear at trial, an arrest warrant was issued and he was tried *in absentia*. He was convicted as charged but not arrested until December 2016. Lerma was thereafter sentenced to two concurrent prison terms, the longer of which was four years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1). [1]

Reasonable Suspicion

¶7 Lerma first argues the trial court erred in denying his motion to **suppress** the evidence resulting from his arrest because the officers lacked reasonable suspicion to detain him.

¶8 A brief investigatory stop does not violate Fourth Amendment protections if a police officer has an "articulable, reasonable suspicion, based on the totality of the circumstances, that [a] suspect is involved in criminal activity." *State v. Teagle*, 217 Ariz. 17, ¶ 20 (App. 2007); *see Terry v. Ohio*, 392 U.S. 1, 30 (1968). Citing *State v. Gonzalez*, Lerma asserts he was seized without reasonable suspicion "the moment his vehicle was blocked in and Officer Morlock approached the door with his firearm drawn because a reasonable person in his position would not have felt free to leave." He further argues the "lap full" of cash should not be "factored into the reasonable suspicion analysis because it was not discovered until after Lerma was detained." We disagree.

¶9 In *Gonzalez*, a police officer responded to a "suspicious activity call" after a report of three individuals—one sitting in a parked vehicle and two outside it—in a restaurant parking lot. 235 Ariz. 212, ¶ 2. The officer parked behind the vehicle in such a way that would have made it "difficult or impossible for [the defendant] to back out and leave." *Id.* ¶ 3. Without activating the patrol car's sirens or spotlight, but with overhead lights on, the officer approached the vehicle "slowly and deliberately," and as he came closer, smelled marijuana. *Id.* ¶¶ 3-4. At the **suppression** hearing, "the key questions were whether a seizure had occurred before the officer smelled marijuana, and if so, whether he had reasonable suspicion at the time of the seizure." *Id.* ¶ 5. In denying the motion, the trial court noted that while Gonzalez was certainly unable to leave, no seizure had occurred before the officer smelled the marijuana because the officer "had not done 'something additional conveying to the parties involved that they were the subject of inquiry.' " *Id.*

¶10 On appeal, this court upheld the trial court's denial, concluding "Gonzalez was not detained prior to the officer smelling marijuana as he approached the vehicle." *Id.* ¶ 1. We noted that while "the officer's actions constituted the show of authority necessary for a seizure," the officer's blocking the car "does not end the analysis." *Id.* ¶¶ 12-13. Rather, unless the officer uses physical force, "a defendant is not seized until he becomes 'aware of and submit[s] to the assertion or display of police authority.' " *Id.* ¶ 13 (quoting *G.M. v. State*, 19 So. 3d 973, 983 (Fla. 2009)). The officer had testified that as he approached the vehicle, none of the suspects reacted or did "anything that indicated that they even saw [him] coming," *id.* ¶ 14, and the trial court therefore could "implicit[ly] determin[e] that there was no submission to the show of authority before the officer smelled marijuana," *id.* ¶ 16; *see also California v. Hodari D.*, 499 U.S. 621, 628-29, 631 (1991) (absent physical force, seizure occurs only when suspect submits to assertion of police authority). [2]

***3** **¶11** Although Lerma asserts "there was no evidence that he was unaware of his detention until he was pulled out" of the SUV, the record is devoid of any indication he submitted to the officer's show of authority prior to Morlock seeing the cash, opening the door, and removing Lerma from the SUV. And the trial court could implicitly

infer that because his seat was deeply reclined as the officers approached from behind, Lerma did not see them and was unaware of their presence outside his vehicle, and therefore was not detained or seized until Morlock opened his door. *See Gonzalez*, 235 Ariz. 212, ¶ 13; *see also G.M.*, 19 So. 3d at 981 (no seizure where defendant could not see police behind his vehicle and was unaware of their presence). At that point, based on the totality of the circumstances, the officer had sufficient information to "derive 'a particularized and objective basis for suspecting [Lerma] of criminal activity.' " *Evans*, 237 Ariz. 231, ¶ 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

