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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALEJANDRO MIGUEL GIBSON, Appellant.	2 CA-CR 2010-0417 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101993001

Honorable John S. Leonardo, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Alejandro Gibson was convicted after a jury trial of burglary of a residential structure, theft, and possession of burglary tools. On appeal, he contends the trial court erred when it denied his motion to suppress evidence seized and statements he had made to law enforcements officers, challenging the court's finding the officer who had detained him had sufficient reasonable suspicion to justify that detention. We affirm for the reasons stated below.

¶2 Gibson stated in his motion to suppress that at around 2:00 in the afternoon on the day of the offenses, the seventeen-year-old victim called 9-1-1 and reported someone had broken into his home. Tucson police officer Jesus Arriola responded to the call and stopped Gibson as he was walking in the street near the victim's home carrying a duffle bag, detained him, and ultimately arrested him. Gibson argued in his motion to suppress that because Arriola lacked reasonable suspicion that Gibson had committed an offense, his rights under the state and federal constitutions were violated when Arriola stopped Gibson by blocking his way, requiring him to place his duffle bag on the back of the patrol car, and then arresting him.

¶3 "In reviewing the denial of a motion to suppress evidence, we consider only the evidence that was presented at the suppression hearing, which we view in the light most favorable to sustaining the trial court's ruling." *State v. Kinney*, 225 Ariz. 550, ¶ 2, 241 P.3d 914, 917 (App. 2010). We review for an abuse of discretion the court's findings of fact. *State v. Lopez*, 198 Ariz. 420, ¶ 7, 10 P.3d 1207, 1208 (App. 2000). Accordingly, we defer to that court with respect to its assessment of an officer's credibility and the determination of whether the inferences an officer drew under the circumstances were reasonable. *State v. Mendoza–Ruiz*, 225 Ariz. 473, ¶ 6, 240 P.3d 1235, 1237 (App. 2010). But we review de novo the legal question of whether the

evidence was obtained in violation of the constitution. *See State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004).

¶4 A law enforcement officer may detain a person in order to conduct a limited investigation if the officer "reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). But an officer may also briefly stop any "suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146 (1972). Whether that stop is reasonable depends on the facts known to the officer when the stop is made. *Id*. Indeed, under *Terry*, officers may stop a pedestrian and ask questions on any topic. 392 U.S. at 34 (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way.").

¶5 Reasonable suspicion means an officer has more than a hunch that a person has been involved in criminal activity, but requires only "some minimal, objective justification" for stopping the person. *State v. Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d 266, 272 (App. 2007). Although the inferences an officer draws from a particular set of circumstances may be based on the officer's experience and training, *United States v. Arvizu*, 534 U.S. 266, 273 (2002), the test is not dependent on an officer's subjective beliefs. Rather, courts must consider "such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances." *State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008).

¶6 The victim testified at the suppression hearing that on the afternoon the offenses were committed, he was in his home and heard noises in the backyard like the sound of dirt hitting a window. He "saw an Hispanic man" who was wearing an orange striped shirt, hitting the window with a bat. The victim ran to the closet in his bedroom and called 9-1-1. The 9-1-1 recording establishes the victim told the dispatcher the person was an Hispanic male and was carrying a bat. Towards the end of the recording the dispatcher told the victim officers had arrived and had caught the person. The victim apparently gave officers a more detailed description of the suspect once they arrived.

¶7 Officer Arriola testified he had responded to a report that a burglary was in progress and went to the area. He explained the protocol for such a situation requires a responding officer to "contain the area" by stopping "anyone [in the general area] who is trying to leave" because the person could be "a witness, a victim, a suspect." Less than fifty yards from where the burglary reportedly had occurred, he saw a male carrying "a duffel bag or a luggage bag" and walking "rapidly" in the roadway, "[a]way from the direction of the house." Although Arriola initially testified that he had known the suspect was an Hispanic male before he stopped the person later identified as Gibson, he conceded during cross-examination that he had not heard that description over the radio or read it in a "text" message before he stopped Gibson.

