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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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RUTH A. WILLINGHAM,  
CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0622  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DAVID LEE LAMB, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-006230-001 DT

The Honorable Roland Steinle, Judge  
The Honorable Julie P. Newell, Judge *Pro Tempore*

**VACATED AND REMANDED**

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By Kent E. Cattani, Chief Counsel  
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And Suzanne M. Nicholl, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
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Attorneys for Appellant

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**B R O W N**, Judge

¶1 David Lee Lamb appeals from his convictions and sentences for one count of possession of marijuana and one count

of possession of a narcotic drug. Lamb argues that the trial court erred in denying his motion to suppress drug evidence seized by the police following his detention and arrest. Because the defendant requested a hearing and it was not granted, we vacate the convictions and sentences and remand for further proceedings.<sup>1</sup>

#### **BACKGROUND**

¶2 In April 2009, Lamb was indicted for possession of a narcotic drug, possession of marijuana, and threatening or intimidating another by a street gang member. Lamb filed a timely motion to suppress, asserting the police officers lacked reasonable suspicion to conduct an investigatory stop. The State filed a response to the motion, and shortly thereafter, both parties filed written "offers of proof." Attached to the State's "offer of proof" was a video recording of Lamb's arrest. The day before trial, the trial court denied the motion without an evidentiary hearing, finding that the police had probable cause to arrest the defendant because he failed to identify himself.<sup>2</sup>

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<sup>1</sup> Because we are vacating the convictions, we need not address Lamb's arguments that he was eligible for mandatory probation and entitled to additional presentence incarceration credit.

<sup>2</sup> The State has conceded on appeal that the duties of identification imposed by Arizona Revised Statutes section 13-2412 (2010) were not triggered under the facts of this case.

¶13 A jury found Lamb guilty on the two drug charges, but not guilty on the intimidation charge. Lamb timely appealed.

#### DISCUSSION

¶14 The Fourth Amendment prohibits unreasonable searches and seizures, but an investigatory stop is permissible when supported by an officer's reasonable suspicion of criminal activity. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996). Officers may conduct a weapons frisk if there is a reasonable fear for safety. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¶15 Reasonable suspicion is a mixed question of law and fact. *Rogers*, 186 Ariz. at 510, 924 P.2d at 1029. It is a lower standard than probable cause, and arises from "specific, articulable facts, along with rational inferences that arise from those facts." *State v. Ramsey*, 223 Ariz. 480, 484, ¶ 17, 224 P.3d 977, 981 (App. 2010). Evidence gained from an investigatory stop absent reasonable suspicion is "fruit of the poisonous tree" and must be suppressed. *State v. Richcreek*, 187 Ariz. 501, 506, 930 P.2d 1304, 1309 (1997). When considering the denial of a motion to suppress, we review only the "evidence submitted at the suppression hearing." *State v. Box*, 205 Ariz.

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The State contends that, though the trial court's rationale for denying the suppression motion was incorrect, we should nevertheless affirm because the court was correct on other grounds.

492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). The problem we face here, however, is that the trial court did not conduct a suppression hearing and thus we have no evidence to review.<sup>3</sup>

¶6 In his motion to suppress, Lamb specifically requested that the court conduct an evidentiary hearing. The record, however, is silent as to why there was no hearing conducted or why each party submitted an offer of proof. By minute entry, the court established its requirements for pretrial motions, stating that “[a]ll motions must comply with Rule 35.1 including setting forth a sufficient factual basis for the motion. Failure to file a sufficient motion may result in the motion being denied without evidentiary hearing[.]” But the court gave no indication that Lamb’s motion was deficient; instead, the court determined the outcome based on the merits.

¶7 In any event, to the extent the court may have relied on Rule 35.1 when it ruled on the motion without a hearing, an important distinction exists between the Rule 35.1(a)<sup>4</sup> requirements of *alleging* a prima facie case and the

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<sup>3</sup> Arguably the video recording could be considered evidence; however, the events depicted in the recording are irrelevant to the issue of reasonable suspicion to effectuate an investigative stop. See *infra* ¶ 10.

<sup>4</sup> Arizona Rule of Criminal Procedure 35.1(a) reads:

Unless otherwise specified in these rules, all motions shall be typewritten, double-spaced on 8.5 x 11 inch paper and shall

necessity to prove a prima facie case under Rule 16.2(b).<sup>5</sup> *Rodriguez v. Arellano*, 194 Ariz. 211, 213 n.1, ¶ 3, 979 P.2d 539, 541 n.1 (App. 1999) (accepting special action jurisdiction to correct a misinterpretation of Rule 16.2). As explained in *Rodriguez*, "It suffices under [Rule 35.1] for a defendant to make allegations of fact that, if proved, would entitle the defendant to suppression; the obligation to prove a prima facie

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contain a short, concise statement of the precise nature of the relief requested, shall be accompanied by a brief memorandum stating the specific factual grounds therefor and indicating the precise legal points, statutes, and authorities relied upon, and shall be served to all other parties.

<sup>5</sup> Arizona Rule of Criminal Procedure 16.2(b) provides as follows:

**Burden of Proof on Pretrial Motions to Suppress Evidence.** The prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial. However, whenever the defense is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence by confession, identification or search and seizure, or defense counsel was present at the taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's burden of proof shall arise only after the defendant has come forward with evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed.

case for suppression is imposed by Rule 16.2 and *attaches at the hearing, not the motion, stage.* *Id.* (emphasis added).

¶18 This distinction is particularly important where, as here, there is no evidence in the record that the investigatory stop or the subsequent arrest and seizure were based on a warrant, either for Lamb or for anyone else for whom he might have been mistaken. In *State v. Hyde*, 186 Ariz. 252, 270, 921 P.2d 655, 673 (1996), our supreme court explained the warrant/warrantless dichotomy:

[I]f the challenged evidence was obtained under authority of a warrant, defendant bears the burden of going forward with some evidence to show that the challenged evidence was illegally obtained. If the challenged evidence was obtained without a warrant, the state carries the entire evidentiary burden.

¶19 Applying the dichotomy to Rule 16.2, the *Rodriguez* court stated, "this means that a defendant who establishes that evidence was seized pursuant to a warrantless search has satisfied the burden of going forward under the rule and has triggered the State's burden of proving the lawfulness of the acquisition of the challenged evidence." *Rodriguez*, 194 Ariz. at 215, ¶ 12, 979 P.2d at 543. Stated differently, a search without a warrant is presumptively unreasonable and requires adequate justification by the State. *Id.* at 214, ¶ 10, 979 P.2d

at 542 (“[A]n unrebutted presumption [of unreasonableness] carries the day.”); Ariz. R. Crim. P. 16.2(b).

¶10 There were five items presented to the trial court: (1) the defense motion, which included booking photos of the defendant and another man whom the defendant alleged he was mistaken for; (2) the State’s response; (3) the defense “offer of proof”; (4) the State’s “offer of proof”; and (5) the video recording. The video is irrelevant to the issue of whether the original stop was valid because it begins too late, with Lamb prostrate on the ground, and the officers standing over him. See *Ramsey*, 223 Ariz. at 484, ¶ 16, 224 P.3d at 981 (reasoning that seizure begins when the defendant yields to police authority). None of the other items before the court constitute evidence.

¶11 Offers of proof are to be used in cases where evidence has been excluded, to show the character of the evidence and allow for reconsideration by the trial court and appellate review. *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996); *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985). Until offers of proof are substantiated by evidence, they are merely argument and should not be considered for substantive merit by a jury, for example. See Ariz. R. Evid. 103(c) (“[P]roceedings shall be conducted . . . to prevent inadmissible evidence from being suggested to the jury by any

means, such as making statements or offers of proof or asking questions in the hearing of the jury." ). In short, if it was the parties' intent to submit the suppression motion for resolution based on a stipulated record, it was incumbent on them (or the trial court) to make that clear. An offer of proof is not synonymous with submission on a stipulated record. Moreover, the offers of proof in this case are not entirely consistent factually as to the circumstances and reasons for the investigatory stop.

¶12 When we are presented with a sparse record such as this, we must vacate and remand because there was no evidentiary hearing and no evidence offered to provide a basis for the ruling. See *State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981) (vacating ruling and holding that argument of counsel is not evidence, but that sworn affidavits, stipulated facts, depositions, and oral testimony are proper evidence in support of a motion).

¶13 We therefore conclude that the trial court erred in denying the motion to suppress without holding an evidentiary hearing. See *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982) (noting that an abuse of discretion occurs when a discretionary conclusion is reached without consideration of the evidence). As the evidence seized by the police in this case constituted the key evidence



supporting the jury verdicts, Lamb's convictions must be vacated. See *State v. Blakely*, 226 Ariz. 25, \_\_\_, ¶ 26, 243 P.3d 628, 635 (App. 2010).

**CONCLUSION**

¶14 For the foregoing reasons, we vacate Lamb's convictions and sentences. We remand to the trial court with directions to conduct an evidentiary hearing on Lamb's motion to suppress, and to conduct such other proceedings as are necessary for the resolution of this case.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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DANIEL A. BARKER, Presiding Judge

/s/

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MARGARET H. DOWNIE, Judge