IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANGELA ROSE BEJARANO,
Appellant.

No. 2 CA-CR 2013-0019
Filed December 12, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20112165001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Roach Law Firm, LLC, Tucson
By Brad Roach
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

K E L L Y, Presiding Judge:

¶1 Angela Bejarano appeals from her convictions and sentences for possession of a narcotic drug and possession of drug paraphernalia. She claims the trial court erred by denying her motion to suppress statements she made and physical evidence obtained during a traffic stop. Bejarano argues the evidence was obtained in violation of her rights under the Fourth Amendment to the United States Constitution. Finding no error, we affirm.

Facts and Procedural History

¶2 In reviewing a trial court's decision on a motion to suppress, we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to upholding the court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). In 2011, a Tucson police officer saw Bejarano fail to completely stop her vehicle at a stop sign. The officer attempted to stop her but she continued driving for a few blocks before eventually pulling into a residence. The officer placed both Bejarano and her passenger in handcuffs because "[he] didn't know if [Bejarano] had any weapons or if she would try to run on foot [as s]he had already not yielded to [the] traffic stop."

¶3 Bejarano told the officer she had not stopped because her driver's license was suspended and she wanted to avoid impoundment of her vehicle. When the officer asked "if she had any weapons on her or anything [he] needed to know about," Bejarano stated she had marijuana and a pipe in her purse. The officer then read Bejarano the *Miranda*[1] warnings, and she stated she

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

understood. When he asked Bejarano for identification, she told him it was in her purse in the car. While retrieving Bejarano's identification card from her purse, the officer found a bag of what appeared to be crack cocaine and three foil balls of what appeared to be heroin. Bejarano admitted that the items were crack and heroin and that they were hers. The officer then arrested her for failing to stop her vehicle upon command and for driving with a suspended license and took her into custody. Her car was impounded.

¶4 Bejarano was charged by indictment with two counts of possession of a narcotic drug and one count of possession of drug paraphernalia. She filed a motion to suppress statements she had made to the police officer who had stopped her and the drugs and paraphernalia he had seized, arguing they had been obtained in violation of her constitutional rights. Specifically, Bejarano claimed the statements she had made before the officer gave her the *Miranda* warnings should be suppressed because she had been subjected to custodial interrogation without having been made aware of her constitutional rights; the officer deliberately had waited before giving her the *Miranda* warnings, rendering the warnings ineffective and requiring suppression of any post-*Miranda* statements; and the drugs and drug paraphernalia had been obtained as a result of a government violation of her constitutional rights and thus should be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Bejarano also claimed that the inevitable discovery doctrine, which would allow the evidence to be admitted if it inevitably would have been discovered during an inventory search of the impounded car, "probably [did] not apply."

¶5 The trial court suppressed Bejarano's statements regarding having marijuana in her purse, which she made before receiving the *Miranda* warnings. It found that although it was proper for the officer to ask Bejarano about weapons to protect his and the public's safety, once she was in custody it was improper for the officer to ask whether there was "anything else" he should know until after Bejarano received the warnings. The court denied Bejarano's motion to suppress statements she had made after the officer gave her the warnings, as well as the drugs and paraphernalia found in her purse. Specifically, the court ruled that

Bejarano was "arrested for driving without a license and for failure to stop for the police officer and . . . [her] purse would have been taken with her vehicle when it was impounded[;] accordingly[,] the inevitable discovery [doctrine] allows the evidence from the purse to be admitted at trial."[2]

¶6 Following a jury trial, Bejarano was convicted of all counts and sentenced to concurrent prison terms, the longest of which is six years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 13-4033.

Discussion

¶7 Bejarano argues the trial court erred by not suppressing her statements, drugs, and paraphernalia, claiming there was no probable cause for her arrest and no legal basis to admit the evidence. We review the denial of a motion to suppress for an abuse of discretion. *State v. Becerra*, 231 Ariz. 200, ¶ 4, 291 P.3d 994, 996 (App. 2013). We defer to the trial court with respect to its determination of facts but review de novo its legal conclusions. *See State v. Brown*, 233 Ariz. 153, ¶ 4, 310 P.3d 29, 32 (App. 2013). We generally will not disturb a trial court's suppression order based on a theory not asserted below, *see State v. Carlson*, 228 Ariz. 343, ¶ 19, 266 P.3d 369, 375 (App. 2011), and review such claims only for fundamental error, *see Brown*, 233 Ariz. 153, ¶ 11, 310 P.3d at 34.

Illegal Arrest

¶8 Bejarano first contends that the statements she made and the evidence obtained as a result of her statements were the product of an illegal arrest. She suggests the officer's "uncertainty as to whether [Bejarano] was armed or might try to run on foot" was insufficient reason for her arrest. Quoting *Wong Sun v. United States,* Bejarano argues that because the officer did not have probable cause

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[2]This ruling was supported by the officer's testimony at the suppression hearing, which established that the offense of driving with a suspended license mandates the vehicle be impounded for thirty days and that the Tucson Police Department performs inventory searches on vehicles impounded for this reason.

for her arrest, the statements and evidence were "obtained as a result of . . . illegal conduct [and] should have been suppressed as fruit of the poisonous tree." *See* 371 U.S. at 487-88.

¶9 Because she raises this claim for the first time on appeal, Bejarano has waived the argument and we review the claim only for error that is both fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also Brown*, 233 Ariz. 153, ¶ 11, 310 P.3d at 34. The waiver principle applies equally to constitutional as well as non-constitutional issues. *State v. Bolton*, 182 Ariz. 290, 297-98, 896 P.2d 830, 837-38 (1995). Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶10 Bejarano bears the burden of demonstrating both that the error was fundamental and that it prejudiced her. *See State v. Lopez*, 230 Ariz. 15, ¶ 10, 279 P.3d 640, 643 (App. 2012). Bejarano, however, has failed to allege on appeal that the error was fundamental, and she has neither alleged nor demonstrated that she was prejudiced. The argument is thus waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Improper Search Incident to Arrest

¶11 Bejarano next argues that the officer's search of her purse was unreasonable, and the evidence obtained as a result of that search should be suppressed. She relies on *Arizona v. Gant*, in which the Supreme Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or when it is reasonable to believe the vehicle contains evidence of the offense of arrest, unless police obtain a warrant or show another exception to the warrant requirement applies. 556 U.S. 332, 343-44, 351 (2009). Bejarano argues the search was unjustified because she was "handcuffed and not within reaching distance of the passenger compartment of her vehicle" and that there was no "denominated

'offense of arrest.'" *See id.* She thus asserts the officer found the drugs and paraphernalia in her purse only by violating the exception to the Fourth Amendment's warrant requirement as defined in *Gant*.

¶12 But Bejarano did not make this argument to the trial court. Instead, she argued that the evidence was obtained in violation of her constitutional rights because the officer failed to timely give her the *Miranda* warnings. She argued he questioned her before he read her the *Miranda* warnings and insisted the warnings he subsequently read were ineffective. Bejarano claimed that "only through this illegal line of questioning" did the officer learn of the drugs in Bejarano's purse. She also contended the officer "had no independent source as to knowledge of the drugs" and the inevitable discovery doctrine did not apply.

¶13 "'It is not the province of an appellate court to pass upon questions not acted upon by the court from which the appeal is taken.'" *Bolton*, 182 Ariz. at 299, 896 P.2d at 839, *quoting State v. Narten,* 99 Ariz. 116, 121, 407 P.2d 81, 84 (1965). Bejarano's argument on appeal is based on an alleged violation of the Fourth Amendment's protection against unreasonable searches and seizures, *see Arizona v. Gant*, 556 U.S. at 335, whereas her argument below was based on an alleged *Miranda* violation, rooted in the Fifth Amendment's protection against self incrimination, 384 U.S. at 439. Thus, with respect to the argument she is asserting on appeal, she has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *see also State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006) (defendant's failure to raise particular ground for suppression waives argument on appeal absent fundamental error).

¶14 Although the violation of a defendant's constitutional rights could constitute fundamental error, Bejarano still must demonstrate that she was "prejudiced such that a reasonable jury, reviewing the appropriate evidence, could have reached a different result." *State v. Kinney*, 225 Ariz. 550, ¶ 21, 241 P.3d 914, 921 (App. 2010); *see also Henderson*, 210 Ariz. 561, ¶¶ 25-27, 115 P.3d at 608-09 (denial of procedural rights under Fifth and Sixth Amendments could be fundamental error with showing of prejudice). Because

Bejarano has failed to allege or demonstrate fundamental, prejudicial error, we do not consider this argument further. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Prosecutorial Misconduct

¶15 Finally, Bejarano claims the state committed prosecutorial misconduct by improperly withholding information from the trial court. According to Bejarano, had the court known the traffic stop occurred at Bejarano's residence and that Bejarano's passenger was her significant other, it "would not have found that the contents of the purse would have been subject to inevitable discovery." She implies the court would have found instead that officers would have given her purse to her passenger. Bejarano alleges that "due to [her] absence" from the suppression hearing, "trial counsel . . . was essentially at the mercy of the prosecutor and the police officer insofar as being able to illuminate some salient issues."

¶16 Bejarano does not explain why her presumably voluntary absence from the suppression hearing placed a burden on the state to elicit testimony allegedly favorable to her, or how it excused her from presenting evidence she believed was favorable to her own defense. *Cf. State v. Luzanilla*, 176 Ariz. 397, 406, 861 P.2d 682, 691 (App. 1993) (trial court's preclusion of expert testimony did not prevent defendant from presenting rebuttal evidence and witnesses, and did not constitute fundamental error), *vacated in part on other grounds,* 179 Ariz. 391, 880 P.2d 611 (1994). Bejarano also fails to cite any authority supporting the proposition that the state had an obligation to present evidence that was known to Bejarano. *See State v. Spinks*, 156 Ariz. 355, 360, 752 P.2d 8, 13 (App. 1987) (prosecution does not have burden to call witnesses, equally available to both sides, whose cross examination might be helpful to accused).

¶17 Most importantly, Bejarano did not object to the state's questioning of the officer at the suppression hearing, and raises the issue of prosecutorial misconduct for the first time on appeal. She has thus forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at

607. Bejarano has not shown that the prosecutor acted improperly; thus, she has not established that any error occurred, much less error that may be characterized as fundamental. *See State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008) (reversible prosecutorial misconduct must be so pronounced and persistent that it infects the entire atmosphere of trial with unfairness as to make the resulting conviction a denial of due process).

Disposition

¶18 For the foregoing reasons, we affirm the convictions and the sentences imposed.