¶8 Arriola testified he stopped his car diagonally in the street, intending to block Gibson. Because Gibson could have been a witness, a suspect, or a victim, Arriola approached him to talk to him. Arriola immediately noticed Gibson "was really agitated, irritated" and did not "want[] to be around there." When Arriola asked him where he was coming from, whether he had any identification, and whether he had any weapons, Gibson said he had no weapons but reached for a bulge underneath his shirt. Arriola

"reached or grabbed [Gibson] by his hand or wrist, . . . trying to contain his hand," and felt "something hard underneath his shirt." Gibson tried to pull away from Arriola and run. Arriola grabbed him and after Gibson twice "slipped away," Arriola "picked him up, [and] took him to the ground." A pair of "tin snips" flew out of Gibson's waistband and landed in the road. Gibson tossed a small black bag that looked like a sandwich bag at a nearby wall. The two struggled until other officers arrived. Believing the bag might contain narcotics, Arriola retrieved it; the bag contained jewelry.

¶9 On cross-examination, Arriola testified he had stopped Gibson because he was the only person in the area and he was walking away from the burglarized home. Questioned by the court, Arriola said he realized after this incident he could have stopped Gibson for a traffic violation because he had been walking in the roadway, but he admitted he had not stopped him for that reason.

¶10 Another officer testified at the hearing, corroborating most of Arriola's testimony and explaining he and others had assisted Arriola as he struggled with Gibson. He stated Gibson would not have been released regardless of what happened in relation to the burglary because there had been outstanding warrants for Gibson's arrest. He also stated he brought the victim to the place where Gibson was being held, and the victim identified Gibson as the person who had intruded into his home.

¶11 At the end of the hearing the trial court suggested Arriola had stopped Gibson based solely on the fact that Gibson was in the area near the burglarized home and was walking away from it. Gibson argued this alone was not sufficient justification for the detention, which was effectuated when Arriola parked his car diagonally and blocked Gibson from passing, demanding that he place the bag on the hood of the car. Gibson argued this violated the Fourth Amendment because the encounter was not

consensual and Arriola lacked any basis for reasonable suspicion to believe Gibson had committed the offense.

¶12 After taking the matter under advisement, the trial court denied the motion. The court found Arriola had stopped Gibson based solely on the fact he was near the home and walking away from it, a finding the record amply supports. Relying on *Terry*, 392 U.S. at 21-22, and quoting *Adams*, 407 U.S. at 146, the court correctly noted that, depending on the circumstances and information known to an officer, the officer has the right to stop a suspicious individual briefly in order to determine the person's identity or "'maintain the status quo momentarily while obtaining more information.'" Although the court found the description of the perpetrator as an Hispanic male had been communicated to Arriola after he had stopped Gibson, it nevertheless concluded that, "[g]iven the proximity of the time and location of the stop to the time and location of the reported burglary, the officer acted reasonably, based on articulable facts, in effecting a limited investigatory stop of the defendant relative to that burglary."

¶13 Gibson argues on appeal, as he did in the trial court, that Arriola lacked sufficient reasonable suspicion of criminal activity to justify an investigatory stop. He points out the trial court had found Arriola lacked a description of a possible suspect when he stopped Gibson, doing so only "because he was in the area a short time after the burglary was reported." Relying on *State v. Richcreek*, 187 Ariz. 501, 505-06, 930 P.2d 1304, 1308-09 (1997), Gibson maintains "detentions cannot be based on mere proximity to reported crimes," insisting "there must be particularized suspicion that the individual detained is the one who committed the crime." He asserts there was "no information linking him in any way to the burglary besides proximity."

