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

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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. MARIO MICHAEL TASHQUINTH, Appellant.	)	2 CA-CR 2012-0270 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112722003

Honorable Howard Hantman, Judge

AFFIRMED IN PART; VACATED IN PART

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H O W A R D, Chief Judge.

¶1 Appellant Mario Tashquinth was convicted after a jury trial of possession of marijuana for sale, transportation of marijuana for sale, and conspiracy to commit transportation and/or possession of marijuana for sale. The trial court sentenced him to concurrent, mitigated, three-year prison terms for each offense. On appeal, he argues the trial court erred in denying his motion to suppress marijuana seized during a search of his vehicle. We affirm his convictions and sentences for transportation of marijuana for sale and conspiracy but, because his conviction of possession of marijuana for sale violates double jeopardy, we vacate that conviction and the sentence imposed. We additionally vacate the criminal restitution order entered at sentencing.

¶2 On appeal, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining Tashquinth's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Because Tashquinth appeals only the denial of his motion to suppress, we consider only those facts presented at the suppression hearing and view them in the light most favorable to upholding the trial court's ruling. *See State v. Ellison*, 213 Ariz. 116, ¶ 25, 140 P.3d 899, 909 (2006). In the motion to suppress, Tashquinth argued law enforcement officers had lacked probable cause to search his vehicle and, therefore, the search was unlawful.

¶3 At the suppression hearing, Arizona Department of Public Safety officer Joseph Kretschmer testified that, in August 2011, he had stopped a vehicle driven by Tashquinth for a traffic violation. Upon approaching the vehicle on the passenger's side, Kretschmer smelled raw marijuana and, when he looked inside the vehicle, saw two makeshift burlap backpacks in the back seat. He arrested the vehicle's three occupants

and searched the vehicle, finding approximately 100 pounds of marijuana in the backpacks. The trial court denied Tashquinth's motion to suppress, finding Kretschmer had probable cause to search the vehicle based on "his observation of the marijuana burlap bags . . . and, more importantly, the smell of marijuana as he approached the window."

¶4 "The Fourth Amendment generally requires police to secure a warrant before conducting a search." *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam). "Under the 'automobile exception' to the Fourth Amendment warrant requirement," however, "law enforcement officers can search a vehicle lawfully in their custody if probable cause exists to believe that the vehicle contains contraband, even in the absence of exigent circumstances." *State v. Reyna*, 205 Ariz. 374, ¶ 1, 71 P.3d 366, 366 (App. 2003); *accord Dyson*, 527 U.S. at 467 ("the automobile exception does not have a separate exigency requirement"; probable cause alone sufficient). We review a trial court's determination of probable cause de novo, but review its findings of fact for clear error and give due weight to any inferences it draws from those facts. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010).

¶5 Tashquinth does not dispute that the odor of marijuana combined with the presence of makeshift burlap backpacks, which Kretschmer testified are used in the transportation of marijuana, was sufficient to establish probable cause. *See State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975) (odor of unburnt marijuana emanating from vehicle supplied probable cause to search and arrest); *State v. Olson*, 134

Ariz. 114, 117, 654 P.2d 48, 51 (App. 1982) (officer's experience in packaging of contraband is appropriate factor in probable cause calculation). He instead argues the trial court erred in finding credible Kretschmer's testimony that he had smelled marijuana because Kretschmer did not note that fact in his report, and there were discrepancies between Kretschmer's initial testimony and his testimony after viewing a video recording of the traffic stop.[1]

¶6 As Tashquinth seems to recognize, however, the trial court is in the best position to evaluate witness credibility and resolve any inconsistencies or conflicts in the evidence; we will not second guess its determinations on appeal. *See State v. Estrada*, 209 Ariz. 287, ¶¶ 2, 22, 100 P.3d 452, 453, 457 (App. 2004). Relying on *People v. Africk*, 484 N.Y.S.2d 55, 56 (N.Y. App. Div. 1985), Tashquinth nonetheless suggests a trial court is required to "disregard[] as being without evidentiary value" testimony "that is impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory." *Cf. State v. Million*, 27 Ariz. App. 490, 491, 556 P.2d 338, 339 (1976) (court may consider testimony that is "not obviously incredible or physically impossible").

¶7 Even were we to adopt Tashquinth's proposed rule, we cannot reasonably characterize Kretschmer's testimony as "impossible" to believe. There is nothing inherently unbelievable in Kretschmer's testimony that he had smelled marijuana through the vehicle's open window but had failed to note that fact in his report. Whatever

[1]Although the trial court and Kretschmer viewed the recording on the second day of the suppression hearing, it was not admitted into evidence.

inconsistencies might exist between Kretschmer's initial testimony and that given after viewing the video recording, Tashquinth identifies none that are so profound that Kretschmer's testimony should be deemed incredible as a matter of law.[2] Thus, we find no error in the trial court's conclusion that Kretschmer had probable cause to search the vehicle. We therefore need not address Tashquinth's second argument that no exigency existed justifying the search absent probable cause.

¶8 The state suggests in its answering brief, and we agree, that Tashquinth's conviction of possession of marijuana for sale must be vacated because it is a lesser-included offense of transportation of marijuana for sale; thus, his conviction for both offenses based on the same conduct violates double jeopardy. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 8, 21, 965 P.2d 94, 96, 99 (App. 1998). Although Tashquinth failed to raise this argument in his opening brief, this court will not ignore fundamental error when found. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007); *see also State v. Musgrove*, 223 Ariz. 164, ¶ 10, 221 P.3d 43, 46 (App. 2009) (double jeopardy violation fundamental error). For the same reason, we also vacate the criminal restitution order entered by the trial court at sentencing because that

[2]The only purported inconsistencies Tashquinth identifies relate to whether Kretschmer saw a second passenger in the back seat when he first approached the vehicle or only after he had placed two of the suspects in custody, and whether the burlap backpacks were covered by clothing. We agree with Tashquinth that Kretschmer initially testified he could see three people when approaching the vehicle, but later clarified that he initially only saw two individuals. This minor discrepancy, however, did not require the trial court to reject his testimony entirely. And, we question Tashquinth's claim that Kretschmer's testimony regarding the backpacks was contradictory. He did not state in his initial testimony whether the burlap sacks were covered by clothing but, in any event, he maintained the clothing seen in the video recording "did not obscure [his] view."

order is contrary to this court's decisions in *State v. Lopez*, No. 2 CA-CR 2012-0153, 2013 WL 1450722 (Ariz. Ct. App. Apr. 8, 2013), and *State v. Lewandowski*, 220 Ariz. 531, 207 P.3d 784 (App. 2009).

¶9 For the reasons stated, we vacate Tashquinth's conviction and sentence for possession of marijuana for sale and the criminal restitution order entered at sentencing; we affirm his convictions and sentences for transportation of marijuana for sale and conspiracy.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge