IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AMBER M. CARLSON,
Appellant.

No. 2 CA-CR 2015-0098
Filed January 20, 2016

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NOT FOR PUBLICATION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 Gila County
No. S0400CR201300006
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED

COUNSEL

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

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Following a jury trial, Amber Carlson was convicted of possession of drug paraphernalia, possession of a dangerous drug for sale, and transportation of a dangerous drug for sale. On appeal, she argues the trial court erred in denying her motion to suppress evidence because the initiating traffic stop was not based on reasonable suspicion. Because the court did not err, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court's ruling 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 sustaining the . . . court's ruling." *State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). In December 2012, an Arizona Department of Public Safety (DPS) officer was parked by the side of a highway monitoring traffic, when he observed a truck drive by with "dark-tinted windows." He then initiated a traffic stop for a suspected window tint violation and ultimately issued a repair order after a tint meter revealed the driver and passenger windows of the truck allowed only five percent light transmission, well below the statutory limit. *See* A.R.S. § 28-959.01(A).

¶3 During the course of the stop, Carlson, who was sitting in the passenger seat, stated the truck belonged to her. While she was retrieving the truck's registration information and proof of insurance, the officer observed several vehicle titles and an extra license plate[1] in the back seat. The Department of Motor Vehicle

[1]That license plate did not have any Department of Motor Vehicle record associated with it.

record connected to the license plate on Carlson's truck showed it belonged to a third-party. A deputy with the Gila County Sheriff's Office arrived, accompanied by a drug-detecting canine, and the DPS officer and deputy spoke to the driver and Carlson separately. After both made inconsistent statements, the DPS officer decided to conduct a canine sniff around the exterior of the truck, during which the dog alerted. A search revealed "a crystallized substance inside a purse, and inside some Christmas packages."

¶4 Carlson was charged and convicted as noted above. The trial court sentenced her to presumptive, concurrent prison terms, the longest of which is ten years. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Motion to Suppress

¶5 Carlson argues the trial court erred by denying her motion to suppress, which claimed the traffic stop was unconstitutional under the Fourth Amendment of the United States Constitution because the officer lacked an objective basis to support his reasonable suspicion for the stop.[2] She also contends the officer could not have been able to see whether or not her windows were

[2]Article 2, Section 8, of the Arizona Constitution also provides protection from unreasonable searches and seizures. Carlson did not cite the Arizona Constitution in her opening brief, but asserts, in her reply brief, that because she cited to Arizona case law on unreasonable search and seizure, "this Court can make a finding based on a violation of constitutional or state law." Regardless of her failure to cite to the Arizona Constitution, she has provided no argument, either in her opening brief or reply brief, that the analysis under the Fourth Amendment or state constitution should differ. *State v. Dean*, 206 Ariz. 158, n.1, 76 P.3d 429, 432 n.1 (2003). We therefore consider this issue under only the federal constitution. *Id.* Notably, however, "Arizona's right to privacy outside the context of home searches [is no] broader in scope than the corresponding right to privacy in the United States Constitution." *State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009).

tinted as she drove past him either because the officer had insufficient time or because her windows were rolled down.

¶6 "When reviewing a ruling on a suppression motion, 'we defer to the trial court's factual findings, including findings on credibility and the reasonableness of the inferences drawn by the officer.'" *State v. Moreno*, 236 Ariz. 347, ¶ 5, 340 P.3d 426, 432 (App. 2014), *quoting State v. Moran*, 232 Ariz. 528, ¶ 5, 307 P.3d 95, 98 (App. 2013). We review de novo mixed questions of fact and law, however, including whether the totality of the circumstances gave rise to reasonable suspicion supporting the traffic stop. *Id.*

¶7 An officer need only have reasonable suspicion of a traffic violation to justify a stop under the Fourth Amendment. *Heien v. North Carolina,* ___ U.S. ___, ___, 135 S. Ct. 530, 536 (2014). In evaluating the sufficiency of the basis for such a stop, we consider the totality of the circumstances from the perspective of "an objectively reasonable police officer." *Ornelas v. United States,* 517 U.S. 690, 696 (1996). This analysis "ordinarily involves 'an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time.'" *State v. Jeney,* 163 Ariz. 293, 295, 787 P.2d 1089, 1091 (App. 1989), *quoting Maryland v. Macon,* 472 U.S. 463, 471 (1985). An officer is "not required to determine if an actual violation has occurred prior to stopping a vehicle for further investigation." *State v. Nevarez*, 235 Ariz. 129, ¶ 7, 329 P.3d 233, 237 (App. 2014); *see also State v. Vera*, 196 Ariz. 342, ¶ 6, 996 P.2d 1246, 1247-48 (App. 1999) (officer not required to determine whether cracked windshield, in fact, violated statute requiring "'adequate'" windshields before stopping vehicle to investigate), *quoting* A.R.S. § 28-957.01(A). Additionally, pursuant to A.R.S. § 28-1594, an officer "may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation" of Title 28.

¶8 As relevant here, a motorist "shall not place, install, affix or apply a transparent material on the windshield or side or rear windows of a motor vehicle if the material alters the color or reduces the light transmittance of the windshield or side or rear windows" in a way that allows through less than thirty percent of the light. A.R.S. § 28-959.01(A), (C). An officer does not need "measurable proof" of a window tint violation in order to properly

initiate a traffic stop. *Moreno*, 236 Ariz. 347, ¶ 14, 340 P.3d at 432. Often, the "officer's visual observation of a vehicle's glass may be the only feasible way to establish reasonable suspicion to stop a moving vehicle for a suspected window tint violation." *Id.* ¶ 15; *see also State v. Conaway*, 779 N.W.2d 182, ¶ 7 (Wis. Ct. App. 2009) (reasonable suspicion does not require officer to "distinguish with the naked eye small variations in the amount of light that passes through suspect windows"); *Whren v. United States*, 517 U.S. 806, 817 (1996) ("'[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations'"), *quoting Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (alterations in *Whren*).

