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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

RICHARD VELA, *Appellant*.

No. 1 CA-CR 16-0534  
FILED 9-28-2017

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Appeal from the Superior Court in Maricopa County  
No. CR2015-118711-001  
The Honorable Jerry Bernstein, Judge *Pro Tempore*  
The Honorable Michael W. Kemp, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix  
By Jason Lewis  
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix  
By Nicholas Podsiadlik  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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**S W A N N**, Judge:

¶1 Richard Vela appeals his conviction and sentence for misconduct involving weapons, arguing that the superior court erred by refusing to suppress the physical evidence. We affirm. Vela’s initial contact with law enforcement was consensual, and he was seized within the meaning of the Fourth Amendment only after the officers developed reasonable suspicion that he was engaged in crime.

**FACTS AND PROCEDURAL HISTORY**

¶2 A grand jury indicted Vela for misconduct involving weapons based on prohibited possession of a firearm. Before trial, Vela moved to suppress the physical evidence, arguing that police discovered the firearm as the result of an unconstitutional traffic stop and an unconstitutional seizure of his person.

¶3 In view of Vela’s acknowledgment that he was in a parked vehicle when police approached him, the superior court ruled that there was no traffic stop. The court then held an evidentiary hearing with respect to the balance of the suppression motion.

¶4 At the evidentiary hearing, the state presented evidence of the following facts. Starting in the morning on February 4, 2015, two plainclothes police officers conducted surveillance on an apartment suspected to be associated with a drug sale that had led to the detention of multiple people earlier that day. The officers’ task was to observe the apartment while their colleagues worked to obtain a search warrant. The officers were there to ensure that those apprehended in connection with the drug sale had not been able to direct others to destroy evidence at the apartment, and to look for signs of counter-surveillance on the apartment.

¶5 For several hours, the officers sat in an unmarked car parked on the roadway of the apartment complex. In the early afternoon, the officers observed Vela drive a car “kind of slow[ly]” past the target apartment, and circle the lot at least one more time before parking directly

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behind the officers' car. Vela, who was the car's sole occupant, remained seated—apparently waiting or watching the officers—for approximately five minutes.

¶6 The officers then drove forward, circled, and re-parked directly behind Vela. They observed Vela for a few minutes more before donning handcuffs, flashlights, radios, and ballistic vests with the word "POLICE" on them in large letters. They then walked toward Vela's car. One officer approached the driver's side and the other approached the passenger's side. In a calm manner, the officer on the driver's side asked Vela for his name or identification. The officer also asked Vela what he was doing and whether he had any weapons or drugs in the vehicle.

¶7 Vela gave his name. The officer passed either Vela's driver's license or a field identification card to the other officer, who stepped back to call in Vela's information and the car's license plate number. Within three minutes, the officer learned that Vela was not the registered owner of the car.

¶8 Vela stated that he did not have weapons or drugs, and that he was at the apartment complex to meet somebody. Vela was unable, however, to provide the name or apartment number of that person. When asked where he was supposed to meet the person, Vela gestured toward the building where the target apartment was located. When asked to consent to a search of the car, Vela declined and stated that the car belonged to a friend. Neither officer drew a weapon, used a flashlight, yelled, touched, or gave Vela commands during the brief conversation. Though Vela appeared visibly nervous, he never asked to end the discussion or leave. Nor did he ask the officers to return his driver's license.

¶9 The officer on the driver's side finally asked Vela to exit the car. As Vela complied, the other officer walked around the car toward Vela and saw the grip of a pistol sticking out of his right front pant pocket. The officers immediately grabbed Vela's arms and handcuffed him.

¶10 The superior court denied Vela's motion to suppress the firearm, and the matter proceeded to a jury trial. At trial, the state's evidence established that Vela was a prohibited possessor. The state also presented evidence that the officers had obtained Vela's driver's license during the encounter (as opposed to merely recording his name on a field identification card). The jury convicted Vela of misconduct involving weapons.

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¶11 Vela filed a premature motion to vacate judgment under Ariz. R. Crim. P. 24.2(a)(3), arguing that the officers' possession of his driver's license was new information that compelled a finding of unlawful seizure and the suppression of the physical evidence. The court denied relief on the merits, and on the same day entered judgment on the verdict and imposed a prison sentence. Vela timely appeals.

DISCUSSION

¶12 Vela contends that the superior court erred by denying his motions to suppress and vacate judgment. On this record, we review the court's rulings cumulatively—both motions raised the same legal suppression issue on the same facts.<sup>1</sup> We review the court's factual findings for abuse of discretion, and its ultimate legal determination de novo. *State v. Gilstrap*, 235 Ariz. 296, 297, ¶ 6 (2014).

