IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CARLOS OROZCO,
Appellant.

No. 2 CA-CR 2014-0043
Filed June 15, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201001101
The Honorable Dwight P. Callahan, Judge Pro Tempore

VACATED IN PART; AFFIRMED IN PART

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Neal W. Bassett, Phoenix
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial held in his absence, appellant Carlos Orozco was convicted of possession of a dangerous drug for sale (count one) and transportation of a dangerous drug for sale (count two). He was sentenced to concurrent, ten-year prison terms. On appeal he argues, and the state concedes, that his convictions violate the prohibition against double jeopardy. *See State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 8, 10, 965 P.2d 94, 96-97 (App. 1998). We agree and therefore vacate the conviction and sentence for count one, the lesser included offense, as the state specifically has requested.

¶2 Orozco raises additional issues concerning his motion to suppress evidence, trial in absentia, assistance of counsel, and various "surcharges" imposed at sentencing. For the reasons stated below, we affirm the conviction and sentence for count two. Because the trial court expressly imposed a fine at sentencing "as to Count 1 only," the time payment fee and surcharges based on that fine are now vacated and arguments regarding those financial obligations are moot.

Factual and Procedural Background

¶3 On May 6, 2010, a law enforcement officer stopped a vehicle Orozco was driving after he committed a traffic violation. The vehicle contained a large amount of methamphetamine, and Orozco admitted the drugs belonged to him.

¶4 Orozco was arrested and subsequently charged by indictment with the offenses noted above. He filed a motion to suppress the evidence obtained as a result of the traffic stop, which the trial court denied after an evidentiary hearing.

¶5 The trial court later advised Orozco of the date and time of his trial, directed him to be present at it, and warned him it could proceed in his absence if he failed to appear. When Orozco ultimately did not appear at trial, the court found his absence voluntary and conducted the trial in absentia. The jury found him guilty of both charges on May 1, 2012. Orozco was apprehended over a year later and sentenced on January 9, 2014. This appeal followed.

Jurisdiction

¶6 Although Orozco's absence from trial "prevent[ed] sentencing from occurring within ninety days after conviction," this court has held that A.R.S. § 13-4033(C), under which an absconding defendant waives his right to appeal a conviction, cannot apply unless the defendant has been "informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days." *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). We have reviewed the record and found no evidence that Orozco was given such an admonition. Accordingly, we conclude his absence did not waive his right to appeal. We therefore agree with the state that we have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1) and (4).

Motion to Suppress

¶7 Orozco's first argument concerns his motion to suppress and the credibility of the officer who conducted the traffic stop. We review a trial court's ruling on a suppression motion for an abuse of discretion, to the extent it involves a factual issue, but we review de novo any legal conclusions concerning the constitutionality of a seizure or search. *See State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467 (2004).

¶8 Pinal County Sheriff's Deputy Jesus Lopez testified at the suppression hearing he had stopped Orozco's vehicle after Orozco failed to stop properly at a stop sign. Lopez stated Orozco had stopped the vehicle five to ten feet beyond the stop sign and "well within the intersection." Lopez admitted that, even before stopping Orozco, he knew Orozco's name because other law enforcement officers had mentioned Orozco was "associated with drug activity." The trial court determined that the stop was "the legitimate result of [an] observed traffic violation[]" and consequently denied the motion. In so doing, the court rejected Orozco's argument that Lopez should not be believed because he had merely targeted Orozco for a drug-smuggling investigation.

¶9 Lopez testified at trial that, before the traffic stop, he did not have "any reason to believe" Orozco was transporting drugs in the vehicle. Yet a narcotics detective, Adrian Leos, testified that, on the date of the stop, he had told Lopez "to look for" the vehicle Orozco was driving. Leos further informed the trial court, outside the jury's presence, that he also had told Lopez about Orozco's suspected involvement in drug-related activities. The prosecutor conceded this fact, and the court noted that Lopez's trial testimony did "not appear to be entirely correct."

¶10 On appeal, Orozco maintains Lopez's testimony at trial entitles him to a new suppression hearing because it raises concerns about Lopez's credibility generally and whether Lopez had actually observed Orozco commit a traffic violation. *See State v. Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d 1103, 1106 (App. 2003) (recognizing evidence of officer's motivation admissible to determine whether traffic violation occurred). Our case law is somewhat unclear about whether an appellate court may consider the record from trial when addressing suppression issues, generally.[1]

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[1]*Compare State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006) ("A trial court's ruling on a motion to suppress is reviewed solely based on the evidence presented at the suppression hearing."), *and State v. Huerstel*, 206 Ariz. 93, ¶ 62, 75 P.3d 698, 712 (2003) ("In reviewing the voluntariness of a statement, we consider

¶11 We ordinarily do not consider evidence from trial when reviewing the denial of a motion to suppress, *see State v. Manuel*, 229 Ariz. 1, ¶ 11, 270 P.3d 828, 831 (2011), but rather limit our review to the evidence on which the trial court based its ruling. *State v. Herrera*, 232 Ariz. 536, ¶ 24, 307 P.3d 103, 113 (App. 2013). When a defendant renews a suppression motion at trial, however, we will consider the trial evidence in resolving the Fourth Amendment claim. *E.g.*, *State v. Pederson*, 102 Ariz. 60, 63-66, 424 P.2d 810, 813-16 (1967); *see United States v. Howard*, 687 F.3d 13, 17 (1st Cir. 2012); 6 Wayne LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 11.7(d) (5th ed. 2012).

¶12 Orozco maintains he did renew his suppression motion at trial. He further contends that the information revealed there potentially "cast[] doubt on the correctness of the pretrial suppression ruling." *United States v. Longmire*, 761 F.2d 411, 420 (7th Cir. 1985). Assuming arguendo he is correct on these points and entitled to appellate review of the expanded record, we find no basis to disturb the trial court's ruling.

¶13 When Orozco appeared to renew his suppression motion below, the trial court noted that the trial developments would not alter its ruling. It explained:

> The Court never assumed or ruled or based any part of its ruling on the Motion to

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only the evidence presented at the voluntariness hearing and nothing presented at trial."), *with State v. Cañez*, 202 Ariz. 133, ¶ 70, 42 P.3d 564, 586 (2002) (acknowledging suppression arguments subject to fundamental error review "even absent a pretrial motion to suppress"), *and State v. Randall*, 94 Ariz. 417, 419, 385 P.2d 709, 710 (1963) ("To determine the legality of a search and seizure, we will consider the evidence adduced at the trial as well as the evidence presented upon the motion to suppress."), *and State v. Strayhand*, 184 Ariz. 571, 582 n.3, 911 P.2d 577, 588 n.3 (App. 1995) ("[T]he scope of review is not restricted to what happened at the voluntariness hearing."), *citing Blackburn v. Alabama*, 361 U.S. 199, 210 (1960).

> Suppress on any testimony that this was a routine traffic stop. . . . [T]he Court did not get from the testimony that this was a routine traffic stop. . . . I did not make a finding that there was no information [regarding illegal drugs]. . . . [E]ven though they never admitted that in front of the Court, it's not important to me. What's important to me is do I believe the officer when he says that he saw a traffic violation, and I believe that portion of his testimony.

This determination is essentially a factual one supported by the record; thus, the ruling does not constitute an abuse of discretion and may not be disturbed on appeal. *See State v. Waller*, 235 Ariz. 479, ¶ 5, 333 P.3d 806, 810 (App. 2014) (appellate court defers to trial court's determinations of fact and witness credibility); *see also State v. Aguilar*, 224 Ariz. 299, ¶ 6, 230 P.3d 358, 359 (App. 2010) ("[A]n abuse of discretion . . . occurs when a discretionary finding of fact is 'not justified by, and clearly against, reason and evidence.'"), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶14 In fact, a second deputy offered similar testimony at trial about Orozco's traffic violation, stating he had observed the vehicle go "in the middle of the intersection before it came to a complete stop." This deputy did not testify at the suppression hearing, and the trial court did not appear to base its ruling on this evidence. Nevertheless, the additional testimony underscores the reasonableness of the court's disposition of the renewed motion to suppress.

¶15 Orozco asserts he is entitled to "a remand for a new suppression hearing, in front of a different judge." However, he fails to provide any legal authority or argument required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., to support the requested relief. We therefore find this contention waived and do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

Absence from Trial

¶16 Orozco next argues we must remand his case for a redetermination of whether he voluntarily absented himself from trial. He bases his argument on alleged death threats he had received that were not explicitly made part of the record on appeal until the trial court mentioned them at sentencing. There, the court considered Orozco's absconder status as a potential aggravating factor, stating:

> I'm not sure if it was all on the record, but at the time of the trial it seemed Counsel all agreed that one of the Defendant's motivations for failure to appear was, in fact, a credible allegation that he might be murdered in the courthouse environment if he had appeared and we had a substantial law enforcement response to that threat because all the parties took that threat very seriously.

¶17 When the trial began, the trial court referred to a "security issue" and asked the parties' attorneys, "Are we anticipating any problems or is there any special need for the defendant for security today?" Defense counsel replied that none was needed. He further informed the court he had met with Orozco the day before trial, Orozco had said he would be present, and counsel had no information about why he was not. The court explained, "I'm not necessarily intending to start without him. If we have an explanation, I would be happy to hear it." Counsel, however, could offer no explanation. Nor could he reach Orozco when directed by the court to make further efforts to do so.

¶18 On appeal, Orozco does not challenge the trial court's express finding at trial that his absence was voluntary, pursuant to Rule 9.1, Ariz. R. Crim. P. Instead, he maintains the court abused its

discretion by failing to make a more complete record of the threats known at that time.

¶19 We reject this argument for two reasons. First, we find the contention waived because it is offered without any legal support. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838. Second, "[t]he defendant has the burden of establishing that his absence was involuntary," *State v. Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d 1132, 1134 (App. 1999); it is not a court's obligation to establish voluntariness. This rule is reasonable given a defendant's unique access to information about what prevented him from appearing at trial. Even assuming Orozco actually had feared for his life, this would not have prevented him from contacting his attorney and attempting to make a record of the reasons for his absence. We therefore find no error in the trial court's not acting sua sponte to place information about death threats on the record. *See State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010) (defendant must show error under any standard of review).

Assistance of Counsel

¶20 Last, Orozco attempts to raise a claim of ineffective assistance of trial counsel. He acknowledges such claims can be raised only in post-conviction proceedings under Rule 32, Ariz. R. Crim. P., not on direct appeal, as our supreme court held in *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), and *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20, 153 P.3d 1040, 1044 (2007). Orozco nonetheless asks this court to follow case law from other jurisdictions and "create an exception to that rule in cases when there can be no possible explanation for a defense attorney's ineffectiveness." As an intermediate appellate court, we are bound by our supreme court's precedents and cannot modify them. *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004); *State v. Sang Le*, 221 Ariz. 580, ¶ 4, 212 P.3d 918, 919 (App. 2009). We therefore must reject this argument without considering its merits.

Disposition

¶21 For the foregoing reasons, the conviction and sentence on count one are vacated, along with the $1,000 fine, $20 time payment fee, and surcharges totaling $860 that were based on that count. The conviction and ten-year prison term on count two are affirmed.