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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

STATE OF ARIZONA, *Appellee*,

v.

DUSTIN LEE BREY, *Appellant*.

No. 1 CA-CR 20-0046
FILED 9-29-2020

Appeal from the Superior Court in Yavapai County
No. P1300CR201700390
The Honorable Krista M. Carman, Judge

AFFIRMED

COUNSEL

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By Michelle L. Hogan
Counsel for Appellee

C. Kenneth Ray II, P.L.L.C. Attorney at Law, Prescott
By C. Kenneth Ray II
Counsel for Appellant

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MEMORANDUM DECISION

Judge David B. Gass delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Michael J. Brown joined.

G A S S, Judge:

¶1 Dustin Lee Brey appeals from his conviction for possession or use of marijuana. Brey contends the Yavapai County Sheriff's Office (YCSO) did not have a reasonable suspicion to stop the truck in which he was a passenger. To challenge the basis for the stop, Brey claims YCSO was required to preserve the truck for his inspection and the failure to do so constituted a denial of due process. Brey also contends the superior court abused its discretion when it denied his motions to continue trial to secure a witness's presence. Because YCSO did not deprive Brey of due process and because the superior court did not abuse its discretion, we affirm Brey's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 This court reviews the facts in the light most favorable to sustaining the jury's verdict, resolving all reasonable inferences against the defendant. *See State v. Felix*, 237 Ariz. 280, 283, ¶ 2 (App. 2015). Because the jury is charged with weighing evidence and assessing witness credibility, this court will not invade those duties. *See State v. Williams*, 209 Ariz. 228, 231, ¶ 6 (App. 2004).

¶3 On April 14, 2016, Brey was a passenger in a pickup truck. Steven Smalley was driving the truck through Yavapai County. Neither Brey nor Smalley were the registered owners.

¶4 YCSO Detective D.C. was on patrol along Interstate 40. At approximately 9:08 p.m., D.C. stopped Smalley's truck because he saw it had no functioning license plate light. He also noted the truck had only one functioning taillight. Smalley stopped on the shoulder of the highway, and D.C. stopped behind him.

¶5 D.C. approached the truck on the passenger side and again observed the lack of a functioning license plate light. D.C. told Smalley and Brey the reason for the stop. Brey responded he recently checked the lights and they were working. While talking with them, D.C. asked for permission

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to search the truck. Smalley consented. During the search, D.C. found approximately 25 grams of marijuana, a marijuana pipe, rolling papers, and THC concentrate.

¶6 D.C. had Brey and Smalley exit the truck and placed Brey in the patrol vehicle. After searching the vehicle and determining there was no further evidence to be gathered, D.C. released the truck to a towing company without any restrictions or further instructions. The towing company later released the truck to Smalley.

¶7 On March 24, 2017 – more than eleven months after the initial arrest – the State indicted Brey for possession or use of marijuana, possession of drug paraphernalia, and failure to appear in the first-degree.¹ Brey moved to dismiss the indictment or, in the alternative, to suppress all evidence seized from the truck, contending D.C. did not have reasonable suspicion to support the stop. To that end, Brey argued he was deprived of due process when the State failed to preserve obviously exculpatory evidence when it released the truck and that it did so in bad faith.

¶8 On February 12, 2019, the superior court held a suppression hearing. The parties stipulated Brey would testify that from his position in the patrol vehicle, he saw one taillight was not working but the license plate light was functioning. D.C. testified he specifically noted the lack of a functioning taillight and license plate light at least two times. D.C. said he noted the nonfunctioning taillight but would not have stopped the truck for that reason alone because it was not a traffic violation. He, therefore, only stopped the truck because the license plate light was not functioning. Based on this evidence, the superior court found D.C. had a reasonable suspicion to support the initial traffic stop. The superior court went on to find officers do not “need to retain every vehicle in a drug case” and YCSO did not act in bad faith when it released the truck to the towing company without restrictions or further instructions.

¶9 On November 5, 2019 – more than eighteen months after the indictment and only eight days before trial – Brey orally moved to continue the trial because he had not been able to locate or subpoena Smalley. The superior court denied the motion. Brey filed a renewed motion to continue trial on November 8, 2019. On November 13, at the pretrial conference held the morning of trial, Brey claimed he had been unable to compel Smalley’s

¹ The superior court severed the failure to appear in the first-degree count. It was not tried with the other charges and is not a subject of this appeal.

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appearance. He further claimed Smalley's absence would prejudice his defense because Smalley was needed to get recorded statements into evidence in which Smalley claimed the marijuana was his. Brey declined to say what he had done to locate Smalley, arguing the State was required to locate him. The superior court again denied the motion.

¶10 After a two-day trial, the jury convicted Brey of possession or use of marijuana and acquitted him of possession of drug paraphernalia. The superior court suspended the imposition of sentence and imposed probation. As a condition of probation, the superior court imposed 31 days of jail with 31 days credit for time served and an additional 120 days of deferred jail.

¶11 Brey timely appealed. This court has jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4033.A.

ANALYSIS

I. YCSO did not violate Brey's due process rights when it did not preserve the truck for Brey's inspection.

¶12 This court reviews a superior court's denial of a motion to dismiss an indictment and motion to suppress for abuse of discretion, but reviews questions of law and constitutional issues *de novo*. See *State v. Hulse*, 243 Ariz. 367, 377, ¶ 17 (2018) (motion to dismiss an indictment); *State v. Snyder*, 240 Ariz. 551, 554, ¶ 8 (App. 2016) (motion to suppress). A superior court abuses its discretion when its reasoning is legally incorrect, clearly untenable, or otherwise constitutes a denial of justice. See *State v. Penney*, 229 Ariz. 32, 34, ¶ 8 (App. 2012).

¶13 Brey's argument goes as follows. He has standing to challenge D.C.'s stop, but not the search. See *Arizona v. Johnson*, 555 U.S. 323, 333-34 (2009) (citation omitted); see also *Brendlin v. California*, 551 U.S. 249, 257-63 (2007) (passengers have standing to challenge a stop of the vehicle). If Brey could successfully challenge the stop, the evidence from the search would be excluded. See *State v. Starr*, 222 Ariz. 65, 69, ¶ 12 (App. 2009) (law enforcement officers need reasonable suspicion of traffic law violation to stop a vehicle); See *State v. Fornof*, 218 Ariz. 74, 76, ¶ 5 (App. 2008) (evidence seized after traffic stop lacking reasonable suspicion must be excluded). Brey argues YCSO denied him due process by releasing the truck because he could not later test the truck's lights to challenge YCSO's reasonable suspicion. The crux of the issue, therefore, is whether (1) the truck's exculpatory nature was apparent to YCSO before D.C. released it and Brey

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“cannot obtain comparable evidence through reasonably available means, or (2) the potential usefulness of the evidence [was] unknown but the [S]tate acted in bad faith by destroying it.” *See State v. Forde*, 233 Ariz. 543, 559, ¶ 46 (2014).

¶14 The superior court expressly found there was no bad faith when YCSO released the truck. Brey does not challenge this finding on appeal. Brey, therefore, is left to argue the truck’s exculpatory nature was apparent before it was lost and he could not obtain comparable evidence through reasonably available means. “Apparent” requires more than “[t]he mere possibility that [the truck] could have exculpated” Brey. *See State v. O’Dell*, 202 Ariz. 453, 458, ¶ 13 (App. 2002). Put simply, without a showing of bad faith by YCSO, the “failure to preserve *potentially* useful evidence does not constitute a denial of due process of law.” *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (emphasis added).

¶15 Though Brey might have wanted to test the truck’s lights, the truck—and any tests he wished to perform—would only be potentially useful in his dismissal and suppression argument. Even if Brey had presented evidence the truck’s lights worked, the superior court could still have upheld the search if it determined D.C.’s mistake was reasonable. *See Heien v. North Carolina*, 574 U.S. 54, 61 (2014) (“Reasonable suspicion arises from the combination of an officer’s understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground.”). In sum, if YCSO had preserved the truck, any theoretical test results would have merely gone into the superior court’s weighing of the evidence. The superior court could still have found there was reasonable suspicion even with inspections of the truck’s lights.

¶16 To that end, the truck was only potentially probative to the validity of the stop, not to the crime of possessing or using marijuana for which the jury convicted Brey. In other words, it was potentially exculpatory for only a collateral issue, not the elements for the crime. The lack of materiality and probative value for Brey’s actual crime mitigates its exculpatory nature. Because the truck was not clearly exculpatory, and at best was only potentially useful, Brey cannot establish his due process rights were violated. The superior court did not abuse its discretion.

II. The superior court did not abuse its discretion in denying Brey’s motions to continue trial.

¶17 Lastly, Brey contends the superior court abused its discretion when it denied his motions to continue trial to secure Smalley’s attendance.

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Brey claims the denial prevented him from introducing recorded exculpatory statements Smalley made during the traffic stop.

¶18 A trial court “may continue trial *only* on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice . . .” Ariz. R. Crim. P. 8.5(b) (emphasis added). This court reviews a denial of a motion to continue for an abuse of discretion and requires the defendant to demonstrate prejudice. *Forde*, 233 Ariz. at 555, ¶ 18. The superior court has broad discretion and may deny a motion to continue even if it would result in a material witness’s absence from trial. *See State v. Axley*, 132 Ariz. 383, 388 (1982) (“no violation of the right to compulsory process when the unavailability of the witness has not resulted from the suggestion, procurement, or negligence of the government”).

¶19 This case began with an indictment in March 2017. Brey first moved to continue on November 5, 2019, only eight days before the first day of trial. He renewed that motion on November 8, 2019, only two days before trial. The superior court was well within its discretion to deny the request and proceed to trial. Brey had ample time to locate and compel Smalley’s attendance and gave no just reason why he did not.

¶20 Moreover, even without Smalley’s presence, Brey introduced Smalley’s recorded statements into evidence at trial. Brey, therefore, was not prejudiced by Smalley’s absence. Brey’s failure to demonstrate prejudice is independently dispositive.

CONCLUSION

¶21 For the foregoing reasons, we affirm Brey’s conviction and sentence.



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