DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-1026
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ANTHONY HIRALES ESTRADA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201000210

The Honorable John P. Plante, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 After Anthony Hirales Estrada ("Defendant") ran from a patrolling police cruiser and sprinted up a stranger's driveway, the police found a baggie of methamphetamine at the spot where

he had been standing. Defendant moved for the baggie's suppression, contending that he had been illegally seized in an unjustified *Terry* stop. The alleged seizure took place on the sidewalk, 15 yards away from the baggie, after Defendant walked back down from the driveway. The court, finding no legal connection between the allegedly unlawful seizure of Defendant on the sidewalk and the discovery of the baggie in the driveway, denied the motion. Defendant appeals from that ruling. Because he cannot establish that the baggie qualifies as evidence "tainted" by what he claims was an illegal stop and seizure, we affirm the trial court's ruling.

¶2 Defendant also appeals from the court's sentencing order, claiming that he deserves more presentence incarceration credit than the trial court granted him. We agree with Defendant and therefore order that the sentence be modified.

FACTS AND PROCEDURAL HISTORY

¶3 On the night of February 14, 2010, Officer Pino was driving through a Yuma neighborhood on a routine patrol. As Pino drove north on 13th Avenue, he noticed that Defendant, who was walking south on the sidewalk, glanced over at the patrol car and then quickly looked away. Pino, wanting to talk to Defendant, made a U-turn. When Defendant saw the police car turn, he sprinted up the driveway of a house. At the end of the driveway he stopped and stood near the house, with a parked

truck between him and the street. Although Defendant made no move to stoop, kneel, crouch, or lie down on the ground, it seemed to Pino that he was trying to use the truck to hide.

¶4 Pino, having seen Defendant run up the driveway and position himself between the house and the truck, pulled up to the house, stepped out of his car, and asked Defendant if he could talk to him. Defendant replied, "Sure. Do you want to see my ID? Do you want to search me?" To which Pino responded, "Sure, if you want to talk to me, come on down."

¶5 Defendant walked down from his spot on the driveway and joined Pino on the sidewalk, covering a distance of 15 yards. On the sidewalk, Pino asked Defendant why he had run toward the driveway when he saw the police cruiser turn. Defendant told Pino that he was at the house to meet a friend. Pino asked the friend's name, but Defendant couldn't give him an answer. So Pino asked Defendant again why he had run away. Defendant "changed the story" and told Pino that his friend was going to pick him up at the house.

¶6 During this conversation, Pino held Defendant's license and ran a wants-and-warrants check. While the two talked and while Pino ran the check, Defendant remained standing. When another officer -- Officer Offutt -- arrived, Pino gave the license to him and had Defendant sit on the curb.

Offutt remained by Defendant while Pino went to the door of the house.

¶7 Pino spoke with the homeowner and asked him if he knew anyone with Defendant's name. The homeowner said he knew no one by that name. Pino, shining his flashlight on Defendant, asked the homeowner if he recognized Defendant. The homeowner told Pino that he did not know him.

¶8 Turning from the door to the driveway, Pino walked to the area in which Defendant had been standing. The area between the truck and the house was filled with "some boxes and some furniture and some odds and ends." Within that area, Defendant had stood in a "little empty space between the boxes and furniture and the truck." And in that space Pino found a small plastic baggie containing methamphetamine. Pino picked up the baggie and placed Defendant under arrest. He was booked in the early hours of February 15, 2010.

¶9 A grand jury charged Defendant on two counts: Count One, Possession of Dangerous Drugs for Sale with Two Prior Felony Convictions; and Count Two, Possession of Drug Paraphernalia with Two Prior Felony Convictions.

¶10 Before his trial, Defendant filed a motion to suppress arguing that Pino, by instructing him to sit on the curb, seized him and that the seizure was unlawful because Pino lacked reasonable suspicion. Defendant argued that any evidence

gathered against him was the “fruit of the poisonous tree” and therefore must be suppressed. In its response, the state argued that Defendant lacked standing to move for the baggie’s suppression. Defendant lacked a protectable interest in the baggie, the state argued, because he had abandoned it.

¶11 At oral argument, Defendant insisted that the critical issue was whether he had been illegally seized. He contended that “doing the abandonment issue first” -- i.e., beginning the analysis with whether Defendant could have a protectable interest in a baggie found 15 yards away in a stranger’s driveway –- would be “putting the cart before the horse.” But the court, after hearing Pino testify and both parties argue, found that issue dispositive. Conceding that “abandonment” might not be the best legal term to describe what Defendant had done with the baggie, the court held that by leaving “something on the ground in somebody else’s driveway” Defendant had “no Fourth Amendment right to not have it looked at.” Accordingly, it denied Defendant’s motion to suppress.

¶12 Defendant’s case went to trial and a jury found him guilty of both counts.

