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: 12/01/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	No. 1 CA-CR 10-0432
Appellee,	DEPARTMENT A
v.	**MEMORANDUM DECISION**
THOMAS EDWARD INGRAHM,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2009-129678-001-DT

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

AFFIRMED

Thomas Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Presiding Judge

¶1 Thomas Edward Ingrahm appeals his convictions and sentences imposed for possession of methamphetamine, a dangerous

drug, a class four felony, and possession of drug paraphernalia, a pipe, a class six felony. He argues the trial court committed reversible error by (1) denying his motion to suppress evidence obtained by police officers as the result of a pre-arrest pat-down search because they did not have reasonable suspicion to either initially detain him or believe he may be a threat to officer safety, and (2) amending the information over his objection. For the following reasons, we affirm.

DISCUSSION

1. Motion to suppress

¶2 When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2008), and view the facts in the light most favorable to sustaining the trial court's ruling. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (1996). We will not disturb the ruling absent clear and manifest error. *Id.* We review de novo whether the police had reasonable suspicion to justify an investigatory stop, but we defer to the trial court's findings of fact. *State v. Fornof*, 218 Ariz. 74, 76, ¶ 5, 179 P.3d 954, 956 (App. 2008) (citations omitted).

¶3 The Fourth Amendment guarantees the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV. [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 (1968), a police officer may make a limited investigatory stop in the absence of probable cause if the officer has articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity. *See id.* at 30. If the officer reasonably concludes the person is armed or a threat to officer safety, the officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.*

¶4 Ingrahm contends the stop in this case was not justified at its inception, and, additionally, the officer had no basis for conducting a pat-down search. We commence our consideration of these arguments with a review of the pertinent evidence.

¶5 At the suppression hearing, Phoenix Police Officer Kristopher Bertz testified that Officer Christopher Villa and he responded to an anonymous call mid-morning about a "suspicious person" riding his bicycle up and down a dead-end section of 13th Place near Indian School Road multiple times as though he was casing the area for a future burglary. Officer Bertz had received training in drug recognition and was at the time involved in "dealing with neighborhood drug complaints,"

including investigation and surveillance of "suspected drug locations." He was very familiar with the area and had "spent quite a bit of time patrolling and trying to do observation" there because a house on that stretch of 13th Place was under investigation for possible involvement in the sale of illegal drugs.

¶6 When Officers Bertz and Villa arrived at the location, Ingrahm, who matched the description given by the caller of the "suspicious person," was standing next to a bicycle and leaning against the wall of a closed business. The officers activated the overhead lights on their patrol car and stopped in front of Ingrahm in the oncoming traffic lane of 13th Place. They exited the car and approached Ingrahm, identified themselves as police officers, and told him why they were there. Officer Bertz then began asking Ingrahm "generic questions as to what he was doing in the area." Ingrahm responded he was "hanging out listening to music."

¶7 Officer Bertz asked Ingrahm for identification and Ingrahm provided out-of-state identification. As Ingrahm retrieved the identification card from his wallet, he peered over the top of his sunglasses at Officer Bertz, who observed that Ingrahm's pupils were "pinpoint pupils." Based on his training and experience both as a police officer and a former emergency medical technician "trained to handle people who are

under the influence of drugs," Officer Bertz concluded Ingrahm was possibly under the influence of a controlled substance, such as methamphetamine, which the officer knew "cause[d] constricted pupils." When Officer Bertz asked Ingrahm where he lived, Ingrahm "was somewhat elusive" and could not give him a street address but only a "general intersection." Officer Bertz recalled that the intersection was "a couple [of] miles" away from their present location.

¶8 After concluding Ingrahm may be under the influence of methamphetamine, Officer Bertz decided to conduct a *Terry* frisk for officer safety reasons. The officer testified he based this decision on the fact that Ingrahm was wearing an "untucked shirt" that concealed his waistband and on the fact he was aware through his training that methamphetamine users also use hypodermic needles to inject the drug, which could pose a threat to officer safety. After checking Ingrahm's waistband for weapons, Officer Bertz executed a "pat and crunch" of Ingrahm's pants pockets. In a back pocket, Officer Bertz felt a "bulb shaped object with a stem attached to it," which the officer immediately recognized as a pipe for smoking illegal drugs. Officer Bertz then arrested Ingrahm.