¶12 Lerma also argues, however, that each observation Officer Morlock found suspicious, including the "lap full of cash," was "consistent with innocent activity" and that his suspicion "amounted to nothing more than a hunch." But there is "a gestalt to the totality of the circumstances test," and we cannot simply "parse out each individual factor, categorize it as potentially innocent, and reject it" but instead "must look at all of the factors, (all of which would have a potentially innocent explanation, or else there would be probable cause), and examine them collectively." *State v. O'Meara*, 198 Ariz. 294, ¶ 10 (2000); *see, e.g.*, *State v. Sweeney*, 224 Ariz. 107, ¶¶ 23-24 (App. 2010) (noting individual factors but considering them in aggregate). We consider "such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and [take] into account the officer's relevant experience, training, and knowledge." *State v. Fornof*, 218 Ariz. 74, ¶ 6 (App. 2008).

¶13 Recapping the salient factors here, Officer Morlock knew Lerma had just left the residence of a suspected drug trafficker after a short visit. Lerma had then pulled into a restaurant parking lot and appeared to telephone someone. Within a few minutes, another man parked next to Lerma and got into the passenger side of Lerma's SUV. After a short conversation, both men deeply reclined their seats, all but disappearing from outside view. As Morlock approached, he observed Lerma through the driver's side window, down low in his seat with a "lap full" of cash. Based on his training and long experience as a narcotics supervisor and law enforcement officer, Morlock had a justifiable and particular suspicion that Lerma was conducting a narcotics transaction and the officer lawfully detained him for further investigation. [3] *See Evans*, 237 Ariz. 231, ¶ 8.

De Facto Arrest

***4 ¶14** Lerma additionally contends the manner of his detention "was unreasonable in light of the surrounding circumstances and amounted to a de facto arrest" without probable cause. In determining whether an illegal arrest occurred, we "give great deference to the trial court's factual determination, but we review the ultimate question de novo." *State v. Blackmore*, 186 Ariz. 630, 632 (1996). When addressing pretrial motions to **suppress** evidence, "the State has the burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the State will use at trial." Ariz. R. Crim. P. 16.2(b)(1). The trial court found the state met this burden, and we agree. [4]

¶15 Because there is no bright-line rule as to when a valid investigatory detention definitively transforms into a de facto arrest, courts evaluate the totality of the circumstances in determining whether a detention was proper. *See State v. Boteo-Flores*, 230 Ariz. 105, ¶ 14 (2012). The detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). Further, it "must be tailored to fit the exigencies" of the situation. *Id.* (quoting *United States v. Pontoo*, 666 F.3d 20, 30 (1st Cir. 2011)). Appellate courts consider "whether the police [were] acting in a swiftly developing situation, and ... [courts] should not indulge in unrealistic second-guessing" or "imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985); *see Boteo-Flores*, 230 Ariz. 105, ¶ 15.

¶16 Lerma argues his detention was "completely excessive" because "the circumstances did not warrant approaching the car with guns drawn, dragging Lerma out of the car and handcuffing him on the ground." The record, however, supports the state's contention that the officers were in the midst of a swiftly developing situation, *see Sharpe*, 470 U.S. at 686, and acted reasonably to effectuate the purpose of the stop, preserve the status quo, and confirm or dispel their suspicion of drug trafficking in progress, *see Boteo-Flores*, 230 Ariz. 105, ¶¶ 14-15; *Blackmore*, 186 Ariz. at 633 (brief stop to maintain status

quo "may be most reasonable in light of the facts known to the officer") (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)). At the time Officer Morlock approached the two men in the SUV and determined a drug-trafficking transaction was likely taking place, he was accompanied by only one other law enforcement officer. Morlock testified he put Lerma on the ground so he would be in "a position where [the officer] could control his activities safely" and "control his movement." This "use of force does not transform a stop into an arrest if the situation explains an officer's fears for his personal safety," nor does the display of a weapon "necessarily convert an investigation into an arrest." *State v. Romero*, 178 Ariz. 45, 49 (App. 1993); *cf. State v. Vasquez*, 167 Ariz. 352, 355 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1052 (1983) (investigatory detentions leave police "particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger' ").

