IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/01/2009
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA, Appellant, v. JAVIER CABAN, Appellee.	)	1 CA-CR 08-0728 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-109684-001 DT

The Honorable Larry Grant, Judge

AFFIRMED

Andrew P. Thomas, Maricopa County Attorney — Phoenix
By James P. Beene, Deputy County Attorney
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Attorneys for Appellant

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K E S S L E R, Judge

¶1 The State appeals from the superior court's order suppressing evidence of burglary tools and identification

documents. For the reasons stated below, we affirm the superior court's order suppressing the evidence.

FACTUAL AND PROCEDURAL HISTORY

¶2 The State charged Javier Caban ("Caban") with two counts of taking the identity of another in violation of Arizona Revised Statutes ("A.R.S.") section 13-2008 (Supp. 2008).[1] Caban pled not guilty to both counts. Caban filed a motion to suppress evidence uncovered by a police search of his bags on the night of his arrest, alleging that the State obtained that evidence in violation of the Fourth Amendment. The superior court conducted a suppression hearing.

¶3 The evidence at the hearing indicated that Phoenix police officers T. and W. first noticed Caban when he exited the passenger compartment of a vehicle which had just committed a civil traffic violation by swerving into an oncoming traffic lane while turning. The officers were in a marked patrol vehicle and immediately executed a U-turn, activated their lights and sirens, and honked the horn. After the car stopped, the driver and two passengers exited the vehicle and began walking away. The driver was traveling separately from the two passengers.

[1] We cite the current version of the statute because the statute has not changed materially as to the issues on appeal. *See State v. Zamora*, 220 Ariz. 63, 66 n.4, ¶ 5, 202 P.3d 528, 531 (App. 2009).

¶4 Officer T. twice shouted an order that Caban and the other passenger return to the site of the vehicle. After the second order, Caban and his companion complied and returned to Officer T. When Caban returned, the officers searched him for weapons, told him to place the two bags he was carrying on the ground, and sit on the curb.

¶5 Officer W. arrested the driver and passenger for outstanding warrants and placed them in separate patrol vehicles. By that time, three other officers had also arrived at the scene. After determining that Caban had no outstanding warrants, Officer W. questioned Caban about the two bags. Caban stated that one bag belonged to Caban and the other to Caban's friend. Officer W asked Caban if he could search the bags and Caban consented to the search. During the search, police discovered a screwdriver, black gloves, a crowbar, and a coin collection in one bag. The other bag contained a social security card, birth and death certificates, and sensitive personal financial information belonging to persons other than Caban. The officer admitted that without Caban's consent, there would have been no reason to search the bags and prior to the search the officers had no reason to further detain Caban.

¶6 Caban argued the encounter amounted to a seizure of Caban, the stop was not a valid *Terry*[2] stop because there was no reasonable suspicion Caban was involved in criminal activity and the consent was invalid because it was tainted by the illegal stop. At the suppression hearing, the State argued there had not been a stop and the search was valid because Caban voluntarily consented to it. However, it did not argue that if there was a stop, it was a valid *Terry* stop. The superior court granted the motion to suppress. The court held the encounter was a stop given the repeated orders to Caban to return to the police. It also held that since the officer had conceded there was no reason to search the bags there was no reason to ask Caban for permission to search the bags.

¶7 The State successfully moved to dismiss the indictment without prejudice. The State filed a timely notice of appeal. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-120.21(A)(1) (2003) and § 13-4032(6) (Supp. 2008).

ANALYSIS

¶8 On appeal, the State contends the superior court committed legal error by failing to apply the correct test to determine whether Caban was in custody and finding that officers need a reason to request a consent search. For the first time

[2] *See Terry v. Ohio*, 392 U.S. 1 (1968).

in its reply brief, the State argues the search was reasonable under the Fourth Amendment without regard to consent because Caban was a passenger in a vehicle stopped for a civil traffic violation.

¶9 We review superior court rulings on motions to suppress evidence for an abuse of discretion. *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009). "Although we view the evidence in the light most favorable to upholding any factual findings, we review de novo the legal conclusions on which the ruling rests." *Id.* We will affirm the superior court's ruling if legally correct for any reason supported by the record. *Id.* (citing *State v. Canez*, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002)).

