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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA ) 1 CA-CR 09-0004  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
BRIAN KEITH WILSON, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
Appellant. )  
)

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Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020070862

The Honorable John N. Lamb, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Sarah E. Heckathorne, Assistant Attorney General  
Attorneys for Appellee

Shaffery & Coronado, P.C. Lakeside  
By Emery K. La Barge  
Attorneys for Appellant

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G E M M I L L, Judge

¶1 Brian Keith Wilson ("Wilson") was found guilty by a jury of one count of third-degree burglary and one count of forgery, both class four felonies. Wilson appeals his convictions and sentences. He argues on appeal that the trial court erred by refusing to hold an evidentiary hearing before ruling on his motion to suppress. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

¶2 The following facts were adduced at trial. On the morning of June 22, 2007, D.J. drove her van to Joseph City High School located in Joseph City, Arizona. D.J. was a part-time custodian at the school and needed to borrow one of the school's large trash containers. She parked her van in the school's parking lot and went inside. When she returned to the van a few minutes later, she noticed that her "papers were all over" the inside of the van and she also "noticed the smell of smoke." D.J. eventually determined that some of her belongings were missing from the van including her debit card and her day planner, which contained a credit card and checkbook.

¶3 D.J. went back inside the school and asked the school's principal, Brian Fields, if she could view surveillance

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<sup>1</sup> We view the facts in the light most favorable to sustaining the conviction. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

video of the parking lot. The surveillance video revealed a man enter D.J.'s van and later walk away from the van "flipping through pages of [a] book" that D.J. believed to be her day planner. The video then showed the man get into a red car and drive away. The video did not show the man actually inside the van because the school's surveillance cameras are constantly rotating direction.

¶4 After viewing the surveillance video, D.J. called the sheriff's department. Deputy Sheriff S.B. was on duty and responded to D.J.'s call. Deputy S.B., along with Deputy D.C., met with D.J. and Fields at the school and watched the surveillance video. After watching the video and speaking with D.J., the deputies patrolled Joseph City looking for the red car that was seen on the surveillance video.

¶5 Later that day, Deputy S.B. received a call from Jeff Dixon, a computer technician for the Joseph City School District. Dixon had pulled the surveillance video for Deputy S.B. and he had also watched the video. Dixon reported that he saw the red car and the man from the surveillance video at a Speedy's gas station and it appeared as though the car was traveling towards Winslow, Arizona. Dixon also gave the red car's license plate number to Deputy S.B.

¶6 Deputies S.B. and D.C. eventually located the red car in Winslow and pulled it over. The car looked "very very

similar" to the red car in the surveillance video and matched the license plate number Dixon had provided to Deputy S.B. There were two people inside the car. The owner of the car, R.B., was riding in the passenger seat and Wilson was in the driver's seat.

¶17 Deputy S.B. made contact with the car's occupants and informed them they were being stopped because their car matched the description of a car leaving the scene of an apparent burglary at Joseph City High School. She asked both Wilson and R.B. for permission to search the car and they both provided their written consent on the same piece of paper. R.B. wrote "I [R.B.] here by give Deputy [S.B.] [the] o.k. to search my vehicle" and she signed her name. Just below R.B.'s written consent, Wilson wrote, "I *Curt Wilson* give permission for a search of my belongings" and he signed it "*Thurston* Wilson." (Emphasis added.) Deputy D.C., however, recognized Wilson and knew that his real name was "Brian," not "Thurston." The name "Thurston Wilson," along with the driver's license and social security number Wilson gave the deputies, belonged to a man residing in Peoria, Arizona.

¶18 The deputies ran a warrant check under the name "Brian Wilson" and learned there was a warrant for Wilson's arrest. Deputy S.B. informed Wilson that there was a warrant for his arrest and instructed Wilson to put his hands behind his back.

Wilson, however, "took off running" and, after giving chase, the deputies were unable to apprehend him. The deputies then returned to the car and R.B. They told R.B. to drive the car back to her residence in Joseph City. At this point, the deputies had performed only a brief search of the car and they had not found any of D.J.'s belongings.

¶9 Approximately one hour later, Deputies S.B. and D.C. arrived at R.B.'s residence. Deputy S.B. asked R.B. if she could continue to search R.B.'s car and R.B. consented.<sup>2</sup> During the search, Deputy S.B. found D.J.'s day planner in the backseat of the car and Deputy D.C. found other items belonging to D.J. inside of a backpack on the passenger side of the car. R.B. told Deputy D.C. that she did not own the backpack and that it must belong to Wilson. R.B. also testified that Wilson had borrowed her car that morning around the same time D.J.'s van was burglarized.

¶10 A grand jury indicted Wilson on one count of third-degree burglary, one count of forgery, and one count of taking the identity of another.<sup>3</sup> On October 22, 2008, fourteen days before his trial, Wilson filed a motion to suppress the evidence

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<sup>2</sup> R.B. testified at trial that she did not consent to the second search of her car. According to R.B., the deputies never asked for R.B.'s consent and in fact told R.B. to step away from the vehicle.

<sup>3</sup> Count three of the indictment against Wilson, taking the identity of another, was eventually dismissed.

found during the second search of R.B.'s car. According to Wilson, the second search of the car was illegal because his "consent to search was revoked when he fled" and because R.B. did not give consent.

¶11 On November 5, 2008, just prior to voir dire, the trial judge discussed the suppression issue with the parties. Wilson requested the court conduct an evidentiary hearing and presented an offer of proof before the court that R.B. would testify that she did not consent to the second search of her car. The judge, however, decided against holding a hearing because "it wouldn't make a difference" and denied the motion. In reaching this decision, the judge explained:

I'm denying [the motion to suppress] based on the timeliness but also because I looked behind that and saw no colorable claim and nothing that . . . I could see that we need to have a hearing on because . . . even if [I] went with what [Wilson] offered as proof, it wouldn't make a difference, it would still be suppressed.<sup>4</sup>

¶12 On November 6, 2008, after a two-day jury trial, Wilson was found guilty of one count of burglary in the third-degree and one count of forgery. The court sentenced Wilson to two presumptive, concurrent terms of imprisonment of four and one-half years each. Wilson timely appealed. We have

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<sup>4</sup> It is evident from a review of the record that the court meant that the motion to suppress would still be denied, rather than that the challenged evidence "would still be suppressed."

jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (Supp. 2009).

#### **ANALYSIS**

¶13 Wilson contends that the court committed reversible error by refusing to hear evidence on his motion to suppress the items found in R.B.'s car. The court denied Wilson's motion to suppress, as well as his request for an evidentiary hearing, because the "motion was untimely" and because the court determined there was "no colorable claim" involving a violation of Wilson's rights. On appeal, we review the court's denial of a motion to suppress evidence for an abuse of discretion if it involves a discretionary issue, but we review constitutional and legal issues de novo. *See State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007).

#### **The timeliness of Wilson's motion to suppress**

¶14 First, the court denied Wilson's motion to suppress, along with his request for an evidentiary hearing on the motion, because the motion was not filed on time. Wilson argues this was error because he filed the motion "as soon as [he was] aware of the [suppression] issue." In addition, Wilson asserts that a trial court should hear late motions when the failure to do so would result in a valid ineffective assistance of counsel claim.

We disagree with Wilson's arguments.

¶15 Arizona Rule of Criminal Procedure ("Rule") 16.1(b) provides in relevant part that "[a]ll motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct." In addition, Rule 16.1(c) provides that "[a]ny motion . . . not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." The purpose of the preclusion sanction in Rule 16.1(c) is "to insure orderly pretrial procedure in the interests of expeditious judicial administration." *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App. 1985). Preclusion, under Rule 16.1(c), "is a judicial remedy designed to protect judicial interests" and its invocation "rests in the discretion of the trial court subject to review only for abuse." *Id.* at 8-9, 708 P.2d at 99-100.

¶16 Here, Wilson's motion to suppress violated Rule 16.1(b) because it was filed later than twenty days before trial. The motion was filed on October 22, 2008, fourteen days prior to the November 5, 2008 trial. The court applied the preclusion sanction authorized in Rule 16.1(c), and we find no abuse of discretion in so doing.

¶17 This case was assigned to Wilson's attorney on April



22, 2008, almost six months before the motion to suppress should have been submitted to the court. Wilson based his motion to suppress on the argument that he revoked his consent when he ran away from the deputies and also on R.B.'s proffered testimony that she did not consent to the second search of her car. The court in its discretion could have reasonably concluded that these bases could have been discovered through "the exercise of reasonable diligence." Wilson's own actions of running away from the deputies formed one of the bases of his motion to suppress, and this conduct was known to Wilson. Regarding R.B.'s proffered testimony that she did not give permission to search the second time around, Wilson had almost six months to conduct an interview with R.B., who was one of the key witnesses in this case and also the owner of the car where D.J.'s belongings were found.