¶9 Ingrahm argues the trial court erred by denying the motion to suppress because Officer Bertz never articulated specific facts to support a finding that he had "reasonable

suspicion" that Ingrahm was engaged in any criminal activity at the time the officers initially approached him. The State counters that the officers' initial contact with Ingrahm did not constitute a "stop" for Fourth Amendment purposes, and therefore the officers could contact and question Ingrahm without reasonable suspicion of criminal activity.[1] Although the State fails to identify the point at which the contact became a "stop," it argued to the trial court that the stop occurred after the officers contacted Ingrahm and interacted with him. The trial court found that the stop was valid, but it did not identify when the stop occurred. Before we address whether the officers possessed reasonable suspicion to stop Ingrahm, we must decide when the stop occurred for purposes of the Fourth Amendment.[2]

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[1] The State also argues that the encounter with Ingrahm was justified under the "community caretaker" doctrine, which permits police officers to engage in community caretaking functions intended to promote public safety. *See State v. Mendoza-Ruiz*, 225 Ariz. 473, 475, ¶ 8, 240 P.3d 1235, 1237 (App. 2010) (holding warrantless intrusion into vehicle permitted under doctrine if intrusion was "suitably circumscribed to serve the exigency which prompted it") (citations omitted). The State did not raise this argument to the trial court and has therefore waived it on appeal. *See State v. Montano*, 204 Ariz. 413, 426, ¶ 62, 65 P.3d 61, 74 (2003).

[2] Whether the "stop" found to be valid by the trial court occurred at the inception of contact between the officers and Ingrahm or during the conversation is pertinent to our decision in this appeal. If the officers seized Ingrahm at the time of initial conduct, the seizure violated the Fourth Amendment as reasonable suspicion could not have been validly based solely on

¶10 The Fourth Amendment is not intended to eliminate contact between the police and citizens; a contrary conclusion would unduly restrain police officers' ability to effectively investigate criminal activity. *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). A "seizure" triggering Fourth Amendment protections happens when police physically restrain a defendant's movements or the defendant yields to "a show of authority." *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991). A "show of authority" underlying a seizure occurs when surrounding circumstances would entitle a reasonable person to believe he or she is not free to disregard an officer's questions and leave. *Mendenhall*, 446 U.S. at 554. Assuming such circumstances, a court is justified in finding a seizure in the absence of physical force only when the defendant actually

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the anonymous call. *See State v. Altieri*, 191 Ariz. 1, 3, 951 P.2d 866, 869 (1997) (holding that anonymous tip consisting of "neutral, non-predictive information about the defendant and his activities" insufficient to constitute reasonable suspicion); *State v. Canales*, 222 Ariz. 493, 497, ¶ 16, 217 P.3d 836, 840 (App. 2009) (deciding tip that suspicious activity in parking lot of apartment complex along with description of suspicious vehicle and expressed concern that person "possibly preparing" to burglarize vehicles insufficient to constitute reasonable suspicion). Because the trial court found the stop valid but did not specify when the stop occurred, we assume the court found a valid stop occurred during the contact between the officers and Ingrahm. *See State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) (noting that appellate court presumes trial court knew and followed the law).

submits to the show of authority. *Brendlin v. California*, 551 U.S. 249, 254 (2007).

¶11 Ingrahm argues the officers seized him by a show of authority, thereby causing him to believe he could not freely walk away from the officers at the time of initial contact. Specifically, he points to the officers' acts in (1) pulling in front of him and stopping in the wrong lane with lights flashing, (2) surrounding him on two sides against a wall, and (3) leaving as his only exit a path towards the dead-end of the street as a show of authority that constitutes a seizure under the Fourth Amendment.

¶12 The evidence adduced at the suppression hearing does not support Ingrahm's contention that the officers seized him at the time of initial contact. Even though the officers activated their lights as they stopped in front of Ingrahm, it is reasonable to conclude they did so to warn oncoming traffic rather than as a means to exert authority over Ingrahm. *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993) ("A reasonable person would know that while flashing lights may be used as a show of authority, they also serve other purposes, including warning oncoming motorists . . . to be careful."). The evidence does not show that the officers raised their voices, brandished weapons, or made demands of Ingrahm. *See Mendenhall*, 446 U.S. at 554 ("Examples of circumstances that might indicate a

seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."); *see also State v. Rogers*, 186 Ariz. 508, 510-11, 924 P.2d 1027, 1029-30 (1996) (concluding officers' statement, "we need to talk to you" constituted seizure). The officers approached Ingrahm in the open where he stood by a wall and did not follow or chase him. Even though Ingrahm was surrounded on two sides by the officers, nothing prevented him from walking around them and leaving; asking questions in a confined space does not necessarily constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (expressing doubt that a seizure occurred when two officers boarded a bus, asked the defendant a few questions, and asked to search his bags); *cf. Canales*, 222 Ariz. at 495, ¶ 8, 217 P.3d at 838 (concluding defendant seized when officer's act in blocking defendant's car made it impossible to terminate the encounter). Indeed, Officer Bertz testified Ingrahm was free to walk away at the point of initial contact. Although Officer Bertz asked to see Ingrahm's identification, Ingrahm was free to say, "no." Such a request does not establish a seizure. *Bostick*, 501 U.S. at 437 (explaining "no seizure occurs when police ask questions of an

individual, ask to examine the individual's identification, and request consent to search his or her luggage – so long as the officers do not convey a message that compliance with their requests is required.").

