FILED BY CLERK
JUL -2 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHRISTIAN JOSEPH SANCHEZ, Appellant.	)	2 CA-CR 2012-0447 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20120143001

Honorable Jose Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra
Tucson
Attorneys for Appellee

The Law Offices of Stephanie K. Bond, P.C.
By Stephanie K. Bond
Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Christian Sanchez was convicted of possession of a deadly weapon by a prohibited possessor. After finding Sanchez had two or more prior felony convictions, the trial court sentenced him to a mitigated six-year term of imprisonment. On appeal, Sanchez claims the court erred by denying his motion to suppress evidence. For the following reasons, we affirm.

¶2 When reviewing the denial of a motion to suppress evidence, "we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). When reviewing a trial court's denial of a motion to suppress based upon "an alleged Fourth Amendment violation, we defer to the trial court's factual findings, including findings on credibility and the reasonableness of the inferences drawn by [police] officer[s], but we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusions." *Id.* ¶ 19; *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000).

¶3 On January 5, 2012, Keith Olson, a sixteen-year veteran police officer, received an attempt to locate bulletin (ATL) requesting assistance in locating Marco Rivera, the suspected shooter in an incident that had occurred a few days earlier. Detective Lance Padilla, who had prepared the ATL, testified that although no arrest warrant existed for Rivera as of January 5, the ATL was directed at a "police talk . . . mean[ing] stop and arrest."[1] The ATL[2] included two photographs of Rivera, described

[1]Upon further questioning by defense counsel, Padilla clarified that on January 5, Rivera "wasn't wanted for the arrest per the court's warrant, but he was just wanted for

him as 5'9" in height and weighing 180 pounds, and provided his father's home as his last known address. In addition, Olson "had done a little research" and learned that in 2011, Rivera had been "stopped driving a silver 2007 Chrysler Sebring with a wheelchair plate of EES 03," a vehicle that was registered to Rivera's father.

¶4 The same evening he received the ATL, Olson saw the described vehicle "just a few houses away from the suspect location." He followed the vehicle hoping to "make a traffic stop," but it pulled into the parking lot of a nearby convenience store before he could do so. Olson testified that the individual who got out of the vehicle, later identified as Sanchez, but whom Olson then believed to be Rivera, matched the description he had been given of Rivera: "[H]e was a Hispanic male, about 5'9["], medium build. He was wearing blue jeans, brown T-shirt and he had two sweatshirts on, white over a black one." In addition, Rivera was described as having "dark hair and facial hair," like the person who got out of the car.

¶5 Olson parked his unmarked police vehicle "in front of [Sanchez's] car," and Sanchez walked "away from [his own] car toward the [gas pumps and the] street," leading Olson to believe he was trying to "get away." Olson testified,

> I was in full uniform, walked up behind him and took him by the arm and told him I'm going to detain you, and that's when he kind of pulled away from me. When he did I saw that he had a gun in his right pocket of his sweatshirt.

---

questioning," a fact the trial court acknowledged in its ruling denying the motion to suppress evidence.

[2]The ATL was not admitted as an exhibit at the suppression hearing.

Olson testified that the presence of a gun had caused him concern "[b]ecause [Rivera] had already shot someone and I'm by myself, I see a gun, I'm by myself, I have to try to detain him."

¶6 Olson then placed the individual he believed to be Rivera in handcuffs, confiscated the gun, and asked him if he was Rivera. Sanchez, who was not carrying any identification, told Olson he was Rivera's brother, Christian Sanchez. A records' check revealed that Sanchez had a suspended driver license. When Olson asked Sanchez "if he may be [a] prohibited [possessor]," Sanchez replied that he was. Olson arrested Sanchez for driving on a suspended license and notified him that, "pending further investigation on his prior convictions he may be charged with the prohibited possessor [offense] as well." Sanchez's father arrived a few minutes later with documents verifying Sanchez's identity, after which Sanchez was arrested on the weapons charge. The photographs of Rivera that had been attached to the ATL, along with Sanchez's booking photograph, were admitted in evidence at the suppression hearing.

¶7 In its ruling denying Sanchez's motion to suppress, the trial court quoted the following passage from *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000):

> In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

The trial court further explained:

> On January 5, 2012, Officer Olson was near the area where the shooting occurred . . . a few days prior on January 1, 2012. He observed a Chrysler matching the plates from the attempt to locate investigation. He turned around to follow the vehicle which subsequently pulled into the Quik Mart Store. He saw an individual exit the vehicle, which he mistakenly believed matched the physical descriptors listed in the bulletin. The officer also considered the basis for the bulletin was to question an individual involved in a shooting. He grabbed the driver who was talking with someone and pulled his arm, saw a firearm and detained him in handcuffs. The individual was not Mario Rivera, but Defendant Sanchez.
>
> "A mistaken premise can furnish grounds for a [*Terry*] stop, if the officers do not know that it is mistaken and are reasonable in acting upon it." "[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they . . . always [be] correct, but that they always be reasonable."

(citations omitted).