¶14 The trial court did not err in concluding Arriola could conduct a brief investigative stop of the only person rapidly walking away from the burglarized home, carrying a duffel bag, shortly after the burglary was reported and near where it had occurred. *See Terry*, 392 U.S. at 21-22; *see also Adams*, 407 U.S. at 146. The Fourth Amendment permits a brief investigatory stop of this nature, and the court did not err in concluding Arriola could stop Gibson to ask him for identification and question him because he was either a potential witness or suspect of the recently reported burglary. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) (there has been no seizure for Fourth Amendment purposes when officers ask person for identification if officers do not convey message compliance with request required); *see also State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996) (same). "In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Notwithstanding that possibility, law enforcement officers must be permitted to investigate crimes based on their experience and, as here, proper law-enforcement protocol; indeed, they have an obligation to do so. *See State v. Miller*, 112 Ariz. 95, 97, 537 P.2d 965, 967 (1975) (law enforcement officers have "duty to be alert to suspicious circumstances and to investigate if necessary"). Additionally, the fact that the crime had just been committed created exigent circumstances that provided further justification for stopping Gibson. *See State v. Watkins*, 207 Ariz. 562, ¶ 16, 88 P.3d 1174, 1178 (App. 2004) ("Exigent circumstances permitting temporary detention of a witness may exist when a crime has been reported recently, the officers are confronted with a rapidly-moving situation, or the police come upon a flight scenario.").

¶15 Gibson seems to argue, however, that the stop exceeded the permissible scope of a brief investigatory stop under *Terry* and its progeny because Arriola had

parked his car so as to block Gibson from passing, essentially seized Gibson's bag, and testified he had intended to keep Gibson there "until the [burglary] investigation was completed." As we understand this argument, Gibson is suggesting the brief investigatory stop was an excessive detention or tantamount to an arrest from the outset. The trial court correctly rejected this argument. As the court pointed out in its minute entry, an officer's subjective beliefs have no bearing on whether there has been an arrest. *See Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d at 956; *see also Terry*, 392 U.S. at 22. The court observed that instead, "whether an investigative detention becomes an arrest depends on an objective determination of whether the suspect's freedom of action was restricted to a degree associated with formal arrest." The court found Arriola had not truly restricted Gibson's movement, noting Gibson could have walked around the car, and Arriola had not placed Gibson in handcuffs, told Gibson he could not leave, drawn a weapon, or placed Gibson in a police vehicle. Consequently, the court concluded, a reasonable person would not have believed he was under arrest. Once there was a struggle for what the officer believed was a weapon, Gibson tried to flee, and "evidence of criminal activity was found on his person," Arriola then had probable cause to arrest Gibson.

¶16 Based on the record before us, the trial court did not err in concluding the initial detention had not violated Gibson's rights under the federal or state constitutions. The record shows Arriola did not truly restrict Gibson's movement until after the stop. Almost instantly Gibson gave Arriola additional reasons to do so by behaving in an agitated, nervous manner, reaching for an obvious bulge in his waistband, struggling with and resisting Arriola, and throwing the black bag. But the initial approach and stop was permissible.

¶17 Gibson makes two additional arguments that we address briefly. First, he asserts *Richcreek* supports his argument that the stop here was unlawful. But his reliance on that case is misplaced. There, our supreme court concluded police did not have sufficient reasonable suspicion to justify stopping the defendant after he had driven past an automobile accident simply because he had slowed down while passing the scene, pulled over a bit, and then accelerated and left. *Richcreek*, 187 Ariz. at 502, 506, 930 P.2d at 1305, 1309. As the court observed, however, "[f]orced stops of an automobile are much different and more intrusive than simply addressing a question to a pedestrian encountered on the street or public conveyance." *Id*. at 505, 930 P.2d at 1308.

¶18 Second, other than citing to the relevant provision of Arizona's Constitution, *see* Ariz. Const. art. II, § 8, Gibson has provided no authority for his assertion that it provides greater protection for a person engaged in "private affairs," that while walking quickly down the street, away from a crime scene, he had been engaged in private affairs, and that he is entitled to relief under the Arizona Constitution that might not be warranted under the Fourth Amendment. We therefore reject the argument summarily. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief on appeal must contain argument and citations to authority); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (noting requirement that opening brief in criminal appeal contain significant arguments and supportive authority and acknowledging lack of compliance with rule could result in waiver or abandonment of claim). Although we have summarily rejected the argument, we note, in any event, that "Arizona's right to privacy outside the context of home searches [is no] broader in scope than the corresponding right to privacy in the United States Constitution." *State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009).

¶19 We conclude the stop was constitutional and need not address the state's argument that Arriola could have stopped Gibson for violating traffic laws by walking in the roadway. The trial court did not err in denying Gibson's motion to suppress evidence because the initial stop was otherwise lawful. We affirm the convictions and the sentences imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge