FILED BY CLERK
DEC 15 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. REGINALD DAVID TENNYSON, Appellant.	2 CA-CR 2010-0402 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093224001

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Reginald Tennyson was convicted after a jury trial of possession of methamphetamine for sale and possession of drug paraphernalia. He was sentenced to presumptive, concurrent terms of imprisonment of ten years and one year. Tennyson argues the trial court erred when it denied his motions to suppress evidence found in a vehicle he was driving and statements he made to a law enforcement officer. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 When reviewing the denial of a motion to suppress, we look "only at the evidence presented to the trial court during the suppression hearing." *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). We view that evidence in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶3 In an attempt to execute an arrest warrant on Charles S. for the suspected theft of an all-terrain vehicle, law enforcement officers conducted surveillance on a residence. Tennyson arrived at the residence, driving a flatbed tow truck with Charles as the passenger. Under the direction of Pima County Sheriff's Deputy Christopher Hogan, a United States marshal approached the men as they emerged from the truck and detained them. Before Hogan arrived at the scene about ten minutes later, Tennyson consented to a search of his pockets. Therein, the marshal found a folded bundle of cash totaling $1,700 and a cellular telephone, which were placed on the hood of the truck.

¶4 Once Hogan arrived, he heard Tennyson's telephone ring constantly. Hogan also looked into the passenger compartment of the truck. In plain view on the

bench seat, Hogan saw a black nylon zip-up case and a partially open cigarette pack with a pink plastic bag inside. Believing the items contained contraband, he took the cigarette pack and the zip-up case from the truck. The zip-up case contained a scale with a white residue on it, and the cigarette pack contained three colored plastic bags with a substance later identified as methamphetamine inside each of them.

¶5 Another sheriff's deputy read Tennyson the *Miranda*[1] warnings at the scene while he was detained.[2] Once Hogan found the drugs, Tennyson asked the deputy whether he needed a lawyer. Tennyson was transported to a sheriff's substation and was given the *Miranda* advisory again. He then admitted he and Charles had purchased about $1,000 worth of methamphetamine for their personal use.

¶6 Before trial, Tennyson moved to suppress the evidence found in the truck, and the trial court denied the motion after a hearing. Tennyson filed a motion for reconsideration and a second motion to suppress, arguing his statements to the deputy were inadmissible because he had invoked his right to counsel. After a hearing, the court denied both the motion for reconsideration and the second motion to suppress. A jury found Tennyson guilty of both charges and he was sentenced as stated above. This appeal followed.

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

[2]Although this deputy did not testify at the suppression hearing, the parties stipulated to the admission of audio recordings documenting the exchange between him and Tennyson. *See* Ariz. R. Crim. P. 16.3(d) (allowing parties to "submit any issue to the court for decision on the basis of stipulated evidence").

Discussion

¶7 Tennyson argues the trial court erred when it denied his motion to suppress the evidence found in the vehicle because he "was detained longer than necessary before the search and the totality of the evidence did not amount to probable cause." When reviewing the denial of a motion to suppress, we defer to the trial court's factual findings but review de novo the court's ultimate legal conclusion that the search was constitutional. *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004).

Unreasonable Detention

¶8 Tennyson contends the police detained him "past the completion of the purpose of the police action, the arrest of [Charles]," and he "should have been released and allowed to take the truck long before Detective Hogan began his snooping." But Tennyson did not argue below that the evidence was seized unlawfully because the duration of his detention had been unreasonable. Consequently, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶9 On appeal, Tennyson concedes his initial detention during the arrest of Charles had been lawful. Based on the record before us, Tennyson has not established officers detained him longer than necessary to execute the arrest warrant. He has not specified, and the record of the suppression hearings does not reveal, how long it took Hogan to see and seize the items in the vehicle once he was at the scene. Nor does the record establish how officers had determined Charles's identity or how long it had taken

to fully secure the scene and effectuate his arrest. Thus, Tennyson has not sustained his burden to show he is entitled to fundamental error relief.[3] *See id.* ¶¶ 19-20.

Probable Cause for Automobile Exception

¶10 Tennyson also argues the totality of circumstances did not establish officers had probable cause to search the truck. Under what has come to be known as the automobile exception to the Fourth Amendment's warrant requirement, law enforcement officers can search a vehicle lawfully in their custody if probable cause exists to believe that the vehicle contains contraband, even in the absence of exigent circumstances. *United States v. Johns*, 469 U.S. 478, 484 (1985); *State v. Reyna*, 205 Ariz. 374, ¶ 1, 71 P.3d 366, 366 (App. 2003). "An officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched." *State v. Buccini*, 167 Ariz. 550, 556, 810 P.2d 178, 184 (1991).

¶11 Deputy Hogan testified he had contacts with Tennyson going back ten years related to both narcotics and burglary and he had arrested "associates" of Tennyson for narcotics-related offenses. Charles, the passenger in Tennyson's vehicle, was "linked to methamphetamine activity." Tennyson had items in his pockets that can be "consistent

[3]Before it decided *Henderson*, the seminal case on fundamental error, our supreme court stated that a fact-intensive issue not raised by a defendant in a motion to suppress is waived altogether on appeal. *State v. West*, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998). Because we have decided Tennyson has not sustained his burden of establishing fundamental error occurred, we need not decide whether *Henderson* supersedes or merely supplements *West*.

with narcotics activity": a constantly ringing cellular telephone and a large amount of cash, about $1,700. When Hogan looked through the windows of the truck, he saw a hard cigarette pack partially opened with a pink plastic bag inside, the type of bag he knew was associated with narcotics sales, and a small black nylon bag of the type commonly used to store drug paraphernalia.

¶12 Probable cause is determined from the totality of the circumstances, and the information upon which it is based may be "viewed in light of the police officers' knowledge and past experience." *State v. Million*, 120 Ariz. 10, 15, 583 P.2d 897, 902 (1978). Accordingly, an officer's experience in the packaging of contraband is an appropriate factor in the probable cause calculation. *State v. Olson*, 134 Ariz. 114, 117, 654 P.2d 48, 51 (App. 1982); *accord Million*, 120 Ariz. at 15, 583 P.2d at 902.

¶13 Although we can find no case squarely addressing whether the precise combination of factors here would rise to the level of probable cause, we are guided by cases in which an officer's knowledge that a particular method of packaging or concealing drugs is used regularly in the area is an important factor in the totality of the circumstances. *See, e.g.*, *Million*, 120 Ariz. at 12, 15, 583 P.2d at 899, 902 (probable cause to search motor home fitting description of narcotic-trafficking vehicle and seen being loaded at night with full garbage bags commonly used for transporting marijuana); *People v. Vielma*, 60 Cal. Rptr. 301, 303-04 (Ct. App. 1967) (common knowledge drugs often disposed of in crumpled cigarette packs and defendant's furtive action in dropping it on floor of car provided probable cause when police had knowledge of defendant as drug dealer); *P.L.R. v. State*, 455 So. 2d 363, 364, 366 (Fla. 1984) (probable cause to

arrest juvenile at known drug site when his pocket contained manila envelope of type usually used for marijuana transactions); *State v. Stregare*, 576 So. 2d 790, 791-92 (Fla. Dist. Ct. App. 1991) (officers had probable cause to believe cigarette pack contained drugs when officer knew it was common method of drug concealment in area, car sped away from heavy drug transaction area, and nervous passenger repeatedly attempted to pass pack to driver); *cf. United States v. Fladten*, 230 F.3d 1083, 1085, 1086 (8th Cir. 2000) (glass tube often used in manufacture of methamphetamine in back seat of vehicle parked at house where evidence of drug-related activity found sufficient for probable cause to search vehicle). Accordingly, the totality of the circumstances here, when viewed in the light of the officer's knowledge of Tennyson and the nature of drug paraphernalia, would cause a reasonably prudent person to believe narcotics would be found inside the vehicle, and the trial court did not err in denying Tennyson's motion to suppress evidence.[4]

Right to Counsel

¶14 Finally, Tennyson argues he invoked his right to counsel, and thus, his statements should not have been admitted. A suspect must "unambiguously request counsel" in order to invoke his right to counsel during police questioning. *Davis v. United States*, 512 U.S. 452, 459 (1994); *accord State v. Gay*, 214 Ariz. 214, ¶ 32, 150

[4]The trial court found that the seizure of the cigarette pack had been lawful under the plain-view exception to the warrant requirement and that the zip-up nylon bag would have been discovered inevitably in an inventory search. We need not decide whether those exceptions would have applied here because we have determined Hogan legitimately could search the truck and the items within it under the automobile exception to the warrant requirement.

P.3d 787, 796 (App. 2007). While speaking with a sheriff's deputy after the drugs had been found in the truck, Tennyson said, "Well at this point do you think I should have a lawyer? I mean he's talking about charging me with dope[.] I think I should probably have someone represent me on my part, you know what I mean?"

¶15 But as the state points out, numerous cases have held such equivocal statements do not qualify as unambiguous assertions of the right to counsel. *See, e.g.*, *Davis*, 512 U.S. at 462 ("Maybe I should talk to a lawyer."); *State v. Eastlack*, 180 Ariz. 243, 250, 883 P.2d 999, 1006 (1994) ("I think I better talk to a lawyer first."); *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989) ("Do you think I should get a lawyer?"); *State v. Zinsmeyer*, 222 Ariz. 612, ¶¶ 5, 11, 218 P.3d 1069, 1074, 1075-76 (App. 2009) ("I think I need a lawyer," and "Do I need a lawyer?"). He acknowledges that authority and does not argue his statements were meaningfully different, but rather contends those cases were wrongly decided. Specifically, Tennyson observes that Arizona courts have found, in the context of voir dire, a phrase prefaced by "I think," to constitute an unequivocal expression of intent. *See, e.g., State v. Sparks*, 147 Ariz. 51, 53-54, 708 P.2d 732, 734-35 (1985); *State v. Purcell*, 199 Ariz. 319, ¶¶ 12-13, 18 P.3d 113, 117 (App. 2001). Although we acknowledge that these cases are difficult to harmonize, we have no authority to overrule decisions of our supreme court. *State v. Szpyrka*, 223 Ariz. 390, ¶ 4, 224 P.3d 206, 208 (App. 2010). The trial court did not err in denying Tennyson's motion to suppress his statements.

Disposition

¶16 For the foregoing reasons, Tennyson's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge