IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WELLINGTON CURICHIMBA MARIN,
Appellant.

No. 2 CA-CR 2013-0509
Filed August 11, 2014

Appeal from the Superior Court in Pima County
No. CR20124282001
The Honorable Christopher Browning, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Wellington Curichimba Marin was convicted after a jury trial of kidnapping, armed robbery, aggravated robbery, assault, burglary, and conspiracy. He was sentenced to a combination of minimum and presumptive, concurrent prison terms, the longest of which was four years. On appeal, Marin contends the trial court erred by denying a motion to suppress his statements because the police officers did not have reasonable suspicion to stop him; alternatively, he contends the stop turned into a de facto arrest without probable cause. He also argues the trial court erred by ordering monthly probation payments when it did not order probation. For the following reasons, we vacate the order of monthly probation payments, but otherwise affirm Marin's convictions and sentences.

Factual and Procedural Background

¶2 Because Marin's primary argument regards the motion to suppress, we limit our discussion to the facts presented at the suppression hearing. In November 2012, U.P. was at her home when a young boy knocked on her door. As she let him in, a man and a woman also entered, held guns to her head, assaulted her, and stole numerous items, including jewelry.

¶3 After Oro Valley police investigated, U.P. looked up Jacqueline Carlson on a social media website. Carlson had telephoned U.P. several times in the past and argued with her, because U.P. and Marin had previously dated and Carlson and Marin were currently dating. On Carlson's social media page, U.P. located a photograph of one of the men who had participated in the home invasion. She told police about her discovery and they

identified the man as Anthony White-Giordano. Detectives also identified Marin as being involved because he knew where U.P. lived and that she kept a large amount of jewelry in an odd location underneath a television armoire.

¶4 The next afternoon, Carlson pawned jewelry stolen during the home invasion. The following day, officers received notification that the missing items had been pawned. Video from the pawn shop showed that Carlson arrived in a car that matched the make, model, and color of Marin's car. The pawn shop cashier told detectives that, while Carlson had been in the store, one adult male waited for her in the driver's seat, while one stayed in the back seat.

¶5 The detectives told a surveillance team that they had probable cause to arrest Carlson and White-Giordano, and reasonable suspicion to stop Marin. The team located Marin's car in the parking lot of Carlson's apartment complex in Tucson and witnessed two males—who matched the descriptions of the young boy and White-Giordano—unsuccessfully attempt to enter the apartment. The males left the complex in the same car, but were stopped by the surveillance team. Marin was driving; Carlson, White-Giordano, and the boy were passengers.

¶6 The officers placed the passengers and Marin in separate unmarked police vehicles so they could not communicate with each other. Marin was handcuffed. After forty minutes, Oro Valley detectives arrived and interviewed the boy for approximately twenty minutes. The boy told them Marin had been involved in planning the home invasion and had come in through the back door that night to show the boy where U.P. kept her jewelry. A detective then informed Marin he was under arrest and took him to the police station, where the detective read him his *Miranda*[1] rights and interviewed him. Marin gave an incriminating statement.[2]

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

[2]Details of the statement are not included in the transcript of the motion to suppress hearing.

¶7 Marin was charged with kidnapping, armed robbery, aggravated robbery, aggravated assault, first-degree burglary, and conspiracy. He was convicted and sentenced as described above, and this timely appeal followed.

Investigatory Detention

¶8 Police may briefly detain a person without probable cause if the officer reasonably suspects he or she is involved in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968); *State v. Boteo-Flores*, 230 Ariz. 105, ¶ 11, 280 P.3d 1239, 1241 (2012). We assess the reasonableness of a *Terry* stop by examining whether it was warranted by the facts and whether its scope was reasonably related to the circumstances that led to the interference. *Boteo-Flores*, 230 Ariz. 105, ¶ 11, 280 P.3d at 1241. We review the legality of an investigatory stop de novo. *Id.*

¶9 Marin first contends the officers did not have reasonable suspicion to initiate a *Terry* stop. The state does not argue that the encounter was consensual or that Marin was not stopped; therefore, we review only whether the officers had reasonable suspicion.

¶10 The question of reasonable suspicion is based on the totality of the circumstances, considering factors such as the suspect's conduct and appearance, location, and surrounding circumstances, as well as the officer's experience, training, and knowledge. *State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008). The officer must have "more than an inchoate 'hunch,'" but need only articulate some "minimal, objective justification" for the stop. *State v. Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d 266, 272 (App. 2007).

¶11 In reviewing the motion to suppress, we consider the evidence presented at the suppression hearing, viewing it in the light most favorable to upholding the trial court's factual findings. *Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d at 956. Facts supporting reasonable suspicion are viewed as a whole, rather than parsed to determine if there could be innocent explanations for each fact. *See State v. Ramsey*, 223 Ariz. 480, ¶ 25, 224 P.3d 977, 982 (App. 2010).

¶12 The detective testified Marin had dated the victim, U.P., for several years previously, but was dating Carlson at the time of the home invasion. After U.P. reported the home invasion, she identified White-Giordano as one of the intruders by looking at Carlson's social media page. The next day, Carlson had pawned U.P.'s jewelry, arriving at the pawn shop in a car that matched the make, model, and color of the car Marin owned. One adult male was behind the wheel, and another was in the back seat.

¶13 Marin contends this evidence demonstrates only an association with Carlson and White-Giordano; that a car similar to his was driven to the pawn shop; and, even if he was in the car at the pawn shop, there was no evidence he knew what was going on. But each fact cannot be viewed separately from the others. Viewing them as a whole, Marin was linked to the identified intruders and to the car used at the pawn shop. These facts provided the minimal, objective justification for the detention. *See Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d at 272. The trial court did not err in finding there was reasonable suspicion for the stop.

¶14 The analysis does not end there, however. We must also determine whether any continued detention was reasonably related to the circumstances that justified the initial stop. *See Teagle*, 217 Ariz. 17, ¶¶ 27-29, 170 P.3d at 273-74. A valid investigatory stop "'must be tailored to fit the exigencies of particular situations.'" *Boteo-Flores*, 230 Ariz. 105, ¶ 14, 280 P.3d at 1242, *quoting United States v. Pontoo*, 666 F.3d 20, 30 (1st Cir. 2011).

¶15 Marin contends the scope of the detention was overbroad and became a "de facto arrest" because he was handcuffed and placed in a police vehicle, where he remained for an hour before he was formally arrested. He relies primarily on *Boteo-Flores* to support his argument.

¶16 In *Boteo-Flores*, police officers tracking a stolen truck witnessed the driver of the truck shout to Boteo-Flores before driving away. 230 Ariz. 105, ¶¶ 3-4, 280 P.3d at 1240-41. All but one of the officers followed the truck, and the remaining officer approached Boteo-Flores, handcuffed him, advised him of his *Miranda* rights, and began questioning him. *Id.* ¶¶ 5-6. The other

officers returned and called an auto theft detective to assist with the investigation, and Boteo-Flores was left handcuffed, standing by a police car, for thirty to forty minutes, waiting for the detective to arrive and be briefed. *Id.* ¶¶ 6-7, 16. Our supreme court found that the officer had reasonable suspicion to stop Boteo-Flores, but concluded the time he spent handcuffed, waiting for the detective to arrive, resulted in a de facto arrest. *Id.* ¶¶ 13-21.

¶17 Although the detention in *Boteo-Flores* was shorter than the detention here, and Boteo-Flores was not placed in the back of a police vehicle as Marin was, the scope of Marin's detention was reasonable in light of the particular circumstances. In *Boteo-Flores*, the supreme court noted that the officers who carried out the stop had witnessed the suspicious activity and that there was nothing in the record indicating the need to wait for an automobile theft detective to talk to Boteo-Flores. *Id.* ¶ 18. Here, however, there is nothing in the record indicating that the surveillance officers knew enough of the background to interview Marin or the passengers, as the officers in *Boteo-Flores* had, or that waiting for a brief interview with one suspect was unreasonable. The record shows the surveillance officers initiated the stop at the request of the detectives, who relayed that there was reasonable suspicion to stop Marin. The length of the wait was attributable to the distance between Tucson and Oro Valley, where the crime had occurred and where the detectives were located, plus the time spent interviewing one of the suspects. The time allowed the officers to investigate whether Marin had been involved in the home invasion, and we conclude it was reasonable under the circumstances. *See Teagle*, 217 Ariz. 17, ¶¶ 33-37, 170 P.3d at 275-76 (one-hour-forty-minute detention to wait for drug-sniffing dog reasonable); *see also Gallegos v. City of Los Angeles*, 308 F.3d 987, 989, 992 (9th Cir. 2002) (forty-five-minute to one-hour detention while officers drove suspect to scene of crime for identification not unnecessary delay).

