FILED BY CLERK
MAY -5 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS HUMBERTO SOTO, Appellant.	2 CA-CR 2008-0405 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20031147

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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

¶1 Appellant Jesus Soto was convicted after a jury trial of possession of a deadly weapon by a prohibited possessor. He was sentenced to a presumptive term of ten years' imprisonment. He argues the trial court erred in denying his motion to suppress evidence arising from an unlawful traffic stop. He also contends his conviction should be reversed because the record is "insufficient to determine whether the prosecutor's explanation of a juror's demeanor as a reason for exercising a peremptory strike was valid." For the following reasons, we affirm Soto's conviction and sentence.

Factual and Procedural Background

¶2 The following facts, taken from the suppression hearing, are set forth in the light most favorable to upholding the trial court's ruling. *See State v. Weekley*, 200 Ariz. 421, ¶ 3, 27 P.3d 325, 326 (App. 2001). Tucson Police officers Jesse Chamberlain and Jeffrey Stover saw a vehicle fail to completely stop at a stop sign. According to the officers, the vehicle also had been traveling approximately forty-five miles per hour; the speed limit was thirty-five miles per hour. They then observed the vehicle make an illegal turn and initiated a traffic stop. Soto was identified as the driver.[1]

¶3 Chamberlain searched the vehicle and found a .22-caliber revolver and a bag of crack cocaine underneath the passenger seat and a larger caliber revolver on the passenger seat. Soto was charged with various offenses relating to the guns and drugs found in the vehicle, but the jury found him guilty only of one count of possession of a

[1]In what appears to be a transcription error, testimony about both the driver and passenger from the suppression hearing refers to that person as "Soto." At trial, however, Officer Stover testified Soto was the driver and Silva the passenger. Neither party on appeal disputes that Soto was the driver and neither of the issues Soto has raised turn on his being the driver of the vehicle.

deadly weapon by a prohibited possessor. After being sentenced, Soto filed this timely appeal.

Reasonable Suspicion

¶4 Soto argues his motion to suppress should have been granted primarily because "[t]he objective facts discredited the officers' subjective belief that they were able to observe a car run the stop sign." In particular, Soto maintains that his investigator's measurements demonstrated that the officers could not have observed a car run a stop sign from their vantage point. We review the denial of a motion to suppress for an abuse of discretion but review legal conclusions de novo. *State v. Kinney*, 225 Ariz. 550, ¶ 13, 241 P.3d 914, 919 (App. 2010). Although the state bears the burden of demonstrating that the stop was lawful, *see* Ariz. R. Crim. P. 16.2(b); *Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 12, 979 P.2d 539, 543 (App. 1999), the state may satisfy that burden even when the evidence is conflicting. *See State v. Warner*, 159 Ariz. 46, 50, 764 P.2d 1105, 1109 (1988).

¶5 Contrary to Soto's assertion, the objective evidence here did not necessarily conflict with the officers' testimony. The officers testified they were traveling north on Twelfth Avenue when they saw Soto, who was traveling on Veterans Boulevard, fail to stop at the intersection of Twelfth and Veterans. Soto contends in his opening brief that the officers testified "they were pulling out of the parking lot of a [restaurant] when they saw Soto roll through the stop sign." He contends that because his investigator testified that the restaurant is 630 feet from the intersection and that the stop sign could not be

seen from that distance, "it was physically impossible for the two officers to see a car run a stop sign from their location."

¶6 However, Soto has mischaracterized the officers' testimony. Although the officers maintained they had passed the restaurant when they saw the car roll through the stop sign, neither said they were "pulling out of the parking lot of [the restaurant]," as stated in the opening brief. Rather, Chamberlain stated they were about fifty yards away from the intersection when they witnessed the car fail to come to a complete stop, and another investigator, called as a witness by Soto's co-defendant, opined that a person could see the stop sign pole from as far as 178 feet south of the intersection.[2] Thus, the expert testimony presented did not necessarily conflict with the officers' testimony.

¶7 In any event, this court will neither weigh conflicts in the evidence nor second-guess the trial court's determination about the credibility of witnesses and the weight to give their testimony. *See Warner*, 159 Ariz. at 50, 764 P.2d at 1109; *State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004). Accordingly, we defer to the court's implicit determination that the officers had seen Soto run the stop sign.

¶8 Even assuming the officers were not correct that Soto had failed to stop at the stop sign, the officers witnessed other traffic violations that justified their stopping Soto. Officer Stover testified he issued citations to Soto both for failing to stop at the sign and for an improper right turn, and Soto does not dispute that he made an unlawful turn. Furthermore, the officers estimated Soto had been traveling over the speed limit

[2]Soto's investigator appeared to testify that the stop sign could be seen at distances less than 108 feet, but the testimony is not entirely clear.

before they initiated the traffic stop. *See State v. Sweeney*, 224 Ariz. 107, ¶ 16, 227 P.3d 868, 872-73 (App. 2010) (officer needs only reasonable suspicion traffic violation occurred to initiate investigatory stop). We therefore find no error in the trial court's ruling.[3]

Peremptory Strike

¶9 During jury selection, Soto challenged the state's peremptory strike of two prospective Hispanic jurors, Juror M. and Juror S., pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). When reviewing a trial court's ruling on a *Batson* challenge, we review de novo the court's application of the law but defer to its findings of fact unless clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006). In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the state from using peremptory strikes to remove prospective jurors "solely on account of their race." 476 U.S. at 89.

¶10 A trial court's analysis of a *Batson* challenge involves three steps. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). First, the challenging party must make a prima facie showing of discrimination based on race, gender, or another protected characteristic. *State v. Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d 160, 162 (App.

[3]Although the trial court addressed the issue of reasonable suspicion, it did not do so in the context of a motion to suppress evidence, but rather in the context of Soto's "motion to dismiss based upon illegal seizure." We need not decide whether Soto raised the argument in the correct form below because the state has characterized Soto's filing as a "motion to suppress" on appeal without objecting to it on procedural grounds, and we have concluded the officers had reasonable suspicion to stop Soto's vehicle. *See State v. Windus*, 207 Ariz. 328, n.2, 86 P.3d 384, 386 n.2 (App. 2004) (treating motion as motion to suppress on appeal despite it being filed as motion to dismiss in trial court).

2001). The proponent must then provide a facially neutral explanation for the strike. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). The explanation need not be persuasive or plausible so long as it is facially neutral. *Id.* at 768. Third, the trial court must determine the credibility of the proponent's explanation and whether the opponent met its burden of proving discrimination. *State v. Martinez*, 196 Ariz. 451, ¶ 16, 999 P.2d 795, 800 (2000); *State v. Eagle*, 196 Ariz. 27, ¶ 9, 992 P.2d 1122, 1125 (App. 1998), *aff'd*, 196 Ariz. 188, 994 P.2d 395 (2000). "This third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court." *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. Therefore, the court's finding is entitled to great deference. *Id.*

¶11 After the trial court found Soto had made a prima facie case of racial discrimination based on the state's strikes of Jurors M. and S., the state explained as to one of them:

> [Juror M.] is—I mean he's—my impression is he's a slob, sleeps all day, and he takes tickets for a couple of hours at the movie theater. Doesn't read anything, doesn't do anything. That's not the kind—he's sloppy, T-shirt and gold chain. Not a guy I want to have on the jury. That's why I let him go.

Soto simply responded that the state had not "stated any race neutral grounds for excusing either of these individuals." He did not specify how the state's explanation was race based. Nor did he dispute that Juror M. was indeed wearing a "T-shirt" and gold chain or oppose the state's characterization of him as a "slob" and "sloppy." The court

found "that the State has made a race neutral basis for the strikes" and "accepted . . . that the strikes had nothing to do with the race of either of the individuals."[4]

¶12 Under *Batson*'s second step, the state has a low threshold to clear when providing its facially neutral explanation for a peremptory strike. *See Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162 (proponent's neutral basis for strike "must be more than a mere denial of improper motive, but it need not be 'persuasive, or even plausible'"), *quoting Purkett*, 514 U.S. at 767-68. And Soto does not argue he satisfied the third *Batson* step by showing a racial motivation for the strike. Rather, he simply argues the reason for striking the juror was based on his demeanor—"that he was a slob and his manner of dress"—and thus, the trial court should have made "specific findings as to why the demeanor of the juror provided a race-neutral reason for the strike" under *Snyder v. Louisiana*, 552 U.S. 472 (2008).

¶13 First, however, it is unclear that the characterization of Juror M. as a slob and the discussion of his clothing are statements about his demeanor as the term was used in *Snyder*. *See id.* at 477 (examples of demeanor include "nervousness, inattention"); *see also The American Heritage Dictionary* 379 (2d college ed. 1991) ("demeanor" defined as "[t]he way in which a person behaves or conducts himself; deportment").

¶14 Second, assuming arguendo the statements do involve demeanor, the United States Supreme Court recently has clarified that neither *Batson* nor *Snyder* set forth a categorical rule that "a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of

[4]Soto does not challenge on appeal the court's ruling as to Juror S.

the prospective juror's demeanor." *Thaler v. Haynes*, ___U.S.___, 130 S. Ct. 1171, 1174-75 (2010). The Court in *Thaler* emphasized that *Snyder* was decided "in light of the particular circumstances of the case." *Thaler*, ___U.S.___, 130 S. Ct. at 1174. In *Snyder*, the state proffered one clearly invalid reason for the strike, and, in the absence of factual findings, the Court could not presume that the trial court had based its ruling on the state's other proffered reason, the juror's nervous demeanor. 552 U.S. at 479-80. In this case, Soto has not shown the state had any invalid basis for striking Juror M. The record supports the state's explanation about Juror M.'s work and sleep habits, and, as noted, Soto does not contest the remainder of the explanation—the description of Juror M.'s clothing or the state's characterization of him as a slob.

¶15 Furthermore, the Court in *Thaler* reiterated the guiding principles when reviewing trial courts' rulings on *Batson* challenges that (1) "when the explanation for a peremptory challenge 'invoke[s] a juror's demeanor,' the trial judge's 'first hand observations' are of great importance"; and (2) "the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." *Thaler*, ___U.S.___, 130 S. Ct. at 1175, *quoting Snyder*, 552 U.S. at 477 (alterations in *Thaler*). Here, the trial court stated, "The explanation offered by the State is accepted by the Court; that the strikes had nothing to do with the race of either of the individuals." The court was not required to make any additional findings to support its ruling, and we are in an inferior position to assess the accuracy of the state's observations about the venireperson in question. *See Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845. We therefore have no basis to conclude the court abused its discretion, and we find no error.

Disposition

¶16 For the foregoing reasons, Soto's conviction and sentence are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge