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



DIVISION ONE  
FILED: 12/30/2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0724  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DONALD PERRY MITCHELL, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Apache County

Cause No. CR2007367

The Honorable Michael P. Roca, Judge

**AFFIRMED**

\_\_\_\_\_  
Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Michael J. Mitchell, Assistant Attorney General  
Attorneys for Appellee

Emily Danies Tucson  
Attorneys for Appellant  
\_\_\_\_\_

**G E M M I L L**, Judge

¶1 After a trial to the court, Donald Mitchell was  
convicted of one count of possession of marijuana weighing at

the time of seizure four or more pounds and one count of possession of drug paraphernalia, class 4 and 6 felonies, respectively. On appeal, Mitchell challenges the trial court's denial of his motion to suppress the marijuana found in his rental car after an allegedly unconstitutional seizure. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 In reviewing the trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing. *State v. Wyman*, 197 Ariz. 10, 12, ¶ 2, 3 P.3d 392, 394 (App. 2000).

¶3 The facts presented at the suppression hearing are as follows. On December 13, 2007, Officer A.C. was patrolling Interstate 40 in Apache County with his narcotics dog, Rico. A.C. has been with the Navajo Police Department for 14 years and during that time he has received training in drug interdiction and recognition. Rico is certified in drug detection and is primarily used to detect drugs.

¶4 At approximately 5:30 p.m., A.C. was parked in a median on Interstate 40 and observed Mitchell drive by in a white Pontiac rental car. As Mitchell drove by A.C., he leaned back and down in his car seat and covered his face with his left hand. Finding this behavior unusual, A.C. pulled out of the

median and followed Mitchell. When A.C. pulled onto the highway, Mitchell changed lanes and slowed down to 65 miles per hour, ten miles per hour slower than the posted speed limit. As A.C. followed Mitchell, he noticed Mitchell weaving in and out of the right travel lane. As a result, A.C. initiated a traffic stop.

¶15 A.C. made contact with Mitchell and informed him that he was pulled over for weaving. Mitchell explained to A.C. that he was tired and that he must not have been paying attention to the road. Mitchell also told A.C. that he was traveling from Phoenix to Kansas to visit a friend, but he did not know the friend's name or where the friend lived. Mitchell said he was planning on staying in Kansas for three to four days; however, the rental car agreement provided that the Pontiac had to be returned to the rental company by December 19th. During his conversation with Mitchell, A.C. observed that Mitchell's voice was "shaky."

¶16 A.C. collected Mitchell's driver's license and the rental car agreement. When Mitchell handed over the documents, A.C. noticed Mitchell's hands were trembling. According to A.C., Mitchell's nervousness level was different than that of the "general motoring public" and it increased during the stop. Inside the car, A.C. observed fast food and snack wrappers, a Mountain Dew drink, a single key in the ignition, and a cellular

phone. A.C. testified that Mitchell's nervousness, his peculiar travel plans, and the contents of the rental car were all indicators that Mitchell was involved in criminal activity.

¶7 After speaking with Mitchell, A.C. went to his vehicle and filled out a warning citation. A.C. then walked back to Mitchell's vehicle and returned Mitchell's license and rental agreement. A.C. explained to Mitchell that he was being issued a warning and he gave Mitchell a copy of the citation. Mitchell told A.C. to have a "Merry Christmas" and A.C. told Mitchell to "drive safe." A.C. then turned and walked away. According to A.C., Mitchell was free to leave at this point.

¶8 Before Mitchell drove away, however, A.C. turned back towards Mitchell's vehicle and asked Mitchell if he could speak with him. A.C. explained to Mitchell that officers often request consent to search vehicles and he asked Mitchell if there were any drugs or other illegal contraband in the vehicle. When A.C. asked Mitchell if there was marijuana in the vehicle, Mitchell looked away, took a "long drag" of his cigarette, and said "No." A.C. testified that Mitchell's eyes were twitching, his hands were trembling, and he looked nervous and worried. A.C. also testified that Mitchell's manner of responding to the marijuana question was noticeably different compared to the responses Mitchell gave when asked if other drugs were in the car. A.C. then asked Mitchell for consent to search the vehicle

and Mitchell refused. A.C. opined that this encounter with Mitchell, after Mitchell was free to leave, was consensual.

¶19 After Mitchell refused to give consent, A.C. asked Mitchell to step out of the vehicle so that Rico could conduct an exterior sniff of the vehicle. Mitchell got out of the car and A.C. patted him down to check for weapons. According to A.C., he was justified in ordering Mitchell out of the car because during the initial traffic stop he had developed reasonable suspicion that Mitchell was involved in criminal activity.

¶10 A.C. retrieved Rico from his vehicle and Rico quickly alerted A.C. to the trunk of Mitchell's car. According to A.C., approximately two minutes elapsed from the time Mitchell refused consent to the time Rico alerted A.C. to the trunk. A short time later, A.C. searched the trunk of Mitchell's car and found a duffle bag containing marijuana.

¶11 Mitchell was placed under arrest and charged with the following felony offenses: one count of possession of marijuana, weighing at the time of seizure four or more pounds, a class 4 felony (count one); one count of possession of marijuana for sale, weighing at the time of seizure four or more pounds, a class 2 felony (count two); one count of transport of marijuana, weighing at the time of seizure two or more pounds, a class 2 felony (count three); one count of transport of marijuana for

sale, weighing at the time of seizure two or more pounds, a class 2 felony (count four); and one count of possession of drug paraphernalia, a class 6 felony (count five).

¶12 Mitchell moved to suppress the marijuana found in his car, arguing that after the initial encounter with A.C. was over and he was free to leave, the subsequent detention by A.C. was not supported by reasonable suspicion and was therefore unlawful. The court denied Mitchell's motion, primarily relying on *State v. Box*, 205 Ariz. 492, 73 P.3d 623 (App. 2003). According to the court, *Box* "held that where the dog was right there and the additional time negligible, there was no Fourth Amendment violation."

¶13 The matter was submitted to the court based upon stipulated facts and an agreement between the parties that counts two, three, and four be dismissed. On July 21, 2009, the court entered its ruling, finding Mitchell guilty of counts one and five. The court also found, with respect to count five, two aggravating factors: (1) the offense was committed as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value, and (2) Mitchell procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value. On September 15, 2009, the court sentenced Mitchell, in accordance with the parties' agreement, to a presumptive term of 2.5 years for count one, and

a concurrent aggravated term of 2 years for count five.

¶14 Mitchell timely appeals his convictions and sentences. We have 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 (2010), and 13-4033(A) (2010).

#### ANALYSIS

¶15 Mitchell's sole contention on appeal is that the court erred in denying his motion to suppress the marijuana because the evidence was the product of an unreasonable seizure in violation of his Fourth Amendment rights. In examining the denial of a motion to suppress evidence, we defer to the court's factual determinations, but review de novo whether the evidence was obtained in violation of the Constitution. See *State v. Davolt*, 207 Ariz. 191, 202, ¶ 21, 84 P.3d 456, 467 (2004).

¶16 The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Evidence obtained from an illegal seizure is subject to suppression under the fruit of the poisonous tree doctrine. See *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). A temporary detention of an individual during a traffic stop constitutes a seizure of a person within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

¶17 To initiate a traffic stop and conduct an investigatory detention, an officer must have reasonable suspicion that a traffic violation has occurred or that other criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *State v. Teagle*, 217 Ariz. 17, 22-23, ¶ 20, 170 P.3d 266, 271-72 (2007). “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). Once a police officer returns a driver’s documents and hands him a written citation, the purpose of the stop has concluded and he must allow the driver to continue on his way unless (1) the encounter between the driver and the officer becomes consensual, or (2) during the encounter, the officer develops a reasonable and articulable suspicion that criminal activity is afoot. *Teagle*, 217 Ariz. at 23, ¶ 22, 170 P.3d at 272.

¶18 Mitchell does not contest the validity of the initial traffic stop by A.C. or the length of his detention during that stop. Rather, Mitchell asserts that after the initial traffic stop and investigatory detention were over, he was subjected to a second detention when A.C. told him to step out of his vehicle so that Rico could sniff the car. Relying on *State v. Sweeney*, 224 Ariz. 107, 227 P.3d 868 (App. 2010), Mitchell argues the court should have granted his motion to suppress because the



second detention was not supported by reasonable suspicion. According to Mitchell, nothing happened between the end of the first detention and the start of the second detention that would give rise to reasonable suspicion and A.C. could not use the reasonable suspicion he developed during the initial traffic stop and detention to justify the second detention.

¶19 In denying Mitchell's motion to suppress, the court found that A.C.'s testimony was credible and that during the traffic stop A.C. developed reasonable suspicion that Mitchell was involved in criminal activity. The court's ruling does not specifically address whether A.C. could use the reasonable suspicion developed during the initial traffic stop and detention to justify Mitchell's detention during the narcotics dog sniff. Instead, the court based its ruling on this court's decision in *Box* and concluded that Mitchell's Fourth Amendment rights were not violated because A.C. was traveling with a narcotics dog and the additional time taken to conduct the dog sniff was negligible. Because we agree that this case is analogous to *Box* and conclude that Mitchell's second detention was de minimis, we affirm the court's ruling.

¶20 The facts in *Box* are similar to those before us. *Box* was pulled over by Officer Baxley for speeding. *Box*, 205 Ariz. at 494, ¶ 3, 73 P.3d at 625. During the stop, Baxley noticed several indicators that led him to believe *Box* was trafficking

illegal drugs. *Id.* After conducting radio checks on Box's drivers' license, vehicle registration and proof of insurance, Baxley asked Box to step out of the car and issued him a written warning for the speed violation. *Id.*

¶21 After Baxley handed Box the warning and returned his documents, he asked Box several questions, including whether there were illegal drugs in the car. *Id.* at ¶ 4. The court determined this interaction between Box and Baxley was a consensual encounter. 205 Ariz. at 498, ¶ 21, 73 P.3d at 629. Box denied having drugs, and Baxley asked for Box's consent to search the vehicle, which he declined. 205 Ariz. at 494, ¶ 4, 73 P.3d at 625. Because Baxley was traveling with a narcotics dog, he told Box to step away from the car to allow the dog to sniff around the exterior of the vehicle. *Id.* at ¶ 5. In under a minute, the dog alerted Baxley to the trunk of the car where marijuana was found. *Id.* at ¶¶ 5-6. Box moved to suppress the marijuana, arguing, among other things, that his detention after the traffic stop had been completed was unconstitutional. 205 Ariz. at 495, ¶ 7, 73 P.3d at 626.

¶22 In affirming the trial court's ruling, this court did not reach the issue of reasonable suspicion for a detention after the completion of the traffic stop. 205 Ariz. at 499, ¶ 24, 73 P.3d at 630. Rather, it found that Box's detention during the dog sniff was de minimis and not unreasonable under

the Fourth Amendment. *Id.* According to the court, “[t]he drug dog was already at the scene, and appellant was, at most, only slightly inconvenienced when he was further detained for less than a minute while the dog sniffed his vehicle.” *Id.* The court noted the following facts were important in finding Box’s detention during the dog sniff de minimis: Box had originally been lawfully detained, Box’s brief ensuing conversation with Baxley was of a consensual nature, and the dog sniff took less than one additional minute. *Id.*

¶23 Similar to the de minimis detention in *Box*, Mitchell’s detention while Rico sniffed for drugs was brief and was not unreasonable under the Fourth Amendment. Mitchell, like Box, had originally been lawfully detained for a traffic violation. After A.C. returned Mitchell’s documents and told him to “drive safe,” the traffic stop and related detention were over and Mitchell’s subsequent conversation with A.C. was a consensual encounter. See *Box*, 205 Ariz. at 498, ¶ 21, 73 P.3d at 629 (explaining that once officer returned driver’s documents, driver was free to leave and the ensuing brief interaction between officer and driver was within the scope of a consensual encounter). The consensual encounter ended, and a second detention began, once A.C. told Mitchell to step out of his vehicle so that his narcotics dog could sniff around the car. Because the dog was riding with A.C., the dog sniff took only 30

seconds. Altogether, it took only about two minutes from the time Mitchell refused to consent to the search of his car to the time Rico alerted to the trunk. Accordingly, we conclude that the second detention of Mitchell, like the second detention in *Box*, was de minimis and was not an *unreasonable* seizure within the meaning of the Fourth Amendment.

¶24 Mitchell does not address *Box* in the lone brief he filed in this appeal. As previously noted, he asserts that this case is controlled by our decision in *Sweeney*. In that case, we held that “after a lawful traffic stop has concluded, an officer must have reasonable cause to initiate a second detention of a suspect.” *Sweeney*, 224 Ariz. at 109, ¶ 1, 227 P.3d at 870. The court, however, reached its holding *after* it concluded *Sweeney*’s second detention was not de minimis. 224 Ariz. at 111, ¶ 15, 227 P.3d at 872. According to the court, *Sweeney*’s detention was not de minimis because the officer conducting the dog sniff waited for the arrival of a second officer before conducting the sniff and *Sweeney* was detained through the use of physical force. *Id.*

¶25 Unlike in *Sweeney*, Mitchell was not detained by force and A.C. accomplished the dog sniff without waiting for the arrival of a second unit. Moreover, because we conclude that the second detention of Mitchell was de minimis, we do not need to reach the issue of whether A.C. could use the reasonable

suspicion developed during the initial traffic stop and detention to justify the second detention. See *Box*, 205 Ariz. at 499, ¶ 24, 73 P.3d at 630 (declining to address the issue of reasonable suspicion because the detention was de minimis).

**CONCLUSION**

¶26 For the above reasons, Mitchell's convictions and sentences are affirmed.

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

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge