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
APR 21 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SAMUEL MARK DURSO, Appellant.	2 CA-CR 2008-0144 DEPARTMENT A <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071028

Honorable Edgar Acuña, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Sherri Tolar Rollison — Phoenix
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Frank P. Leto — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Samuel Durso was convicted of one count each of possessing a narcotic drug (cocaine) and possessing drug paraphernalia. The trial court suspended imposition of sentence and placed Durso on concurrent, two-year terms of probation. On appeal, he challenges the court's denial of his motion to suppress, arguing police officers lacked a sufficient basis to stop his vehicle and the court erred in finding he had consented to a search of his person. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling, considering only the evidence presented at the suppression hearing. *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). On an evening in February 2007, Pima County sheriff's deputy Robert Svec followed a jeep as it left a house that was under surveillance by narcotics officers. After observing the jeep cross the center line into oncoming traffic three times and twice swerve to the right, Svec activated his patrol car's flashing lights and stopped the jeep, which was being driven by Durso.

¶3 Once stopped, Durso was unable to produce a driver's license or other form of identification, proof of insurance, or the vehicle's registration. After identifying Durso from his social security number, Svec asked for permission to search the jeep, and Durso consented. While Svec searched the vehicle, another deputy who had arrived, Alexander Tish, asked Durso's permission to search his person. Again, Durso agreed and immediately placed his hands on top of his head. After finding what proved to be a rock of crack cocaine in Durso's pocket, Tish placed him under arrest.

¶4 Durso filed a pretrial motion to suppress the cocaine found as a result of the traffic stop, arguing that the officers had lacked reasonable suspicion to stop him and that the subsequent search of his person was nonconsensual. After a hearing, the trial court denied the motion.

Discussion

¶5 Durso challenges the denial of his motion to suppress, arguing the trial court erred in finding no violation of his rights under either the Fourth Amendment of the U.S. Constitution or article II, § 8 of the Arizona Constitution, based on Durso's claims that Svec lacked reasonable suspicion to stop Durso's vehicle and that his consent to search his person was involuntary. In reviewing a trial court's decision on a motion to suppress evidence, we defer to the court's factual findings unless they are clearly erroneous, but we review legal conclusions de novo. *See State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005).

Reasonable Suspicion

¶6 "An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment." *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). "[A] police officer may make a limited investigatory stop in the absence of probable cause if the officer has an articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity." *Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d at 271-72. In *Teagle*, this court additionally noted that the privacy right afforded by article II, § 8 has not been expanded beyond protections provided by the Fourth Amendment except in cases involving warrantless entries into the home. *Id*. n.3; *cf. State v. Ault*, 150 Ariz. 459,

465-66, 724 P.2d 545, 551-52 (1986); *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984). Moreover, "[o]ur supreme court long ago held that Article 2, Section 8 of the Arizona Constitution 'is of the same general effect and purpose as the Fourth Amendment' and that the decisions concerning the scope of allowable vehicle searches under the federal constitution are 'well on point.'"[1] *State v. Reyna*, 205 Ariz. 374, ¶ 14, 71 P.3d 366, 369 (App. 2003), *quoting Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 549 (1926). "[T]he question of whether the police had reasonable suspicion to conduct an investigatory stop is a mixed question of law and fact that we review *de novo*." *In re Ilono H.*, 210 Ariz. 473, ¶ 3, 113 P.3d 696, 697 (App. 2005).

¶7 We first address Durso's argument that the trial court erred in finding Svec had reasonable suspicion to stop his vehicle. He argues the state did not present sufficient evidence that he had violated A.R.S. § 28-729(1), which states:

> If a roadway is divided into two or more clearly marked lanes . . .:
> 1. A person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety.

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[1]Durso's suggestion that *Teagle* is not binding precedent because it is a court of appeals decision is patently incorrect. Our supreme court's silence on a point of law does not nullify our decisions. To the contrary, our decisions are the law of Arizona unless overruled by statute, or by decision of our Supreme Court or the United States Supreme Court, or this court itself. *See Wilderness World, Inc. v. Ariz. Dep't of Rev.*, 180 Ariz. 155, 157, 882 P.2d 1281, 1283 (App. 1993) (court of appeals bound by its own previous decisions unless improvidently decided), *rev'd in part on other grounds*, 182 Ariz. 196, 895 P.2d 108 (1995).

Although Svec testified he saw Durso's jeep cross the center line three times and swerve to the right twice, Durso contends Svec's testimony lacked credibility because the road had a curb, and the absence of any evidence showing that Durso went over the curb meant he could not have swerved off the road to the right.[2] Additionally, citing *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (App. 2003), he argues this stop was "pretextual" and the court erroneously failed to perceive Svec's testimony as incredible. As noted above, we view all facts in the light most favorable to supporting the trial court's ruling. Although Durso presented evidence the road had a curb and argued it was impossible for him to have left the roadway without hitting the curb, resolving conflicting testimony is the province of the trial court; this court will not upset a trial court's credibility determinations on appeal. *See May*, 210 Ariz. 452, ¶ 4, 112 P.3d at 41.