I. The Superior Court Did Not Err By Finding Officers Seized Caban

¶10 "Because the Fourth Amendment prohibits only unreasonable seizures, the first step in analyzing an alleged Fourth Amendment violation is determining whether a seizure occurred." *Childress* at 338, ¶ 10, 214 P.3d at 426 (citing *Terry*, 392 U.S. at 16). "A seizure occurs when a police officer restrains a citizen's liberty 'by means of physical force or show of authority.'" *Id.* (quoting *Terry*, 392 U.S. at 20 n.16). We examine the totality of the circumstances when analyzing whether a stop is consensual. *Id.* at 338, ¶ 11, 214 P.3d at

426. "[T]he use of language or tone of voice indicating that compliance with the officer's request might be compelled" shows authority sufficient to demonstrate the lack of consent. *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980). Saying "police officers, we need to talk to you" is an appeal to authority sufficient to permit a finding that the stop is not consensual. *State v. Rogers*, 186 Ariz. 508, 510-11, 924 P.2d 1027, 1029-30 (1996).

¶11 The superior court did not err in holding the encounter was nonconsensual. The officers admitted that Caban was attempting to leave and returned only when the officers shouted "Hey, come back. I want to talk to you." After the second command, Caban returned. The police also admitted that they directed him to place his bag on the ground, submit to a search of his person, and sit on a curb. Just as in *Rogers* in which a seizure was found when police told a person "we need to talk to you," the stop here was not consensual. 186 Ariz. at 510, 924 P.2d at 1029. That a person would not feel free to leave and thus the encounter is nonconsensual is especially true when the police have to issue multiple orders to the person to return so the police could question him. *State v. Wyman*, 197 Ariz. 10, 13-15, ¶¶ 8-13, 3 P.3d 392, 395-97 (App. 2000).

¶12 The State argues the superior court should have found no seizure occurred under *State v. Carter*, 145 Ariz. 101, 700

P.2d 488 (1985). We disagree. *Carter* describes the test for determining whether a defendant is undergoing a custodial interrogation for *Miranda*[3] purposes. *Id.* at 105, 700 P.2d at 492. The proper test for determining whether a person has been seized for Fourth Amendment purposes is whether a reasonable person would have felt free to leave. *Childress*, 222 Ariz. at 338, ¶ 11, 214 P.3d at 426 (citing *Mendenhall*, 446 U.S. at 554-55). In this case, the superior court properly determined a reasonable person commanded twice in a loud voice to return to a police officer, then ordered to sit on the curb and set his bags down would not feel free to leave.

II. The Seizure Was Illegal

¶13 The State argues for the first time in its reply brief the seizure of Caban was legal because Caban was a passenger in a vehicle subject to a legitimate traffic stop. This Court will not consider an argument not raised in the trial court or raised for the first time in a reply brief. *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (appellate court will not consider arguments not raised in trial court); *State v. Larson*, 222 Ariz. 341, 346, ¶ 23, 214 P.3d 429, 434 (App. 2009) (appellate court will not consider arguments first raised in

[3] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

reply brief on appeal). Accordingly, we treat Caban's seizure as illegal.[4]

III. The Illegal Seizure Tainted Caban's Consent to Search The Bags

¶14 "When consent follows an illegal act by the police-whether seizure of a person or search of property-the requirement that consent be voluntary is supplemented by a second distinct requirement: that the consent be purged of the taint of the earlier illegal act." *United States v. Goodrich*, 183 F.Supp.2d 135, 145 (D.Mass. 2001) (citing *United States v. Navedo-Colon*, 996 F.2d 1337, 1338 (1st Cir. 1993)). If the State fails to show that the taint has been purged, then

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[4] The dissent points out that the superior court did not find that the seizure was illegal. The lack of such a finding is not surprising since Caban argued in the trial court that the seizure was unlawful and the State did not dispute that. We may affirm the superior court on any grounds supported by the record and may infer factual findings supported by that record which support the trial court's order. *Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009) (citation omitted); *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998) (citation omitted).

Moreover, in *Arizona v. Johnson*, the Supreme Court held that seizure of a passenger of a vehicle is reasonable incident to a valid traffic stop, but a frisk of the passenger is valid only if supported by independent reasonable suspicion. 129 S.Ct. 781, 784, 787 (2009) (citations omitted); *see also United States v. Childs*, 277 F.3d 947, 952 (7th Cir. 2002) ("A person stopped on reasonable suspicion must be released as soon as the officers have assured themselves that no skullduggery is afoot."). In this case, the officers admitted that they had no independent reason to detain Caban and no independent reason to frisk him or search his bags. Thus the record supports a legal conclusion the officers exceeded the scope of a permissible traffic stop detention by frisking Caban when they admitted they had no reasonable suspicion to do so.

evidence the police obtain as a result of the seizure is subject to the exclusionary rule. *Goodrich*, 183 F.Supp.2d at 145 (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). *See also State v. Flannigan*, 194 Ariz. 150, 153, ¶ 16, 978 P.2d 127, 130 (App. 1998) ("'When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given . . . .'") (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)).

¶15 The State failed to prove the taint of the illegal seizure had been purged by any intervening force. The consent to search the bags was obtained soon after the illegal seizure because Caban was surrounded by officers and his two companions had just been arrested and placed in the back of patrol vehicles. The superior court correctly determined that a reasonable person would have felt under police control. Because the taint of the illegal seizure was not purged, the consent was invalid. *See Wong Sun*, 371 U.S. at 488; *Goodrich*, 183 F.Supp.2d at 145.

¶16 The State argues the superior court erred because officers may freely request consent to search and a defendant's merely being in custody does not per se invalidate a consent. We disagree. Police may request that a person consent either to answer questions or to a search provided the totality of the

circumstances do not convey to the person that he must comply with the request. *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) (request to consent to search); *Wyman*, 197 Ariz. at 13, ¶ 7, 3 P.3d at 395 (request to talk to suspect). However, if the seizure of the person is illegal, the constitutional violation may taint a consent to search. *Goodrich,* 183 F.Supp.2d at 145 In this case, the State failed to prove that the taint of the illegal seizure was purged.

¶17 The State also argues that police officers may ask questions unrelated to a traffic stop after the traffic stop has ended. While this is true, the evidence must show that the defendant had reason to believe the stop had ended or the defendant was otherwise free to leave without permission of the police. *Johnson*, 129 S.Ct. at 788. In this case, the court found that a reasonable person in Caban's situation would not have felt free to go. Furthermore, the cases on which the State relies involve lawful stops and do not consider whether the consent to search was tainted by illegal police activity. In this case, the tainted consent was procured as a result of an illegal seizure.

CONCLUSION

¶18 For the foregoing reasons, the superior court did not err in finding that the search of Caban's bags violated the

Fourth Amendment. Accordingly, we affirm the superior court's order suppressing the evidence.

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DONN KESSLER, Judge

CONCURRING:

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PATRICIA A. OROZOCO, Judge

H A L L, Presiding Judge, dissenting.

¶1 The trial court did not find that Caban was either illegally seized or detained for an unreasonable amount of time. Rather, the court based its suppression order on two findings: (1) that Caban had been "arrested"; and (2) that the police officer had no reason to look into the backpacks that Caban was carrying with him and, therefore, "there would have been no reason to request that this defendant consent to a search." Although Caban argued that he was unlawfully seized by the police after he tried to walk away from the scene of the traffic stop, the court did not so find.[5] Indeed, given ***Arizona v. Johnson***, 129 S.Ct. 781 (2009), in which the United States

[5] Because the trial court did not find that Caban was ***unlawfully*** seized, I do not fault the State for not arguing in its opening brief that any Fourth Amendment seizure of Caban that may have occurred was lawful.

Supreme Court held that police may detain a passenger in a motor vehicle stopped for a traffic violation, such a finding would have been incorrect.[6] The only finding that Caban was illegally detained is made by the majority for the first time on appeal. The majority then relies on this appellate determination to hold that the consent later obtained from Caban was therefore tainted. I disagree.

¶2 First, it is clear that the police initially acted lawfully in detaining Caban. *Id.* at 784. Second, contrary to the trial court's apparent belief, the Fourth Amendment does not require police to have a reason to ask a lawfully detained person to consent to a search. *See Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that police are not required to have "independent reasonable suspicion" before questioning a detainee about matters unrelated to the stop); *see also Florida v. Bostick*, 501 U.S. 429, 434-35 (1991) ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." (citations omitted)). Finally, the trial court never made a finding whether Caban consented to the search.

[6] The evidentiary hearing was held before the Court's decision in *Johnson* was announced on January 26, 2009. The State's opening brief on appeal was filed three days after *Johnson*.

Because the trial court misapplied the law and failed to make necessary factual findings, I would vacate the suppression order.

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PHILIP HALL, Presiding Judge