IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

EVAN WILLIAM GRACE, *Appellant*.

No. 1 CA-CR 18-0696
FILED 11-21-2019

Appeal from the Superior Court in Maricopa County
No. CR2017-137062-001
The Honorable Cari A. Harrison, Judge, *Retired*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Casey Ball
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jennifer Roach
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge David D. Weinzweig and Judge Maurice Portley[1] joined.

H O W E, Judge:

¶1 Evan William Grace appeals his convictions and sentences for possession of narcotic drugs, possession of drug paraphernalia, and misconduct involving weapons. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509 ¶ 93 (2013). One night in August 2017**,** two uniformed police officers, Officers Peyton and Fisher, were patrolling an area in Phoenix known for high-crime activity. While on patrol, the officers noticed a car parked in an apartment complex parking lot with its engine running and lights off. After parking approximately 50 to 100 feet from the car, the officers observed the driver, Grace, sitting in the car with another occupant in the passenger seat.

¶3 The officers continued to observe the occupants from a distance and then, after about a minute, approached the car on foot. Officer Fisher approached the car's passenger side and Officer Peyton approached the driver's side. Officer Peyton then shined his flashlight into the car and Grace rolled down his window. Officer Peyton immediately recognized the odor of "burnt marijuana."

¶4 Officer Peyton identified himself as a police officer and asked Grace, "Real quick, [are] there any guns, bombs, knives, Bazookas, or dead bodies inside the vehicle that I need to learn about?" Grace answered "no." Officer Peyton told Grace that he smelled marijuana coming from inside the car and asked him to step out, but Grace "refused to exit by stating 'no, I

[1] The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

want your supervisor and a lawyer.'" Officer Peyton then directed Officer Fisher to pull the patrol car behind Grace's car to prevent him from leaving.

¶5 The officers arrested Grace and searched his car incident to arrest. They found a handgun, heroin, drug paraphernalia, and prescription drugs. After being advised of his *Miranda*[2] rights, Grace admitted in a recorded interview that the gun, drugs, and drug paraphernalia were his.

¶6 The State charged Grace with possession of narcotic drugs, a class 4 felony; possession of drug paraphernalia, a class 6 felony; and misconduct involving weapons, a class 4 felony. Grace moved to suppress the evidence found in his car, claiming he was "illegally seized" without reasonable suspicion and that consequently any evidence obtained was the fruit of that illegal seizure. The trial court found, however, that Grace was not seized at the point at which the officers smelled the marijuana and noted that the police had probable cause by the time the encounter evolved into a seizure.

¶7 Grace submitted the case to the trial court on the evidence in the record, and the court found Grace guilty as charged. The court subsequently sentenced Grace to concurrent terms of 2.5 years' imprisonment for possession of drugs, one year's imprisonment for possession of drug paraphernalia, and 10 years' imprisonment for misconduct involving weapons. The court credited Grace with 46 days' presentence incarceration credit. Grace timely appealed.

DISCUSSION

¶8 Grace challenges the trial court's denial of his motion to suppress, claiming that his initial encounter with the officers was not consensual and he was seized for purposes of the Fourth Amendment.[3] We review the trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Sanchez*, 200 Ariz. 163, 165 ¶ 5 (App. 2001). Whether a

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

[3] Grace also argues for the first time on appeal that Officer Peyton had obtained his post-arrest statements in violation of *Miranda*, and the court accordingly should have sua sponte suppressed those statements. Because Grace did not raise this issue with the trial court, we cannot consider it. *See State v. Brita*, 158 Ariz. 121, 124 (1988) ("It is highly undesirable to attempt to resolve issues for the first time on appeal, particularly when the record below was made with no thought in mind of the legal issue to be decided.").

person has been seized by police, however, is a mixed question of law and fact that we review de novo. *State v. Teagle*, 217 Ariz. 17, 22 ¶ 19 (App. 2007). We review the evidence presented at the suppression hearing in the light most favorable to sustaining the trial court's factual findings and we will uphold the court's ruling if it is legally correct for any reason the record supports. *State v. Childress,* 222 Ariz. 334, 338 ¶ 9 (App. 2009).

¶9 The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. Consensual encounters between people and police, however, do not implicate the Fourth Amendment. *State v. Serna*, 235 Ariz. 270, 272 ¶ 8 (2014). In distinguishing between a consensual encounter and a seizure, we consider the totality of the circumstances and determine whether a reasonable person under those circumstances would have believed that he or she was free to leave or otherwise terminate the encounter. *Childress,* 222 Ariz. at ¶ 11. Relevant factors in this determination 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." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

¶10 Contrary to Grace's assertion, nothing in the record suggests that, before smelling the marijuana, the officers had seized him. The officers did not turn on their sirens, display force, brandish weapons, summon Grace to their presence, block his rout of departure, threaten him, or use language or tone that might have indicated that compliance was required. Instead, the officers simply approached and asked him questions, which Grace answered voluntarily. *See State v. Watkins*, 207 Ariz. 562, 566 ¶ 17 n.5 (App. 2004) ("[P]olice can always request to speak to a citizen."). Because Grace's initial encounter with the officers was objectively consensual, the Fourth Amendment was not implicated. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.").

¶11 Grace nonetheless suggests that *Brendlin v. California*, 551 U.S. 249 (2007), requires suppression. But *Brendlin* is inapposite. *Brendlin* held only that a passenger is seized within the meaning of the Fourth Amendment when a police officer makes a "traffic stop." 551 U.S. at 251, 263. This case does not involve a traffic stop. As the record reflects, Grace's car was parked at an apartment complex when officers approached him. Grace's suggestion that he was seized merely because police officers walked up to his parked car and asked him questions is meritless. *See State v. Robles*, 171 Ariz. 441, 443 (App. 1992) (finding no basis to conclude that

the defendant had been seized simply because police officers walked up to his parked vehicle and asked him questions).

¶12 Grace also asserts that the officers seized him because their "bodies block[ed] both car doors" during the encounter, preventing him from opening his car doors or backing out of the parking space without hitting the officers with the doors or side mirrors, risking a possible aggravated assault charge. The record does not support this argument. Although the officers stood on either side of Grace's car, nothing shows that they physically blocked Grace or that they otherwise indicated to him that he could not leave. The record shows only that the officers' initial encounter with Grace was consensual.

CONCLUSION

¶13 For the foregoing reasons, we affirm.

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