IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARK LEON JOHNSON, *Appellant*.

No. 1 CA-CR 15-0338
FILED 3-22-2016

Appeal from the Superior Court in Navajo County
No. S0900CR201200800
The Honorable Robert J. Higgins, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Emery K. La Barge, Attorney at Law, Snowflake
By Emery K. La Barge
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

K E S S L E R, Judge:

¶1 Mark Leon Johnson was tried and convicted of possession of dangerous drugs, a class 4 felony. On appeal, Johnson challenges the trial court's order denying his motion to suppress evidence obtained from a search of his vehicle. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 At approximately 10:30 p.m. on September 13, 2012, Officer H. was on routine patrol, dressed in full uniform, and driving an unmarked patrol car with the emergency lights concealed within the windows. He observed a vehicle in front of him abruptly swerve and then gradually make its way to the right lane, where it turned into a Walgreens parking lot without signaling.

¶3 Although Officer H. believed he had grounds to cite the driver for unsafe lane usage and failure to signal a right-hand turn, he elected to continue observing the vehicle to confirm his suspicion of a possible DUI. Officer H. parked directly across the street and watched the car and driver with binoculars. The driver remained in the vehicle for several minutes without exiting. Officer H. then drove to another parking lot to continue monitoring the vehicle from a better vantage point. After fifteen minutes, Officer H. decided to make contact with the driver to: (1) see if the driver was passed out, (2) confirm his suspicion of a DUI, or (3) determine if the driver was waiting to commit a robbery.

¶4 Officer H. drove to the Walgreens parking lot. He testified that he did not activate the patrol car's emergency lighting and he did not park his vehicle in a manner that would block or prevent the driver from leaving. Johnson testified that when Officer H. pulled into the parking lot he activated his lights. Officer H. then made contact with Johnson and asked him what he was doing. Johnson explained that he was looking for a pair of glasses. Officer H. found his statement to be unusual because he already had a pair of glasses on, pushed up above his forehead. Johnson

clarified that he was looking for a different pair of glasses he was planning on returning to Walgreens, and he explained to Officer H. that he had misplaced them in a duffle bag of items he was planning to return to various stores.

¶5 Based in part on safety concerns, and also to observe his demeanor, Officer H. asked Johnson to step out of the vehicle. Johnson complied. Based on their initial conversation, Officer H. no longer suspected Johnson of being impaired. However, based on the time of day, and because Johnson had not exited his vehicle for approximately twenty minutes, Officer H. continued to believe there was a possibility that Johnson was casing the Walgreens to rob it.

¶6 Officer H. next asked Johnson if he had any illegal weapons or narcotics in his car. Johnson explained that he had medical marijuana, and provided Officer H. with his prescription. Officer H. asked Johnson if he could search the vehicle, and Johnson said no. Because Officer H. thought "people lie to law enforcement consistently," he contacted Officer N., a department canine handler, for assistance. Officer H. explained to Johnson that Officer N. was on his way, and again asked him if there was anything illegal in the car. Johnson stated that his friend's gun was in the center console, and admitted that he was a convicted felon and a prohibited possessor. Johnson testified that throughout their entire encounter, Officer H. had his hand on his gun.

¶7 Officers N. and T. arrived five minutes later. Officers H. and N. testified that neither of the officers parked in a manner that blocked Johnson's vehicle, and they did not activate their emergency lights; Johnson testified that their lights were on. Officer N. conducted a "free air sniff" with his canine around the vehicle.[1] The dog alerted at the passenger door, and a search of the vehicle produced a loaded .38 caliber revolver handgun, ammunition, and a syringe containing methamphetamine.[2] Johnson was subsequently arrested and advised of his *Miranda*[3] rights. He then admitted that the methamphetamine was his, but maintained that the gun belonged to his friend.

---

[1] The canine was certified to detect marijuana, methamphetamine, cocaine, and heroin. The dog sniff was conducted for narcotics in general, and not tailored to a specific drug.

[2] At the hearing on the motion to suppress, Johnson stipulated that drugs were found in the car.

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

¶8 Johnson was charged with possession of dangerous drugs and misconduct involving weapons, both class 4 felonies. Johnson moved to suppress the evidence discovered in his vehicle, stating it was obtained as the result of an illegal search. The court found that Officer H. had reason to approach and investigate Johnson based on the traffic violations and suspected DUI, the encounter was an investigatory stop, and Johnson was not free to leave.