¶18 Additionally, the court in *Boteo-Flores* noted that leaving Boteo-Flores handcuffed for the duration of the wait, without offering any explanation of an ongoing threat or fear of flight, suggested he was under arrest. 280 Ariz. 105, ¶ 19, 280 P.3d at 1243. In contrast, Marin was suspected of being involved in a violent

armed robbery, and the accomplices were all in the car with him when he was pulled over. Handcuffing him and placing him in a police vehicle promoted officer safety and kept the suspects from communicating with each other, and was therefore reasonable in context. *See State v. Clevidence*, 153 Ariz. 295, 297, 299, 736 P.2d 379, 381, 383 (App. 1987) (handcuffing, frisk, and placement next to patrol car did not transform detention into arrest); *State v. Aguirre,* 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981) (detaining, frisking, handcuffing, and placing suspect in patrol car did not transform investigative stop into arrest where officer sought information on reported crime and was concerned about escape); *see also United States v. Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982) (not unreasonable to continue use of handcuffs where defendants suspected of violent armed robbery). Marin's detention was not unreasonable in the context of the facts of this case.

¶19 Moreover, even assuming the stop became an arrest because of the length of time before detectives arrived, the officers had probable cause to arrest Marin. Probable cause is more than mere suspicions but requires something less than the proof needed to convict. *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005). An officer has probable cause when "reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000). We review de novo whether probable cause existed, *Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d at 577, considering the collective knowledge of all of the investigating officers, *State v. Peterson*, 171 Ariz. 333, 335, 830 P.2d 854, 856 (App. 1991).

¶20 Marin owned a car matching the description of the one driven to the pawn shop where Carlson sold the stolen jewelry and he was driving it at the time he was stopped by officers. All three of the other identified suspects in the robbery were in the car with him. Marin was also the link between the victim and the other three suspects, and police believed he was the only person in the group who knew where U.P. hid her jewelry. A person of reasonable caution would believe Marin not only associated with the suspects, but also helped plan the robbery and assisted in the sale of the stolen

jewelry by driving Carlson to the pawn shop. *See United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992) (probable cause existed where red car used in earlier aborted drug delivery, and defendant later drove red car to location where passenger ultimately delivered drugs); *United States v. Williams*, 630 F.2d 1322, 1325 (9th Cir. 1980) (probable cause existed for defendants in motor home where it was seen earlier travelling with car carrying drugs and drug-manufacturing paraphernalia); *but cf. State v. Hansen*, 117 Ariz. 496, 498, 573 P.2d 896, 898 (App. 1977) (no reasonable suspicion where defendant sitting next to person smoking marijuana, but not observed participating).[3]

Probation Payments

¶21 Marin also contends the trial court erred in imposing a monthly probation fee when it did not order probation. Marin did not object before the trial court, but an illegal sentence is fundamental, reversible error. *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013); *see also State v. Payne*, 223 Ariz. 555, ¶ 14, 225 P.3d 1131, 1136-37 (App. 2009) (imposition of unauthorized fee fundamental error). The state concedes the error.

¶22 A probation fee is appropriate only if a defendant is placed on probation. A.R.S. § 13-901(A). It is clear from the sentencing minute entry and the transcript of the oral pronouncement of sentence that Marin was not placed on probation. In the oral pronouncement, the trial court imposed a probation fee of sixty-five dollars per month. The minute entry does not include this order. We therefore vacate the imposition of the probation fee in the oral order as reflected in the transcript.

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[3] At the suppression hearing, the detective testified that investigators had said they had reasonable suspicion for Marin and probable cause for the others, implying the detectives did not believe they had probable cause for Marin. The standard for probable cause is objective, however; therefore the investigators' subjective belief is not controlling. *See State v. Vaughn*, 12 Ariz. App. 442, 444, 471 P.2d 744, 746 (1970).

Disposition

¶23 For the foregoing reasons, we vacate the probation fee imposed, but otherwise affirm Marin's convictions and sentences.