DIVISION ONE
FILED: 02-25-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0293
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MICHAEL JAMES RICH,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. CR 2007-0458

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

Emily L. Danies — Tucson
Attorney for Appellant

G E M M I L L, Judge

¶1 Michael James Rich appeals his convictions and sentences for conspiracy to transport and transportation of methamphetamine and cocaine for sale, possession of a usable amount of methamphetamine and ecstasy, and possession of drug paraphernalia. He argues that the trial court abused its discretion in denying his motion to suppress, his motion for sanctions, and his motion for mistrial and severance of his trial from that of a co-defendant. For the reasons that follow, we find no error and affirm.

¶2 The evidence at trial, viewed in the light most favorable to sustaining the convictions,[1] was as follows. During a traffic stop on Interstate 17 near Cordes Junction, a Department of Public Safety ("DPS") officer called for a drug sniffing dog to circle the exterior of the sports utility vehicle that Mr. Rich and his co-defendant had driven to Phoenix from Colorado for a two-day trip. The canine alerted to the left rear bumper area of the SUV, which was registered to Mr. Rich's mother, and a DPS officer discovered two bricks of methamphetamine weighing 1.6 pounds and one brick of cocaine weighing 1.2 pounds hidden in a hollow area behind the tail light. A search of the SUV resulted in discovery of $1,752 in cash, glass pipes, and usable quantities of methamphetamine and

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

ecstasy in a blue briefcase in the vehicle. A DPS officer testified that Mr. Rich had admitted to him at the scene that the blue briefcase was his.

¶3 Mr. Rich and the driver were tried together, and both testified at trial that they had not known the drugs were in the SUV. They both testified that once they arrived in Phoenix, they checked into a motel and took a nap for several hours before they learned the plans they had made for Phoenix had not panned out, and they left town to return to Colorado. Mr. Rich accused a third person accompanying them on the trip of hiding the drugs in the SUV while they napped; his co-defendant testified that he did not know if this third person had left the motel room while they slept. Mr. Rich denied that the briefcase in which the additional drugs and money were found was his, and testified that it was the property of the third person, who must have left it behind in the vehicle when he decided to remain in Phoenix.

¶4 The jury convicted both defendants of the charged crimes. The judge sentenced Mr. Rich to concurrent mitigated terms, the longest of which was five years. Mr. Rich timely appealed.

Motion to Suppress

¶5 Mr. Rich argues the trial court abused its discretion in denying his motion to suppress, because the traffic stop was

not justified at its inception, and the DPS officer who stopped them "was not justified in temporarily detaining defendant for further investigation to confirm or dispel his suspicion that defendant was transporting illegal drugs." In reviewing the validity of a traffic stop, we restrict our review to consideration of the facts the trial court heard at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We review the facts in the light most favorable to sustaining the trial court's ruling, and give deference to the trial court's factual findings. *See State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996); *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). Whether an officer has an objective basis for reasonable suspicion that the suspect is involved in criminal activity necessary for a traffic stop, is a mixed question of law and fact that we review *de novo*. *See Rogers*, 186 Ariz. at 510, 924 P.2d at 1029.

¶6 The evidence at the suppression hearing, viewed in the light most favorable to sustaining the trial court's ruling, was as follows. At about 2 p.m. on March 20, 2007, a DPS officer was driving northbound on Interstate 17 in the Cordes Junction area when he observed a sports utility vehicle following the vehicle in front of it too closely. After confirming his suspicion of the traffic violation by repeatedly clocking the time that the two vehicles passed a fixed point on the highway,

the officer activated his emergency lights and executed a traffic stop. The officer testified that the so-called "gap times" he measured were less than two seconds and "anything under two seconds . . . would be a violation as following too closely."

¶7 The officer testified that the driver appeared noticeably more nervous when the officer asked him where he had been, and first started to say, "Tucson," and then corrected himself and said "Phoenix." The officer testified that the passenger, Mr. Rich, was leaning back in his seat with his eyes closed, opening them only a crack when he thought the officer was not looking at him. Mr. Rich's hands trembled as he handed the officer the insurance and registration papers showing that the vehicle was registered in his mother's name. Mr. Rich told the officer that they were returning to Colorado after a trip for a couple of days to visit a friend in Phoenix. When asked what he had been doing in Tucson, he appeared shocked, looked back toward the driver, and finally said, "I don't know. I hate Arizona. I'm just tired and I want to go home." The officer testified that he suspected the defendant and the driver were transporting illegal drugs, based on the "raised level of nervousness – especially from the passenger who was not even a subject of the stop . . . [c]ross-country travel . . . . Arizona is a transshipment state . . . short stay to either

Phoenix or Tucson . . . [t]he owner of the vehicle not being present . . . [the] dirty lived-in look of the vehicle . . . the response, the reaction to Tucson."

¶8 After checking the paperwork, the officer gave the driver a written warning for following too closely, in violation of Arizona Revised Statutes ("A.R.S.") section 28-730(A), returned his driver's license to him, and told him that he was done with the stop and to have a safe trip. As the driver walked away, the officer asked him if he could ask him a few questions. The officer testified that the driver "turned back toward me and said that I could." The officer informed the driver that police have a problem with people transporting illegal items on Interstate 17, and asked if they had anything illegal in the vehicle, and specifically if they had any large quantities of money, drugs, or weapons in the vehicle. When the driver denied having any illegal items in the vehicle, the officer asked him if he could search the vehicle. After some discussion, the driver agreed and signed a written consent to search. As the officer was speaking to the driver about the consent, another police car arrived and parked in back of the officer's vehicle.

¶9 The officer proceeded to the passenger side of the vehicle, again explained Arizona's problem with transportation of illegal items, and asked Mr. Rich if he had any weapons,

drugs, or large quantities of money. Mr. Rich denied having any of these items. Mr. Rich initially consented to a search of the vehicle, but changed his mind. Mr. Rich, however, agreed to allow a dog to sniff the exterior of the SUV. The officer told him that the canine handler was "not terribly far away and it wouldn't take that long to get him there . . . it would take ten or 15 minutes for the dog to arrive." Mr. Rich told the officer that was okay. The canine handler and dog arrived nine minutes later, and the dog alerted on the left bumper of the SUV within five minutes. The entire traffic stop, from the activation of emergency sirens to the alert of the canine officer on the rear bumper of the SUV, lasted thirty-three minutes.

¶10 Following the evidentiary hearing, the judge denied Mr. Rich's motion to suppress, reasoning that the officer had articulated a reasonable basis for the traffic stop by his observation, confirmed by the gap times, that the SUV was violating the traffic code by following the vehicle in front of it too closely. He found that the officer told the defendants that they were free to go once he had issued the written warning, and the evidence failed to show that they were detained without their consent. He further found that, even absent consent, the continued detention would have been permissible based on the objective factors giving rise to reasonable suspicion that the defendants were engaged in drug trafficking,

which factors included "cross-country travel, heightened nervousness, a short stay to a supply city, the inconsistency in the statements made by the two defendants," as well as "the owner of the vehicle was not present, [the vehicle] had a dirty lived-in look. This kind of peeking out of the eyeballs – out from under the eyelids by Mr. Rich on a couple of occasions." The judge also noted that the length of time it took for the canine unit to arrive, nine minutes, was not unusually long.

¶11 We find no error. The traffic stop was justified at its inception, and initially lasted no longer than necessary to issue the warning. A police officer may make a limited investigatory stop if the officer has articulable, reasonable suspicion that the suspect is involved in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 21-23 (1968). To determine whether an officer has the requisite basis for reasonable suspicion of criminal activity, we evaluate the totality of the circumstances from the standpoint of "an objectively reasonable police officer." *See Ornelas v. United States,* 517 U.S. 690, 696 (1996). In this case, the officer suspected that the driver of the SUV was following the vehicle in front of it too closely, in violation of A.R.S. § 28-730(A)(2004). The statute provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent and shall have due regard for the speed of the vehicles on, the traffic on

and the condition of the highway." The officer confirmed his suspicion that the driver was violating this provision in the traffic code by using a method he had learned in his training, measuring the "gap time," that is, the difference in time it takes the first vehicle to pass a fixed point before the second vehicle passes it. He testified that all of the gap times he measured were less than two seconds, a time he had been trained to consider the minimum necessary given perception and reaction times of the ordinary person. On this record, we find that the traffic stop was justified at its inception by the officer's observation, supported by gap timing, that the driver was violating the prohibition against following too closely.[2]

¶12 We further find that the initial detention was not longer than permitted for a traffic stop. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see State v. Winegar,* 147 Ariz. 440, 447, 711 P.2d 579, 586 (1985) (such *Terry* stops are tolerated absent probable cause because "they are brief and as narrowly

[2] To the extent that Mr. Rich is arguing that the officer was using the traffic infraction as a mere pretext to stop the SUV, we defer to the trial court's finding that the evidence failed to support this claim. Moreover, even if the officer had other motives besides the suspected traffic infraction to stop the vehicle, the subjective motives of an officer do not invalidate an otherwise lawful traffic stop. *Whren v. United States*, 517 U.S. 806, 813 (1996).

circumscribed as possible"). No evidence in the record suggests that this initial detention, which lasted about fifteen minutes, was any longer than necessary to check the paperwork and issue the driver the warning.

¶13 Once the initial detention for the traffic stop had been concluded, the officer, moreover, was free to ask additional questions unrelated to the traffic stop. *See State v. Teagle*, 217 Ariz. 17, 23, ¶ 23, 170 P.3d 266, 272 (App. 2007). In this case, we find, as we did in *Teagle*, that the additional delay in asking the driver and Mr. Rich if they would consent to a search or a dog sniff "was de minimus and did not unreasonably extend the traffic stop." *See id.* at ¶ 24.

¶14 We further find that the additional nine minutes that Mr. Rich spent stopped by the roadside waiting for the drug sniffing dog to arrive had ceased to be a detention because Mr. Rich agreed to the wait. Once an officer conducting a routine traffic stop has confirmed that the driver has produced a valid license and proof of entitlement to operate the vehicle, he must allow the driver to proceed on his way unless, during the initial encounter, the officer has gained reasonable and articulable suspicion that the driver is engaged in illegal activity, or unless the encounter ceases to be a detention and becomes consensual. *Id.* at ¶ 22. We do not agree with Mr. Rich's contention that the officer was not prepared to allow the

driver and Mr. Rich to go no matter what they said and therefore reasonable suspicion of drug trafficking was necessary to support the detention. A policeman's unarticulated plan has no bearing on the question whether a suspect has been detained; "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *See Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984) (addressing determination of whether person detained for traffic stop is "in custody"). In this case, the officer did not convey this intention to detain either to Mr. Rich or his driver, but rather told the driver he was free to go before asking him if he could ask additional questions and, after the driver agreed, asking the driver and Mr. Rich if they would consent to a search or a dog sniff. Under these circumstances, we find that when the officer told the driver the traffic stop was over and wished him a safe trip, the encounter ceased being a detention and became a consensual encounter. *See id.*

¶15 After the driver agreed to answer additional questions and signed a written consent to search the vehicle, the evidence demonstrated that Mr. Rich expressly consented to have a drug dog sniff around the exterior of the SUV, and also expressly consented to wait for the estimated ten to fifteen minutes it would take for the dog to arrive at the scene. The nine minutes it took for the dog to arrive in this case was less than Mr.

Rich agreed to wait and not unreasonable under the circumstances. *Cf. Teagle*, 217 Ariz. at 27, ¶ 37, 170 P.3d at 276 (holding that detention of driver for one hour and forty minutes to await arrival of drug-detention dog was not unreasonable under the circumstances). On this record, Mr. Rich's consent to wait for arrival of a drug dog and to allow him to sniff the exterior of the SUV was all that was necessary to support the continuation of the investigation by the side of the road. In short, we find that the officer had the requisite particularized and objective basis for conducting the traffic stop, and Mr. Rich consented to wait to allow the dog to sniff the exterior of the SUV, and thus the trial court did not abuse its discretion in denying the suppression motion.

Motion for Sanctions

¶16 Appellant next argues that the trial court abused its discretion in denying his motion for sanctions for bad faith violation of an unwritten "free talk" agreement. Specifically, appellant argues that the prosecutor acted in bad faith when he failed to honor an unwritten "free talk" agreement that the county attorney's office would follow a DPS sergeant's recommendation to offer him a plea agreement and a lesser sentence. The judge heard evidence that a DPS sergeant and a deputy county attorney initiated a "free talk" meeting with Mr. Rich. The DPS sergeant testified that he explained to Mr. Rich,

in the presence of the deputy county attorney and defense counsel, that the DPS would evaluate the information he provided and make a recommendation to the Yavapai County Attorney's Office. The sergeant testified that he had warned Mr. Rich that no promises were being made, and, in fact, no promise was made about whether the county attorney's office would follow the DPS's recommendation. Mr. Rich developed an ongoing relationship with the sergeant, although his information failed to result in any arrests or removal of drugs from the streets. The sergeant testified that he did not agree with the way the prosecutor was handling Mr. Rich's case, specifically, by taking it to trial. He testified that when he expressed his concerns to the county attorney's office, he was told that the prosecutors needed to try the two defendants together or offer them both plea agreements, and they were concerned over the lack of concrete results from Mr. Rich's information. The prosecutor who took this to trial did not offer a plea to Mr. Rich but told his attorney that he would make a sentencing recommendation based on his cooperation, better than what his co-defendant were to receive were both convicted.

¶17 The judge denied the motion for sanctions, reasoning that both parties had agreed at the outset that the county attorney's office had the ultimate authority whether or not to act on the sergeant's recommendation, and he did not find any

prosecutorial misconduct. A trial court's finding on whether the prosecutor engaged in misconduct or acted in bad faith "must be based primarily upon the objective facts and circumstances shown in the record." *State v. Armstrong*, 208 Ariz. 345, 352, ¶ 31, 93 P.3d 1061, 1068 (2004) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 106-07, 677 P.2d 261, 269-70 (1984)). We review such finding for abuse of discretion. *See Armstrong,* 208 Ariz. at 353, ¶ 36, 93 P.3d at 1069.

¶18 We find no such abuse in this case. The evidence confirmed that no promises were made to Mr. Rich that the prosecutor would abide by the sergeant's recommendation for disposition of the charges against him. The evidence failed to support any unwritten agreement to the contrary. Mr. Rich's information did not result in discovery of any drugs or any arrests. On this record, we cannot say that the judge abused his discretion in finding no evidence of bad faith or misconduct in the prosecutor's failure to heed the sergeant's recommendation and instead proceed to trial. *See id.*

Motion for Severance and Mistrial

¶19 Appellant argues that the trial court abused its discretion in refusing to declare a mistrial and sever his trial from that of his co-defendant after his co-defendant testified inconsistently with defendant as to when a third person whom both defendants had accused of planting the drugs had joined

their group. Specifically, appellant argues that he and his co-defendant had mutually antagonistic defenses, in that the jury could believe either Mr. Rich's testimony that the third person drove with the two defendants from Colorado, or his co-defendant's testimony that the third person joined them in Phoenix, but not the testimony of both defendants. He also summarily argues that severance was necessary because the prosecutor engaged in misconduct by continuing to question an officer, after an adverse ruling, about paperwork that tied Mr. Rich to the blue briefcase containing the drugs and paraphernalia that formed the basis for the possession charges.

¶20 The background on this issue is as follows. The judge denied Mr. Rich's pre-trial motion to sever. The judge also denied Mr. Rich's oral motion for mistrial the second day of trial, which defense counsel made on the ground the prosecutor had improperly attempted to "taint the jury's mind" by continuing, after the judge had sustained defense counsel's objections, to ask a DPS sergeant about paperwork indicating Mr. Rich's ownership of the blue briefcase. The evidentiary issue first arose on the second day of trial, when the prosecutor questioned a DPS sergeant about his mentioning "that you found some paperwork in that blue briefcase-type bag that tied Mr. Rich to the bag." The judge sustained defendant's objection to the question, later explaining to the attorneys that he believed

it assumed facts not in evidence, specifically that the paperwork tied *Mr. Rich* to the bag. The prosecutor subsequently discovered at a sidebar that the items preserved in Exhibit 35 did not have any indicia of ownership of the blue briefcase, as he had thought. The prosecutor subsequently asked the sergeant if Exhibit 35 contained "what you believe tied the bag to Mr. Rich." The judge again sustained defense counsel's objection, and instructed the jury to "disregard comments made by the prosecutor with regard to the connection of the blue bag at this point." The prosecutor then asked the officer repeatedly, over defendant's objection and instruction by the court to rephrase, if he had been mistaken in what he had said earlier about Exhibit 35 containing indicia of ownership. The sergeant agreed that he had been mistaken in thinking that indicia of ownership of the blue briefcase were contained in Exhibit 35.

¶21 Defense counsel subsequently moved for a mistrial on the ground that the prosecutor returned to the subject of the paperwork indicating ownership of the blue briefcase after the judge had sustained his objection, and tried to "taint the jury's mind by saying that the bag had indicia in it." The prosecutor explained that he was only trying to correct the mistake for the jury. The judge denied the mistrial, finding that he had sustained the objection and instructed the jury to ignore the original comment, and the officer's testimony that he

had been mistaken, and admission of Exhibit 35, "ultimately cleared that up." He further noted that even disregarding Exhibit 31, a police inventory of non-evidential property indicated Mr. Rich's paperwork had been found in the blue briefcase but not preserved as evidence, and another officer had already testified that Mr. Rich had admitted at the scene that the blue briefcase was his. The judge found that, on this record, defendant had not been prejudiced by this line of questioning.

¶22 On the third day of trial, Mr. Rich filed a written motion for mistrial and severance on the grounds that 1) the prosecutor's continued questions about paperwork showing Mr. Rich's ownership of the blue briefcase after the judge had sustained his objection had irretrievably prejudiced him in front of the jury; and 2) in pertinent part, he and his co-defendant had mutually exclusive defenses because of the difference in testimony as to when the third person who had the opportunity to plant the drugs had joined them on their trip. Mr. Rich's co-defendant declined to join in the motion for mistrial and to sever, reasoning that the core testimony of their defense was not antagonistic, but rather, "almost identical." The judge denied the motion to sever and motion for mistrial, reasoning in pertinent part the defenses were not mutually antagonistic, in that neither blamed the other for the

presence of the drugs, but “[b]oth defendants are claiming that he himself was not involved in placing drugs into the vehicle, did not know how they got there, and is saying that there was an opportunity for someone else to have put the drugs in the vehicle.”

¶23 Joint trials are favored in the interests of judicial economy. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). The trial court must sever the trial of co-defendants only when it "is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4(a). We review a trial court's decision not to sever for clear abuse of discretion. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558. “A clear abuse of discretion is established only when a defendant shows that, at the time he made his motion to sever, he had proved that his defense would be prejudiced absent severance.” *Id*. Defendant “must demonstrate compelling prejudice against which the trial court was unable to protect." *Id.* (quoting *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 472 (1983)). Prejudice occurs when, *inter alia*, co-defendants present antagonistic, mutually exclusive defenses. *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995).

¶24 A declaration of mistrial is “the most dramatic remedy for trial error and should be granted only when it appears that

justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann,* 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "The trial judge's discretion is broad, because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citations omitted).

¶25 To require severance on the basis of antagonistic defenses, the "defenses must be irreconcilable; they must be antagonistic to the point of being mutually exclusive," such that a jury could not find both defendants innocent based on their respective theories. *See Cruz,* 137 Ariz. at 544-45, 672 P.2d at 473-74. Appellant argues that the discrepancy in testimony between him and his co-defendant as to when the third person whom they blamed for the presence of the drugs in the vehicle joined them on their trip required severance. We are not persuaded. Under these circumstances, the defenses presented by appellant and his co-defendant were not "antagonistic," but complementary. *See Cruz,* 137 Ariz. at 544, 672 P.2d at 473. Both defendants shared a defense that they knew nothing about the drugs and the third person had had the opportunity to plant the drugs in their vehicle while they slept

in a motel in Phoenix. The difference in their testimony on when the third person joined the trip may have shed light on their credibility or their ability to remember, but it did not go to the heart of either's defense. In short, the jury "could have believed the core of the evidence offered by either defendant without disbelieving the core of the evidence offered by the other." *See id.* at 545, 672 P.2d at 474. Under these circumstances, we cannot say that the judge abused his discretion in finding that this difference in testimony did not create mutually antagonistic defenses requiring a mistrial and severance.

¶26 Nor do we find any merit in appellant's argument that a mistrial and severance was required because of the prosecutor's continued questioning regarding indicia of ownership of the blue briefcase after the court had sustained defense counsel's objection. As an initial matter, appellant has failed to make any argument or cite any authority that severance would be required because of the introduction of evidence that was not offered on behalf of or against his co-defendant, and we know of none. In any case, the continued questioning by the prosecutor was designed, on its face, simply to have the officer concede that he had been mistaken in believing that the paperwork ostensibly linking Mr. Rich to the briefcase containing drugs was contained in Exhibit 35. We find

no abuse of discretion in the judge's finding that the prosecutor's follow-up questions "ultimately cleared that up." Nor do we find any abuse of discretion in the judge's finding that because another officer had already testified that Mr. Rich had admitted the blue briefcase was his, Mr. Rich did not suffer any prejudice from the prosecutor's questions regarding the paperwork.

¶27 In sum, we find no abuse of discretion in the judge's denial of Mr. Rich's motion for mistrial and severance.

Conclusion

¶28 For the foregoing reasons, we affirm Mr. Rich's convictions and sentences.

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WEISBERG, Presiding Judge

____/s/_____
PHILIP HALL, Judge