> I think the officer did have reason to approach and investigate. I think that, you know, seeing—he had a traffic violation, as you said, going across the lanes, and he had reason to approach because of the DUI, which he later got rid of, but he had those reasons to approach and investigate, and I do agree with [defense counsel] at this point, that it's an investigatory stop, and I also think that Mr. Johnson was not free to leave. I don't think the reasonable person, and I understand you guys disagree, but I think when you have three police cars there, whether they had their lights on or not, and you have an officer right up against Mr. Johnson, and as [defense counsel] said, it wasn't disputed that he had his hand on the gun, and you got all these officers around you, I don't think, and especially like [defense counsel] said, at night, at a Walgreens, when there's nobody else really around, that he was free to leave.

The court also found, however, that the officers had probable cause to search the vehicle based on Johnson's admission regarding the handgun and his prohibited possessor status, there was additional probable cause based on the dog's alert, and the length of time Johnson waited for Officer N. to arrive on the scene was *de minimis*. Based on this reasoning, the court denied the motion. Johnson was ultimately convicted of possession of dangerous drugs and sentenced to twelve years' imprisonment.

¶9 Johnson timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

DISCUSSION

¶10 On appeal, Johnson argues that the trial court erred in denying his motion to suppress the evidence obtained from the search of his vehicle because: (1) his encounter with Officer H. amounted to an illegal

seizure under the Fourth Amendment, and (2) Officer H.'s statements as to the basis for the stop falls short of a particularized or founded suspicion to justify the seizure. "In reviewing a trial court's ruling on a motion to suppress evidence, we evaluate discretionary issues for an abuse of discretion but review legal and constitutional issues de novo." *State v. Huerta*, 223 Ariz. 424, 426, ¶ 4 (App. 2010). In addition, "we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the court's ruling." *State v. Caraveo*, 222 Ariz. 228, 229 n.1, ¶ 1 (App. 2009).

I. Johnson was seized within the meaning of the Fourth Amendment.

¶11 Johnson first argues that his encounter with Officer H. amounted to an illegal seizure under the Fourth Amendment. The United States Constitution and Arizona Constitution guarantee protection against unreasonable searches and seizures. U.S. Const. amend. IV; Ariz. Const. art. 2, § 8. "'[S]ubject only to a few specifically established and well-delineated exceptions,' a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant." *State v. Gant*, 216 Ariz. 1, 3, ¶ 8 (2007) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). These narrowly drawn exceptions include exigent circumstances, plain view searches, searches incident to a valid arrest, inventory searches, and *Terry* investigative stops.[4] *State v. Garvin*, 207 P.3d 1266, 1270, ¶ 11 (Wash. 2009). It is the State's burden to prove the legality of a warrantless search. *State v. Valle*, 196 Ariz. 324, 330, ¶ 19 (App. 2000).

¶12 "Because the Fourth Amendment prohibits only unreasonable seizures, the first step in analyzing an alleged Fourth Amendment violation is determining whether a seizure occurred." *State v. Childress*, 222 Ariz. 334, 338, ¶ 10 (App. 2009). "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

¶13 "Law enforcement officers have wide latitude to approach people and engage them in consensual conversation." *State v. Hummons*, 227 Ariz. 78, 80, ¶ 7 (2011). A consensual encounter may become a detention when, based on the totality of the circumstances, a reasonable person would not have felt free to leave or otherwise terminate the

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

encounter. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also United States v. Drayton*, 536 U.S. 194, 201 (2002); *Childress*, 222 Ariz. at 338, ¶ 11. Examples of conditions that suggest a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Florida v. Royer*, 460 U.S. 491, 498 (1983).

¶14 Johnson argues he was "seized" within the meaning of the Fourth Amendment. The State, however, contends that the encounter was consensual. There is evidence in the record supporting the superior court's decision that this was an investigatory stop and not a consensual encounter. Officer H., dressed in full uniform, asked Johnson to step out of his vehicle, kept his hand on his weapon throughout their conversation, and called for additional officer assistance. Two other officers then arrived at the scene. Regardless of whether Officer H. activated his emergency lights, a reasonable person in this situation would not have felt free to end the encounter and walk away.

II. Based on the totality of the circumstances, Officer H. demonstrated reasonable suspicion to justify the detention under *Terry v. Ohio*.

¶15 Johnson argues that Officer H.'s statements as to the basis for the stop fall short of a particularized or founded suspicion to justify the seizure under *Terry v. Ohio*. Pursuant to *Terry*, a limited investigatory stop is lawful if an officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." 392 U.S. at 29. This "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. . . . [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. Ultimately, "courts agree that a stop must be based upon what is variously described as a 'particularized' or 'founded' suspicion by the officer, who must be able to state an 'articulable reason' for the stop." *State v. Graciano*, 134 Ariz. 35, 37 (1982). "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *State v. Teagle*, 217 Ariz. 17, 23, ¶ 25 (App. 2007). In reviewing reasonable suspicion,

the courts "cannot parse out each individual factor, categorize it as potentially innocent, and reject it. Instead, one must look at all of the factors, (all of which would have a potentially innocent explanation, or else there would be probable cause), and examine them collectively." *State v. O'Meara*, 198 Ariz. 294, 296, ¶ 10 (2000). "However, circumstances that 'describe a very large category of presumably innocent travelers' are insufficient to establish reasonable suspicion because travelers would then be subject to 'virtually random seizures.'" *Teagle*, 217 Ariz. at 23, ¶ 25 (quoting *Reid v. Georgia*, 448 U.S. 438, 441 (1980)). "In reviewing a claim that law enforcement officers lacked the reasonable suspicion required for an investigatory stop, we apply a peculiar sort of *de novo* review, slightly more circumscribed than usual, because we defer to the inferences drawn by the [trial] court and the officers on the scene, not just the [trial] court's factual findings." *State v. Evans*, 235 Ariz. 314, 317, ¶ 8 (App. 2014) (alterations in original) (citation and internal quotation marks omitted); *see also Teagle*, 217 Ariz. at 24, ¶ 26 ("In reviewing the totality of the circumstances, we accord deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious actions.").

¶16 Johnson specifically argues that once Officer H. no longer suspected Johnson of driving under the influence, he was required to cease his investigation. Although it is true that Officer H. testified that after their initial conversation he no longer suspected Johnson of being impaired, he still had a "particularized and objective basis" to detain Johnson based on his concern that Johnson was potentially "casing" the Walgreens. Specifically, based on his experience as a patrol officer, Officer H. found it unusual that a driver would pull into the Walgreen's parking lot late at night and not exit the vehicle for twenty minutes. Furthermore, although he could not point to specific instances, Officer H. also testified that the Walgreens and cars within that parking lot had been robbed or burglarized in the past. In reviewing the record, we find Officer H.'s belief that Johnson was potentially casing the store to rob it was founded on more than just an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27; *see also United States v. Givan*, 320 F.3d 452, 458 (3rd Cir. 2003) ("After a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.").

¶17 To support his argument that there are no articulable facts in the record to justify the continued detention and search of his vehicle, Johnson relies on *State v. Sweeney*, 224 Ariz. 107 (App. 2010). We find this case to be distinguishable. In *Sweeney*, the court found that "[a] reasonably

prudent person's suspicions would not be raised after observing a foreign national driving a clean, deodorized rental car with an atlas on the passenger seat, who upon being stopped and questioned outside in the three-degree weather by police, failed to articulate with specificity the places he had visited while staying in an unfamiliar city." 224 Ariz. at 113, ¶ 24. The court ultimately found that it was the defendant's refusal to consent to a search that triggered the officer's suspicion, and stated that "[t]he invocation of one's constitutional rights cannot constitute a circumstance that gives rise to reasonable suspicion." *Id.* at 115, ¶ 32. As we have already stated, *see supra* ¶ 16, in this case, Johnson was detained based on a "particularized" or "founded" suspicion by Officer H., prior to Johnson's refusal to consent, which justified the continuation of the stop under *Terry v. Ohio*.

CONCLUSION

¶18 For the foregoing reasons, we find the seizure was lawful and affirm the trial court's denial of Johnson's motion to suppress.[5]

Ruth A. Willingham · Clerk of the Court
FILED: ama

[5] Johnson does not separately challenge that even if the seizure was justified, the search was improper. We therefore do not address the probable cause for the search. *See* ARCAP 13(a)(6); *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370 (App. 1990). If we did address the issue, however, Johnson's admission to having contraband in the car provided Officer H. with the probable cause necessary to search the vehicle without first obtaining a warrant. *See State v. Weinstein*, 190 Ariz. 306, 310 (App. 1997) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits the police to search the vehicle without more." (quoting *Pennsylvania v. Labron,* 518 U.S. 938, 940 (1996)); *see also State v. Spears*, 184 Ariz. 277, 285 (1996) ("Probable cause to conduct a search exists when a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with criminal activity and that they would be found at the place to be searched." (citation and internal quotation marks omitted)).