¶13 In sum, the evidence introduced at the suppression hearing showed that the officers' initial contact with Ingrahm did not constitute a seizure. Accordingly, the officers were not required to have a reasonable suspicion that Ingrahm was engaging in criminal activity at the time of initial contact in order to question him. The officers unquestionably "stopped" Ingrahm when Officer Bertz physically restrained him by conducting the pat-down search. *Hodari D.*, 499 U.S. at 626. Until that point, the officers merely asked Ingrahm for information, and a reasonable person would have felt free to terminate the encounter. *Mendenhall*, 446 U.S. at 554. Having identified the point when officers "stopped" Ingrahm, we next consider whether reasonable suspicion supported the stop.

¶14 Ingrahm argues that nothing about his circumstances, demeanor, or statements gave rise to reasonable suspicion he was involved in criminal activity. We disagree, as the totality of the circumstances supports a finding of reasonable suspicion. Officer Bertz responded to a tip that someone was repeatedly bicycling up and down a dead-end street for no apparent reason. The officers were aware that a house at the end of the street

was a site for possible drug trafficking activity. Ingrahm was likely the person described by the tipster as he matched the physical description given and was standing beside a bicycle in the area. Ingrahm was "elusive" about his reason for being in the neighborhood. His only expressed reason for being there was "hanging out listening to music," and he could not identify precisely where he resided, although he said he resided near an intersection located a few miles west of that location. Ingrahm's pupils were constricted consistent with a person who has been using narcotic drugs – most likely methamphetamine, in Officer Bertz's experience. Under these circumstances, the officers were justified in being reasonably suspicious that Ingrahm might be involved in illegal drug activity, thereby warranting a *Terry* stop.

¶15 The validity of the stop and the validity of the frisk are two separate questions. *In re Steven O.*, 188 Ariz. 28, 30, 932 P.2d 293, 295 (App. 1997). An officer need not be "absolutely certain that the individual is armed; the issue instead is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry,* 392 U.S. at 27. Here, given Officer Bertz's knowledge of suspected drug activity in the area, his concern that he could not see Ingrahm's waistband because of the untucked shirt, and the officer's belief that

Ingrahm might be a methamphetamine user with a syringe secreted on his person, it was reasonable for him to conclude that the officers' safety was at risk during the encounter. Although Ingrahm did not act in a threatening manner, Officer Bertz testified that he had seen a seemingly calm person under the influence of drugs suddenly become violent. In light of the totality of the circumstances, and giving due weight to the trial court's finding that the officers had legitimate safety concerns, the court did not err in finding that the frisk was warranted.

¶16 Based on the totality of the evidence before us, the trial court did not err by denying Ingrahm's motion to suppress.

2. Amendment of information

¶17 In count one of its complaint and information, the State charged that Ingrahm "knowingly possessed or used Methamphetamine, a dangerous drug," in violation of Arizona Revised Statutes ("A.R.S.") section 13-3407 (2010). Prior to trial, in the context of an evidentiary dispute, the prosecutor informed Ingrahm and the court that the State would not proceed under the theory that Ingrahm had "used" the methamphetamine, only that he had "knowingly possessed methamphetamine." At a hearing to resolve the evidentiary dispute, the prosecutor confirmed she only intended to proceed under the theory that Ingrahm "possessed" the drug. She clarified she only planned to

use Ingrahm's admission to using drugs to establish he knowingly possessed the methamphetamine. Because the State elected to pursue the "possession" charge, the court precluded the State from eliciting Officer Bertz's views that Ingrahm's constricted pupils indicated methamphetamine use.

¶18 At the commencement of trial, the court read the charges, including the allegation that Ingrahm had "possessed or used" methamphetamine. After the State rested its case, the trial court sua sponte amended the information to conform to the evidence by striking the reference to "use." Thereafter, no mention of "use" was made to the jury in arguments, instructions, or verdict forms.