¶18 In addition, we disagree with Wilson that *Vincent* requires late motions be allowed if a conviction could be challenged on ineffective assistance of counsel grounds. *Vincent* supports the proposition that the preclusion sanction of Rule 16.1(c) is within the trial court's discretion and that a court may consider late motions. See *id.*, 147 Ariz. at 8-9, 708 P.2d 99-100. We need not address whether the language of *Vincent* is in conflict with the language of Rule 16.1(c). Cf. *State v. Montano*, 204 Ariz. 413, 418-19, ¶¶ 16-18, 65 P.3d 61,

67 (2003) (agreeing with the trial court that Rules 16.1(b) and 16.1(c) barred defendant's untimely motion to dismiss). Even if we assume that the trial court's denial of Wilson's untimely motion to suppress will result in an ineffective assistance of counsel claim, we still perceive no abuse of discretion.

¶19 Because we conclude that the trial court did not abuse its discretion in precluding Wilson's untimely motion to suppress pursuant to Rule 16.1(c), the court did not err in refusing to conduct an evidentiary hearing.

**Even if R.B. did not consent to the second search of her car, the search was legal pursuant to the automobile exception**

¶20 In addition to the late filing of the motion, the court also denied Wilson's motion to suppress -- and any evidentiary hearing -- because the motion had "no colorable claim" and there was no "violation of the Fourth Amendment." According to the court, even if it were to find that R.B. did not consent to the second search of her car, the evidence found inside the car would still be admitted at trial.

¶21 We first note that under the Rules, it is within the court's discretion to conduct a hearing on a motion. Rule 35.2 provides that "[u]pon request of any party, or on its own initiative, the court *may* set any motion for hearing. The court may limit or deny oral argument on any motion." (Emphasis added.) In addition, the court has "maximum discretion" in

deciding what procedures "will be most helpful to it in reaching a reasoned and expeditious decision on each issue." Ariz. R. Crim. P. 35.2 cmt.

¶122 The trial court declined to hold an evidentiary hearing on Wilson's motion to suppress because it was untimely and because R.B.'s proffered testimony would not cause the court to grant the motion. Assuming R.B. did not consent to the second search of her car, the search was still legal pursuant to the automobile exception. This exception provides that the police may conduct a warrantless search of an automobile, and the containers within the automobile, where they have probable cause to believe contraband or evidence is contained. *California v. Acevedo*, 500 U.S. 565, 580 (1991). Probable cause exists when, given the totality of the circumstances, a reasonable person could believe that contraband will be found in a particular place. *State v. Eliason*, 25 Ariz. App. 523, 526, 544 P.2d 1124, 1127 (1976).

¶123 Here, the deputies had probable cause to believe D.J.'s stolen belongings were in R.B.'s car. The school's surveillance videos revealed a man enter D.J.'s van and walk away from the van with what seemed to be D.J.'s missing day planner. The man left the school driving a red car that looked "very very similar" to D.J.'s car. When the deputies pulled Wilson over, he provided the deputies with false information

including the wrong name. He also ran away from the deputies once they determined his real name. A reasonable person, given these circumstances, could believe that D.J.'s belongings were stolen from her van and that they were in R.B.'s car. As a result, the deputies' search of the car and the backpack inside the car were legal without a warrant or R.B.'s consent.

¶24 Because R.B.'s testimony would not have been helpful "in reaching a reasoned and expeditious decision" on Wilson's motion to suppress, the court did not need to hold an evidentiary hearing on the point. The court reviewed Wilson's offer of proof and listened to his arguments; no further hearing was necessary. *See State v. Nilsen*, 134 Ariz. 433, 435-36, 657 P.2d 421, 423-24 (App. 1982), *aff'd as modified on other grounds*, 134 Ariz. 431, 657 P.2d 419 (1983).

¶25 Finally, we note that Wilson asserts that his constitutionally guaranteed due process rights have been violated. For the reasons explained above, we find no due process violation.

#### CONCLUSION

¶26 We conclude that the court acted within its discretion in denying Wilson's motion to suppress and in not holding an evidentiary hearing on the motion. Having addressed Wilson's arguments on appeal and finding no reversible error, we affirm

Wilson's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
SHELDON H. WEISBERG, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge