IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

DAVID MICHAEL WALLACE, *Appellee*.

No. 1 CA-CR 17-0638
FILED 12-20-2018

Appeal from the Superior Court in Mohave County
No. S8015CR201601681
The Honorable Billy K. Sipe, Jr., Judge *Pro Tempore*

REVERSED

COUNSEL

Mohave County Attorney's Office, Kingman
By Jaimye L. Ashley
Counsel for Appellant

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellee

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Michael J. Brown joined. Judge David D. Weinzweig dissented.

C R U Z, Judge:

¶1 The State of Arizona appeals from the superior court's judgment granting David Michael Wallace's motion to suppress. For the following reasons, we reverse the court's ruling.

FACTS AND PROCEDURAL HISTORY

¶2 Callister, a police officer for more than ten years, was on duty near the Arizona-Nevada border when he noticed a black car pass him shortly after crossing the Arizona state line. The driver appeared to get nervous, locking his left arm on the steering wheel and tucking his head into his shoulder. Shortly afterward, the driver made a sudden lane change in front of a pickup truck, leaving three-fourths of a car length between the vehicles while they were both driving seventy-five miles per hour. Callister followed the black car for an additional mile-and-a-half and then conducted a traffic stop of the vehicle.

¶3 Callister identified Wallace as the driver by Wallace's Utah driver's license. While Wallace was stopped, Callister, who had "stopped many hundreds, maybe even approaching the thousands, of those types of violations," noticed Wallace appeared to be exceptionally nervous because he stared directly at Callister "not breaking eye contact, not even once," and his face twitched as he spoke. He also noticed that Wallace's eyes were red and watery, and he suspected that during the day Wallace may have used some sort of illegal drug. Callister asked Wallace to exit the vehicle and briefly conducted a field sobriety test. He determined Wallace was not impaired, but it still appeared as though "[Wallace] had used drugs at some point during the day." Callister informed Wallace he would be issuing him a warning for unsafe lane use. Wallace's nervousness did not appear to abate but rather increased.

¶4 As Callister issued the warning, the two conversed. During the conversation, Wallace informed Callister that he had rented a car in St.

George, Utah, traveled to Las Vegas, and was on his way back home from the trip. After Callister finished issuing the warning, he returned Wallace's documents. Callister did not inform Wallace that the traffic stop had ended or that Wallace was free to leave, but he asked Wallace about whether there was anything illegal in his vehicle, "including drugs." Wallace said no, and Callister asked if he would consent to a vehicle search. Wallace declined, and Callister asked an additional investigative question inquiring whether a drug dog would alert to anything illegal in Wallace's vehicle if it were to sniff the vehicle. Wallace then admitted he had a methamphetamine pipe in his car. Callister asked him whether he had methamphetamine in the vehicle and Wallace said there was "a lot of [methamphetamine] in the vehicle." In total, the stop lasted approximately fifteen minutes.

¶5 The State indicted Wallace for transportation of dangerous drugs for sale (methamphetamine), a Class 2 felony. Wallace moved to suppress all evidence obtained as a result of the stop, arguing reasonable suspicion did not exist to justify the traffic stop and reasonable suspicion did not exist to detain him after the purpose of the stop was completed.

¶6 After an evidentiary hearing, the court granted the motion to suppress. The court found that reasonable suspicion existed to justify the traffic stop, but that Callister's purpose for the stop was completed upon Callister's return of Wallace's documents. It found Callister was not allowed to "add time" to the traffic stop absent reasonable suspicion, and it found that reasonable suspicion did not exist to further detain Wallace.

¶7 The State 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) and 13-4032(6).

DISCUSSION

¶8 The State argues the superior court erred in finding no objective reasonable suspicion that Wallace was involved in criminal activity to justify prolonging the stop.[1] We agree.

¶9 We review *de novo* "the superior court's ultimate legal conclusions about whether the totality of the circumstances warranted an investigative detention and whether its duration was reasonable." *State v. Woods*, 236 Ariz. 527, 530, ¶ 10 (App. 2015). "[W]e consider only the

[1] The parties do not challenge the constitutionality of the initial stop; therefore, we do not address the issue.

evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Peltz*, 242 Ariz. 23, 29, ¶ 20 (App. 2017).

¶10 The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV; *United States v. Sharpe*, 470 U.S. 675, 682 (1985). This includes investigatory traffic stops, which are only permissible when supported by an articulable, reasonable suspicion of a traffic violation. *State v. Sweeney*, 224 Ariz. 107, 111-12, ¶ 16 (App. 2010); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Sweeney*, 224 Ariz. at 112, ¶ 17 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). After an officer has effectuated the purpose of the stop, the officer must end the stop unless "(1) the encounter between the driver and the officer becomes consensual, or (2) during the encounter, the officer develops a reasonable and articulable suspicion that criminal activity is afoot."[2] *Id.* (citation omitted).

¶11 A reasonable suspicion exists "if, under the totality of the circumstances, an officer developed 'a particularized and objective basis for suspecting . . . criminal activity.'" *State v. Kjolsrud*, 239 Ariz. 319, 323, ¶ 15 (App. 2016) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). "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). When determining whether circumstances give rise to reasonable suspicion, we consider "such objective factors as the suspect's conduct and appearance, location, and the surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge." *State v. Fornof*, 218 Ariz. 74, 76, ¶ 6 (App. 2008). The factors taken together "must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." *Teagle*, 217 Ariz. at 24, ¶ 25 (citation omitted).

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[2] *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), considered whether a dog sniff conducted after the completion of a traffic stop violated the Fourth Amendment, but it specifically reserved for consideration upon remand the question of whether reasonable suspicion existed to justify detaining Rodriguez beyond the initial stop. Because we find that Callister had reasonable suspicion to detain Wallace beyond the initial stop, *Rodriguez* is not controlling here.

¶12 "[S]eemingly innocent behavior can form the basis for reasonable suspicion if an officer, based on training and experience, can perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer." *State v. Boteo-Flores*, 230 Ariz. 105, 108, ¶ 12 (2012) (quotation omitted). Nor must an officer "expressly rule out the possibility of innocent explanations for the conduct." *State v. Evans*, 237 Ariz. 231, 234, ¶ 11 (2015).

¶13 "Viewing the mosaic of facts and circumstances from the standpoint of an objectively reasonable police officer and giving due deference" to Callister's training and experience of over ten years, *Teagle*, 217 Ariz. at 25, ¶ 29 (citing *Ornelas v. United States*, 517 U.S. 690, 696 (1996)), we conclude sufficient bases existed for developing a reasonable and articulable suspicion that criminal activity was afoot. Callister testified he suspected Wallace was involved in criminal activity based on (1) the twitching of Wallace's face as he spoke, (2) the odd manner in which Wallace constantly stared at Callister, (3) Wallace's red and watery eyes, (4) Wallace's travel to Las Vegas to stay in a hotel while experiencing "hit-and-miss" employment, (5) the rental car, and (6) Wallace's exceptional nervousness from the inception of the stop which only increased after learning he would only receive a written warning for the traffic violation. Reasonable suspicion is based on all of the factors together, not an analysis that considers the factors in isolation. *See Kjolsrud*, 239 Ariz. at 324, ¶ 17 (explaining that the totality of the circumstances determines whether reasonable suspicion exists). Wallace's appearance led Callister to believe Wallace may have used illegal drugs earlier in the day. Callister also observed that, while it is normal for motorists to become nervous when stopped by police, Wallace appeared to be nervous to an "exceptional" degree based on Callister's experience, because Wallace stared directly at Callister and his face twitched as he spoke. Finally, Wallace's nervousness did not abate but rather increased when Callister informed him he would only be issuing Wallace a warning, which Callister, having stopped countless motorists in the past, testified was not normal behavior for an innocent traveler on the road.

¶14 Callister's suspicion that criminal activity was afoot started immediately "when [he] first made contact with [Wallace] when he was still sitting in the car." Although the superior court concluded that "Wallace's performance on the field sobriety tests demonstrated he was not under the influence which should have diminished Trooper Callister's suspicion[,]" the lack of impairment did not eliminate Callister's continued suspicion that Wallace had used drugs earlier in the day and was likely transporting illegal drugs. If so, the presence of that drug, or its metabolite, in Wallace's

body at the time of driving supported further investigation for the crime of Driving Under the Influence, a violation of A.R.S. § 28-1381(A)(3), which states that "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . [w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body." Although Callister determined Wallace was not impaired, Wallace appeared as though he "had used drugs at some point during the day." Consistent with the reasoning in *Sweeney,* Callister was permitted to continue the investigation past the point of issuing the warning, because during the encounter Callister had developed a reasonable and articulable suspicion that criminal activity was afoot and that suspicion had not yet been dispelled. *Sweeney*, 224 Ariz. at 112, ¶ 20. Contrary to the dissent's conclusion that his reasonable suspicion ended when Callister returned the license and registration, there was still reasonable suspicion of the possibility that Wallace was driving with a drug metabolite in his system. Actual impairment is irrelevant to a determination of Driving Under the Influence for a § 28-1381(A)(3) charge, a criminal offense.

¶15 The dissent relies on *Sweeney* for the proposition that the officer relied on common behavior that would subject nearly everyone to a continued intrusive detention, however *Sweeney* is distinguishable. In *Sweeney*, an officer physically grabbed a defendant, detained him, and ordered him to stand in front of the patrol car until a second officer arrived and stood by the defendant while the officer conducted the dog sniff. 224 Ariz. at 112, ¶ 20. Those are not the facts of this case.

¶16 Based on this record, we conclude Callister had reasonable suspicion that Wallace was involved in criminal activity to ask a few additional questions.

CONCLUSION

¶17 For the foregoing reasons, we reverse the superior court's ruling and remand for further proceedings.

W E I N Z W E I G, J., dissenting:

¶18 I respectfully dissent.

¶19 I concur that Trooper Callister had reasonable suspicion to stop the defendant's vehicle, perform a field sobriety test and pose investigative questions. His reasonable suspicion ended, however, when he returned the defendant's license and registration. *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). At that point, the officer needed to either release the defendant or articulate an objective, reasonable suspicion that the defendant was engaged in additional, specific criminal conduct. *Id.*

¶20 The trial court examined the evidence, heard testimony from the officer at an evidentiary hearing, personally assessed the credibility of all witnesses and found the officer lacked a reasonable suspicion to curtail defendant's liberty beyond the initial traffic-stop. *State v. Sweeney*, 224 Ariz. 107, 111, ¶12 (App. 2010) ("We generally review the denial of a motion to suppress with deference to the trial court's factual determinations, including its evaluation of the credibility of witness testimony."). And, to reiterate, this court must "view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Peltz*, 242 Ariz. 23, 29, ¶ 20 (App. 2017) (citation omitted).

¶21 The majority holds that Trooper Callister had reasonable suspicion to extend the traffic stop and continue his questioning based on his belief that defendant Wallace was *either* hauling illegal drugs *or* had illegal drugs in his system. Although it does not match *which* facts indicate reasonable suspicion for *which* offense, the majority generally holds that the officer had reasonable suspicion to extend the stop and pursue other criminal conduct because the defendant (1) was returning from a vacation to Las Vegas, but lacked a stable job, (2) was very nervous, (3) became more nervous when informed he would only receive a warning, (4) had facial twitches, (5) maintained constant eye-contact with the officer, (6) had red and watery eyes, and (7) drove a rental car.

¶22 Based on the universe of evidence and testimony presented to the trial court, these seven facts are insufficient to spark an objective, reasonable suspicion of ongoing criminal conduct. *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (circumstances or factors that do not reliably distinguish between suspect and innocent behaviors are insufficient to establish reasonable suspicion because they may cast too wide a net and subject all travelers to "virtually random seizures"). I believe the officer's suspicion instead teetered on common behavior that "would subject nearly

everyone to a continued, intrusive detention following a routine traffic stop." *Sweeney*, 224 Ariz. at 113, ¶ 24.

¶23 I first note the defendant passed a field sobriety test—indeed, the officer cut the test short "because it was clear that Mr. Wallace did not have any impairment to drive." This must not be minimized because it colors the entire narrative.

¶24 The officer testified that the defendant's Las Vegas vacation, "fairly pricey" Circus Circus accommodations and part-time job building pools represented a "red flag" that drugs were in the vehicle, describing the vacation as "unusual" if "money might be an issue." The trial court reasonably concluded that this "red flag" represented the officer's subjective assessment—namely, that the Circus Circus hotel was too expensive for someone with part-time employment—and emphasized that reasonable suspicion is an objective inquiry. *State v. Teagle*, 217 Ariz. 17, 23, ¶ 25 (App. 2007) (the Fourth Amendment requires that an officer have some minimal, objective justification for a detention). I share his conclusion, reticent to believe that part-time workers cannot drive to Las Vegas to meet friends without arousing the reasonable suspicion of law enforcement.

¶25 The officer heavily relied on defendant's nervousness to arouse his reasonable suspicion, including "the twitching of the face and the staring that he did," which the officer attributed to "nervousness" rather than a biological reaction to illegal drugs. As the trial court explained, however, "the courts consistently hold that nervousness typically adds nothing to the reasonable suspicion analysis." *See, e.g.*, *Sweeney*, 224 Ariz. at 110, 113, ¶¶ 9, 24 ("Appellant displayed an overly nervous demeanor, even after the officer told him that he was to receive a warning and not a citation. Appellant's demeanor included a shaking hand, heavy breathing and twitching cheeks. . . . [T]hese factors did not give rise to objective reasonable suspicion of anything.").

¶26 I am particularly confused by the officer's emphasis on the defendant's nervousness *after* told he would *not* receive a traffic ticket, which he characterized as abnormal. And that's true. The defendant's reaction was counterintuitive because a motorist would be expected to express relief—maybe with an audible sigh—after informed of his good fortune. But strange behavior is meaningless unless tethered to suspicions of *particular* criminal conduct. As relevant here, it is unclear how defendant's counterintuitive reaction to getting a warning would spark a reasonable suspicion that he was *either* transporting drugs or has drugs in his system. Indeed, impairment had been ruled out.

¶27 Also problematic is the officer's vacillating attitude on eye contact, which creates a no-win situation for the driving public. In particular, the officer testified that his suspicions are aroused when motorists make *too much* eye contact or *too little* eye contact, leaving motorists to his subjective assessment of appropriate eye contact, which falls somewhere in between. *Sweeney*, 224 Ariz. at 113, ¶ 24. At a minimum, the court reasonably found that defendant's eye contact was not "a significant factor" towards reasonable suspicion.

¶28 And last, exhausted travelers often have red, watery eyes when driving long distances. The officer never testified that relevant training or experience led him to believe Wallace's red and watery eyes were an indication of drug use. *State v. O'Meara*, 198 Ariz. 294, 296 (2000) (factors that do not reliably distinguish between suspect and innocent behaviors are insufficient to establish reasonable suspicion because they may cast too wide a net and subject all travelers to "virtually random seizures").

¶29 Although I understand and respect the holding of my colleagues, I do not believe the officer had reasonable suspicion to extend the traffic stop and would thus affirm the superior court's suppression order.