¶13 At the sentencing hearing, the court imposed a mitigated sentence of five years imprisonment for Count One and the presumptive sentence of one year for Count Two, to run concurrently. The court stated that the sentences began on that

day -- the day of the hearing, December 8, 2010 -- and that Defendant was entitled to 289 days of presentence credit.

¶14 Defendant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A).

STANDARD OF REVIEW

¶15 A trial court's ruling on a motion to suppress evidence will not be overturned absent an abuse of discretion. *State v. Rosengren*, 199 Ariz. 112, 115-16, ¶9, 14 P.3d 303, 306-07 (App. 2000). In reviewing the facts, we only consider the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's ruling. *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004). We review the trial court's legal conclusions de novo. *Id.*

DISCUSSION

I. SUPPRESSION OF THE BAGGIE

¶16 The Constitutions of both the United States and Arizona guarantee the people's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *see* Ariz. Const. art. 2, § 8. Under the "fruit of the poisonous tree" doctrine, *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963), courts enforce that right by excluding from a defendant's criminal trial any evidence obtained, either

directly or indirectly, from an illegal search or seizure. *Id.* at 484-85.

¶17 Even if we were to assume what Defendant asserts -- that the stop was unlawful -- it is nonetheless true that the exclusionary rule does not apply to all evidence that happens to be obtained after an illegal search or seizure. *State v. Ochoa*, 131 Ariz. 175, 178, 639 P.2d 365, 368 (App. 1981). Invocation of the rule requires as "a prerequisite to suppression" something "more than a mere chronological succession of events." *Id.* The defendant must establish that the evidence was "derived from an illegal search or seizure." *State v. Richcreek*, 187 Ariz. 501, 506, 930 P.2d 1304, 1309 (1997). In other words, the unlawful stop must have been a cause in fact of the discovery of the evidence.

¶18 On appeal, Defendant cites *Richcreek* for the proposition that evidence "derived" from an illegal stop is subject to suppression. *Richcreek*, 187 Ariz. at 506, 930 P.2d at 1309. But Defendant's arguments address only one part of that proposition: the alleged illegality of the stop. None of Defendant's arguments address the issue on which the trial court correctly focused: whether the bag of methamphetamine found in

the driveway could be considered "derived from" the alleged illegal stop of Defendant on the sidewalk.[1]

¶19 Defendant was unable to make the necessary showing that Pino came upon the baggie "by exploitation of the illegality." *Ochoa*, 131 Ariz. at 178, 639 P.2d at 368. Nor can we see how a baggie full of drugs could qualify as suppressible "fruit of the poisonous tree" when it was left on a stranger's driveway *before* the alleged seizure took place.

¶20 If Pino had illegally seized Defendant by a "show of authority" while he was still standing near enough to the drugs to control them, Defendant might have argued that the baggie was tainted when he yielded to Pino's authority. *See State v. Ramsey*, 223 Ariz. 480, 483, ¶ 12, 224 P.3d 977, 980 (App. 2010) (citing *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991)). But Defendant cannot make that argument. The record shows that while Defendant remained near the drugs, his interaction with Pino was consensual. While Defendant stood at the top of the driveway, Pino asked if they could talk. Before leaving the

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[1] The trial court correctly reasoned:

> [P]erhaps . . . a statement that the defendant made might be suppressed or . . . something else that he had on his person might be suppressed. But that isn't really what anyone is asking here. What you're asking is that the contraband be suppressed; and the contraband, according to both briefs as I read it, was found on the ground. . . . And I just can't see how you . . . could ask to have that suppressed.

driveway, Defendant agreed to talk, offered his ID, and even volunteered to be searched. Nothing in that interaction constitutes an unreasonable seizure of Defendant. *See State v. Wyman*, 197 Ariz. 10, 13, 3 P.3d 392, 395 (App. 2000) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, [and] asking him if he is willing to answer some questions.") (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)).

II. DEFENDANT'S PRESENTENCE CREDIT

¶21 A defendant is entitled to presentence incarceration credit for "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced." A.R.S. § 13-712(B). When calculating that credit, we include each day of presentence custody except for the day of sentencing. *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987). In this calculation, "custody" begins when a defendant is booked into a detention facility. *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993).

¶22 When Defendant was arrested on February 14, 2010, it was late at night; he was not booked until the early morning of February 15, 2010. Defendant was sentenced on December 8, 2010. The number of days from Defendant's booking up to (but not including) his sentencing comes to 296. Defendant only received

credit for 289 days. Defendant therefore deserves seven more days credit.

CONCLUSION

¶23 We affirm the trial court's order denying Defendant's motion to suppress. We modify the trial court's sentencing order to reflect an increase of Defendant's presentence credit from 289 to 296 days. Ariz. R. Crim. P. 31.17(b).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge