

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

CHARLES EDWARD WALLACE,
Appellee.

No. 2 CA-CR 2015-0299
Filed April 29, 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NOT FOR PUBLICATION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 Cochise County
No. S0200CR201400583
The Honorable John F. Kelliher, Jr., Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

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

STARING, Judge:

¶1 The state appeals the trial court's decision granting appellee Charles Wallace's motion to suppress any evidence collected during the traffic stop resulting in his arrest on the ground that the stop was unlawfully prolonged. We conclude the court clearly abused its discretion, and reverse its ruling on the motion to suppress.

Factual and Procedural Background

¶2 In September 2014, Cochise County Sheriff's Deputy Brando Reibscheid made a daytime traffic stop of the minivan Wallace was driving. Reibscheid's marked unit was equipped with a dashboard camera system, which recorded at all times and provided a clock permitting the viewer to determine the duration of the stop. A microphone attached to Reibscheid's vest captured his conversations with Wallace. The trial court viewed and admitted the video into evidence at the suppression hearing.

¶3 At the time of the stop, Reibscheid was part of "Operation Stone Garden," which consisted of highly visible traffic enforcement intended to redirect criminal activity to outlying areas covered by federal law enforcement authorities. The deputy testified he had been looking for traffic and equipment violations and checking license plate numbers.

¶4 Reibscheid stopped Wallace because of a broken windshield, and because Wallace had something hanging from his rearview mirror. When Reibscheid approached the passenger side and asked for Wallace's paperwork, Wallace had considerable difficulty producing it, at one point providing some sort of bill

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instead of proof of insurance, and then providing an expired proof of insurance.

¶5 As Wallace searched for the requested documents, Reibschied engaged him in conversation and asked basic questions, including his destination and whether he had drugs or weapons. The deputy testified Wallace appeared nervous from the beginning of the stop, and became visibly more nervous when asked about weapons.

¶6 A red “running hatchet man” decal on the minivan’s side window caused Reibschied to have concern, based on his training and experience, about possible gang affiliation and the presence of knives, swords, or hatchets. Wallace said he had knives with him¹ but denied having any guns. Reibschied testified that for his safety, his “common practice” upon encountering a motorist with a weapon is to disarm the person and speak outside near the police vehicle, where the person is “out of their element” and unable to access items that may be hidden in the vehicle.

¶7 Approximately two and a half minutes after making contact with Wallace, and after Wallace told him about having knives, Reibschied requested backup using the microphone on his vest. While still looking for his documentation, Wallace received a telephone call, which the deputy permitted him to take without interruption.

¶8 It took Wallace almost four and a half minutes after Reibschied initiated the stop to locate the current vehicle registration. The deputy verified Wallace’s current address and asked Wallace to come back to his unit. When he stepped out of the van, Wallace repeated that he had knives, and Reibschied asked to pat him down. Reibschied removed one knife and Wallace pointed to a second knife the deputy had overlooked. During the pat-down and for some time thereafter Wallace engaged in another telephone conversation and smoked a cigarette.

¹Wallace told the deputy he had large knives or swords at home.

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¶9 Reibscheid checked Wallace's license status and whether he was wanted or the subject of any warrants after returning to the unit. The license, want and warrant check, which Reibscheid completed in approximately thirty-five seconds, is conducted on every traffic stop.

¶10 Reibscheid testified he could not begin the repair order until after the check, because the results could include information such as notice of a suspended license necessitating the use of a different form. He also needed to keep his hands free in case there was a warrant for Wallace's arrest. Reibscheid obtained the results of the record check by radio approximately seven minutes after he stopped Wallace; by that time a second deputy had arrived on the scene.

¶11 As Reibscheid began the repair order, Wallace started a conversation, asking Reibscheid where he was from and mentioning a friend who had died in a car accident. Reibscheid informed Wallace the other deputy would walk a dog around the car while Reibscheid completed the repair order. Wallace responded, "all right." Reibscheid then confirmed the addresses for Wallace and the vehicle owner for the repair order form.

¶12 Reibscheid testified it normally takes four to six minutes to complete a repair order and if a motorist is organized the whole stop takes ten to twelve minutes. He also testified he needed information about the vehicle and driver to complete the repair order, including "their name, their driver's license number, their date of birth, their physical characteristics, where they live at, the VIN number, year, make, model, [and] registered owner." Reibscheid testified he filled out the repair order on a clipboard, copying the necessary information, while still watching Wallace. He further stated: "I have to watch the person I'm talking to. Even after I pat them down, disarm them, I still have to be cognizant of that person. . . . I'm not conducting a full search of that person. I'm just conducting a pat-down of the person."

¶13 As Reibscheid continued the repair order, he and Wallace engaged in mutual conversation, discussing the birthday party Wallace planned to attend, the significance of the decal on the

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minivan, which Wallace said belonged to his wife, and maintenance issues Wallace experienced with another car he had purchased and the minivan.

¶14 Reibscheid completed the repair order approximately eight minutes after receiving Wallace's documents. But, approximately five minutes and forty seconds after Wallace had provided his documents, and therefore more than two minutes *before* Reibscheid completed the repair order, the other deputy finished walking the dog around the minivan. As of that time, which was approximately ten minutes after Reibscheid initiated the stop, the dog had already alerted to the outside of Wallace's vehicle.

¶15 A subsequent search of the minivan revealed, among other things, two handguns, four types of narcotic drugs, and a digital scale. Wallace was charged with two counts of possession of a deadly weapon while being a prohibited possessor, four counts of narcotic possession, and one count of possession of drug paraphernalia. Wallace moved to suppress the evidence resulting from the search of the minivan, relying primarily on the Supreme Court's decision in *Rodriguez v. United States*, 575 U.S. ___, ___, 135 S. Ct. 1609, 1616 (2015), establishing that police may not prolong a traffic stop beyond the time needed to handle the matter for which the stop was made in order to conduct a dog sniff.

¶16 Characterizing the stop as "a fishing expedition," the trial court granted Wallace's motion. The court acknowledged the stop had been prolonged in part because of the time Wallace spent looking for his documents, but concluded Reibscheid's questioning "slowed down the process" in a manner that was not permissible for "a traffic stop for a busted window or something." The judge relied on his personal experience of having "been stopped a few times" and never having been asked about weapons or to get out of his car to criticize Reibscheid's decision to question Wallace about weapons and have him get out of the minivan. The judge also made a series of statements during Reibscheid's testimony, at one point concluding, "If you had left him in his van and went back to your car and wrote the repair order, there's no danger to you." With respect to the time necessary to complete the repair order, the judge

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stated: “You testified four to six minutes to finish it up. My guess is two to four minutes.”

¶17 The state appealed the suppression order. We have jurisdiction pursuant to A.R.S. § 13-4032(6), which provides the state may appeal from “[a]n order granting a motion to suppress the use of evidence.”

Wallace’s Motion to Suppress

¶18 In reviewing a 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 trial court’s ruling.” *State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). We will not disturb the trial court’s ruling “absent a clear abuse of discretion.” *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). A court abuses its discretion when its discretionary action involves an error of law, failure to consider the evidence, or factual findings not supported by “substantial evidence.” *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). A trial court’s decision on a motion to suppress involves a mixed question of fact and law. *State v. Evans*, 237 Ariz. 231, ¶ 6, 349 P.3d 205, 207 (2015). The court’s factual findings are reviewed for abuse of discretion, while its purely legal conclusions are reviewed de novo. *Id.* The legality of a roadside detention, including its duration, is a question of law which is reviewed de novo. *State v. O’Meara*, 197 Ariz. 328, ¶ 2, 4 P.3d 383, 384 (App. 1999), *aff’d*, 198 Ariz. 294, 9 P.3d 325 (2000).

¶19 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV; *State v. Gilstrap*, 235 Ariz. 296, ¶ 7, 332 P.3d 43, 44 (2014). Absent proof a search is otherwise reasonable, evidence seized is generally suppressed. *State v. Allen*, 216 Ariz. 320, ¶ 9, 166 P.3d 111, 114 (App. 2007). “[W]arrantless searches are presumptively unreasonable.” *Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 9, 979 P.2d 539, 542 (App. 1999). The state has the burden under Rule 16.2(b), Ariz. R. Crim. P., to prove by a preponderance of the evidence that a warrant exception justifies the seizure of evidence obtained as a result of a warrantless search. *Id.* ¶¶ 11-12.

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¶20 A traffic stop is a seizure under the Fourth Amendment, and is unlawful absent reasonable suspicion the driver has committed an offense. *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003). The scope of a lawful traffic stop includes checking for outstanding warrants against the driver and reviewing the registration and proof of insurance, as these inquiries advance the objective of “ensuring that vehicles on the road are operated safely and responsibly.” *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1615. A traffic stop ends when the officer returns the driver’s documents and provides a written warning or citation. *See State v. Teagle*, 217 Ariz. 17, ¶ 23, 170 P.3d 266, 272 (App. 2007); *see also Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (“Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave.”). During a lawful traffic stop, an officer may also investigate “matters unrelated to the justification for the traffic stop . . . so long as those inquiries do not measurably extend the duration of the stop.” *Johnson*, 555 U.S. at 333.

¶21 The use of a trained, drug-detection dog on the outside of a vehicle is not an unreasonable search under the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005); *State v. Weinstein*, 190 Ariz. 306, 310, 947 P.2d 880, 884 (App. 1997), *citing State v. Morrow*, 128 Ariz. 309, 625 P.2d 898 (1981). The investigation of matters unrelated to a traffic stop may thus include a dog sniff on the outside of the vehicle so long as the stop is not “prolonged beyond the time reasonably required” to complete and issue the traffic citation. *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1612, *quoting Caballes*, 543 U.S. at 407.

¶22 After an officer completes a traffic stop, the driver must be permitted to leave unless the driver consents to remain or the officer forms a reasonable suspicion of illegal activity. *Teagle*, 217 Ariz. 17, ¶ 22, 170 P.3d at 272. An officer may conduct a warrantless search of a vehicle when it is “readily mobile and probable cause exists to believe it contains contraband.” *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). A drug-detection dog’s alert to the outside of a vehicle provides probable cause to search the vehicle. *See Weinstein*, 190 Ariz. at 310-11, 947 P.2d at 884-85.

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¶23 Wallace has not disputed the initial legality of the traffic stop for a cracked windshield and an item hanging from the mirror. Neither has he disputed the dog's alert gave the police probable cause to search the minivan. The state has not reasserted on appeal the argument that reasonable suspicion other than the dog's alert justified the search and any delay in the stop.

¶24 The state asserts on appeal the stop was not excessively prolonged, or, if there was "a brief delay," suppression was improper because Reibschied relied in good faith on the decision in *State v. Box*, 205 Ariz. 492, ¶¶ 13-24, 73 P.3d 623, 627-30 (App. 2003), abrogated by *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616, which allowed a brief and "minimally extended" traffic stop to facilitate a canine sniff. The state did not raise its good faith argument in the trial court and, in light of our resolution of this matter on other grounds, we do not address it here. The scope of this decision is thus limited to whether the trial court abused its discretion by holding the traffic stop was unconstitutionally extended and by suppressing the evidence.

1. Purpose of the Stop

¶25 The trial court's characterization of the stop as a "fishing expedition" may have been prompted by Reibschied's participation in Operation Stone Garden, which Wallace characterized as "a drug interdiction program emphasizing pretextual traffic stops as a means to initiate criminal drug investigations." But a traffic stop does not violate the Fourth Amendment simply because an officer's "ulterior motives" may include objectives other than traffic enforcement. *See Whren v. United States*, 517 U.S. 806, 811-13 (1996). Accordingly, Reibschied's involvement in Operation Stone Garden does not invalidate this traffic stop, which was justified by observed safety violations.

2. Officer-Safety Precautions

¶26 The state asserts it was "contrary to the law" to find the deputy's safety precautions impermissibly delayed the stop. We agree. The Supreme Court has rejected the notion traffic stops are inherently less dangerous than other police activities. *Pennsylvania*

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v. Mimms, 434 U.S. 106, 110 (1977) (“And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.”). Officer-safety concerns alone are sufficient to justify ordering a driver out of a vehicle during a lawful traffic stop. *Id.* at 111 (“What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.”). A pat-down search for weapons is permissible if the officer has reasonable suspicion an occupant of the vehicle is armed and dangerous. *Johnson*, 555 U.S. at 332. Reasonable suspicion arose here when Wallace informed the deputy he was armed with knives.

¶27 The trial court had no legal or factual basis to conclude Reibscheid’s safety measures were unreasonable in any respect. *Mimms*, 434 U.S. at 110 (“Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.”). The judge’s personal experience when being stopped was irrelevant. Neither are we aware of any authority for the proposition that a law enforcement officer must take identical safety precautions with every motorist. In light of the generally accepted precedent for disarming motorists and other minimally-intrusive officer-safety measures, the court’s conclusion that Reibscheid’s decision to remove Wallace from the van and disarm him impermissibly prolonged the stop is legally incorrect, and therefore an abuse of discretion.

3. Repair Order Form

¶28 The state also challenges the court’s finding the repair order should only have taken two to four minutes to complete. We agree this finding was inappropriate.

¶29 The trial court heard Reibscheid’s testimony about the information on the form and the process of filling it out. The repair order contains a half page of blanks to complete, and requires copying information from multiple other documents. Reibscheid testified the form takes four to six minutes when he is sitting alone in his vehicle.

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¶30 But Reibscheid could not even determine the correct form to use until he had received Wallace’s license, want and warrant check results. Safety concerns, including keeping his hands free in order to react if Wallace had an arrest warrant, also necessitated Reibscheid waiting for the want and warrant check before beginning any paperwork.

¶31 Because Reibscheid completed the paperwork outside his vehicle and in Wallace’s presence, he needed to simultaneously engage Wallace in routine questioning, while watching for potential threats to his and Wallace’s safety. This particular stop also required confirmation of the addresses of Wallace and the vehicle owner, which differed. Reibscheid confirmed the two addresses just before the second deputy and his dog began the exterior sniff of Wallace’s van. To whatever extent any of these factors may have slowed the process, they were either directly related to the original purpose of the traffic stop, *see Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1615, or done pursuant to legitimate concerns for officer safety, *see Mimms*, 434 U.S. at 110-11. *See also Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616 (officer may take “certain negligibly burdensome precautions” for safety reasons). Also, Wallace’s initiation of conversation and participation in telephone calls contributed to extending the time required to complete the repair order.

¶32 The eight minutes it took Reibscheid to complete the repair order was not substantially longer than the four to six minutes he testified it had taken to complete a repair order for a typical traffic stop. Moreover, because the dog’s alert supplied the probable cause that ultimately justified the warrantless search, the more relevant moment is the time of alert or, at the latest, the completion of the dog’s open air sniff. The alert justified extending the stop in order to search the vehicle, regardless of the status of the repair order. The sniff concluded approximately ten minutes after Reibscheid initiated the stop, and less than six minutes after Wallace provided the documents needed to complete the repair order.²

²At oral argument, Wallace’s counsel acknowledged “this was a pretty quick stop” and that it was “about a ten minute stop.”

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¶33 *Rodriguez*, in contrast, involved very different facts. There, the officer issued a written warning and returned the driver's documents just over twenty minutes after initiating the traffic stop. 575 U.S. at ___, 135 S. Ct. at 1612-13. Before completing the written warning, the officer also questioned and completed a records check on the passenger. *Id.* at ___, 135 S. Ct. at 1613. On the basis of what the magistrate judge characterized as "'a rather large hunch,'" the officer, despite the traffic stop being completed, then detained the driver to allow a second officer to arrive to facilitate a dog sniff. *Id.* At least another seven minutes elapsed before the dog alerted on its second pass around the vehicle. *Id.*

¶34 Here, the deputies attended to both the traffic matter and the dog sniff in approximately half the time the officer in *Rodriguez* spent on just the traffic matter. As the state noted, the trial court heard no evidence rebutting Reibscheid's testimony about the time required to complete the repair order form. Although the court was not required to accept Reibscheid's testimony, *see State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n*, 128 Ariz. 515, 521, 627 P.2d 666, 672 (1981), its conclusion that the form should have taken two to four minutes was unsupported by any evidence properly introduced; it was nothing more than the court's own "guess." The court's conclusion, which differed so considerably from the only evidence that had been presented, constituted an abuse of discretion. *See Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982).

¶35 Reibscheid's general testimony that his conversation with Wallace, including questioning unrelated to the violations resulting in the stop, increased the time needed to complete the repair order does not support concluding the stop was "'prolonged beyond the time reasonably required'" to complete and issue the repair order. *See Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1612, *quoting Caballes*, 543 U.S. at 407. In its entirety the stop was of short duration. Moreover, Wallace initiated significant portions of the conversation, received telephone calls during the stop, and Reibscheid's conversations with Wallace served the interest of officer safety by keeping him engaged throughout the stop. *See Mimms*, 434 U.S. at 110 (murders of police officers frequently

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occur during traffic stops). Reibscheid's questions may not all have been specifically addressed to the repair order or the violations, but that did not abrogate their safety purpose.

¶36 We therefore conclude, as a matter of law, Wallace's detention was not "'prolonged beyond the time reasonably required'" to complete and issue the repair order. *See Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1612, *quoting Caballes*, 543 U.S. at 407.

4. *State v. Kjolsrud*

¶37 Finally, during our consideration of this case, we published our opinion in *State v. Kjolsrud*, Nos. 2 CA-CR 2015-0230, 2 CA-CR 2015-0231, 2016 WL 1085229 (consolidated) (Ariz. Ct. App. Mar. 18, 2016). This case is distinct from *Kjolsrud*. In that case, another Cochise County Sheriff's Deputy admitted he intentionally had delayed starting traffic citation paperwork to allow a second deputy approximately ten minutes to arrive with a drug-detection dog. *Id.* ¶¶ 3, 12, 23. The deputy conceded he had no safety concerns, and removed the driver from the vehicle solely to ask about matters unrelated to the traffic stop. *Id.* ¶ 14. Moreover, the deputy radioed for canine assistance after the motorist refused consent to search the vehicle. *Id.* ¶ 5. *Kjolsrud*, therefore, provides an example of a substantial, unjustifiable delay. *See id.* ¶¶ 14-17. Here, we resolve the case on the complete absence of evidence to support a holding the stop was extended beyond the time needed to reasonably complete the repair order.

Disposition

¶38 The trial court abused its discretion by disregarding legitimate officer-safety concerns and making a determination about the time reasonably needed to complete the repair order that was not supported by any evidence properly before it. We therefore reverse the ruling on the motion to suppress, and remand the case for proceedings not inconsistent with this decision.