DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. VERNON TILLMON, Appellant.	)	1 CA-CR 10-0265 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. CR 130020070366

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel, Criminal Appeals Section
and Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

The Law Office of Emily Danies — Tucson
by Emily Danies
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Vernon Tillmon ("Defendant") appeals from an order denying his motion to dismiss or alternatively, motion to suppress, following an evidentiary hearing after a remand from this court. For reasons that follow, we affirm.

PROCEDURAL HISTORY

¶2 On March 1, 2007, Officer Soto of the Department of Safety ("DPS") initiated a traffic stop of a commercial truck driven by Defendant. A DPS chaplain accompanied him for a ride-along. The officer smelled marijuana while inspecting Defendant's truck. After Defendant consented to a full search of the truck, the officer found 1,569 pounds of marijuana wrapped in plastic, along with incriminating financial documents. Defendant was convicted of transportation of marijuana for sale, in an amount greater than two pounds, and possession of drug paraphernalia. The court sentenced him to mitigated prison terms of four years and nine-months respectively.

¶3 On appeal, Defendant, who is African-American, argued, among other things, that the trial court had erred by denying as untimely his motion to dismiss the charges or, alternatively, motion to suppress, based on a claim of racial profiling and selective enforcement. *State v. Tillmon,* 222 Ariz. 452, 456, ¶ 16, 216 P.3d 1198, 1202 (App. 2009). This court agreed. Finding no other reversible error, we

conditionally affirmed Defendant's convictions and sentences "subject to the court's ruling on remand on defendant's motion." *Id. at* 457, ¶ 20, 216 P.3d at 1203.

¶4 On remand, the trial court held an evidentiary hearing at which Dr. Frederick Solop, an expert on racial profiling, and Defendant testified. Following the hearing, the court denied Defendant's motion. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 120.21(A)(1)(2003), 13-4031, -4033(A)(3)(2010).

DISCUSSION

¶5 Defendant contends that the trial court violated his due process rights to a fair hearing by taking judicial notice of trial testimony in denying his motion. We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion. *State v. Guillory,* 199 Ariz. 462, 465, ¶ 9, 18 P.3d 1261, 1264 (App. 2001). In considering the evidence presented at the suppression hearing, we "draw all reasonable inferences in favor of upholding the court's factual determinations." *Id.*

¶6 The Equal Protection Clause of the Fourteenth Amendment forbids race-based selective enforcement of the law. *Jones v. Sterling,* 210 Ariz. 308, 311, ¶ 13, 110 P.3d 1271, 1274 (2005). Even when a stop, search or seizure are otherwise lawful under the Fourth Amendment, a defendant may still have an independent defense to criminal charges based on selective

enforcement. *Id.* at 311-13, ¶ 15, 110 P.3d at 1274-75. *See also Whren v. United States,* 517 U.S. 806, 813 (1996) (Although the subjective motivations of police officers are not relevant to whether a stop is reasonable under the Fourth Amendment, Equal Protection Clause forbids selective enforcement based on race.).

¶7 Like other equal protection challenges, to establish selective enforcement, the claimant must demonstrate that state action "had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Armstrong,* 517 U.S. 456, 465 (1996)(citation omitted). "Both prongs must be demonstrated for the defense to succeed." *United States v. Turner,* 104 F.3d 1180, 1184 (9th Cir. 1997). *See also State v. Munoz,* 182 Ariz. 528, 529, 898 P.2d 477, 478 (App. 1994) (to succeed on claim of discriminatory law enforcement, it is necessary to prove disparate treatment of those who are similarly situated and impermissible motive).

¶8 To show discriminatory effect, "there must be some evidence that similarly situated defendants of other races could have been [stopped], but were not." *Armstrong,* 517 U.S. at 469. Thus, statistical evidence must reveal, not that there is a disparity in the number of drivers of each race who are stopped by police, but 'that police treated those drivers differently than other similarly situated drivers of another race;"

statistics alone will rarely support a selective enforcement claim. *Jones,* 210 Ariz. at 316, ¶¶ 33-34, 110 P.3d at 1279 (citations omitted). The standard required to prove selective enforcement claim is "a demanding one." *Armstrong,* 517 U.S. at 463. And as in other equal protection challenges, the claimant must first make a prima facie showing of discriminatory purpose; then the burden shifts to the State to rebut the presumption by showing that state action was based on race-neutral criteria. *Washington v. Davis,* 426 U.S. 229, 241 (1976).

¶9 As background, Dr. Solop testified that he had reviewed DPS data for several years in connection with its participation in Operation Pipeline, a federal program for interdicting drugs on the nation's highways. Operation Pipeline had been linked to racial profiling. Multiple studies showed that at the relevant time, there was disparate treatment based on race as to "who is being stopped on the highway, who is being searched, and the length of time that people are being detained." He testified that Hispanic, Black and Native American drivers are more than two times more likely to be searched, "given similar vehicle characteristics, stop characteristics, and reasons for stops."

¶10 Dr. Solop testified that he had reviewed the original police report of Officer Soto's stop as well as an interview of Officer Soto conducted by defense counsel prior to the

evidentiary hearing. He stated that he could not give "an opinion with scientific certainty of whether racial profiling [was] a factor in this case." He concluded, however, that at the time Officer Soto stopped Defendant's truck "there [was] the presumption of racial profiling" by DPS officers on Arizona highways.

¶11 On cross-examination, Dr. Solop agreed that to substantiate a racial profiling claim, the defendant must show "that similarly situated people were treated differently" and "racial intent by the individual officer." When the prosecutor asked whether Dr. Solop would agree "that that there is no evidence in this case that Officer Soto had any discriminatory intent," the doctor responded, "I would agree at this time that evidence isn't available." Dr. Solop explained that racial profiling can occur after a stop but agreed that racial profiling would not be a factor in the stop if the officer did not know the driver's race before initiating it. When later asked, "Would you agree that you have provided no data and no information that on March 1st, 2007, Officer Soto engaged in racial profiling?," he replied, "Yes, I have not testified to that."

¶12 Defendant testified that after the stop, DPS officers did not treat him unprofessionally; did not use racial slurs; requested standard information, such as his driver's license,

proof of insurance and log book; and conducted the search in the same manner as had occurred when his truck had been inspected on prior occasions.

¶13 The prosecutor informed the court that Officer Soto and the DPS chaplain were available to testify. He stated, however, "I think at this point the State doesn't even need to put them on" because "the defense hasn't even met their burden for the State going forward. They have shown no discriminatory intent . . . no discriminatory effect based on their conduct."

¶14 The court asked counsel whether he should consider the trial testimony in making his ruling. Defense counsel objected because the court "would not have heard that testimony" had the motion to dismiss/suppress "progressed in a normal fashion." Remarking that nothing in this court's mandate suggested that the court should "disregard proper valid testimony," the court took judicial notice of the testimony presented at trial. The prosecutor again offered to put on his witnesses but told the court that he was willing to submit the matter on the basis of testimony presented at trial and at the evidentiary hearing.

¶15 The court ruled that Defendant had not met his burden of making a prima facie case for racial profiling and selective enforcement. The court found that based on his trial testimony, Officer Soto did not know the Defendant's race when he stopped his truck. The court acknowledged that racial profiling can

"take place at various stages" of the process and that "there is some evidence of racial profiling in general" but found, however, that "there has been no showing at all, nor do I think the defense can make a showing" that Officer Soto or anyone else involved was "motivated by racial profiling considerations in either the inspection, inclusive of viewing the load or in the stop itself."

¶16 We agree with the trial court that Defendant did not make a prima facie case for selective enforcement based on Defendant's race. Even assuming that the statistical evidence Defendant offered was sufficient to show discriminatory effect, Defendant presented no evidence whatsoever of discriminatory intent by Officer Soto or others. Dr. Solop testified that he had reviewed Officer Soto's interview in which the officer gave details about the basis for the stop and search of Defendant's truck. In the interview, Officer Soto also provided information about DPS policy that prohibited racial profiling, and his training in that area. Dr. Solop could not find any evidence that Officer Soto's conduct was based on impermissible racial motives. Also, Defendant's testimony at the evidentiary hearing did not support a finding of discriminatory purpose or intent.

¶17 Further, the trial testimony of Officer Soto and the DPS chaplain, upon which the court relied, and statements Officer Soto made in his interview, show that the officer

initiated the stop and made the decision to conduct an administrative inspection of inspect Defendant's truck before he knew that Defendant was African-American. And nothing in them reveals that the officer had a discriminatory intent or purpose at any stage of the process.

¶18 Defendant contends, however, that the trial court erred by taking judicial notice of the trial testimony of Officer Soto and the DPS chaplain because this evidence would not have been presented at a pretrial suppression hearing. He cites no authority for this argument and we have found none.[1] Because Officer Soto conducted the stop, search and seizure, he would have testified at a pretrial suppression hearing; there is nothing to suggest that such testimony would have been materially different from his trial testimony.

¶19 Defendant argues that had the witnesses testified at the evidentiary hearing, "the defense would have questioned [them] in a completely different fashion at trial asking

[1]The State cites a number of federal cases holding that in reviewing a district court's ruling on a motion to suppress evidence, the appellate court can consider not only evidence presented at the suppression hearing, but also evidence presented at trial. This, however, is not the law in Arizona. *State v. Spears,* 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996); *State v. Schinzel,* 202 Ariz. 375, 378, ¶ 12, 45 P.3d 1224, 1227 (App. 2002). In any event, the issue here is not whether we can review the trial testimony in deciding whether the court erred in denying the motion to suppress but whether on remand the trial court could retrospectively consider the trial testimony at the suppression hearing.

specific questions about the racial profiling in the case." However, defense counsel conducted a lengthy, in-depth interview of Officer Soto in which she essentially cross-examined him about racial profiling. Defendant does not claim that Officer Soto's trial testimony conflicted with statements he made in his interview. And Defendant has not produced anything to suggest that the DPS chaplain would have testified at the evidentiary hearing in a manner inconsistent with his trial testimony if counsel had cross-examined him differently. Finally, nothing precluded defense counsel from calling these available witnesses and questioning them specifically about racial profiling in this case. There was no abuse of discretion by the trial court.

CONCLUSION

¶20 For the foregoing reasons, we affirm the trial court's order denying Defendant's Motion to Dismiss or alternatively, Motion to Suppress Evidence.

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SHELDON H. WEISBERG, Judge

CONCURRING:

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DONN KESSLER, Presiding Judge

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DIANE M. JOHNSEN, Judge