¶9 An officer's subjective reasons for stopping a vehicle based on a suspected window tint violation therefore can be objectively reasonable despite the officer's inability to objectively measure the tinting before initiating the stop. *See Moreno*, 236 Ariz. 347, ¶ 15, 340 P.3d at 432; *Nevarez*, 235 Ariz. 129, ¶ 7, 329 P.3d at 237. In determining whether an officer's belief was objectively reasonable, courts have considered facts such as whether the officer could clearly see inside the vehicle, whether the windows were, in fact, below or near the statutory limit, and the officer's training and experience in enforcing window tint regulations. *See Moreno*, 236 Ariz. 347, ¶ 17, 340 P.3d at 432 (officer's experience successfully spotting window tint violations and fact that tint within "few degrees of" legal limit sufficient to show reasonable suspicion); *see also Ciak v. State*, 597 S.E.2d 392, 395-96 (Ga. 2004) (officer's observation that windows were darkly tinted and belief that tinting was below legal limit sufficient); *Sanders v. State*, 989 N.E.2d 332, 335 (Ind. 2013) (officer's inability to "'clearly recognize or identify the occupant inside,'" combined with fact "the actual tint closely border[ed] the statutory limit" sufficient); *Johnson v. State*, 992 N.E.2d 955, 958-59 (Ind. Ct. App. 2013) (officer's testimony he could not "clearly identify the vehicle's occupants" at time of stop sufficient); *State v. Kirk*, 196 P.3d 407, 409 (Kan. Ct. App. 2008) (state trooper's general experience in enforcing window tint law, combined with fact that windows only four percent transparent when state minimum was thirty-five percent, sufficient).

¶10 In *Moreno*, this court found an officer's stop of a car for a window tint violation was based on reasonable suspicion, despite the fact the window tint was later determined to be within the legal limit. *Id.* ¶¶ 3, 18. In that case, the officer testified he believed the defendant's windows were illegally tinted because they appeared "'too dark'" on a "'sunny'" day. *Id.* ¶ 17. The officer's testimony additionally established that he "had accurate knowledge of Arizona's law on window tint, . . . had stopped 'several hundreds' of vehicles based on suspected tint violations, and had been correct '99 percent' of the time." *Id.* And, as the court noted, the "window was near the darkest legal limit, and the detective was only off in his visual assessment by a few degrees of light transmission." *Id.*

¶11 Here, the officer testified that at approximately 2:00 p.m., he was parked by the road monitoring traffic and he observed Carlson's truck drive by "with dark-tinted windows" through which he could not see. He stated that, in his experience, if he "can't see inside the vehicle, then . . . usually . . . [the vehicle is] in violation of the window tint" law. The officer also testified he had been with DPS for nine years, conducted "over [1,000] traffic stops" each year, and had accurate knowledge of Arizona's window tint laws. Additionally, the tint meter revealed, and Carlson does not dispute, the driver and passenger windows allowed only five percent of light transmission; a "substantial difference" from the thirty percent statutory minimum. *See Kirk*, 196 P.3d at 409; *see also* § 28-959.01.

¶12 The record supports the trial court's findings of fact. Accordingly, based on the totality of the circumstances in this case, viewed from the perspective of "an objectively reasonable police officer," the trial court did not err in finding the officer had reasonable suspicion for stopping Carlson's car on the basis of illegally tinted windows. *See Ornelas*, 517 U.S. at 696; *see also Moreno*, 236 Ariz. 347, ¶¶ 14-15, 18, 340 P.3d at 432.

¶13 Carlson argues, however, that her case is "distinguishable from *Moreno* in significant ways." Namely, she points out that in *Moreno*, the detective had followed Moreno's car "for several miles, observed suspicious behavior, and pulled up very

close to the vehicle at one point before finally conducting a traffic stop."

¶14 Those facts were noted in the court's recitation of the facts in *Moreno* but the court's analysis of whether the detective had reasonable suspicion did not turn on those details. *Id.* ¶¶ 2-3, 17. Carlson has not provided any other argument on why her case is distinguishable from *Moreno*, and this argument accordingly fails. Moreover, as the court in *Moreno* noted, the determination of whether an officer had reasonable suspicion to initiate a traffic stop "turns on the specific facts and totality of circumstances involved," and thus even if Carlson's case differed in certain aspects, that does not necessarily mean the stop was illegal. *Id.* n.7; *see also State v. Fornof*, 218 Ariz. 74, ¶ 11, 179 P.3d 954, 957 (App. 2008). Under the facts of this case, the officer had reasonable suspicion to initiate the traffic stop on Carlson's truck.

¶15 Carlson additionally argues that because the officer observed the truck as it was driving past him at approximately fifty-five miles per hour, he could not have had enough time to observe whether the windows were illegally tinted. She also points to her own testimony that the truck's windows were rolled down when it passed the officer, thus reasoning the officer could not have been able to discern whether the windows were illegally tinted. The officer, however, testified the windows were up and he was able to see the windows sufficiently as the truck drove by to believe they were tinted illegally. Carlson essentially asks this court to assess the witnesses' credibility, something we do not do. *See State v. Olquin,* 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007) (trial court in best position to assess witness credibility).

Disposition

¶16 For the foregoing reasons, we affirm Carlson's convictions and sentences.