¶8 To the extent Durso argues the trial court erred by not finding the stop pretextual and Svec's testimony therefore incredible, we disagree. Although we have held that a single, brief crossing of a lane line on a winding highway by a driver not placing herself or other drivers in danger does not give rise to reasonable suspicion warranting a stop, *see Livingston*, 206 Ariz. 145, ¶¶ 5, 12, 75 P.3d at 1105, 1106, this is not such a case. Svec testified that Durso drove "erratic[ally]" on a straight road, crossing the center line multiple

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[2]Durso also claims that, because the state failed to establish the road had clearly marked lanes that were visible at night, the trial court could not find Svec had reasonable suspicion to stop him. However, Durso did not make this argument below and has thus forfeited all but fundamental error review on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because he does not request fundamental error review, we need not consider this issue. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

times and presenting "a danger to oncoming traffic." As the state correctly notes, weaving in traffic "is a specific and articulable fact" justifying an investigative stop. *See State v. Superior Court*, 149 Ariz. 269, 273, 718 P.2d 171, 175 (1986). Therefore, the trial court did not err in finding Svec did not "stop [Durso] based on [his] subjective interests" in questioning him about the suspected drug house but, rather, stopped him because he had committed a traffic violation. Moreover, even if Svec's primary reason for stopping Durso was his desire to question him about suspected drug activity, "the subjective motives of an officer do not invalidate an otherwise lawful traffic stop." *Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d at 1106; *see also Whren v. United States*, 517 U.S. 806, 813 (1996); *State v. Vera*, 196 Ariz. 342, ¶ 5, 996 P.2d 1246, 1247 (App. 1999). *Livingston* does not hold or suggest otherwise as Durso contends. Rather, in *Livingston*, we merely agreed that a court could consider an officer's subjective motivations in weighing the credibility of his or her testimony. *See Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d at 1106.

Lawfulness of Searches

¶9 Durso next contends the evidence gleaned from both searches should have been suppressed because his consent was not knowing and voluntary and claims the trial court erred in "requiring, as a matter of law, evidence of [his] subjective feeling of intimidation or fear of the officers." "Although the burden of proof is on the state to establish by clear and positive testimony the consent was freely and intelligently given, we must view the evidence in a light most favorable in support of the ruling below." *State v. Wilkerson*, 117 Ariz. 143, 144, 571 P.2d 289, 290 (App. 1977). We review the denial of a motion to suppress evidence

for an abuse of discretion. *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). We look to the totality of the circumstances to determine whether consent was voluntary, considering such factors as whether the person was in custody when consent was given and whether the person consented despite denying guilt or after having previously refused to consent. *See Wilkerson*, 117 Ariz. at 144, 571 P.2d at 290. We will not overturn a trial court's factual determinations on the voluntariness of consent unless they are clearly erroneous. *See State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992).

¶10 Uncontroverted testimony at the suppression hearing shows Durso was "very cooperative," was not in custody, did not deny his guilt, and immediately agreed to the search the first time the officer sought permission. Durso claims his consent was nonetheless invalid because it was the result of intimidation or fear. He points to evidence that "his voice was cracking, . . . his hands were shaking . . . [and he had] immediate[ly] place[d] . . . his hands on top of his head," demonstrating he was too fearful of a uniformed law enforcement officer for his consent to be considered voluntary. This evidence, however, does not show the trial court abused its discretion in finding Durso had consented voluntarily. *See State v. Watson*, 114 Ariz. 1, 4, 7, 559 P.2d 121, 124, 127 (1976) (search consensual even though officers in uniform with guns drawn); *Wilkerson*, 117 Ariz. at 144-45, 571 P.2d at 290-91 (search consensual notwithstanding defendant nervous and shaking "uncontrollably").

¶11 We find nothing in the record showing the trial court "require[d]" Durso to present evidence of his "subjective feeling[s]." As noted above, the test for consent takes into account all circumstances, which may include evidence of a defendant's cooperation and

apparent lack of fear. *See State v. Sherron*, 105 Ariz. 277, 279, 463 P.2d 533, 535 (1970) (noting defendant's cooperation and apparent feelings of confidence); *State v. Laughter*, 128 Ariz. 264, 266-67, 625 P.2d 327, 329-30 (App. 1980) (no evidence defendant was threatened and defendant "cooperative in all matters"). We do not view the trial court's statement that "[t]here [was] no testimony in the record regarding [Durso's] subjective feeling" as anything more than an observation about the evidence presented.

¶12 In any event, as the state points out, Durso's consent was immaterial in this situation, because the officers had probable cause to arrest him when he failed to produce his driver's license.[3] *See* A.R.S. § 28-1595 (failure to present driver's license is misdemeanor offense); § 13-3883(A)(2) (officers may arrest for misdemeanor offenses); *see also State v. Lopez*, 198 Ariz. 420, ¶ 3, 10 P.3d 1207, 1208 (App. 2000) (driver arrested for failure to produce driver's license). Searching Durso was permissible regardless of whether he consented because the officers had probable cause to arrest him before they searched his person. *See State v. Cofhlin*, 3 Ariz. App. 182, 185-86, 412 P.2d 864, 867-68 (1966) (search prior to lawful arrest constitutional when probable cause for arrest existed before search); *accord State v. Weinstein*,190 Ariz. 306, 311, 947 P.2d 880, 885 (App. 1997).

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[3]To the extent Durso argues the state has waived this argument by not raising it below, he is mistaken. Although an appellant forfeits claims of error on appeal by not raising them below, we have the duty to uphold a trial court's decision if it is correct on any legal ground. *See State v. Rojers*, 216 Ariz. 555, ¶ 17, 169 P.3d 651, 655 (App. 2007).

Disposition

¶13 For the foregoing reasons, Durso's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge