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. SAMMY LEE MITCHELL, Appellant.	2 CA-CR 2012-0445 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR201200119

Honorable Robert Duber II, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Amy Pignatella Cain — Tucson
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

K E L L Y, Presiding Judge.

¶1 Appellant Sammy Mitchell appeals from his convictions for transport of dangerous drugs for sale, possession of dangerous drugs, possession of a narcotic drug, and two counts of possession of drug paraphernalia. He maintains the court abused its

discretion in denying his motion to suppress the evidence against him "due to an illegal traffic stop." Finding no error, we affirm.

¶2 In February 2012, a Gila County Sheriff's sergeant saw a white sport utility vehicle (SUV) traveling only five to six feet behind another vehicle on a road that was partially wet. Because the SUV was following too closely, the sergeant began to follow the vehicles. Ultimately the SUV slowed, apparently after noticing the sergeant's vehicle. The officer turned on his emergency lights and stopped the SUV, and Mitchell, who was driving, consented to a search of the vehicle and his person. The sergeant found a glass pipe and a small amount of methamphetamine in a plastic bag in Mitchell's pockets and arrested him. Subsequently, an Oxycodone pill and five pounds of methamphetamine were found in the vehicle. After a jury trial, Mitchell was convicted as outlined above, and the trial court imposed slightly mitigated, presumptive, concurrent terms of imprisonment, the longest of which was nine years.

¶3 On appeal Mitchell challenges the trial court's denial of his pretrial motion to suppress the evidence against him. He maintains the officer who stopped his vehicle did so illegally, "without a valid objective reason" and the subsequent search of his person was unlawful. "When reviewing a trial court's denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, ¶ 5, 243 P.3d 628, 630 (App. 2010) (citations omitted). We defer to the trial court's findings of fact, including its evaluation of witnesses' credibility, but review de novo the court's determinations of reasonable suspicion and probable cause. *State v. Olm*, 223 Ariz. 429,

¶ 9, 224 P.3d 245, 248 (App. 2010); *State v. Sweeney*, 224 Ariz. 107, ¶ 12, 227 P.3d 868, 872 (App. 2010).

¶4 A traffic stop constitutes a seizure under the Fourth Amendment, but because such stops are less intrusive than arrests, officers do not need probable cause to justify them. *State v. Gonzalez–Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). Instead, to justify a stop on this ground the law enforcement officer effectuating the stop need only have reasonable suspicion to believe the person he or she is stopping committed a traffic violation. *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003); *see also Tornabene v. Bonine ex rel. Ariz. Hwy. Dept.*, 203 Ariz. 326, ¶ 27, 54 P.3d 355, 365 (App. 2002).

¶5 As Mitchell agrees, A.R.S. § 28-730 prohibits a driver from "follow[ing] another vehicle more closely than is reasonable and prudent" and requires that a driver "have due regard for the speed of the vehicles on, the traffic on, and the condition of the highway." At the suppression hearing, the sergeant testified it had been "raining and sleeting off and on throughout the day and . . . the road was slightly wet" and the road was "mountainous," "curvy," and had "rocks throughout the different parts of [it] where they slid off of the mountain from the recent storm." He noticed Mitchell's SUV "extremely close to the back of the" vehicle ahead of it. He estimated there had been "five to six feet between the two of them" and the SUV had maintained that distance for nearly two miles. The sergeant also testified that at the speed the vehicles were traveling, it would take 73.33 feet to safely stop. In view of this evidence we cannot say the trial

court erred in concluding the sergeant had reasonable suspicion that Mitchell was traveling too closely in violation of § 28-730. Mitchell's argument on appeal merely cites contrary evidence presented at the hearing and amounts to a request that we reweigh the evidence that he had been following more closely than was prudent given the road conditions. But "[w]e do not reweigh the evidence on appeal." *State v. Groshong*, 175 Ariz. 67, 69, 852 P.2d 1251, 1253 (App. 1993).

¶6 We further reject Mitchell's claim that this case is analogous to *Livingston*, 206 Ariz. at 145, 75 P.3d at 1103. In that case, an officer observed the right-side tires of Livingston's car "cross[] the white shoulder line on one occasion" before stopping her vehicle. *Id.* ¶ 4. This court affirmed the trial court's conclusion that the officer had lacked reasonable suspicion, noting that the statute Livingston had been suspected of violating did not extend to such a "brief, momentary, and minor deviation[] outside the marked [road] lines." *Id.* ¶ 10. Unlike Livingston, Mitchell did not commit a brief or momentary violation of the statute prohibiting following another vehicle too closely, but followed closely for nearly two miles.

¶7 Mitchell further contends "there was no legal reason to pat [him] down" because no new "indicia of 'reasonable suspicion' had happened between the stop and the search of the car and person" and because he "did not consent to a personal pat down or body search."[1] But contrary to this assertion, the evidence at the suppression hearing shows Mitchell did consent to a search of his person.

[1]Mitchell does not cite anything in the record to show he raised this argument below, and consequently we would review only for fundamental error. *See State v.*

¶8 "'In determining whether or not there was a consent, it is necessary that such a waiver or consent be proved by clear and positive evidence in unequivocal words or conduct expressing consent . . . .'" *State v. Cañez*, 202 Ariz. 133, ¶ 53, 42 P.3d 564, 582 (2002), *quoting State v. Kananen*, 97 Ariz. 233, 235, 399 P.2d 426, 427 (1965). Opening one's trunk in response to a police request to search the trunk has been found to constitute consent, *State v. Wilkerson*, 117 Ariz. 143, 145, 571 P.2d 289, 291 (App. 1977), as has raising one's arms in response to a request to search one's torso, *United State v. Mendoza-Cepeda*, 250 F.3d 626, 627-29 (8th Circuit 2001). "'And failure to object is evidence of consent.'" *State v. Lynch*, 120 Ariz. 584, 586, 587 P.2d 770, 772 (App. 1978), *quoting People v. Smith*, 26 Cal. Rptr. 620, 623 (1962).

¶9 In this case, according to the sergeant's testimony at the hearing, when he asked if he could search Mitchell's person, Mitchell said nothing, but raised his hands. Mitchell also testified the sergeant had not "give[n him] a choice" as to whether he could search his person, but had asked if he "had any drugs or weapons or anything," and Mitchell stated he had "raised [his] shirt and twisted to show him [he] had no weapons." He did not, however, testify he had said anything to the sergeant to indicate he was merely raising his shirt to show him he had no weapon. Nor was there any testimony that

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Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). But, the state has not argued the fundamental error standard applies, and the trial court separately addressed the sergeant's search of Mitchell's person in its ruling. In our discretion, we therefore do not limit our review to fundamental error. *See State v. Aleman*, 210 Ariz. 232, ¶ 24, 109 P.3d 571, 579 (App. 2005).

Mitchell objected once the officer began to pat him down. Thus, the record shows Mitchell consented to the search of his person, and that search was not unlawful.[2]

¶10 For all these reasons, Mitchell's convictions and sentences are affirmed.

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

CONCURRING:

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

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

[2]The trial court did not specifically reach the question of whether Mitchell had consented, concluding instead that a search "would not be a violation . . . regardless of consent." We will affirm the court's decision if it is correct for any reason. *State v. Sheko*, 146 Ariz. 140, 142, 704 P.2d 270, 272 (App. 1985).