¶19 Ingrahm argues the trial court committed reversible error by amending count one because the amendment deprived him of (1) adequate notice of the charge against him with ample opportunity to defend against it, and (2) double jeopardy protection against a subsequent prosecution on the original charge. We review a trial court's amendment of a charging document for an abuse of discretion. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶20 Rule 13.5(b), Ariz. R. Crim. P., which governs the process of amending a charge, provides as follows:

> The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's

> order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

A "formal or technical defect" exists when the amendment neither alters the nature of the charged offense nor prejudices the defendant. *State v. Freeney*, 223 Ariz. 110, 112, ¶ 11, 219 P.3d 1039, 1041 (2009).

¶21 Ingrahm asserts the trial court violated Rule 13.5(b) by amending the information without his consent because the amendment "did not correct any mistake or remedy a formal or technical defect" but instead "removed an element of the charge of possession or use." According to Ingrahm, the amendment prejudiced him because it (1) potentially confused the jury about the evidence presented at trial, and (2) eliminated Ingrahm's only theory of defense, which was to undermine Bertz's credibility by showing he was incorrect in concluding that Ingrahm was "under the influence of drugs" at the time of their encounter.

¶22 Although the trial court amended the information to conform to the evidence, we agree with the State that the amendment was justified as a formal or technical one. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300, ¶ 12, 247 P.3d 180, 183 (App. 2011) (noting appellate court may affirm trial

court on any basis supported by record). We are guided by this court's decision in *State v. Olea*, 182 Ariz. 485, 897 P.2d 1371 (App. 1995). The grand jury in that case indicted the defendant on one count of "knowingly possess[ing] or us[ing] a narcotic drug, to wit; .45 grams of cocaine" in violation of A.R.S. § 13-3408(A)(1). *Id.* at 488, 897 P.2d at 1374. The trial court ruled the indictment duplicitous and ordered the prosecutor to elect to pursue a charge of either "possession" or "use," and the prosecutor chose "use." *Id.* On the first day of trial, the court amended the indictment to allege the defendant "knowingly use[d] a narcotic drug, to wit: cocaine." *Id.* On appeal, the defendant argued the court improperly altered the nature of the charge by removing the listed weight of the cocaine from the indictment, thereby prejudicing him. *Id.* at 490, 897 P.2d at 1376. This court disagreed, holding the amendment was technical. *Id.* The court reasoned that the listed weight of the cocaine was superfluous in the original indictment because § 13-3408(A)(1) does not require proof of use of a particular quantity of narcotic drug. *Id.* Therefore, deleting that reference did not change the nature of the charge. *Id.* Additionally, the court decided the defendant could not have been misled to think the State had alleged he used .45 grams of cocaine because that was the amount of cocaine found in the defendant's car. *Id.* The court concluded "[t]he defendant is

not entitled to take advantage of the technical oversight of failing to immediately delete the quantity allegation after the State elected to pursue the use charge rather than the possession charge." *Id.* at 491, 897 P.2d at 1377.

¶23 Like the indictment in *Olea*, count one of the information in this case was duplicitous because it alleged separate crimes – possession and use – in a single count. *Spencer v. Superior Court,* 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983). The prosecutor was required to elect which offense to pursue before the jury. *See State v. Davis*, 206 Ariz. 377, 390, ¶ 61, 79 P.3d 64, 77 (2003). Once the prosecutor elected to pursue "possession," the "use" language became superfluous, and the trial court could delete the reference without changing the nature of the charge. *Olea*, 182 Ariz. at 490, 897 P.2d at 1376. Because the amendment was a technical one, the court was not required to secure Ingrahm's permission to amend the information. Ariz. R. Crim. P. 13.5(b).

¶24 Ingrahm was not prejudiced by the amended charge. As the State points out, Ingrahm signed a waiver of preliminary hearing form stating his understanding he was "charged with the crime of Possession of Drug Paraphernalia, Possession of Dangerous Drugs." No mention is made of a charge of "use." Our review of the record does not reveal any likelihood of confusion by the jury by considering evidence of Ingrahm's drug use.

Ingrahm's admissions were relevant to whether his possession was "knowing." Also, the jury instructions and forms of verdict did not refer to "use," and the State argued for a conviction of "possession." We also disagree with Ingrahm that the amended charge deprived him of a chance to impeach Officer Bertz's credibility. The court did not amend the count until after the State had rested and Ingrahm had cross-examined Officer Bertz. Finally, the amendment did not deprive Ingrahm of double jeopardy protections, it ensured them. *See State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990) ("The purpose behind the prohibition of duplicitous indictments is the avoidance of the following dangers: . . . (2) exposure of the defendant to the possibility of double jeopardy . . . .").

¶25 For these reasons, the trial court did not abuse its discretion by amending count one of the information to delete reference to "use."

CONCLUSION

¶26 For the foregoing reasons, we affirm Ingrahm's convictions and sentences.

/s/
Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Daniel A. Barker, Judge