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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. RICARDO DAVID PADILLA, Appellant.	)	2 CA-CR 2010-0383 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092880001

Honorable Charles S. Sabalos, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Ricardo Padilla was convicted in absentia of possession of drug paraphernalia and possession of a narcotic drug for sale. He was sentenced to concurrent, mitigated prison terms, the longer of which was twelve years. On appeal, he argues the trial court erred in denying his motion to suppress evidence seized during the traffic stop that led to his arrest. We affirm.

¶2 As a threshold matter, the state asserts we lack jurisdiction over this appeal because A.R.S. § 13-4033(C) bars Padilla from appealing his conviction after his voluntary absence delayed sentencing for more than ninety days. As the state acknowledges, this court recently determined that statute applies only if "the defendant's voluntary delay of sentencing can be regarded as a knowing, voluntary, and intelligent waiver of his constitutional right to appeal," and that such a waiver may only be inferred "if the defendant has been informed he could forfeit the right to appeal." *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). And, the state admits, "no such evidence appears in this record."

¶3 The state nonetheless argues that *Bolding* is "flawed in several respects." It first contends that promulgation of § 13-4033(C) by the legislature is sufficient notice, citing *State v. Soltero*, 205 Ariz. 378, 71 P.3d 370 (App. 2003). We disagree. Our supreme court has required personal notice of the right to be present at trial before a voluntary absence constitutes waiver of that right. *See State v. Bohn*, 116 Ariz. 500, 503, 570 P.2d 187, 190 (1977); *see also State v. Tudgay*, 128 Ariz. 1, 2, 623 P.2d 360, 361 (1981) (referring to personal notice as "requirement" for inference of voluntary absence). That same standard is reflected in our rules of criminal procedure. *See* Ariz. R. Crim. P.

9.1 ("The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence should he or she fail to appear."). We see no reason to apply a lesser standard to waiver of a defendant's constitutional right to an appeal. *Soltero* does not suggest otherwise; it addressed only whether an amendment to a criminal statute that was immediately effective pursuant to an emergency clause was sufficient notice of the elements of the offense to comport with due process. 205 Ariz. 378, ¶ 1, 71 P.3d at 371. And, in any event, *Soltero* could not reduce the notice requirement clearly delineated by our supreme court in Rule 9.1 and the cases discussed above.

¶4 For similar reasons, we reject the state's argument that a defendant's implied waiver of his right to appeal can be found notwithstanding that the defendant lacks personal notice that his or her absence could result in forfeiture of that right. The state relies on *Taylor v. United States*, in which the Supreme Court determined a voluntarily absent defendant had waived his right to be present at trial despite the lack of a personal warning, reasoning that it was "incredible" that a defendant who "had attended the opening session of his trial" would have "entertained any doubts about his right to be present." 414 U.S. 17, 19-20 & 20 (1973). And, the Court noted, the defendant had not asserted "he was unaware that a consequence of his flight would be a continuation of the trial without him." *Id.* at 20. But *Taylor* is distinguishable because it addresses whether a defendant's flight in the midst of a proceeding can constitute sufficient waiver. Here, the question is whether a defendant has waived an entirely separate right to a separate

proceeding—the right to an appeal—by absconding before trial. In any event, as we have explained, Arizona has adopted a more stringent waiver requirement that a defendant must have personal notice before voluntary waiver may be found.

¶5 Finally, we disagree with the state that *Bolding* "contravenes the equitable principle that a party may not profit from his own wrongdoing by essentially granting an absconder license to delay his criminal proceedings" and thereby defeats the state's interest in proceeding in a timely manner. *Bolding* does not interfere with the state's right to proceed. First, it is the defendant who seeks further proceedings by pursuing an appeal, not the state. Second, we see no sound policy reason the state's interest in proceeding should trump a defendant's constitutional right to an appeal absent a knowing, intelligent, and voluntary waiver of that right. Accordingly, we conclude we have jurisdiction to decide Padilla's appeal.

¶6 Padilla argues the trial court erred in denying his motion to suppress evidence, asserting police officers had no reasonable basis to stop his vehicle. In reviewing a trial court's decision on a motion to suppress, we consider only the evidence presented at the suppression hearing. *State v. Weekley*, 200 Ariz. 421, ¶ 3, 27 P.3d 325, 326 (App. 2001). We view that evidence in the light most favorable to sustaining the court's ruling. *Id.* In addition, the trial court, not this court, determines the credibility of witnesses. *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). However, we review the trial court's legal conclusions de novo, including the issues of the existence of reasonable suspicion and probable cause and the reasonableness of the stop. *See State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

¶7 "An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). In order to stop a vehicle, an officer needs only reasonable suspicion that the driver has committed an offense. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *State v. Sweeney*, 224 Ariz. 107, ¶ 16, 227 P.3d 868, 872-73 (App. 2010). Reasonable suspicion exists when the totality of circumstances provides a "'particularized and objective basis'" for suspecting the particular person has violated the law. *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778, *quoting United States v. Cortez*, 449 U.S. 411, 417-18 (1981). An officer is not required to determine if an actual violation has occurred before stopping a vehicle for further investigation. *State v. Vera*, 196 Ariz. 342, ¶ 6, 996 P.2d 1246, 1247-48 (App. 1999).

¶8 Tucson Police Department officers saw a white car in which Padilla was a passenger traveling at "a high rate of speed," in excess of the speed limit, while approaching a red light in a residential zone. After the car made an "abrupt stop" at the light, causing its nose to dip, it turned in front of the officers. Neither officer could see a license plate on the vehicle. The officers opted to stop the car, and only after it had completely stopped and the officers activated their patrol car's emergency lights, spotlight, and take-down lights could they see an unlit temporary registration tag in the upper-right corner of the car's rear window. One of the officers testified that the law required both that the temporary tag be illuminated and that it be placed in the lower-right corner of the window.

¶9 The officers approached the car and saw an unrestrained child in the back seat. The driver was unable to produce a driver's license or proof of insurance. After learning the driver's license had been suspended, the officers decided to impound the car. When retrieving a personal item from the car at the driver's request, one of the officers saw a baggie of what appeared to be crack cocaine on the driver's side floor. And, during an inventory search of the car, the other officer found another baggie of what appeared to be crack cocaine under the passenger seat, as well as a baggie of marijuana between the passenger seat and center console. Padilla and the driver were arrested.

¶10 At the suppression hearing, Padilla argued that, because A.R.S. § 28-2354 does not require a "temporary license plate" to be displayed in a particular fashion, just that it be visible, the officers lacked reasonable suspicion to continue the stop once they saw the temporary tag. He additionally argued there was insufficient evidence the car had been speeding. The trial court denied Padilla's motion, finding that the "officers' observations of the vehicle"—presumably the visibility of the temporary registration tag—and "the manner in which it was being driven gave them a reasonable suspicion supporting their decision to stop the vehicle."

¶11 Padilla argues on appeal that, because § 28-2354(B) does not require a license plate to be illuminated or to be displayed in a particular location on a vehicle, and because the temporary registration tag was visible to the officers once the car had stopped, the officers lacked reasonable suspicion for the stop. First, it appears the placement of the temporary registration tag at issue here is instead governed by A.R.S. § 28-2156(D), requiring the registration to be "clearly visible" from outside the vehicle.

But, in any event, that requirement is the same in § 28-2354(B).[1] Because the registration tag had to be "clearly visible," the officers plainly had reasonable suspicion to believe Title 28 had been violated, even after seeing the registration tag. The officers could not see the tag when the car was illuminated with their patrol car's headlights. Indeed, they could not see the tag until they had activated their patrol car's emergency lights and take down lights, the car had stopped, and the officers had illuminated the car with a spotlight. In these circumstances, we have no basis to disturb the trial court's determination that the temporary registration was not "clearly visible" as required by statute. *See State v. Huerta*, 223 Ariz. 424, ¶ 4, 224 P.3d 240, 242 (App. 2010) (factual determination reviewed for "clear and manifest error").

¶12 Additionally, even assuming the officers could no longer justify detaining the driver and Padilla based upon §§ 28-2156 or 28-2354 once the officers saw the registration tag, both officers testified the driver had committed a moving violation by exceeding the speed limit for a residential zone. *See* § 28-701(A), (B)(2). And, although both officers stated they did not initially stop the car for that reason, one of them asserted that, after seeing the temporary registration was valid, he had nonetheless continued the traffic stop in part because the driver had been speeding. Padilla complains the officers "did not use radar, pacing, or any other recognized method of calculating a speed of the vehicle." But he cites no authority, and we find none, suggesting that such methods must

[1]For the purposes of this discussion, we will assume without deciding that A.R.S. § 28-925(C), which requires "the rear license plate" to be illuminated "with a white light" and "clearly legible from a distance of fifty feet to the rear" does not apply to the temporary registration tag at issue here.

be employed before an officer reasonably can believe a driver had been speeding. *Cf. Boomer v. Frank*, 196 Ariz. 55, ¶ 25, 993 P.2d 456, 462 (App. 1999) ("One need not be an expert to offer the opinion that a vehicle was speeding."). Nor has Padilla citied any authority suggesting that, even when a particular traffic violation was not the original impetus for a traffic stop, a law enforcement officer cannot continue the stop based on that violation. Accordingly, for the reasons stated, the trial court did not abuse its discretion in denying Padilla's motion to suppress.

¶13 Padilla's convictions and sentences are affirmed.

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

CONCURRING:

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

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