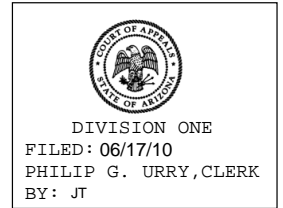


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0106  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
JESUS ALONZO AGUILAR-GONZALEZ, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-131643-001 DT

The Honorable F. Pendleton Gaines III, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Melissa M. Swearingen, Assistant Attorney General  
Attorneys for Appellee

Brian F. Russo Phoenix  
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**H A L L**, Judge

¶1 Jesus Alonzo Aguilar-Gonzalez (defendant) appeals from his convictions and sentences for one count of possession of dangerous drugs for sale, two counts of possession of narcotic

drugs for sale, and one count of misconduct involving weapons. He contends that the trial court improperly denied his motion to suppress evidence. For the reasons that follow, we reject this argument and therefore affirm.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶12 The evidence presented at the suppression hearing is as follows.<sup>1</sup> On the morning of May 21, 2008, Officer D.W. of the Phoenix Police Department was working undercover, targeting prostitution and drug-related offenses. He was parked in a grocery store parking lot that he regarded as a "high drug activity" area. At some point, the officer observed a white Buick driving around the parking lot and then eventually pulling up to a Chevy truck. The occupant of the Chevy truck exited his vehicle and reached through the passenger window of the white Buick. After momentarily reaching through the passenger window, the driver of the Chevy truck then returned to his vehicle and drove away.

¶13 Based on his experience, Officer D.W. believed that he had just observed a drug transaction and further believed that the driver of the Buick was the drug dealer because those

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<sup>1</sup> In reviewing a motion to suppress, we review only the facts presented to the superior court at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We view those facts "in the light most favorable to sustaining" the superior court's decision. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003).

"dealing drugs stay in their vehicles." The officer then decided to follow the Buick as it left the parking lot. Shortly after the Buick exited the parking lot, its driver failed to stop at a red light before making a right-hand turn. Because Officer D.W. was in plain clothes and an undercover vehicle, he contacted nearby patrol officers to make the traffic stop. Officer D.W. momentarily lost sight of the Buick, but quickly relocated it parked on the side of the road with the driver, alone, still seated in the vehicle. The officer drove around the corner and waited for the patrol officers to arrive.

¶14 When the patrol vehicle arrived shortly thereafter, Officer H. activated its overhead lights. The three officers then decided to approach the Buick, which, by that time, contained three occupants. As the officers approached the vehicle with their weapons drawn, Officer H. gave verbal commands ordering the occupants "to keep their hands up on the dash." Despite the commands, the front passenger, defendant, repeatedly leaned forward and "put his hands down, out of [] sight, and then put them up on the dash, and then back down, out of [] sight."

¶15 Because of defendant's movements, Officer D.W. removed him from the vehicle first, then the other two

occupants.<sup>2</sup> The officers asked the driver of the vehicle if there were any guns or drugs in the car, and he responded that there were not. After the occupants were removed, however, Officer J.Z. peered through the car window and observed a gun "sitting on the floorboard." At that point, Officer D.W. retrieved the loaded weapon and then "looked under the passenger seat where [he] saw [defendant] reaching down" to ensure "there wasn't any other weapons inside the vehicle." The officer saw a plastic baggie containing methamphetamine under the passenger seat and then continued to search the car and found powder cocaine in the glove box. Defendant and the other occupants were then placed under arrest.

¶16 On June 13, 2008, defendant was charged by indictment with one count of possession of dangerous drugs for sale, a class two felony, two counts of possession of narcotic drugs for sale, class two felonies, and one count of misconduct involving weapons, a class four felony. On October 1, 2008, defendant filed a motion to suppress all of the evidence seized from the vehicle. On October 17, 2008, the trial court held a hearing on the motion. At the hearing, the State presented the testimony of Officers D.W. and J.Z. Defendant did not testify on his own

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<sup>2</sup> During his cross-examination at the suppression hearing, Officer D.W. testified that, after the vehicle's occupants were removed, they were positioned about ten feet away from the vehicle and secured by armed officers such that there was no longer any threat that the occupants may retrieve something from the vehicle and compromise the officers' safety.

behalf or present any evidence. The trial court subsequently denied defendant's motion, finding "there was probable cause to make the stop and search Defendant."

¶17 The matter proceeded to trial and the jury found defendant guilty as charged. The trial court sentenced defendant to concurrent terms that effectively result in a seven-year sentence of imprisonment. Defendant timely appealed, and 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) (2003), 13-4031, and -4033(A)(1) (2010).

#### DISCUSSION

¶18 Defendant contends that the trial court erred by denying his motion to suppress evidence. Specifically, he argues that: (1) there was no reasonable basis to conduct a traffic stop of the vehicle he occupied; (2) he was unlawfully detained; and (3) the officers' search of the vehicle was unlawful.

¶19 In reviewing a motion to suppress, we defer to the superior court's determinations of the credibility of the officers and the reasonableness of the inferences they drew. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). We review, however, the superior court's legal decisions de novo. *Id.* We will not reverse a superior court's

decision on a motion to suppress absent clear and manifest error. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003) (internal quotation omitted).

¶10 The United States and Arizona Constitutions protect persons from unreasonable searches and seizures. See U.S. Const. amends. IV, XIV; Ariz. Const. art. II, § 8. “[I]ts 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). Pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968), a police officer may make a limited investigatory stop in the absence of probable cause if the officer has articulable, reasonable suspicion that the suspect is involved in criminal activity. We consider the “totality of the circumstances,” examining factors that might individually appear innocent, and consider them collectively. *State v. O’Meara*, 198 Ariz. 294, 296, ¶ 10, 9 P.3d 325, 327 (2000). We evaluate the totality of the circumstances from the standpoint of “an objectively reasonable police officer.” *Ornelas v. United States*, 517 U.S. 690, 696 (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 *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

## **I. Reasonable Basis for the Traffic Stop**

¶11 Defendant contends that Officer D.W. had no reasonable basis to initiate a traffic stop<sup>3</sup> of the Buick and claims that the officer's "only basis for the stop was to further his investigation and gain access to this vehicle based on his hunch." We disagree.

¶12 According to the applicable traffic statutes, "vehicular traffic facing a steady red signal alone shall stop before entering the intersection and shall remain standing until an indication to proceed is shown." A.R.S. § 28-645(A)(3)(a) (2004). "The driver of a vehicle that is stopped in obedience to a red signal," however, "may make a right turn" after yielding to "pedestrians and other traffic proceeding as directed by the signal." A.R.S. § 28-645(A)(3)(b).

¶13 At the suppression hearing, Officer D.W. testified, without equivocation, that the Buick he was following failed to stop at a red traffic light before making a right-hand turn. As the trial court noted, this testimony was not challenged by any other evidence presented at the suppression hearing. Thus, the record demonstrates that the police officer had an objective

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<sup>3</sup> Citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991), the State contends that the police did not initiate a "stop" of the vehicle because it was already stopped on the side of the road. The officers testified that Officer H. activated his patrol vehicle's overhead lights and that the three officers approached the vehicle with their weapons drawn, ordering commands. We therefore find no merit to the State's argument that the encounter did not constitute a "stop."

basis for reasonably suspecting that the driver of the vehicle had violated the traffic laws.<sup>4</sup>

## II. Lawful Basis to Detain Defendant

¶14 Defendant contends that the police officers unlawfully seized his person by removing him from the vehicle and ordering him to remain against a fence while "surrounded by armed law enforcement officials." We disagree.

¶15 "For the duration of a traffic stop, . . . a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers." *Arizona v. Johnson*, \_\_ U.S. \_\_, \_\_, 129 S.Ct. 781, 784 (2009) (quoting *Brendlin v. California*, 551 U.S. 249, 255 (2007)). When the police have a lawful reason to detain an automobile and its occupants "pending inquiry into a vehicular violation, . . . [they] need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." *Id.* Moreover, in such a situation, police officers may order the driver and passengers to exit the vehicle. *Id.* at 786 (explaining that the "additional intrusion of requiring a

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<sup>4</sup> Contrary to defendant's appellate argument, Officer D.W. did not "admit" that the only reason he stopped the vehicle was to follow-up on a "hunch." Rather, he unequivocally testified that he observed a traffic violation, but agreed with defense counsel's assessment that the driver's traffic violation provided a "convenient legal reason" to stop the car. See *State v. Livingston*, 206 Ariz. 145, 148, ¶ 13, 75 P.3d 1103, 1106 (App. 2003) ("[T]he subjective motives of an officer do not invalidate an otherwise lawful traffic stop.") (citing *Whren v. United States*, 517 U.S. 806, 813) (1996)).



driver, already lawfully stopped, to exit the vehicle" is de minimus) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977)); see also *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.").

¶16 At the suppression hearing, Officers D.W. and J.Z. testified that, after observing defendant repeatedly bend forward and reach toward the floor of the vehicle in contravention of the officers' orders, they removed all of the occupants from the vehicle and ordered them to stand away from the car. The occupants were not placed under arrest or handcuffed but, as Officer D.W. testified at the suppression hearing, they were not free to leave. Nonetheless, because there was a reasonable basis for the traffic stop, the officers' order that the occupants exit the vehicle was permissible under *Wilson* and its progeny. Moreover, defendant's refusal to follow the officers' commands to keep his hands visible created an officer safety issue that necessitated his removal from the vehicle.

### **III. Search of The Vehicle**

¶17 Defendant contends that the police officers lacked probable cause to search the vehicle and that the vehicle's occupants were secured such that a search of the vehicle incident to arrest was unlawful under *Arizona v. Gant*, \_\_ U.S. \_\_,

\_, 129 S.Ct. 1710, 1720 (2009). Because defendant made no showing that he had a legitimate expectation of privacy that was infringed by the search of the vehicle, he may not assert a Fourth Amendment violation. Therefore, we need not address the merits of his claim.<sup>5</sup>

¶18 A defendant contesting a search must establish that his own constitutional rights were violated by the challenged search. *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). To do so, the defendant must have "a legitimate expectation of privacy in the invaded place." *Id.* at 143. "To be considered legitimate, a person's subjective expectation of privacy must be 'one that society is prepared to recognize as reasonable.'" *State v. Juarez*, 203 Ariz. 441, 444, ¶ 12, 55 P.3d 784, 787 (App. 2002) (quoting *Rakas*, 439 U.S. at 143-44 n.12). "Mere possession or ownership of a seized item is insufficient to create a legitimate expectation of privacy in the area searched." *Id.* at 444, ¶ 12, 55 P.3d at 787.

¶19 At the suppression hearing, Officer D.W. testified that the driver was alone in the Buick when the officer relocated the car parked along the road. The officer then drove

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<sup>5</sup> The State claimed defendant failed to demonstrate a legitimate privacy interest in the vehicle in both the trial court and on appeal. Although the trial court did not deny defendant's motion to suppress on this basis, we may affirm the trial court if it is correct for another reason. See *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985).