***5 ¶17** The duration of Lerma's detention was also reasonable under the circumstances. Because "the societal interest in interdicting the transportation (and presumed distribution) of illegal drugs is substantial, ... a person who is reasonably suspected of transporting drugs may be justifiably detained for a longer time than a person detained for a less serious offense." *Teagle*, 217 Ariz. 17, ¶ 33. Here, "within a very few minutes, even seconds" after Lerma was removed from the SUV, other officers arrived at the scene and Lerma was placed in a patrol car. He was detained there for only "between 10 and 15 minutes" until the canine unit arrived and alerted to the SUV. We agree with the state's contention that "because illegal drugs were suspected, the drug-detection dog was the least intrusive and arguably most efficient, reliable means of confirming the [officers'] suspicion." A "significant factor in the permissible length of [Lerma's] seizure is how long it would reasonably take" for a drug dog to arrive at the scene. *Teagle*, 217 Ariz. 17, ¶¶ 34-35 (an hour and forty minute seizure not unreasonable where canine unit was roughly sixty miles away). Because the length of Lerma's detention was "not unreasonably prolonged," it did not amount to a de facto arrest and the trial court did not err in denying Lerma's motion to **suppress**. *Id.* ¶ 35.

Disposition

¶18 For the foregoing reasons, Lerma's convictions and sentences are affirmed.

All Citations

Not Reported in Pac. Rptr., 2018 WL 5309877

Footnotes

1 Section 13-4033(C) provides, "[a] defendant may not appeal" a final judgment of conviction "if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." This provision was not in effect until September 2008, well after Lerma's trial, and does not apply retroactively. *See State v. Bolding*, 227 Ariz. 82, ¶¶ 3, 9 (App. 2011). Lerma's appeal is therefore properly before us.

2 In his reply brief and at oral argument, Lerma urged this court to limit the holding in *Hodari D.* on state constitutional grounds, citing other jurisdictions that have done so. But he has not developed this argument in any meaningful way; we therefore do not consider it. *State v. Bolton*, 182 Ariz. 290, 298 (insufficient argument waives appellate review).

3 Lerma argues for the first time in his reply brief that "the State should not benefit from additional information an officer learns during an otherwise unjustified attempted detention" as it will incentivize police to "detain first" and "develop suspicion later." Because this argument was not raised in his opening brief, we need not address it. *See State v. Doolittle*, 155 Ariz. 352, 357 (App. 1987) (argument first raised in reply brief is waived). And in any event, we would decline an invitation to establish a new rule for an alleged evil not present in this case and which may or may not arise in the future. *See State v. Soriano*, 217 Ariz. 476, n.3 (App. 2008) (appellate court "will not render advisory opinions anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict" (quoting *Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 211 Ariz. 146, n.7 (App. 2005))).

4 We note the trial court could have found that probable cause to arrest Lerma arose as soon as an officer saw what appeared to be illegal drugs in plain view in his SUV's door. *See Blackmore*, 186 Ariz. at 634 (drugs found during detention established probable cause to arrest). At the **suppression** hearing, there was some discussion as to whether this discovery was made before or after the canine alert, due to a police report the officer admitted "should have been

better written" and was "out of order." When the officer corrected the report during the **suppression** hearing, the trial court was entitled to credit his testimony. *See State v. Olquin*, 216 Ariz. 250, ¶ 10 (App. 2007) (trial court in best position to evaluate witness credibility and weigh evidence). Nevertheless, because the parties argued, and the court ruled on, the de facto arrest issue, we address the argument on its merits.