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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. ALAN CLAYTON DAVOLT JR., Appellant.	)	2 CA-CR 2012-0118 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR201100163

Honorable Robert Duber II, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Amy Pignatella Cain
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Alan Davolt Jr. appeals from his convictions for possession of drugs and drug paraphernalia. He maintains the trial court should have "suppress[ed]

statements made to police and evidence found" in his vehicle because his "consent to search was not voluntary." Finding no error, we affirm.

Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In February 2011, Globe Police officer Brian Hudson stopped the vehicle Davolt was driving after seeing him speed and pass other vehicles in the right lane. During the traffic stop, Hudson asked for permission to search Davolt's vehicle. Davolt agreed, and Hudson found an empty plastic bag that smelled of marijuana and three bags of marijuana, totaling 3.93 grams. In a further search of the vehicle after Davolt's arrest, Hudson found three pills, two containing dextropropoxyphene, a narcotic prescription drug, and the other containing zolpidem, a dangerous prescription drug.

¶3 Davolt was charged with and convicted of possession of marijuana, two counts of possession of drug paraphernalia, possession of a dangerous drug, and possession of a narcotic drug. Davolt was also charged with possession of less than two pounds of marijuana for sale, but the jury was unable to reach a unanimous verdict on that charge, and it was dismissed with prejudice. The trial court suspended sentence and placed Davolt on a three-year term of probation.

Discussion

¶4 On appeal, Davolt argues the trial court "erroneously did not suppress statements made to police and evidence found" in his vehicle. Before trial, the state requested a voluntariness hearing. At the hearing, Hudson testified he had recognized

Davolt upon stopping his vehicle. Hudson issued Davolt a verbal warning for speeding and a written warning for a "mud flap violation" and returned Davolt's driver's license and other documents to him. After returning the documents, Hudson began a conversation with Davolt, discussing how Hudson "hadn't seen him around for a while" and inquiring "where he . . . had been." Hudson then asked Davolt if he "had any contraband in the vehicle," and when Davolt said he did not, Hudson "obtained consent to search" the vehicle.

¶5 Hudson searched Davolt's person, finding nothing; and his vehicle, finding three bags of marijuana and paraphernalia, specifically a small plastic bag. After Hudson found the bags of marijuana, he placed Davolt in handcuffs and informed him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Davolt thereafter acknowledged knowing there was a "stash can" in the vehicle, stating it looked like Hudson had found the marijuana in it, but denying the can belonged to him or his passenger. Hudson also found "miscellaneous pills" in "various property bags in the back" of the vehicle.

¶6 At the conclusion of the hearing, the state argued that "all of the statements by defendant . . . were voluntary." Davolt's attorney asked that "the statements be precluded." Davolt does not cite, nor have we found, anything in the record to show he moved to suppress the drugs found in the search. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (requiring appellant to provide argument with citations to record for each contention raised). Therefore, any argument that the trial court erred in failing to suppress that evidence is forfeited absent fundamental error. *See State v. Henderson*, 210 Ariz. 561,

¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Cañez*, 202 Ariz. 133, ¶ 70, 42 P.3d 564, 586 (2002) ("[W]e will review for fundamental error even absent a pretrial motion to suppress."). But Davolt does not argue on appeal that the court's error was fundamental or that he was prejudiced thereby, and any such argument, therefore, is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); *cf. State v. Estrella*, 230 Ariz. 401, n.1, 286 P.3d 150, 153 n.1 (App. 2012) ("Enforcement of our waiver standards is especially appropriate in the context of a motion to suppress because in such cases we are limited to the record presented at the hearing on that motion.").

¶7 Regarding the voluntariness of Davolt's consent to the search of his vehicle, Davolt's counsel stated in his closing argument at the voluntariness hearing: "Simply obeying authority, yes, siring [sic] to authority is not consent. Under the law, someone doesn't have to start fighting and kicking and screaming." But that statement followed counsel's argument on whether Davolt had been free to leave and counsel's observation that "the conversation [was] talking about drugs"; the statement did not specifically relate to the search. Even assuming, however, that this argument was sufficient to preserve the issue for appeal, Davolt's claim fails.

¶8 On appeal, Davolt relies primarily on *United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001), in which the court determined that "[a]n officer must initially restrict the questions he asks during a stop to those that are reasonably related to the justification for the stop." But, that case has been overruled by the United States Supreme Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), in which the Court decided that "'mere police questioning does not constitute a seizure' unless it prolongs

the detention of the individual, and, thus, no reasonable suspicion is required to justify questioning that does not prolong the stop." *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007), *quoting Muehler*, 544 U.S. at 101. And this court has reached a similar conclusion. *See State v. Box*, 205 Ariz. 492, ¶ 21, 73 P.3d 623, 629 (App. 2003) ("[O]fficer was . . . free to ask appellant additional questions unrelated to the traffic stop.").

¶9 In any event, we cannot say that Davolt's consent or other statements to police officers otherwise were involuntary.[1] The voluntariness of a defendant's statements or "consent to search is a question of fact determined from the totality of circumstances." *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991); *see also State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994). The inquiry as to consent is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 439 (1991). And a confession will not be found involuntary unless there is "'coercive police activity.'" *State v. Amaya-Ruiz*, 166 Ariz. 152, 166, 800 P.2d 1260, 1274 (1990), *quoting Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Absent clear and manifest error, we will not disturb the trial court's ruling" on voluntariness. *Ross*, 180 at 603, 886 P.2d at 1359.

¶10 Nothing in the record here suggests Davolt's will was overborne. *See State v. Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d 833, 843 (2006). Hudson displayed no use of force nor engaged in any other coercive conduct toward Davolt. In support of his

[1]As the state points out, contrary to the requirements of Rule 31.13(c)(1)(vi), Davolt does not specify what statements, apart from his consent to search the vehicle, the trial court should have precluded.

argument, Davolt relies on the fact that patrol cars were parked behind Davolt's vehicle, which was facing a convenience store, upon initiating the traffic stop. But Hudson also testified at the voluntariness hearing that after he had returned Davolt's documents, Davolt was free to leave and, had he refused a search of his vehicle, Hudson would have let Davolt leave. Thus, we cannot say a reasonable person would not have felt free to refuse Hudson's attempt at conversation, and the trial court did not clearly err in determining that Davolt's statements were voluntary.

Disposition

¶11 Davolt's convictions and terms of probation 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*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.