¶8 On appeal, Sanchez argues that it was not only unreasonable to stop him, but that even if the police had in fact stopped Rivera instead of him, they lacked probable cause to arrest him. Therefore, Sanchez contends, the evidence obtained after his arrest must be suppressed as fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (evidence obtained through exploitation of previous constitutional violation must be suppressed as "fruit of the poisonous tree"), and the trial court thus erred when it denied his motion to suppress evidence.

¶9 Sanchez first asserts the stop was unreasonable because the vehicle was not registered to Rivera, there was evidence officers knew Rivera "had not returned" to his father's residence since the shooting, Olson did not review the photographs of Rivera at the convenience store "prior to approaching and/or handcuffing" Sanchez, and Sanchez

and Rivera "did not look alike." We address each of these claims in turn. Olson knew that Rivera had driven his father's vehicle in the past, thus the fact it was not registered to Rivera is irrelevant. And, merely because officers believed Rivera had not returned to his father's home since the shooting does not mean he would not do so, or that officers should not maintain a presence near the home in case Rivera did return. Further, based on the evidence presented at the suppression hearing, the trial court could have inferred Olson did not have time to once again consult the photographs attached to the ATL before approaching Sanchez at the convenience store, particularly because Olson believed Sanchez was trying to "get away" from him. *See Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d at 271 (officers' credibility and reasonableness of inferences they draw from their observations left to trial court's discretion).

¶10 Finally, Sanchez maintains it was unreasonable to mistake him for Rivera, asserting he and Rivera "did not look alike" because "Rivera was 5 years younger in age and 40 pounds heavier in weight than [Sanchez]. Rivera also had black hair and brown eyes whereas [Sanchez] has brown hair and hazel eyes." Based on Olson's testimony that he had only a "side view" of Sanchez when he encountered him at the convenience store at approximately 9:40 p.m., the trial court apparently found it reasonable that Olson could confuse two Hispanic males, both in their twenties, both having dark hair and facial hair, both approximately 5'9" tall and with a medium build, and one of whom was wearing two sweatshirts at the time, potentially masking his weight. *See Hill v. California*, 401 U.S. 797, 802-05 (1971) (arrest and search lawful when based upon officer's reasonable, good-faith mistake in identity). "But sufficient probability, not

certainty, is the touchstone of reasonableness under the Fourth Amendment." *Id.*; *cf. State v. Mendez*, 115 Ariz. 367, 369, 565 P.2d 873, 875 (1977) (search based on mistaken identity not reasonable where officer *knew* defendant was not person named in warrant). To the extent Sanchez's arguments constitute a challenge to the court's determination of Olson's credibility and the reasonableness of the inferences he had drawn from his observations, these matters are left to the trial court's discretion. *See Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d at 271.

¶11 Sanchez next argues that even if Olson had stopped Rivera instead of him, that stop was limited to "walk[ing] up" to him and "ask[ing] if he would answer some questions," including whether he was, in fact, Rivera. Sanchez maintains that, by approaching him from behind and handcuffing him, and in the absence of a warrant for his arrest or probable cause, Olson exceeded the limits for an investigatory stop as established in *Terry v. Ohio*, 392 U.S. 1 (1968), rendering his arrest illegal. Under *Terry*, police officers may make limited investigatory stops without probable cause if they have an articulable, reasonable suspicion that a suspect is involved in criminal activity based on the totality of the circumstances. 392 U.S. at 30. "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d at 272. "Reasonable suspicion that a person is wanted in connection with a completed felony also can justify a brief stop." *State v. Kinney*, 225 Ariz. 550, ¶ 14, 241 P.3d 914, 919 (App. 2010), *citing United States v. Hensley*, 469 U.S. 221, 229 (1985).

¶12 Here, based on the ATL, Olson had reasonable suspicion to stop Rivera, a fact Sanchez apparently does not dispute. And, because Olson reasonably believed Sanchez to be Rivera, he properly stopped Sanchez. Further, believing the individual he had stopped, who was suspected of having committed a violent offense, might pose a flight risk, it was reasonable for Olson to approach Sanchez with caution, and with concern for his own safety. *See Hensley*, 469 U.S. at 235 (officers "were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop"). "In the course of an investigatory stop, officers may detain a suspect, using reasonable force, while they gather more information about a reported crime." *Kinney*, 225 Ariz. 550, ¶ 14, 241 P.3d at 919, *citing State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981).

¶13 Accordingly, based on the totality of the circumstances here, we reject Sanchez's assertion that what began as an investigatory stop essentially turned into a de facto arrest. *See Aguirre*, 130 Ariz. at 56, 633 P.2d at 1049 (detaining, frisking, handcuffing, and placing suspect in patrol car did not transform investigative stop into arrest); *see also State v. Blackmore*, 186 Ariz. 630, 633-34, 925 P.2d 1347, 1350-51 (1996) (*Terry* stop can include handcuffing the individual). Moreover, because Olson reasonably believed that Sanchez was Rivera, an individual he had reasonable suspicion to stop, and because that stop was reasonable under *Terry*, we reject Sanchez's assertion that the resulting evidence was fruit of the poisonous tree.[3]

[3]We likewise decline to address Sanchez's claim that police lacked probable cause to arrest Rivera.

¶14 Therefore, because the trial court did not err in denying the motion to suppress the evidence, we affirm Sanchez's conviction and sentence.

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

CONCURRING:

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

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