¶13 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend IV; *see also* Ariz. Const. art. II, § 8. But there is no seizure, and therefore no Fourth Amendment concern, when an encounter between law enforcement and a citizen is entirely consensual. *State v. Serna*, 235 Ariz. 270, 272, ¶ 8 (2014). Officers therefore “may approach an individual and ask questions without running afoul of the Fourth Amendment[ ] [s]o long as a reasonable person would feel free to disregard the police and go about his business’ . . . [and] ‘the police do not convey a message that compliance with their requests is required.’” *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (internal quotation marks omitted)). A person is “‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Seizure may be effected by either physical force or a show of authority to which the citizen yields. *State v. Rogers*, 186 Ariz. 508, 511 (1996). Factors suggestive of 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,

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<sup>1</sup> We see no material difference (much less perjury, as Vela claims) between the evidence offered at the suppression hearing and the evidence offered at trial. At the suppression hearing, the officers never claimed that they did not obtain Vela's driver's license—they merely testified that they could not recall whether they received a driver's license or instead filled out a field identification card. At trial, the officer who had spoken to Vela confirmed that the item in question was a driver's license.

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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.

¶14 Of course, what begins as a consensual encounter may evolve into a seizure. *Serna*, 235 Ariz. at 272, ¶ 10. And at that point, Fourth Amendment protections are triggered. *Id.* at 272-73, ¶ 10. Those protections extend to "brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). An investigatory stop in an on-the-street encounter is lawful "when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, 555 U.S. 323, 326 (2009). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). We review reasonable-suspicion determinations in view of the totality of the evidence, giving due weight to officers' experience and specialized training. *Arvizu*, 534 U.S. at 273.

¶15 We agree with the superior court that the officers' initial contact with Vela was entirely consensual. First, the contact was not the result of a traffic stop – Vela parked his car voluntarily and not in response to any police action. *See State v. Robles*, 171 Ariz. 441, 443 (App. 1992). Second, the manner in which the officers approached and questioned Vela was not tantamount to a seizure. Vela's contention that it was "impossible for [him] to simply drive away," or to open his car door without committing assault, is unsupported by the evidence. Though the officers stood on either side of Vela's car, there is no evidence that they physically blocked Vela or that they otherwise indicated that he could not leave. The space in front of Vela's car was clear, and neither officer ever brandished a weapon, shone a flashlight into Vela's car, yelled at Vela, or touched him. The officer who questioned Vela did so calmly, and his queries were non-accusatory.

¶16 Contrary to Vela's contention, A.R.S. § 13-2412 did not prevent him from refusing the officer's request for his name or identifying information. That statute makes a person's refusal to provide his or her name to law enforcement unlawful only when the person is lawfully detained and has been advised that failure to provide his or her name is a crime. A.R.S. § 13-2412(A). That was not the case here. Further, contrary to Vela's contention, an officer may obtain a person's driver's license without effecting a seizure. If the person provides the license in response to a simple request that a reasonable person would feel free to disregard, there is no seizure. *See Bostick*, 501 U.S. at 437 ("As we have explained, no seizure occurs when police ask questions of an individual, ask to examine

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the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required.”); *Mendenhall*, 446 U.S. at 555 (holding that there was no seizure when law enforcement approached defendant in airport and “requested, but did not demand to see [her] identification and ticket”). That was the case here. There is no evidence that Vela provided his license involuntarily. Nor is there any evidence that, in these circumstances, Vela was prevented from terminating the encounter based on the officers' brief retention of the license to check the information provided therein. Though Vela is correct that he could not lawfully drive away without his license, *see* A.R.S. § 28-3169(A), nothing suggests that he could not have requested his license and ended the encounter.

¶17 The state concedes, as it did below, that Vela's freedom was restrained when he was asked to exit the car. Vela contends, citing *State v. Primous*, 242 Ariz. 221 (2017), and other cases, that this was a case of “arbitrary harassment based on the profile of Mr. Vela as a Hispanic in an old car” and “someone else's suspicious activity.” We disagree. The totality of the circumstances—and, specifically, Vela's own conduct—warranted an investigatory stop. Vela had driven into the parking lot of an apartment complex where there was an apartment that police had reason to believe contained criminal drug evidence that was at risk of destruction. The officers in the parking lot were specifically looking for signs of surveillance, and had observed Vela circle the lot, park nearby the target apartment, and wait in his car. Vela, who was visibly nervous when he spoke to the officers, claimed that he was there to meet someone, but was unable to provide the name or apartment number of that person. And when asked where he was supposed to meet the unknown person, he gestured toward the target apartment building. Based on all of the foregoing, the officers reasonably suspected that Vela had or was engaged in crime. The stop was lawful, and the officers then lawfully seized the pistol protruding from his pocket. *See Serna*, 235 Ariz. at 275, ¶ 23. The superior court properly rejected Vela's suppression arguments.

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**CONCLUSION**

¶18 We affirm Vela's conviction and sentence for the reasons set forth above.



AMY M. WOOD • Clerk of the Court  
FILED: AA