DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. DOUGLAS COOPER MEYER, Appellant.	)	1 CA-CR 12-0056 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201080475

The Honorable Tina R. Ainley, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

C. Kenneth Ray, II — Prescott
Attorney for Appellant

D O W N I E, Judge

¶1 Douglas Cooper Meyer appeals from his convictions for four counts of aggravated DUI, one count of tampering with

physical evidence, and one count of interfering with judicial proceedings. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Sedona police officers Langmack and Waak stopped a vehicle driven by defendant after they observed defendant weave in his lane, exceed the speed limit, make "erratic" speed changes, and discard an object that appeared to be an unlit cigarette from the driver's side window. Defendant filed a motion to suppress and a motion to dismiss, both of which the trial court denied. Defendant thereafter waived his right to a jury trial and submitted the issue of his guilt or innocence to the trial court based on a stipulated record.

¶3 The court found defendant guilty of the offenses noted above and sentenced him to the following presumptive, repetitive, terms of imprisonment: 10 years for each aggravated DUI offense (Counts I-IV) and 3.75 years for the tampering with physical evidence offense, all sentences to be served concurrently. Defendant was ordered to pay a fine for the interfering with judicial proceedings offense. Defendant filed a timely notice of appeal. We have jurisdiction pursuant to

[1] We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997) (citation omitted).

Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4031 and -4033.

DISCUSSION

I. Motion to Suppress

¶4 Defendant moved to suppress all evidence obtained as a result of the traffic stop, arguing the stop was made "without reasonable suspicion to believe [that he] had committed a violation of law (traffic or otherwise)" and that it therefore violated his Fourth Amendment rights. Defendant argued a video recording of the stop "disproved" the officers' claims about his conduct. He also contended a statement by Officer Waak established that the officers "knew there was no legal basis" to stop his vehicle.

¶5 The trial court held an evidentiary hearing at which both police officers testified, the video recording was presented, and counsel argued their respective positions. The court thereafter denied the suppression motion, specifically finding the officers' "testimony that they saw something coming from the defendant's car that looked like a cigarette to be credible." The court stated:

> I find that, alone, as the basis for the stop. Whether we consider all of the other indicators that were shown on the video or may have been seen later, I don't know that they're necessary if it's credible that they both saw something coming from the defendant's car. And I do believe,

> especially in regard to [Officer] Waak, that that testimony was credible and that they did have suspicion that something was thrown from the defendant's car, something that looked like a cigarette.

¶6 Defendant contends the determination that the officers' testimony was credible is "without merit" and cannot "be justified under the totality of the circumstances and evidence presented at the Suppression Hearing." We disagree.

¶7 A trial court's ruling regarding the legality of a traffic stop presents a mixed question of law and fact. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) (citations omitted). We give deference to the trial court's factual findings, but review its ultimate legal conclusions *de novo. Id.* (citations omitted). We consider the evidence presented at the trial level in the light most favorable to upholding the suppression ruling. *State v. Livingston*, 206 Ariz. 145, 146, ¶ 3, 75 P.3d 1103, 1104 (App. 2003) (citation omitted). We defer to the trial court's credibility determinations, as it is in a superior position to observe the witnesses who testify before it. *State v. Mendoza-Ruiz*, 225 Ariz. 473, 475, ¶ 6, 249 P.3d 1235, 1237 (App. 2010). In reviewing the denial of a motion to suppress, we consider only those facts presented at the suppression hearing. *State v. Starr*, 222 Ariz. 65, 68, ¶ 4, 213 P.3d 214, 217 (App. 2009) (citation omitted).

¶8 Law enforcement officers may stop a vehicle when objective facts raise the suspicion of criminal activity. *State v. Altieri*, 191 Ariz. 1, 2, ¶ 8, 951, P.2d 866, 867 (1997) (citations omitted); *see also Gonzalez-Gutierrez*, 187 Ariz. at 119, 927 P.2d at 779 (officer may make investigatory stop based on objective belief a particular person is engaging in criminal activity). The violation of a traffic law provides grounds to stop a vehicle, *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (App. 1990), as does erratic driving, *Gonzalez-Gutierrez*, 187 Ariz. at 120, 927 P.2d at 780. *See also State v. Superior Court (Blake)*, 149 Ariz. 269, 273, 718 P.2d 171, 175 (1986) (weaving in traffic lane justified stop, even if it did not violate traffic laws).

¶9 Officer Langmack testified that, before he activated the video camera by turning on the emergency lights, he followed defendant's vehicle for roughly three-quarters of a mile and observed it weaving within its traffic lane, from right to left, towards the middle lane divider. He also testified that, although the posted speed limit was 35 miles per hour, defendant made "erratic speed change[s]," ranging between 25 and 45 miles per hour, which, at one point, forced the officer to accelerate to 43 miles per hour in order to maintain his following distance. Although the video camera had not yet been activated, Officer Langmack testified there was no doubt in his mind that

he saw defendant throw what appeared to be an unlit cigarette from the driver's side window. Officer Waak testified he also observed the weaving, erratic speed changes, and a cigarette thrown from the window.

¶10 Littering from a moving vehicle is a class 1 misdemeanor under the Sedona City Code. *See* Sedona City Code, § 8.10.050 ("No person, while a driver or passenger in a vehicle, shall throw or deposit litter upon any street or other public place within the city or upon private property."). The trial court specifically found the officers' testimony that they saw defendant throw an object from his window to be credible. This testimony was sufficient to support the determination that the officers had a valid basis for the traffic stop.[2]

¶11 Defendant argues the officers' testimony was fabricated to justify a "bad stop." He relies on Officer Langmack's testimony at his earlier probation violation hearing and on a comment captured on the video recording.

¶12 The fact that Officer Langmack's testimony at the suppression hearing concerning when and how the video camera was activated differed from his testimony at the earlier probation

[2] Although we need not reach the issue, the video recording also supports the officers' testimony that defendant was weaving within his lane and driving at erratic speeds. *See State v. Mincey*, 130 Ariz. 389, 400-01, 636 P.2d 637, 648-49 (1981) (appellate court will affirm if the trial court was correct for any reason).

violation hearing was discussed and explained at the suppression hearing. The same judge presided over both hearings. Thus, insofar as the court accepted Officer Langmack's explanation for the discrepancies, we defer to the trial judge, as she was in the best position to make that credibility determination. *Pima County, Juv. Action, No. 63212-2*, 129 Ariz. 371, 375, 631 P.2d 526, 530 (1981).

¶13 For the same reason, we defer to the court's credibility finding as it relates to Officer Waak's comment about a "bad" stop. *Id*. Officer Waak testified his comment referred to defendant's "bad" driving and stop, and was intended to remind Officer Langmack that this was the kind of information that should be included in the police report.[3]

¶14 The record supports the trial court's determination that the officers had a valid basis for stopping defendant's vehicle. The court therefore properly denied defendant's motion to suppress.

II. Motion to Dismiss

¶15 Defendant was transported to a police station, where Officer Langmack read *Miranda*[4] rights and Arizona's implied consent admonitions. *See* A.R.S. § 28-1321. When he asked defendant if he would submit to a blood test, defendant

[3] Officer Waak was Officer Langmack's field training officer.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

responded that "[n]obody, including the government, was going to take it." Officers thereafter obtained a search warrant, and defendant's blood was drawn by Officer Waak, a certified phlebotomist.

¶16 Before drawing the blood, officers read the warrant to defendant, who again refused to comply. Officer Waak suggested defendant might "feel better" if his blood were drawn at a medical center. However, the supervising sergeant intervened to veto that offer, and Officer Waak drew the blood at the police station.

¶17 Defendant moved to dismiss the DUI counts, arguing the officers interfered with his ability to obtain an independent blood sample and corresponding due process right to present "potentially favorable evidence." The trial court heard evidence relevant to this motion at the suppression hearing. It denied the motion, finding no evidence that officers interfered with defendant's opportunity to obtain an independent blood test.

¶18 We review a ruling on a motion to dismiss for an abuse of discretion. *State v. Rosengren*, 199 Ariz. 112, 115-16, ¶ 9, 14 P.3d 303, 306-07 (App. 2000) (citations omitted). We review due process claims *de novo*, but we are bound by the trial court's findings of fact unless they are clearly erroneous.

Mack v. Cruikshank, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999).

¶19 "Concepts of due process and fundamental fairness require only that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Moss v. Superior Court (Suskin)*, 175 Ariz. 348, 353, 857 P.2d 400, 405 (App. 1993) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Police officers cannot unreasonably interfere with a person's opportunity to obtain an independent test, by, for example, holding him or her incommunicado while blood alcohol levels dissipate or by refusing to allow a suspect to contact an attorney to arrange for an independent test. *Mack*, 196 Ariz. at 546, ¶ 15, 2 P.3d at 105. However, officers are not required to advise a suspect that he has a right to an independent test. *Id*. at ¶ 14. Arranging for an independent test is solely the defendant's responsibility, and any difficulties in obtaining such a test do not violate constitutional rights unless those difficulties are created by the state. *Van Herreweghe v. Burke ex rel. La Paz*, 201 Ariz. 387, 390, ¶ 10, 36 P.3d 65, 68 (App. 2001) (citation omitted).

¶20 The record establishes that the officers did not interfere with defendant's right to obtain an independent blood sample. Defendant never requested an independent sample and stated flatly that "nobody" was going to draw his blood. There

is no indication the withdrawn offer of a blood draw at a hospital interfered with defendant's rights. Officer Waak testified that, even after his sergeant vetoed the hospital trip, defendant could have expressed a desire for an independent blood test or indicated a preference to have his blood drawn at a medical facility. He did neither. According to Officer Waak, defendant never expressed a desire to have a sample of his breath or blood preserved or to speak with an attorney or medical personnel. Further, defendant has never claimed that he in fact desired an independent blood test or that he would have submitted to a blood draw had medical personnel been involved. Based on the record presented, the trial court did not err by denying defendant's motion to dismiss.

CONCLUSION

¶21 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge