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

DIVISION ONE
FILED: 08/16/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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	)	(Not for Publication -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*

CONDITIONALLY AFFIRMED; SENTENCES MODIFIED; REMANDED

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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 the trial court erred in denying his motion to suppress drug evidence seized by the police following his detention and arrest. He also argues he was eligible for mandatory probation and he is due additional presentence incarceration credit. For the reasons set forth below, we conditionally affirm the convictions and sentences, as modified herein, subject to the court's ruling on Lamb's motion to suppress after an evidentiary hearing.

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.[1]

[1] The State has conceded on appeal that the duties of identification imposed by Arizona Revised Statutes ("A.R.S.") section 13-2412 (2010) were not triggered under the facts of this case. The State contends that, though the trial court's

¶3 A jury found Lamb guilty on the two drug charges, but not guilty on the intimidation charge. He was sentenced to concurrent terms of 12 years on the possession or use of narcotic drug charge and 2.25 years on the possession or use of marijuana charge. Lamb timely appealed.

DISCUSSION

A. Motion to Suppress

¶4 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).

¶5 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

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rationale for denying the suppression motion was incorrect, we should nevertheless affirm because the court was correct on other grounds.

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. 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.[2]

¶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

[2] 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.

35.1(a)[3] requirements of *alleging* a prima facie case and the necessity to *prove* a prima facie case under Rule 16.2(b).[4] *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

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[3] 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 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.

[4] Arizona Rule of Criminal Procedure 16.2(b) provides as follows:

> 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.

make allegations of fact that, if proved, would entitle the defendant to suppression; the obligation to prove a prima facie case for suppression is imposed by Rule 16.2 and *attaches at the hearing, not the motion, stage*. *Id.* (emphasis added).

¶8 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.

¶9 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 Because there was no evidentiary hearing conducted and no evidence offered to provide a basis for the trial court's ruling, the court abused its discretion. *See State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981) (explaining that counsel's argument is not evidence, but that sworn affidavits, stipulated facts, depositions, and oral testimony are proper evidence in support of a motion); *see also 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). Thus, we remand this matter for an evidentiary hearing to determine the merits of Lamb's motion to suppress. *See State v. Enriquez*, 106 Ariz. 304, 475 P.2d 486 (1970) (declining to reverse conviction, but remanding, based on trial court's

failure to hold evidentiary hearing on question of probable cause); *State v. Tillmon*, 222 Ariz. 452, 456-57, ¶¶ 16, 20, 216 P.3d 1198, 1202-03 (App. 2009) (conditionally affirming defendant's convictions and sentences subject to the court's ruling on remand); *State v. Zamora*, 220 Ariz. 63, 71, ¶ 21, 202 P.3d 528, 536 (App. 2009) (remanding to determine whether defendant's statements should have been suppressed).

B. Mandatory Probation

¶13 Lamb argues he was eligible for mandatory probation under Arizona Revised Statutes section 13-901.01 (2010).[5] At a hearing on prior convictions, the court found that the State had proven the following convictions under state law: (1) attempt to commit possession of narcotic drugs for sale; (2) resisting arrest; and (3) possession of marijuana. Additionally, the court found that the State had proven a federal conviction for felon in possession of a firearm.

¶14 Because Lamb did not object at sentencing, we review for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). It is Lamb's burden to establish first that a fundamental error exists, and also that the error caused him prejudice. *Id.* at ¶ 20.

[5] Absent material revisions, we cite to the current version of the statute.

¶15 Proposition 200, codified as A.R.S. § 13-901.01, requires a sentence of probation for the first and second convictions of possession of a controlled substance. Relying on *State v. Ossana*, Lamb argues that attempted possession does not count as a strike for purposes of Proposition 200. 199 Ariz. 459, 461-62, ¶ 11, 18 P.3d 1258, 1260-61 (App. 2001). We disagree.

¶16 In *Ossana*, the defendant had two prior convictions for attempted possession of narcotic drugs. *Id.* at 461, ¶ 9, 18 P.3d at 1260. The court held that the purpose of Proposition 200 would not be served by including prepatory offenses in the amount of strikes to impose incarceration. *Id.* at 462, ¶ 11, 18 P.3d at 1261. The court stated, "We agree with appellant that, for a defendant to be excluded from the mandatory probation of [§] 13-901.01[], the prior convictions must be for possession or use, not merely for attempted possession or use." *Id.* However, in *Raney v. Lindberg*, 206 Ariz. 193, 76 P.3d 867 (App. 2003), a different panel of this court disagreed with the *Ossana* court, holding that a preparatory drug offense qualifies as a prior conviction under § 13-901.01 and to construe it otherwise would create absurd results. *Id.* at 199, ¶ 20, 76 P.3d at 873.

¶17 We agree with the *Raney* court that preparatory offenses are both encompassed within the guarantee of probation-eligible offenses, and are also within the later statutory

language removing third-time offenders from probation eligibility. *Compare* A.R.S. § 13-901.01(A) *with* § 13-901.01(H)(1). In the context of § 13-901.01(A), we have consistently included offenses not explicitly covered by the statutory language to avoid the absurdity of incarceration for less serious offenses than possession or use. *See, e.g.*, *State v. Estrada*, 201 Ariz. 247, 252, ¶ 24, 34 P.3d 356, 361 (2001) (mandating probation for possession of drug paraphernalia); *Stubblefield v. Trombino ex rel. Cnty. of Maricopa*, 197 Ariz. 382, 383, ¶ 2, 4 P.3d 437, 438 (App. 2000) (holding that Proposition 200 applies to attempted personal possession of a controlled substance). Therefore, Lamb was not eligible for probation, and we find no error.

C. Presentence Incarceration Credit

¶18 Lamb also argues he is entitled to thirteen additional days of presentence incarceration credit. The State concedes that the court erred, but contends that Lamb is only entitled to an additional four days. We agree with the State.

¶19 By statute, defendants receive credit for time actually spent in custody. A.R.S. § 13-712(B) (2010) ("All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment[.]").

¶20 Lamb was charged for the instant offenses three times, resulting in the following periods of detention: CR 2008–117665: March 19, 2008 to March 31, 2008, for 13 days; CR 2008–006381: November 17, 2008 to December 1, 2008, for 14 days; and CR 2009–006230: April 3, 2009 to sentencing on July 24, 2009, for 113 days, for a total of 140 days.

¶21 At sentencing, the court only calculated 113 days of presentence incarceration credit. Lamb argued that he should receive an additional twenty-three days of credit for time spent in custody in CR2008-006381, one of the cause numbers previously filed and dismissed. Lamb contended that in that cause number, he was taken into custody on November 17, 2008, and "remained in custody for 23 days," before being released.[6] However, it appears that Lamb miscalculated the time spent in custody in CR2008-006381, and was granted additional "credit." *See infra* ¶ 22. With no objection from the State, the court granted Lamb the additional 23 days, for a total of 136 days of presentence incarceration credit.

¶22 Though Lamb argues that he should receive the benefit of the court's miscalculation in addition to full credit for the other dismissed action, we disagree. Lamb is only entitled to credit for time actually served under the statute. He was

[6] The superior court released Lamb on December 1, 2008 and dismissed the case on December 8, 2008.

granted an "extra" ten days presentence incarceration credit on the CR2008-006381 case due to a miscalculation, which in essence gives him ten days credit towards the CR2008-117665 matter. Thus, we modify the presentence incarceration credit to reflect an additional four days. *See* Ariz. R. Crim. P. 31.17(b); *State v. Stevens*, 173 Ariz. 494, 495-96, 844 P.2d 661, 662-63 (App. 1992) (correcting a miscalculation in credit by modifying the sentence without remanding to the trial court).

CONCLUSION

¶23 For the foregoing reasons, we conditionally affirm Lamb's convictions and sentences, as modified herein. On remand, the trial court shall conduct an evidentiary hearing on Lamb's motion to suppress. If the motion is granted, the court is directed to set aside Lamb's convictions and sentences.

/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