

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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JOSE ANGEL LAGARDA,  
*Petitioner,*

*v.*

HON. HOWARD FELL, JUDGE PRO TEMPORE OF THE SUPERIOR COURT  
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,  
*Respondent,*

*and*

THE STATE OF ARIZONA,  
*Real Party in Interest.*

No. 2 CA-SA 2016-0032  
Filed July 29, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED FOR PERSUASIVE AUTHORITY.  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1),(f);  
Ariz. R. P. Spec. Act. 7(g), (i).*

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Special Action Proceeding  
Pima County Cause No. CR20160522001

**JURISDICTION ACCEPTED; RELIEF GRANTED IN PART**

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COUNSEL

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By Ricardo Bours  
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Barbara LaWall, Pima County Attorney  
By Nicolette Kneup, Deputy County Attorney, Tucson  
*Counsel for Real Party in Interest*

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**MEMORANDUM DECISION**

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

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MILLER, Judge:

¶1 Petitioner Jose Angel Lagarda petitions for review of the respondent judge’s order granting the state’s appeal from a ruling of the Pima County Consolidated Justice Court and remanding the case for further proceedings. For the following reasons, we accept jurisdiction and grant relief, in part, to clarify the respondent judge’s order for remand. We otherwise deny relief.

**Jurisdiction**

¶2 “Our exercise of special action jurisdiction is discretionary but proper when the petitioner has no plain, adequate or speedy remedy by appeal.” *Jordan v. McClennen*, 232 Ariz. 572, ¶ 5, 307 P.3d 999, 1001 (App. 2013). Because the justice court’s ruling has been appealed to the superior court, Lagarda has no equally plain, speedy and adequate remedy by appeal. See A.R.S. § 22-375(B); Ariz. R. P. Spec. Act. 1(a). In our discretion, we accept jurisdiction.

**Facts and Procedural Background**

¶3 In justice court, Lagarda sought to suppress evidence that had led to misdemeanor charges against him, alleging the Department of Public Safety (DPS) officer who conducted a traffic stop of his vehicle had lacked reasonable suspicion to do so. At an evidentiary hearing, the officer testified he had seen Lagarda’s vehicle parked on the shoulder of a roadway under the interstate for no apparent reason. In response, he turned around and pulled his

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patrol vehicle up on the other side of the crossing, facing Lagarda's vehicle. When Lagarda pulled into the roadway and drove away, the officer followed him, for no more than a mile and a half, in order to conduct a check of the vehicle's license plate, which revealed no basis for a stop. However, according to the officer, while he was following Lagarda, he observed his vehicle "swerve to the right nearly striking a curb and overcorrect to the left" and also saw him "flick" a cigarette out of the driver's side window. Lagarda testified he did not believe he had swerved and over-corrected while driving, and he denied having thrown a cigarette out of the window, stating he had not been smoking before the officer stopped his vehicle.

¶4 In its under-advisement ruling dismissing the charges against Lagarda, the justice court noted the officer's testimony that Lagarda's vehicle had "at one point . . . made a jerking movement to the right almost striking a curb, then over-corrected to the left" in an area where "[t]here was no other traffic." The court wrote,

It is the opinion of the court that one momentary deviation that did not affect traffic in any way did not constitute reasonable suspicion to stop defendant. The officer might have had subjective suspicion that something illegal was afoot when he first spotted defendant, although that was not borne out, but he did not have reasonable, objective suspicion [for the stop].

The court's order did not address the officer's testimony that Lagarda had discarded a cigarette from the window of his vehicle.

¶5 The state appealed to the superior court from the justice court's order, arguing the justice court had abused its discretion in finding the officer's observations did not support reasonable suspicion for the stop. After a hearing, the respondent judge found "that the lower court was incorrect in its assessment that discarding a cigarette on public property is not a violation of A.R.S. § 13-1601(3) [and A.R.S. § 13-1603(A)(1)], and that if such occurred, as was the testimony from the officer at the trial, there was reasonable

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suspicion to stop the defendant.”<sup>1</sup> The respondent then remanded the matter to the justice court for further proceedings consistent with that ruling.

¶6 In his petition for special action relief, Lagarda argues the respondent judge abused his discretion in “averring there was reasonable suspicion to stop [Lagarda’s] vehicle.” He maintains he had “never contested that littering on public property is a violation of the law.” But he argues the justice court “clearly didn’t find the allegation pertaining to a discarded cigarette credible” and “simply didn’t believe the officer’s testimony” about it, noting language in the court’s ruling finding the officer had “already made up his mind to stop [Lagarda]” and had followed him “hoping to see [him] commit a suspected traffic violation so he could stop [him].” Relying on *State v. Evans*, 235 Ariz. 314, ¶ 2, 332 P.3d 61, 62 (App. 2014), he suggests the respondent judge, by remanding the case after appeal, failed to afford appropriate deference to the justice court’s findings of fact and credibility determinations.

¶7 In response, the state argues the respondent judge “made a legal ruling, not a factual one” and afforded proper deference to the justice court by contemplating factual findings to be made after remand. But, notwithstanding this argument, the state also characterizes the respondent’s remand order as a legal conclusion that “based on the record, the [justice] court was wrong to conclude that no reasonable suspicion existed to justify a traffic stop in this case.”

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<sup>1</sup>Section 13-1601(3) defines litter to include, inter alia, “any rubbish, refuse, waste material, . . . [or] paper.” Section 13-1603(A)(1) provides, in relevant part, “A person commits criminal littering . . . if the person without lawful authority . . . [t]hrows, places, drops or permits to be dropped on public property or property of another that is not a lawful dump any litter . . . that the person does not immediately remove.”

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**Discussion**

¶8 Pursuant to Rule 3(c), Ariz. R. P. Spec. Act., special action relief may be available when a respondent's "determination was arbitrary and capricious or an abuse of discretion." We find no abuse of discretion in respondent's remand order, but we grant limited relief to specify that the purpose of the remand is for the justice court to clarify whether it accepted or rejected the officer's testimony that he stopped Lagarda, in part, to investigate the offense of littering.

¶9 A law enforcement officer's investigatory stop of a motor vehicle is permissible under the Fourth Amendment if he has a reasonable suspicion that the driver has committed a criminal offense. *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003). In other words, the officer must have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). In an appeal from a ruling on a motion to suppress based on an allegedly illegal traffic stop, a reviewing court considers only the evidence presented at the suppression hearing, and must defer to a trial court's factual findings, "including findings regarding [an officer's] credibility and the reasonableness of inferences that he drew." *Evans*, 235 Ariz. 314, ¶ 2, 332 P.3d at 62, quoting *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778 (alteration in *Evans*).

¶10 We decline to speculate about why the justice court's dismissal order omitted reference to the officer's testimony that Lagarda had discarded a cigarette from his vehicle's window. It may be, as the respondent judge's order suggests, that the court had erroneously concluded "that discarding a cigarette on public property" is not a criminal violation, or that an officer's reasonable suspicion of such a violation did not justify a traffic stop. Or the court may have concluded that Lagarda's testimony that he did not toss a cigarette out the window was more credible, but failed to state its conclusion because it focused instead on the officer's observations about Lagarda's driving. In the absence of specific findings relating to the officer's testimony about a discarded cigarette, we cannot determine whether the justice court found his

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testimony lacked credibility as Lagarda suggests, or was an abuse of discretion as the state implies. *See Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d at 1106 (although officer's ulterior motives may influence court's credibility determination, they "do not invalidate an otherwise lawful traffic stop"); *see also State v. Moreno*, 236 Ariz. 347, ¶ 11, 340 P.3d 426, 431 (App. 2014) (suggesting "propriety of traffic stop depends not on whether defendant actually committed traffic offense, but whether it was reasonable for officer to believe an offense had been committed").

¶11 Recognizing that resolution of this issue had been omitted from the justice court's dismissal order, the respondent judge properly remanded the matter for further proceedings, *see Evans*, 235 Ariz. 314, ¶ 2, 332 P.3d at 62, and it clarified the law to be applied to facts found on remand. *See* A.R.S. § 41-1741(C) (DPS highway patrol officers "are vested with the authority of peace officers, primarily for the purpose of enforcing laws relating to the use of highways and operation of vehicles thereon"); *see also Hinton v. State*, 656 S.E.2d 918, 919 (Ga. Ct. App. 2008) (officer had reasonable suspicion to stop vehicle based on observation of littering); *State v. Beall*, 771 N.W.2d 41, 45 (Minn. Ct. App. 2009) (same); *State v. Iverson*, 871 N.W.2d 661, ¶¶ 44-55 (Wis. 2015) (same).

**Disposition**

¶12 We accept jurisdiction and grant relief to the limited extent of clarifying the purpose for remand, as detailed above. Finding no abuse of discretion, we otherwise deny relief.