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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. MARIO SOLANO, Appellant.	)	2 CA-CR 2011-0305 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100068

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Mark A. Suagee, Cochise County Public Defender
By Clarence G. Jenkins
Bisbee
Attorneys for Appellant

K E L L Y, Judge.

¶1 Appellant Mario Solano was charged with transportation of less than two pounds of marijuana for sale, a class three felony, and possession of less than two pounds of marijuana for sale, a class four felony. Solano waived his right to a jury trial and the case was submitted to the trial court based on the police report and other exhibits. The court found Solano guilty of the charges and found the state had proved its sentencing allegation that he had committed the offenses for pecuniary gain. The court suspended the imposition of sentence and placed him on a four-year term of probation.

¶2 Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). As an arguable issue, counsel asks us to consider whether the trial court erred when it denied Solano's motion to suppress evidence. Counsel suggests the police officer who stopped and detained Solano lacked reasonable suspicion to do so.

¶3 In reviewing a trial court's ruling on a motion to suppress evidence, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We will not disturb the court's ruling unless the court clearly has abused its discretion. *State v. Livingston*, 206 Ariz. 145, ¶ 3, 75 P.3d 1103, 1104 (App. 2003). Although we defer to the court's factual findings, its legal conclusions regarding the lawfulness of the detention are a mixed question of fact and law, which we review de novo. *Id*. And, it is for the trial court, not this court, to assess

the credibility of the witnesses and weigh the evidence before it. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶4 Sierra Vista police officer Scott Borgstadt testified at the suppression hearing that a woman had reported to police that her nephew, a juvenile, had told her that on three occasions his mother had sent him to purchase marijuana from a person named Mario. The woman spoke to Borgstadt by telephone and told him the juvenile had told her he no longer wanted to buy the marijuana for his mother. The woman explained Mario was expected to be at a certain location, driving a Chevrolet Suburban, to sell marijuana to the juvenile, who was to be accompanied by the woman's husband. Borgstadt testified that when he arrived at the specified location, he "saw a white Chevrolet Suburban sitting on the west side of the parking lot" and parked behind it so the vehicle could not be driven away. A person getting out of the Suburban said that his name was "Mario Solano" when asked by Borgstadt.

¶5 Borgstadt told Solano "there was an investigation going on" and waited for backup. Other officers arrived, and Borgstadt "made contact . . . with" the woman's nephew. The juvenile told Borgstadt he had purchased marijuana from Solano three times, explaining each time he had called Solano, who then met him at the same location. The juvenile stated Solano always had arrived in the white Suburban, and identified the Suburban parked in front of them as the same vehicle. The juvenile also described in detail how the marijuana had been packaged. Borgstadt then told Solano he had information that Solano was there to sell marijuana and, although Solano denied he had

"anything in his vehicle that [the police] needed to know about," Solano admitted he had marijuana in his pocket, which he gave to Borgstadt. It was wrapped in a manner consistent with the juvenile's description. After a "drug dog" alerted on the vehicle, officers found additional marijuana inside of it.

¶6 In his motion to suppress the marijuana and at the hearing on the motion, Solano argued this scenario was like that in *State v. Canales*, 222 Ariz. 493, ¶¶ 2, 4, 217 P.3d 836, 837 (App. 2009), where police who had received an anonymous tip about a suspicious vehicle in a parking lot had parked their vehicle to block a parked vehicle that fit the description provided, thereby effectuating a stop for purposes of the Fourth Amendment. Affirming the dismissal of the indictment, this court concluded the tip had not provided reliable information establishing a reasonable basis for believing that some illegal activity was taking place. *Canales*, 222 Ariz. 493, ¶¶ 16, 18, 217 P.3d at 840. Solano argued Borgstadt did not have a reasonable suspicion to justify stopping and detaining him because the information Borgstadt received had come from a person who had not previously provided police with reliable information regarding criminal activity. And, he contended, no information was provided that went beyond what was readily observable, which would have demonstrated the informant's reliability.

¶7 Law enforcement officers may, consistent with the Fourth Amendment, conduct an investigatory stop if there is reasonable suspicion that "criminal activity is afoot." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996); *see also Ornelas v. United States*, 517 U.S. 690, 693 (1996). Reasonable suspicion exists when,

based on the totality of circumstances, law enforcement officers have "a 'particularized and objective basis' for suspecting legal wrongdoing"; that suspicion need not rise to the level of probable cause. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). A person may be detained for as long as reasonably necessary to "diligently pursue[] a means of investigation . . . likely to confirm or dispel [officers'] suspicions quickly." *State v. Teagle*, 217 Ariz. 17, ¶ 32, 170 P.3d 266, 275 (App. 2007), *quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985).

¶8 Although an anonymous tip must include certain detailed information in order to be sufficiently reliable to form the basis of a reasonable suspicion, *State v. Altieri*, 191 Ariz. 1, ¶ 9, 951 P.2d 866, 868 (1997), the informant here was neither truly anonymous nor was she a confidential informant, the classification for which Solano had advocated at the hearing on the motion to suppress. Appearing to struggle with how to properly categorize the juvenile's aunt under the somewhat peculiar circumstances of this case, the court concluded she was not exactly a citizen informant, rather, she was more like a "concerned citizen" or a "regular drug informant." *See State v. Gomez*, 198 Ariz. 61, ¶¶ 17-18, 6 P.3d 765, 768 (App. 2000) (distinguishing truly anonymous informant from 9-1-1 caller in that case on ground that call was traceable and identity could be determined; finding caller had "placed her credibility at risk" and was entitled to "enhanced reliability" of "disinterested private citizen"); *see also State ex rel. Flournoy v. Wren*, 108 Ariz. 356, 364, 498 P.2d 444, 452 (1972) (recognizing enhanced reliability of ordinary citizen who volunteers information).

¶9 The trial court ultimately concluded that all of the individuals involved in informing police about the presence of marijuana in the vehicle—the aunt, the uncle, and the juvenile—were "citizen informants or concerned citizens," having placed "their own credibility at issue, at risk, by disclosing their names, their identities to police." The court went on to observe that, most importantly, "[t]he standard here is whether law enforcement had objective facts which raised a suspicion of criminal activity, objective facts that the officer had obtained to suggest criminal activity, which is sufficient for a brief investigatory stop." The court concluded that standard had been satisfied and denied the motion to suppress.

¶10 Both the record and the applicable law support the court's factual findings and its legal conclusions regarding the characterization of the informant, the credibility she should be afforded, and the establishment of reasonable suspicion. Although the woman had not previously served as a police informant, she was not an anonymous informant. Rather, she had identified herself and, having done so, she had indeed placed her credibility at issue by calling police, and she appeared to have been motivated not by self-interest but by a desire to protect her nephew and thwart criminal conduct. *See Gomez*, 198 Ariz. 61, ¶¶ 17-18, 6 P.3d at 768. We note, too, that the instant case is not like *Canales* because there, the 9-1-1 caller had provided no information establishing illegal activity was taking place, whereas here, the woman provided direct information through the juvenile's prior conduct involving Solano that raised a suspicion of further illegal activity. 222 Ariz. 493, ¶ 16, 217 P.3d at 840. The court did not err in concluding,

essentially, that under these circumstances, the information provided by the woman was entitled to "enhanced reliability," *Gomez*, 198 Ariz. 61, ¶ 18, 6 P.3d at 768, and that the information she gave police, including details regarding the location and description of the vehicle, established reasonable suspicion of criminal activity, justifying Solano's initial detention.

¶11 We have reviewed the entire record for fundamental error and have found none. We therefore affirm the convictions and the term of probation.

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

CONCURRING:

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

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