FILED BY CLERK
NOV 30 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL LEROY WITT, Appellant.	2 CA-CR 2011-0320 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900021

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Angela Kebric
Phoenix
Attorneys for Appellee

Gail Gianasi Natale
Phoenix
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Michael Witt was convicted of possession of methamphetamine, marijuana, and drug paraphernalia. The trial court sentenced him to

concurrent, presumptive prison terms, the longest of which was ten years. On appeal, Witt contends the court erred in denying his motion to suppress evidence because it was obtained as a result of an unconstitutional search and seizure. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 When reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, viewing it in the light most favorable to upholding the trial court's ruling. *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). Around 2:30 a.m. on October 20, 2008, Sierra Vista Police Officer Derek Osburn was on patrol when he noticed two men on bicycles. Osburn pulled his vehicle to the side of the street and got out. As the two men approached him, Osburn asked them "what was going on." The men, who later were identified as Witt and M.P., stopped, and Witt said they were going to M.P.'s house. When Osburn asked if they had identification, M.P. produced his identification card. Witt stated he did not have any identification but provided his name and date of birth.

¶3 Osburn then asked Witt and M.P., who had been standing in the middle of the street, "if they wouldn't mind moving to the front of [his] vehicle." Osburn got back in his vehicle, checked for arrest warrants, and learned Witt had two "non-extraditable warrants." After exiting his vehicle, Osburn returned M.P.'s identification card and asked Witt if he knew about the warrants. Witt said that he did. Osburn asked if they had any drugs or weapons on them, and both responded, "no." The officer then requested permission to search them. M.P. responded, "I know my rights," which Osburn

interpreted as a refusal. M.P. also told Witt: "[Y]ou have rights. You do not have to be searched." But Witt said to Osburn, "I don't have anything on me," stood up, and raised his hands by his head. Osburn asked Witt to turn around, Witt did so, and Osburn searched him, finding a glass pipe, marijuana, methamphetamine, and a needle syringe.

¶4 Witt was arrested and subsequently indicted for one count each of possession of methamphetamine, marijuana, and drug paraphernalia. Before trial, Witt moved to suppress the evidence obtained during the search on the basis that both the encounter and search were unconstitutional. After a hearing, the court denied the motion, finding the initial encounter had been consensual and Witt, by his conduct, had "expressed an unequivocal consent" to the search. Witt was convicted as charged and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

¶5 On appeal, Witt challenges the trial court's denial of his motion to suppress, claiming both the encounter and search violated his rights under the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution.[1] "In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court with respect to the factual determinations it made but review the court's legal conclusions

[1]Except in the context of a home search, the Arizona Constitution affords no greater protection against searches and seizures than the United States Constitution. *State v. Juarez*, 203 Ariz. 441, ¶ 14, 55 P.3d 784, 787 (App. 2002); *State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009). Despite asserting that the state constitution is "more explicit than its federal counterpart," Witt does not suggest its protections are broader in this context. We therefore limit our review to Fourth Amendment jurisprudence.

de novo." *State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010). We will uphold a court's ruling on a motion to suppress if it is correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

Consensual Encounter

¶6 Witt acknowledges a police officer may approach someone and ask questions without implicating Fourth Amendment protections against unlawful searches and seizures. But he maintains Osburn had no reason to stop the two men and the encounter "became a seizure when Osburn told [them] to move to the front of his car while he ran a warrants check" because at that point "Witt did not feel free to leave." Whether a person has been seized is a mixed question of law and fact that we review de novo. *State v. Wyman*, 197 Ariz. 10, ¶ 7, 3 P.3d 392, 395 (App. 2000).

¶7 The Fourth Amendment guarantees individuals freedom from unreasonable searches and seizures by the government. U.S. Const. amend. IV; *see also* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 8. However, consensual encounters between law enforcement officers and individuals do not violate the Fourth Amendment. *Wyman*, 197 Ariz. 10, ¶¶ 7, 13, 3 P.3d at 395-97 (consensual encounter became seizure when officer repeatedly requested to speak with men after they had refused).

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 497 (1983). "So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Florida v. Bostick*, 501 U.S. 429, 434 (1991), *quoting California v. Hodari D.*, 499 U.S. 621, 628 (1991).

¶8 In denying Witt's motion to suppress, the trial court found the interaction between Osburn and Witt had been a consensual encounter—"[Witt] was free to leave at any time and did not have to comply with any of [Osburn's] requests." The evidence supports this determination. After observing the two men on bicycles, Osburn parked his vehicle without using lights or siren and simply waited for them as they approached his location. Osburn testified he asked in a "calm and casual" voice "what was going on." Both men stopped of their own volition, and Witt voluntarily responded. The men then willingly provided Osburn information about their identities. *See I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (request for identification does not constitute seizure). Contrary to Witt's assertion, because a reasonable person would not have felt compelled to obey Osburn's request, no reasonable suspicion was required. *Cf. United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980) (lack of consent may be shown by language or tone of voice indicating that compliance with officer's request was compelled). We thus turn to Witt's argument that the encounter "became a seizure when Osburn told the men to move to the front of his car while he ran a warrants check."

¶9 A consensual encounter becomes a seizure within the meaning of the Fourth Amendment only if, in view of all the circumstances, a reasonable person would have believed that he or she was not free to leave. *Delgado*, 466 U.S. at 215; *see also*

Cañez, 202 Ariz. 133, ¶ 54, 42 P.3d at 582. A seizure occurs when a police officer restrains a citizen's liberty "by means of physical force or show of authority." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). A show of authority may include "the threatening presence of several officers, the display of a weapon by an officer, . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554-55. A seizure does not occur unless the individual yields to the show of authority. *State v. Rogers*, 186 Ariz. 508, 509-11, 924 P.2d 1027, 1028-30 (1996) (seizure occurred where officer held badge in hand and said to defendant, "we need to talk to you").

¶10 Here, Osburn asked Witt and M.P. "if they wouldn't mind moving to the front of [his] vehicle," but he did not order them to do so. *See United States v. Vera*, 457 F.3d 831, 835 (8th Cir. 2006) ("An authoritative order or command . . . effects a seizure, while a request—with its implication that the request may be refused—gives 'no indication' that consent is required.") (citations omitted); *State v. Childress*, 222 Ariz. 334, ¶¶ 12-13, 214 P.3d 422, 426-27 (App. 2009) (officer's "command" for defendant to move truck constituted seizure). Osburn testified he had made the request for his safety because he was the only officer on the scene at the time. Notably, he also stated that when he had asked them to move to the front of the vehicle, Witt and M.P. had been standing in the middle of the street. Moreover, Osburn asked them to move farther away from him rather than restricting their movement within his control. *Cf. Brendlin v. California*, 551 U.S. 249, 254 (2007) (seizure occurs when officer "terminates or restrains [defendant's] freedom of movement"). And although Osburn asked them to

move to the front of his vehicle, they actually walked even farther, to the sidewalk. The record reflects Osburn's request involved "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, . . . no threat, no command, not even an authoritative tone of voice." *United States v. Drayton*, 536 U.S. 194, 204 (2002). The trial court did not err in concluding that a reasonable person would have felt free to leave, thereby maintaining the consensual nature of the encounter.[2]

Consent to Search

¶11 Witt next argues the trial court erred by finding he had voluntarily consented to being searched. Although recognizing consent to search can be inferred from nonverbal conduct, he contends that his gesture was "ambiguous at best." "The trial court's factual determinations on the issue of giving consent will not be overturned unless clearly erroneous." *State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992).

¶12 Generally, officers may not conduct a search without a warrant supported by probable cause. *State v. Ahumada*, 225 Ariz. 544, ¶ 6, 241 P.3d 908, 910 (App. 2010).

[2]To the extent Witt separately suggests that he was seized when Osburn conducted a warrants check, we also disagree. An officer's "retention of [identification] papers under some circumstances may transform an interview into a seizure, where it is prolonged or is accompanied by some other act compounding an impression of restraint," *United States v. Tavolacci*, 895 F.2d 1423, 1425-26 (D.C. Cir. 1990), because, under such circumstances, "a reasonable person would not feel free to depart," *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). *See also United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992) (rejecting lower court's reasoning that officer's retention of identification not seizure because "nothing prevented the defendant from asking for [it] back and proceeding on his way"). Here, Witt did not have an identification card and, instead, had verbally provided his name and date of birth. Although Osburn had M.P.'s identification card, he did not have it for a prolonged period of time, and nothing prevented Witt from leaving.

But "[o]ne long recognized exception to the warrant requirement is consent." *State v. Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d 658, 661 (2010). Under this exception, the state must show a person's consent by clear and positive evidence in unequivocal words or conduct expressing consent. *Cañez*, 202 Ariz. 133, ¶ 53, 42 P.3d at 582. The state also has the burden of establishing a defendant's consent was voluntary, based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991).

¶13 Here, the trial court determined that Witt's "conduct expressed an unequivocal consent" to search. In reaching that conclusion, the court found Witt's "actions, standing alone, [were] insufficient to show consent." But, according to the court, given the totality of the circumstances, in which M.P. flatly refused to be searched and told Witt to do the same, Witt "stood and obviously submitted to the search." Although it appears the court did not separately address the issues of consent and voluntariness, we may uphold the court's ruling if it is correct for any reason. *See Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d at 582; *Swanson*, 172 Ariz. at 585, 838 P.2d at 1346. For the reasons that follow, we conclude both that Witt consented to the search by his conduct and the consent was voluntary.

¶14 Consent to search can be expressed nonverbally in various ways. *See, e.g.*, *United States v. Patten*, 183 F.3d 1190, 1195 (10th Cir. 1999) (defendant's silence and acquiescence in opening suitcase indicated consent to search); *United States v. Flores*, 48 F.3d 467, 468-69 (10th Cir. 1995) (after giving consent to first search, defendant consented to second search of trunk when officer told her to reopen trunk and she

complied after brief hesitation); *but see Cañez*, 202 Ariz. 133, ¶ 53, 42 P.3d at 582 (turning away from officer and walking back into house not sufficient to indicate consent to search house). Many of the cases finding consent through nonverbal conduct have focused on the defendant's conduct facilitating a search. *See United States v. Gleason*, 25 F.3d 605, 607 (8th Cir. 1994) (consent properly inferred from defendant's conduct in assisting with search); *cf. State v. Tigue*, 95 Ariz. 45, 48, 386 P.2d 402, 404-05 (1963) (defendant invited search by saying "go ahead" and holding up arms), *overruled on other grounds by State v. Harvill*, 106 Ariz. 386, 476 P.2d 841 (1970). We find *United States v. Wilson*, 895 F.2d 168 (4th Cir. 1990), particularly analogous to this case. In *Wilson*, the defendant argued that an officer's search of his person was nonconsensual. 895 F.2d at 171. After the officer had asked if he could search him, the defendant shrugged his shoulders and raised his arms without any verbal response. *Id.* at 172. The court concluded the defendant's conduct was sufficient to support its finding that the defendant had consented to the search. *Id.*

¶15 Here, the state presented evidence that, in response to Osburn's request for permission to search, Witt said, "I don't have anything on me." According to Osburn, Witt then "stood up on his own and raised his hand by his head and said again, 'I don't have anything on me.'" Witt thus facilitated the search by standing up, raising his hands near his head, and, when asked, turning around and facing away from Osburn as he conducted the search. At the suppression hearing, although Witt testified he told Osburn, "I know my rights, too," he also said he "could see where [Osburn] couldn't hear [him]."

And, Osburn testified unequivocally that Witt had not made such a statement. We thus conclude Witt's conduct, standing alone, constituted consent to search.

¶16 We next turn to the issue whether Witt's consent was voluntary. Witt argues "[i]t defies logic" to believe he would agree to be searched, knowing that he possessed contraband. But that is just one factor to consider under the totality of the circumstances, and, in certain situations, it can actually indicate voluntariness. *See State v. Ballesteros*, 23 Ariz. App. 211, 214, 531 P.2d 1149, 1152 (1975). Here, Osburn asked for permission to search in a nonthreatening manner with his weapon holstered. *See State v. Laughter*, 128 Ariz. 264, 266-67, 625 P.2d 327, 329-30 (App. 1980) (consent voluntarily given where several officers present but they did not draw weapons or threaten). Although Osburn did not inform Witt that he could refuse to be searched, M.P. had just refused Osburn's request, and Osburn accepted M.P.'s refusal without taking any further action in response. *See State v. Smith*, 123 Ariz. 231, 241, 599 P.2d 187, 197 (1979) (knowledge of right to refuse consent not required for voluntariness). Under these circumstances, Witt's consent to being searched was voluntary. *Cf. Drayton*, 536 U.S. at 204 (presence of others may make reasonable person feel more secure in decision not to cooperate with police). The search therefore was constitutional, and the trial court did not err in denying the motion to suppress.[3]

[3]Because the entire encounter was consensual, we need not address Witt's additional argument that his consent to search was not sufficiently attenuated from the alleged unlawful seizure. And because Witt consented to the search, we need not address the state's alternate theory that the evidence inevitably would have been discovered in a search incident to arrest based on the two non-extraditable warrants.

Disposition

¶17 For the foregoing reasons, Witt's convictions and sentences are affirmed.

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

CONCURRING:

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

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