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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FEDERICO MARCOS PALAFOX, Appellant.	2 CA-CR 2012-0101 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111922001

Honorable Richard S. Fields, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Federico Palafox was convicted after a jury trial of possession of methamphetamine and possession of drug paraphernalia and sentenced to an enhanced,

mitigated, six-year term of imprisonment on the drug-possession count, to be served concurrently with an enhanced, presumptive, 3.75-year sentence for the paraphernalia conviction. On appeal, he asserts the trial court erred in denying his motion to suppress evidence obtained pursuant to a search warrant and his *Batson*[1] challenge to the state's peremptory jury strikes. Finding no error, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding the trial court's ruling on Palafox's motion to suppress, considering only the evidence presented at the suppression hearing.[2] *See State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). After receiving anonymous complaints from Palafox's neighbors who suspected he was selling narcotics, Tucson police stopped a van that had left his residence. A search of the vehicle revealed syringes and other narcotics paraphernalia, and a passenger told the officers she worked for Palafox and had received methamphetamine as payment that day. Shortly thereafter, police stopped a bicyclist leaving the residence, who attempted to conceal narcotics he was carrying by ingesting them in the officers' presence.

¶3 Almost a month later, Officer Robert Peterson stopped a different van he saw leaving the residence and found drug paraphernalia in the vehicle. That driver denied obtaining the paraphernalia from Palafox. The next evening, Peterson stopped another vehicle that had left the residence and found marijuana and an amphetamine in

[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

[2]We address separately the facts relevant to Palafox's *Batson* challenge.

the vehicle. The driver informed Peterson that Palafox sold methamphetamine and usually possessed it at his residence, and admitted she had purchased it from him in the past and obtained the amphetamine from him that day. An accompanying passenger denied any involvement but was arrested on unrelated warrants.

¶4 Near midnight, Peterson sought a telephonic warrant to search Palafox, his residence, and any occupant of the residence. He informed the issuing judge of the four separate incidents, and the judge authorized the warrant. Early the next morning, Peterson searched Palafox in the yard of his residence and discovered a pipe and a plastic baggie containing a small quantity of methamphetamine in his pants pocket.[3]

¶5 Before trial, Palafox filed a motion to suppress the evidence, arguing it had been obtained in violation of the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution. Specifically, he argued the warrant was not supported by probable cause because the police informants were unreliable and the underlying information had been stale. Following an evidentiary hearing, the trial court determined the warrant was issued based on sufficiently reliable information and denied Palafox's motion.

[3]At trial, Palafox denied possessing the drug or paraphernalia. He testified he had been wearing someone else's pants when searched, the pipe was an incense burner, and someone had thrown the baggie on the ground during his search so as to "c[o]me rolling in between [his] legs." Although he cites his testimony on appeal, Palafox does not contend the state's evidence was insufficient to support his conviction.

¶6 The matter proceeded to trial, and Palafox was convicted and sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Motion to Suppress

¶7 Palafox argues the trial court erred by denying his motion to suppress the pipe and methamphetamine because the search warrant was not supported by probable cause. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.[4] To survive Fourth Amendment scrutiny, a warrant must be supported by probable cause, that is, "a fair probability that contraband or evidence of a crime will be found in a particular place," based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In reviewing a trial court's ruling on a motion to suppress alleging a Fourth Amendment violation, we look to whether the issuing judge had a substantial basis to conclude probable cause existed, given all the circumstances set forth in the supporting affidavit, and will not disturb its ruling absent a clear abuse of discretion. *Id.*; *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d

[4]Palafox also cites the right-to-privacy provision of the Arizona Constitution but does not separately make any related argument. *See* Ariz. Const. art. II, § 8. In any event, although the Arizona Constitution has been found to provide greater protection in the context of warrantless seizures of the home, *see State v. Krantz*, 174 Ariz. 211, 215, 848 P.2d 296, 300 (App. 1992), the distinction would not aid Palafox. Given the warranted search here, the state constitutional protections are coextensive with those provided by its federal counterpart, *see State v. Hyde*, 186 Ariz. 252, 268, 921 P.2d 655, 671 (1996), and we apply the same interpretation to both.

618, 621 (App. 2002). "[W]e defer to the trial court's factual findings, including findings on credibility and the reasonableness of the inferences drawn by the officer, but we review de novo mixed questions of law and fact and [it]s ultimate legal conclusions." *Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d at 271.

¶8 Palafox first argues the search warrant was not supported by probable cause because it was based solely on information from unreliable informants involved in narcotics and otherwise unknown by police, citing *Jaben v. United States*, 381 U.S. 214, 224 (1965) (credibility of narcotics informants "may often be suspect"). He maintains the informants had reason to incriminate him, having just been arrested for drug possession. However, an informant's reliability, veracity, and basis of knowledge are not "'separate and independent requirements to be rigidly exacted . . . [but] they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause.'" *Crowley*, 202 Ariz. 80, ¶ 12, 41 P.3d at 623, *quoting Gates*, 462 U.S. at 230.

¶9 Based on anonymous tips from Palafox's neighbors, police investigated his involvement in narcotics trafficking and connected him to four separate illegal-drug related incidents. Various individuals directly implicated Palafox as selling methamphetamine, storing methamphetamine at his residence, and tendering the drug as payment for services. And persons who did not accuse Palafox were apprehended by police after leaving his residence with the drug. *See State v. Collins*, 21 Ariz. App. 575, 577, 522 P.2d 40, 42 (1974) (informant's tip may be confirmed with police surveillance); *see also Gates*, 462 U.S. at 241-45 (police corroboration of informant's tip may support

probable cause). Contrary to Palafox's contention, and unlike the anonymous neighbors, police learned the identities of all four informants when they were interviewed, cited, or arrested, and Peterson reported all four instances to the issuing judge. *See Gates*, 462 U.S. at 239 (sufficient information must be presented to issuing judge to allow independent determination of probable cause). The judge could find the informants' statements sufficiently reliable because they were based on their personal observations of criminal activity, they corroborated each other and were corroborated by evidence found in the vehicles, and they had been made against the speakers' interests. *See Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d at 271 (deference given to issuing court's credibility determinations); *see also Gates*, 462 U.S. at 241-42 (corroboration of details supports informant's tip); *State v. Coats*, 165 Ariz. 154, 159, 797 P.2d 693, 698 (App. 1990) (personal observations of criminal conduct presumed reliable); *State v. Rodgers*, 134 Ariz. 296, 301, 655 P.2d 1348, 1353 (App. 1982) (statements against interest likely reliable).

¶10 Palafox next argues "because methamphetamine is rapidly sold, evidence even a few hours old is stale." He asserts probable cause did not exist at the time the search warrant was issued because even the same-day evidence might have dissipated in the four-hour delay during which Peterson obtained the warrant. But, quoting *State v. Hale*, Palafox acknowledges "[t]he question of staleness depends more on the nature of the activity than on the number of days that have elapsed since the factual information was gathered," and where there is evidence of continuous events, "the passage of time becomes less significant." 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982).

¶11 Here, given the ongoing nature of the narcotics-related events, and that police obtained information incriminating Palafox over the course of at least a month, the four-hour delay, during which Peterson interviewed the last informants, transported them and the drugs to the station, arranged for the vehicle to be towed, processed and tested the amphetamine, researched prior incidents involving Palafox to include in his affidavit, contacted a SWAT team, contacted the issuing judge, and executed the warrant, was not unreasonable and did not render the information stale. *See id*. (no arbitrary time limit on age of factual information contained within warrant affidavit); *State v. Torrez*, 112 Ariz. 525, 528, 544 P.2d 207, 210 (1975) (passage of three days between heroin purchase and issuance of warrant did not render warrant stale in light of "protracted and continuous activity inherent in . . . narcotic operation"). Additionally, although the trial court expressed its concern that the officers had "push[ed] it to the limit" by waiting four hours to obtain the warrant without maintaining surveillance over the residence, we agree with the court's conclusion that under these circumstances the delay did not render the warrant invalid.

¶12 The totality of the circumstances here forms a substantial basis for the warrant to have been issued, *see Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621, and we conclude sufficient information was presented to the issuing judge to support its independent determination of probable cause. *See Gates*, 462 U.S. at 239. Accordingly, the trial court did not abuse its discretion in denying Palafox's motion to suppress.

***Batson* Challenge**

¶13 Palafox, who claimed Native American and Hispanic ethnicity, challenged the state's removal of three prospective jurors who allegedly were members of racial minorities: number two, a Hispanic male; number eleven, a "[M]iddle [E]astern or African" male; and number fourteen, a female with a Hispanic last name, asserting the strikes were racially motivated. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (Equal Protection Clause[5] forbids selection of jurors solely on account of their race). The prosecutor responded he struck juror two because, unlike other members of the panel, he had been convicted of a DUI; juror eleven because "he seemed . . . sort of to be above all of this[,] . . . a little bit nonchalant . . . [and] the kind of person who might . . . think this amount of drugs would be very trivial"; and juror fourteen because "she seemed not that interested compared to the other jurors." The prosecutor emphasized the difficulty of proving his case to jurors who were not interested or did not feel the crime was important, and also pointed out there were two other individuals on the panel, apparently members of racial minorities, whom he would have retained had they not been stricken by Palafox. The trial court found each of the strikes non-discriminatory.

¶14 *Batson* challenges are governed by a three-step analysis: (1) a defendant must establish a prima facie case of purposeful discrimination in jury selection; (2) the prosecutor must articulate a race-neutral explanation for striking the jurors; and (3) if a

[5]Palafox's passing reference to article II, § 13 of the Arizona Constitution is of no moment because that provision has the same effect as the federal Equal Protection Clause. *Phx. Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 77, 927 P.2d 340, 343 (App. 1996).

race-neutral explanation is provided, the court must determine whether the defendant has carried the burden of proving purposeful racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Batson*, 476 U.S. at 96-98; *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (juror need not be member of same race as defendant raising *Batson* challenge). We review the trial court's decision for clear error, and will not reverse it unless the reasons provided by the state are clearly pretextual. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *State v. Roque*, 213 Ariz. 193, ¶¶ 12, 15, 141 P.3d 368, 378, 379 (2006).

¶15 Palafox does not dispute that the prosecutor offered a race-neutral explanation for each challenged strike, that is, juror two's DUI conviction and the demeanor of jurors eleven and fourteen. He argues instead that the prosecutor also offered an improper justification—Palafox's own strikes of minority jurors—and because the trial court did not specify whether its denial of his *Batson* challenge was based on the non-discriminatory reasons, there was a possibility its determination was based on the "improper" reason, citing *Snyder*, 552 U.S. at 485-86 (no deference given to trial court's denial of *Batson* challenge where state gave two race-neutral reasons, one pretextual, and record suggested court had based ruling on improper, pretextual justification). *See also State v. Lucas*, 199 Ariz. 366, ¶ 13, 18 P.3d 160, 163 (App. 2001) (impermissible discriminatory reason taints any nondiscriminatory reasons given).

¶16 But we disagree with Palafox's characterization of the prosecutor's statements as a discriminatory "reason" given for the state's strikes. During the *Batson* exchange, and after proffering a nondiscriminatory reason for each peremptory strike, the prosecutor bolstered the credibility of the justifications he had already given by arguing,

"I want to point out that [juror] number three . . . would be part of the *Batson* class and I did not strike him. And . . . I would not have struck [juror number eight], but [the d]efense . . . did." Contrary to Palafox's suggestion, the prosecutor did not argue that he struck minority jurors because Palafox also had done so; he instead sought to support the reasons already given, by pointing out that there were other minority jurors he would have retained on the jury had Palafox not stricken them.[6]

¶17 On the record before us, unlike in *Snyder*, none of the facially neutral reasons given by the state appears pretextual. The trial court properly "consider[ed] the whole process" in determining whether the prosecutor exercised peremptory challenges with a discriminatory motive, including that the state did not strike all minority jurors from the venire. *See Batson*, 476 U.S. at 96 (court may consider "all relevant circumstances" in evaluating legitimacy of proffered nondiscriminatory reasons); *State v. Cañez*, 202 Ariz. 133, ¶ 23, 42 P.3d 564, 577 (2002) (that state allowed minority jurors indicative of nondiscriminatory motive); *see also State v. Harris*, 184 Ariz. 617, 620, 911 P.2d 623, 626 (App. 1995) (trial court could consider that stricken minority jurors not sole minority panel members and some impaneled jurors had Hispanic surnames). And we can rely upon the court's independent evaluation of jurors' demeanors when it

[6]Palafox cites one case outside this jurisdiction in support of his argument that he was not required to defend his own peremptory strikes, but it does not support his contention that the trial court erred in considering his strikes at all. *See Taylor v. State*, 733 So. 2d 251, ¶ 37 (Miss. 1999) (where state brings *Batson* challenge, defendant need not provide race-neutral reason for peremptory strikes until state makes prima facie showing). In any event, there is no indication that the court considered the motives behind Palafox's exercise of his peremptory strikes; only the fact that those panel members had not been stricken by the state.

assesses a prosecutor's stated justifications on such grounds, even absent specific findings on the record. *See Thaler v. Haynes*, 559 U.S. 43, ___, 130 S. Ct. 1171, 1174 (2010) (*per curiam*) (trial court's denial of *Batson* challenge based on demeanor-based explanation may be affirmed even though court had not personally observed or recalled juror's demeanor); *Snyder*, 552 U.S. at 479 (demeanor not reviewable "'from a cold transcript'"), *quoting State v. Snyder*, 942 So. 2d 484, 496 (La. 2006), *rev'd*, 552 U.S. 472 (2008).

¶18 In sum, we defer to the trial court's determination that the prosecutor's race-neutral justifications were credible and nonpretextual. *See Miller-El v. Cockrell*, 537 U.S. 322, 339-40 (2003). Accordingly, we find no error in the court's denial of Palafox's *Batson* challenge.

Disposition

¶19 For all of the foregoing reasons, Palafox's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge