DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ANDRE LASHON WILLIAMS, Appellant.	)	No. 1 CA-CR 11-0695 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-103066-001 DT

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Andre Lashon Williams appeals the denial of his motion to suppress and the resulting convictions and sentences, arguing

the trial court abused its discretion in allocating the burden of proof to Williams at the suppression hearing. For the following reasons, we affirm.

BACKGROUND[1]

¶2 In February 2011, the State charged Williams with one count of resisting arrest, a class 6 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-2508 (2010) and one count of possession of marijuana, a class 6 felony, in violation of A.R.S. § 13-3405 (2010). The following evidence was presented at the hearing on Williams' motion to suppress.

¶3 Officer Morrison testified that on January 18, 2011, at approximately 7:00 p.m., he and another officer were patrolling a housing project in Phoenix. Morrison testified he was familiar with the area because of previous investigations he had done there involving violence and narcotics.

¶4 As the officers drove through the housing project, they heard loud music and discovered it was coming from a vehicle parked in one of the parking lots. When the officers approached the vehicle, the music was so loud they could not communicate with each other. They noticed Williams was standing

[1] Because Williams only challenges the validity of the search incident to the arrest and not the actual arrest, we review the evidence presented at the suppression hearing and consider it in the light most favorable to upholding the court's factual findings. *State v. Zamora*, 220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009).

near the rear of the vehicle, but then he moved "toward the passenger side and as he did so, [he] kind of motioned with his right hand as if he were turning a dial." He entered the vehicle and turned down the music.

¶5 Morrison exited his patrol car and made contact with Williams, who was sitting in the passenger seat. His feet were out the door and his body was leaning over the center console of the vehicle. Because it was dark and he could not clearly see inside the vehicle, Morrison asked Williams to exit the vehicle. After a number of requests for him to exit, Williams complied.

¶6 Morrison noticed Williams had two large bulges in both front pockets of his jeans. Morrison began to question him about why he was on the property, "and obviously, [Morrison's] concern was the severe disturbance that was being caused." As Morrison questioned him, Williams was "very fidgety," would not stay in one place, kept looking around, refused to obey commands, and "attempted to place his hands in his pockets."

¶7 As a safety measure, Morrison asked Williams if he had anything illegal or any weapons on him, but Williams did not respond. Morrison asked again and began to conduct a *Terry*[2] stop. He felt something in Williams' pocket, which was later determined to be forty-eight grams of marijuana. As Morrison was patting down Williams' right side, Williams moved his hand

[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

from behind his head in an attempt to put his hand in his pocket and told Morrison he "only had keys in that pocket." Morrison asked him to stop but he refused to obey. Out of concern for his safety and uncertain whether Williams had a weapon, Morrison physically prevented Williams from putting his hand in his pocket. A scuffle ensued and Williams was eventually taken into custody.

¶8 Following the hearing, the trial court denied the motion to suppress, ruling that the facts supported a "reasonable belief that [Williams] was armed" and, as a result, the pat-down was legal. A jury found Williams guilty as charged. The trial court sentenced Williams to concurrent aggravated terms of four years imprisonment on each count, and this timely appeal followed.

DISCUSSION

A. Improper Allocation of Burden of Proof

¶9 Williams argues the trial court abused its discretion and improperly allocated the burden of proof by interpreting Arizona Rule of Criminal Procedure 16.2(b) as requiring him to present "more evidence" than the mere allegation that the search was warrantless in order to establish a prima facie case. Stated differently, Williams takes the position he should not have been required to call a witness to testify the search was

warrantless.[3] We review de novo the issue of which party bears the burden of going forward with evidence. *See, e.g.*, *State v. Hyde*, 186 Ariz. 252, 265-72, 921 P.2d 655, 668-75 (1996).

¶10 Rule 16.2(b) provides:

> The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial. However, whenever the defense is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence by confession, or search and seizure, or defense counsel was present at the taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's burden of proof shall arise only after the defendant has come forward with evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed.

The plain language of this rule places the "burden of going forward" on a defendant who "moves to suppress evidence that the State has obtained under defined circumstances." *Hyde*, 186 Ariz. at 266, 921 P.2d at 669. It also places the "burden of proof" about the lawfulness of the "acquisition of all evidence

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[3] Prior to Morrison's testimony at the suppression hearing, the prosecutor argued the court should deny Williams' motion "outright" because Williams did not come forward with any evidence of specific circumstances that established a prima facie case of suppression. Williams maintained that the presumptive invalidity of a warrantless search alone constituted a prima facie case and the burden should be shifted to the State. The court agreed with the State, concluding Williams' "statement that there was no warrant obtained" was not sufficient to establish a prima facie case.

which the prosecutor will use at trial" on the State. Ariz. R. Crim. P. 16.2(b); *see also State v. Hocker*, 113 Ariz. 450, 455 n.1, 556 P.2d 784, 789 (1976) (noting that "the burden of proof never shifts to the defendant"), *rev'd on other grounds*, *State v. Jarzab*, 123 Ariz. 308, 599 P.2d 761 (1979).

¶11 We have addressed the issue of shifting burdens under facts similar to the present case. In *Rodriguez v. Arrellano*, 194 Ariz. 211, 979 P.2d 539 (App. 1999), the State charged the defendant with several drug offenses. *Id*. at 212, ¶ 2, 979 P.2d at 540. The defendant moved to suppress evidence seized, asserting the evidence resulted from an illegal search. *Id*. The motion alleged the search was performed without a warrant. *Id*. The State did not respond until the suppression hearing, when it moved to strike for failure to comply with Rule 16.2(b). *Id*. at 212, ¶ 3, 979 P.2d at 540. The State conceded the search was done without a warrant, but argued the defendant could "not sustain his burden of going forward under Rule 16.2(b) by proving this fact alone." *Id*. We summarily rejected the State's argument, stating that "[n]either law nor logic supports the State's position." *Id*. at 214, ¶ 9, 979 P.2d at 542. We concluded that "[t]o establish the presumptive invalidity of a search is to establish a prima facie case for suppression; an unrebutted presumption carries the day." *Id*. at 214, ¶ 10, 979 P.2d at 542. Noting it would be "awkward, wasteful, and

illogical" to proceed otherwise, we stated that when a defendant establishes there has been a warrantless search, the "only sensible method of proceeding" is to just have the State "get on with proving[] whatever exceptions that it claims apply." *Id*.

¶12 Here, it is undisputed the *Terry* stop and subsequent search of Williams were both warrantless intrusions on Williams' privacy, and because Williams alleged the search was warrantless without rebuttal from the State, he met his burden of going forward and the trial court erred in requiring him to put on more evidence. *See Rodriguez*, 194 Ariz. at 214, ¶ 10, 979 P.2d at 542. However, we must also determine if the error was harmless. *See State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (stating that despite trial court's error, an appellate court will affirm if it can conclude beyond a reasonable doubt that the error did not affect the verdict).

¶13 In denying Williams' motion for reconsideration, the court stated:

> In any event, whether the Court erred in requiring formal evidence is immaterial to the ultimate outcome of the motion. Had the Court not required evidence from [Williams], the [State] would have called Officer Morrison and elicited the same testimony on direct examination as she did on cross-examination. And, as explained in the Court's ruling denying the Motion [to Suppress], Officer Morrison's testimony was sufficient to establish by a preponderance of the evidence that the search was lawful.

The court also explained that it made its "determination on the lawfulness of a search based on all of the evidence produced at the hearing, regardless of which party call[ed] a witness." The record supports the trial court's explanation and therefore we can say beyond a reasonable doubt that the error in compelling the defense to present evidence first was harmless.

B. Denial of Motion to Suppress

¶14 Williams also argues the trial court erred by denying his motion to suppress because Morrison did not have a reasonable basis to believe Williams was armed and dangerous. We disagree.

¶15 We review the factual findings underlying the determination of a motion to suppress for abuse of discretion but review the court's legal conclusion de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004). We view the evidence from the hearing in the light most favorable to upholding the court's decision. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004). Furthermore, we give great deference to the trial court's assessment of credibility, and, where conflicting inferences may be drawn, resolve any issues in the manner most favorable to the trial court. *State v. Lacy,* 187 Ariz. 340, 347, 929 P.2d 1288, 1295 (1996) (citation omitted).

¶16 An officer may briefly stop an individual if, based on the totality of the circumstances, they have a reasonable suspicion to believe that the individual may be involved in criminal activity. *State v. Ramsey*, 223 Ariz. 480, 484, ¶ 17, 224 P.3d 977, 981 (App. 2010) (citations omitted). An officer's "reasonable suspicion" must be based on "articulable facts along with rational inferences that derive from those facts." *Id*. Similarly, an officer may conduct a *Terry* stop of an individual if, based on specific articulable facts, the officer has any reasonable fear for his safety. *Id*. The "reasonable suspicion" standard is a considerably lower standard than even that required for a "preponderance of the evidence" and is assessed on the basis upon the totality of the circumstances. *Id*. at 984, ¶¶ 17-18, 224 P.3d at 981.

¶17 Morrison testified that he contacted Williams because he was playing music so loudly it could be heard a block or more away and was causing a "severe disturbance." Morrison could not tell what Williams was doing inside the vehicle or if he had a weapon. Williams initially ignored Morrison's requests to exit the vehicle, but eventually complied. Morrison asked Williams why he was on the property, and at that point he was investigating Williams for disorderly conduct and possibly trespassing. Once Williams exited the vehicle, Morrison noticed the two large bulges in the front pockets of his jeans.

Williams was fidgety and refused to obey commands to keep his hands away from his pockets. Further, he did not answer when Morrison asked if he had any weapons on him. Morrison testified that he was familiar with the area as being a "high crime area," and that weapons were "very much" a concern for him because some of the crimes he investigated there involved gun violence.

¶18 The trial court found that Morrison's testimony established, by a preponderance of the evidence, that he was justified in conducting the *Terry* stop. We agree that the evidence at the suppression hearing supports the court's finding. Thus, the court did not abuse its discretion in denying the motion to suppress based on the legality of the pat-down search. *Moody*, 208 Ariz. at 445, ¶ 62, 94 P.3d at 1140.

CONCLUSION

¶19 For the foregoing reasons, we affirm Williams' convictions and sentences.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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LAWRENCE F. WINTHROP, Judge

/s/

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JOHN C. GEMMILL, Judge