NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUL 18 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,
v.
THOMAS ARTHUR VERHULST,
Appellant.

2 CA-CR 2011-0151
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103471001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Rebecca A. McLean
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Thomas Verhulst was convicted of second-degree burglary and sentenced to 6.5 years' imprisonment.[1] On appeal, he argues the court erred in denying his motion to suppress evidence on the ground it had been obtained pursuant to an unlawful arrest. Finding no error, we affirm.

Background

¶2 In reviewing the denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing and view that evidence and reasonable inferences therefrom in the light most favorable to upholding the [trial] court's ruling." *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). At approximately 4:30 one morning in September 2010, Officer Michael Miller of the Tucson Police Department received a report of "suspicious activity" in the area of a mobile home park. While en route to the source of the call, Miller encountered a person who matched the description of the suspect riding a motorized bicycle away from the park in question. Miller activated his lights and siren and noted Verhulst was "looking back . . . nervously" and initially continued to ride away. When Verhulst eventually stopped, Miller "immediately put him in handcuffs" and read him the *Miranda* warning,[2] after which Verhulst agreed to speak with Miller, ultimately admitting he had been inside a house from which he had taken "some pills." Miller testified he then placed Verhulst under

[1]Verhulst was on probation at the time of the offense and therefore was sentenced to an additional 2.5 years' incarceration to be served concurrently with his burglary sentence.

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

arrest and searched him, finding jewelry, cash, small containers of medication, and "bent up" credit cards.

¶3 After being indicted for burglary, Verhulst moved to suppress his statements and the physical evidence Miller had collected, arguing both had been obtained "through an arrest that lacked probable cause." After a hearing at which only Miller testified, the trial court denied the motion, finding the detention was a valid *Terry* stop[3] based on "the hour of the morning, the fact that the officer actually observed Mr. Verhulst coming out of the . . . trailer park community where the call had come from," and that the description Miller had been given of the suspect "did not exclude" Verhulst. Verhulst was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 Verhulst challenges the trial court's denial of his motion to suppress, claiming his statements and the various pieces of physical evidence were obtained pursuant to an unlawful arrest. Although he concedes there was reasonable suspicion for Miller to conduct a limited investigatory detention, *see Terry v. Ohio*, 392 U.S. 1, 29 (1968); *In re Ilono H.*, 210 Ariz. 473, ¶ 4, 113 P.3d 696, 697 (App. 2005), he argues that, because Miller handcuffed him immediately upon stopping him, his detention exceeded the scope of a *Terry* stop and was in fact an arrest unsupported by probable cause. We review a trial court's ruling on a motion to suppress for an abuse of discretion, deferring

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

to its factual findings unless they are clearly erroneous. *May*, 210 Ariz. 452, ¶ 4, 112 P.3d at 41. However, "the question of whether an illegal arrest occurred and the subsequent implications for admissibility [of evidence] are mixed questions of fact and law" that we review *de novo*. *State v. Winegar*, 147 Ariz. 440, 444, 711 P.2d 579, 583 (1985); *see State v. Blackmore*, 186 Ariz. 630, 632, 925 P.2d 1347, 1349 (1996).

¶5 An officer may conduct an investigatory detention when he or she has "'a reasonable suspicion supported by articulable facts that criminal activity may be afoot' or if the person stopped is reasonably suspected of having committed a crime." *Ilono H.*, 210 Ariz. 473, ¶ 4, 113 P.3d at 697, *quoting United States v. Sokolow*, 490 U.S. 1, 7 (1989). An arrest, by contrast, must be supported by the higher standard of probable cause, that is, "evidence within the knowledge of the arresting officer [that] would warrant a man of reasonable caution to believe that a crime had been committed by the person arrested." *State v. Green*, 111 Ariz. 444, 446-47, 532 P.2d 506, 508-09 (1975); *see also State v. Edwards*, 111 Ariz. 357, 360, 529 P.2d 1174, 1177 (1974) (probable cause standard higher than mere suspicion).

¶6 As Verhulst concedes, Miller had reasonable suspicion to effect an investigatory detention. He was responding to a call of suspicious activity around 4:30 a.m., a "time of the morning [when] there's not a lot of movement or people out . . . in that community." When he first noticed Verhulst, Miller observed he was leaving the mobile home park from which the call had originated and generally matched the profile of the suspect, who was described as a "male in his early 20s[or] late teens" wearing a

"dark shirt" and "dark shorts." Miller also noted Verhulst appeared nervous and evasive and did not immediately respond to Miller's efforts to stop him. *See State v. Fornof*, 218 Ariz. 74, ¶ 17, 179 P.3d 954, 959 (App. 2008) (suspect's hasty departure, though falling short of flight, may support reasonable suspicion). Thus, we agree with the trial court that Miller had reasonable suspicion to stop Verhulst.

¶7 We disagree with the state, however, that Miller had probable cause to arrest Verhulst at the time he conducted the initial stop and placed Verhulst in handcuffs. The state adduced no evidence that Miller knew he was responding to a burglary; he testified only that he was responding to a call about "suspicious activity." And, at the time Verhulst was handcuffed, he had not yet admitted he had entered a residence or had taken anything. The suppression testimony established only that, at the time of the stop, Miller knew there had been "suspicious activity" at a certain mobile home park at an unusual hour, and Verhulst was leaving the vicinity of the same park and generally matched the description of someone involved. Although this was sufficient to give rise to reasonable suspicion as discussed above, it falls short of "facts and circumstances which are sufficient in themselves to lead a reasonable man to believe an offense . . . has been committed and that the person to be arrested . . . commit[ted] it." *State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974); *see also* A.R.S. § 13-3883(A)(1), (2), (4) (arrest permissible if arresting officer has probable cause to believe both that offense occurred and person to be arrested committed offense). We therefore must determine

whether, at the outset, Verhulst was subject to a limited investigatory detention supported by reasonable suspicion, or a *de facto* arrest unsupported by probable cause.

¶8 "'Whether or not an arrest occurred is governed by the facts of the incident and not the subjective intent of the officer.'" *Green*, 111 Ariz. at 446, 532 P.2d at 508, *quoting Taylor v. Arizona*, 471 F.2d 848, 851 (9th Cir. 1972). An arrest occurs once the police interrupt and restrict a person's freedom of movement, *State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986); however, "[a] brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest." *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982); *see Blackmore*, 186 Ariz. at 634, 925 P.2d at 1351.

¶9 Verhulst contends the initially lawful seizure "became an illegal arrest immediately upon the officer's handcuffing [him]." But an officer's use of some force, including handcuffing a suspect, does not necessarily elevate an investigatory detention into an arrest. *See Bautista*, 684 F.2d at 1289-90; *Blackmore*, 186 Ariz. at 634, 925 P.2d at 1351. Rather, an officer is permitted to handcuff a suspect during an investigative stop under certain circumstances, including when the officer has reason to believe the suspect poses a flight risk. *See State v. Taras*, 19 Ariz. App. 7, 10, 504 P.2d 548, 551 (1972). On cross-examination, Miller testified that Verhulst had been acting evasively because, after Miller had activated his lights and siren, Verhulst "continued riding the bicycle across the street" and "continued looking back . . . nervously." Miller also testified that before he effected the stop, "it look[ed] like [Verhulst] was trying to get away . . . or move the bike

faster." Given this evidence, the trial court reasonably could conclude Verhulst posed a flight risk and he was not under arrest despite being handcuffed. *See id.*

¶10 We find Verhulst's reliance on *Winegar*, 147 Ariz. 440, 711 P.2d 579, misplaced. In that case, our supreme court held that the defendant had been arrested when she "was surrounded by police officers, deprived of her liberty of movement, [and] asked to accompany the officers across the street for further questioning." *Id.* at 448, 711 P.2d at 587. But, unlike the seizure in *Winegar*, which lasted approximately four hours, *id.*, Verhulst's initial detention lasted only a short time—during which he admitted having taken some pills from "a friend's house"—before he was formally arrested. And, again in contrast with *Winegar*, in which the defendant was transported to the sheriff's office twenty miles from the scene of the initial stop, *id.*, Verhulst was not surrounded by officers or taken from the scene before his arrest.[4] Thus, the limited intrusion at issue here did not create what the *Winegar* court dubbed "a coercive, police-mediated atmosphere, indicative of arrest." 147 Ariz. at 449, 711 P.2d at 588.

¶11 Nor does our supreme court's recent decision in *State v. Boteo-Flores*, No. CR-11-0180-PR, 2012 WL 2785901 (Ariz. Jul. 3, 2012), provide grounds for reversal. In that case, the court found there was a *de facto* arrest when the defendant was handcuffed and read his *Miranda* rights and then made to wait thirty to forty minutes for a detective

---

[4]One other officer was present during the stop. Although it is unclear whether that officer participated in the detention or was present for its entire duration, this does not rise to the level of police involvement indicative of arrest in *Winegar*. 147 Ariz. at 448, 711 P.2d at 587 (suspect "surrounded by police officers").

to arrive and question him. *Id.* ¶¶ 6, 16, 21. Holding that the scope of the detention was unreasonable, the court observed that the record contained no reason why the on-scene officers waited for a detective to arrive instead of questioning the defendant themselves, and no indication that the defendant posed a flight risk. *Id.* ¶¶ 16-18, 21. But here, as discussed above, there were no breaks in questioning: Miller handcuffed Verhulst, read him his *Miranda* rights, and questioned him with no intervening delay. In addition, unlike *Boteo-Flores*, the record contains ample evidence that Verhulst posed a flight risk. Thus, *Boteo-Flores* is distinguishable and does not suggest that the detention in this case was unreasonable. For all of these reasons, we agree with the trial court that Verhulst's detention did not rise to the level of arrest, even though he was handcuffed.

¶12 Verhulst also argues he was arrested from the time of the initial stop because Miller immediately advised him of his *Miranda* rights. *See Winegar*, 147 Ariz. at 448 n.6, 711 P.2d at 587 n.6 (*Miranda* warning weighs in favor of finding arrest). But Verhulst did not make this argument in his opening brief, broaching it instead in his reply brief. The state consequently did not have an opportunity to respond, and we therefore do not consider the argument. *See State v. Watson*, 198 Ariz. 48, ¶ 4, 6 P.3d 752, 755 (App. 2000) (declining to address argument first raised in reply brief, although same argument made below). We note, however, that advising a suspect of *Miranda* rights does not necessarily militate in favor of finding an arrest. *See, e.g.*, *Saturnino-Boudet v. State*, 682 So. 2d 188, 192 (Fla. Dist. Ct. App. 1996) (*Miranda* warnings did not transform *Terry* detention into arrest); *Cotton v. State*, 872 A.2d 87, 97 (Md. 2005)

("cautious or gratuitous recitation of *Miranda* warnings" irrelevant to whether there has been an arrest).

Conclusion

¶13 Because Miller demonstrated he had reason to believe Verhulst posed a potential flight risk, handcuffing him did not convert the investigative detention into an arrest. The trial court therefore did not err in denying the motion to suppress. Verhulst's conviction and sentence accordingly are affirmed.

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

CONCURRING:

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

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