IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE ISIDRO MARTINEZ-FELIX,
Appellant.

No. 2 CA-CR 2016-0213
Filed August 18, 2017

Appeal from the Superior Court in Pima County
No. CR20142237001
The Honorable Howard Fell, Judge Pro Tempore

REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Jose Martinez-Felix was convicted of transportation of a narcotic drug for sale and possession of drug paraphernalia. The trial court sentenced him to mitigated, concurrent prison terms, the longer of which is three years. On appeal, Martinez-Felix argues the court erred by denying his motion to suppress the evidence obtained during a traffic stop of his vehicle because the stop was unlawfully prolonged without reasonable suspicion or consent. For the reasons stated below, we remand this matter for the trial court to determine whether Martinez-Felix's consent was tainted by an unconstitutional prolonged stop.

Factual and Procedural Background

¶2 In reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's ruling. *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000). In May 2014, City of Tucson Police Officer Francisco Magos observed a vehicle driven by Martinez-Felix make an "improper left turn." Magos, who was accompanied by Officer Robert Orduno, initiated a traffic stop. As Magos approached the left side of the vehicle and Orduno the right, Martinez-Felix stuck his head out of the driver's window and looked at them with his sunglasses on. When Magos asked for identification, Martinez-Felix, who was "shaking" and "looking all over the place," provided a driver's license from Sinaloa, Mexico. Magos returned to the police car to conduct a records check.

[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

While he did so, Orduno walked around to the driver's side and made "[s]mall talk" with Martinez-Felix. The records check revealed no issues with the license and no warrants.

¶3 Magos returned to the vehicle and asked Martinez-Felix to step out and walk back toward the police car. Once in front of the police car, the two discussed "possible criminal activity" and also engaged in "small talk." At some point, Martinez-Felix consented to a search of his vehicle, and Magos requested that another officer bring his drug-detection dog to the scene to complete an exterior sniff of Martinez-Felix's vehicle. Officer Jason Bentley and his dog arrived "minutes" later, "ten minutes maybe max," according to Orduno. The dog gave a positive alert for the presence of drugs, and the officers eventually found a "golf ball size clear plastic wrap concealing . . . a dark brownish substance," consistent with heroin, under the front-passenger seat. A grand jury indicted Martinez-Felix for transportation of a narcotic drug for sale and possession of drug paraphernalia.

¶4 Martinez-Felix filed a motion to suppress "all evidence from [his] arrest and seizure," arguing that "it was unreasonable for Officer Magos to infer from his observations, . . . [Martinez-Felix's] left hand turn, and his experience that [Martinez-Felix] was attempting to commit a crime of drug possession." Relying on *State v. Box*, 205 Ariz. 492, 73 P.3d 623 (App. 2003), the state maintained the officers had reasonable suspicion, based on Martinez-Felix's behavior, to conduct a "de minimis post-traffic stop detention" involving a dog sniff. Although the state did not argue in its response that Martinez-Felix had consented to the search, Magos testified at the suppression hearing that he had. Magos admitted, however, that he had failed to include that detail in his written report.

¶5 During oral argument, the trial court observed:

> The testimony was that [Martinez-Felix] had given consent to search the vehicle. I don't have anybody here to tell me that's not what happened. [Martinez-Felix is] not here. I've heard no testimony. So I need to rely on the credibility of the witness, which is what I

> will do. But right now there's no evidence before me that he didn't consent . . . .

The court subsequently denied the motion to suppress, explaining that the "officers had reasonable suspicion to stop the vehicle" and that "officers do not need an individualized reasonable suspicion of drug related activity before subjecting a vehicle lawfully detained to . . . a dog sniff."

¶6 A few days before trial, Martinez-Felix filed a motion for reconsideration based on the recently decided *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015). In *Rodriguez*, the United States Supreme Court held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." ___ U.S. at ___, 135 S. Ct. at 1612. The Court reiterated that "[a] seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id.*, *quoting Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (first alteration added, remaining alterations in *Rodriguez*).

¶7 The trial court denied the motion for reconsideration, reasoning that this case was distinguishable from *Rodriguez*. The court explained:

> Based upon his interaction with . . . Martinez-Felix, . . . Officer Magos had reasonable suspicion that Martinez-Felix was concealing criminal behavior. In fact, Officer Magos asked Martinez-Felix if there was anything illegal in his vehicle, to which Martinez-Felix replied, "No, there shouldn't be." It was at that time that the [drug-detection dog] summoned by Officer Magos arrived on scene.

The jury found Martinez-Felix guilty as charged,[2] and the court sentenced him as described above. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion to Suppress

¶8 Martinez-Felix argues the trial court erred by denying his motion to suppress. He reasons, "Because [the] officers lacked reasonable suspicion to believe [he] was engaged in criminal activity, their expansion of the scope of the traffic stop from the investigation of a traffic violation to an investigation of possible drug crimes," including "a dog sniff of his vehicle," violated his Fourth Amendment rights. He also maintains the state failed to show he voluntarily consented to the search. We review a ruling on a motion to suppress evidence for an abuse of discretion if it involves a discretionary issue, but we review purely legal issues de novo. *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶9 The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *State v. Gay*, 214 Ariz. 214, ¶ 8, 150 P.3d 787, 791 (App. 2007). "An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment" and, therefore, requires reasonable suspicion that the driver has committed an offense. *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). An officer who has observed a traffic violation has reasonable suspicion to initiate a stop. *State v. Kjolsrud*, 239 Ariz. 319, ¶ 9, 371 P.3d 647, 650 (App. 2016).

¶10 An investigatory stop, however, is "temporary" and may "last no longer than is necessary to effectuate the purpose of the stop." *State v. Sweeney*, 224 Ariz. 107, ¶ 17, 227 P.3d 868, 873 (App. 2010), *quoting Florida v. Royer*, 460 U.S. 491, 500 (1983). For a traffic stop, "the tolerable duration of police inquiries . . . is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and to attend to related safety concerns." *Rodriguez*, ___ U.S. at ___, 135 S.

[2]The jury in Martinez-Felix's first trial was unable to reach a verdict, and the trial court declared a mistrial.

Ct. at 1614, *quoting Caballes*, 543 U.S. at 407. "Authority for the seizure thus ends when tasks tied to the traffic stop are—or reasonably should have been—completed." *Id.*

¶11 On-scene investigation, including dog sniffs, into other criminal activity constitutes a "detour" from the mission of the traffic violation. *Id.* at ___, 135 S. Ct. at 1615-16. "[T]he Fourth Amendment tolerate[s] certain unrelated investigations that d[o] not lengthen the roadside detention," but a traffic stop "'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a [citation or] warning ticket." *Id.* at ___, 135 S. Ct. at 1614-15, *quoting Caballes*, 543 U.S. at 407 (fifth alteration in *Rodriguez*, remaining alterations added). Upon completion of the mission, an officer "must allow a driver to continue on his way unless (1) the encounter between the driver and the officer becomes consensual, or (2) during the encounter, the officer develops a reasonable and articulable suspicion that criminal activity is afoot." *Sweeney*, 224 Ariz. 107, ¶ 17, 227 P.3d at 873.

¶12 Martinez-Felix concedes that the officers "had reasonable suspicion to stop [him] for an illegal left turn." Accordingly, it was reasonable for the officers to make contact with Martinez-Felix, request his identification, and perform a records check. *See Rodriguez*, ___ U.S. at ___, 135 S. Ct. at 1615; *see also Kjolsrud*, 239 Ariz. 319, ¶ 11, 371 P.3d at 651.

¶13 The parties, however, dispute what occurred after the records check. Martinez-Felix maintains that Magos unlawfully prolonged the stop by "convert[ing] the purpose . . . into a drug investigation" without any new reasonable suspicion or consent. He reasons that this delay constituted an "impermissible detention in violation of the Fourth Amendment." In its answering brief, the state offers multiple justifications for Magos's conduct: (1) Magos did not unlawfully prolong the stop because "the dog sniff was conducted by the time the traffic stop reasonably should have been completed"; (2) "reasonable suspicion of criminal activity existed to support [Martinez-Felix's] detention" to conduct the dog sniff; and (3) Magos "had an independent basis for detaining [Martinez-Felix] for a dog sniff: consent."

¶14 *Kjolsrud* is instructive. There, a deputy pulled over the defendants for a traffic violation. *Kjolsrud*, 239 Ariz. 319, ¶ 2, 371 P.3d at 649. After speaking to the defendants and performing a records check, the deputy testified that he "could have concluded the stop at that time." *Id.* ¶ 3. Instead, he asked the driver to step out of the car and brought her to his patrol vehicle. *Id.* The driver declined the deputy's request to search the car, and the deputy radioed for another officer to bring his drug-detection dog to the scene. *Id.* ¶ 5. The other officer and his dog arrived approximately ten minutes later. *Id.* ¶ 23. The trial court granted the defendants' motion to suppress the evidence obtained during a subsequent search of the car. *Id.* ¶¶ 6-7.

¶15 On appeal, this court concluded that "removing the driver from the car to undertake further questioning falls into the category of a 'detour' from the mission of the underlying traffic stop" and "amounts to an additional seizure under the Fourth Amendment." *Id.* ¶ 14. Turning to "whether the deputy had reasonable suspicion to extend the detention beyond the traffic stop," we determined that the deputy's decision to request a dog sniff was based on the defendants' prior criminal history, which was not sufficient for reasonable suspicion. *Id.* ¶¶ 15, 17. We additionally found that the good-faith exception to the exclusionary rule did not apply because the "delay—approximately ten minutes—was not 'a de minimis intrusion on the defendant's liberty,' as described in *Box*." *Id.* ¶ 23, *quoting Sweeney*, 224 Ariz. 107, ¶ 14, 227 P.3d at 872.

¶16 Here, we must first determine whether Magos unlawfully prolonged the traffic stop. Martinez-Felix maintains that he did because, "rather than pursue the original justification for the stop, . . . Magos decided to convert the purpose of the stop into a drug investigation." He argues that Magos "facilitate[d] that new purpose" by asking him to get out of his vehicle, escorting him to the police car, and forcing him to wait for Bentley to arrive at the scene with his drug-detection dog. The state, on the other hand, asserts that the stop was not unlawfully prolonged because, "Had Officer Magos written [Martinez-Felix] a citation or warning based on the illegal turn (as he likely would have absent [Martinez-Felix's] strange behaviors), completion of the paperwork likely would have taken roughly the

same amount of time." We are unpersuaded by the state's argument based on a hypothetical set of facts.

¶17 Rule 16.2(b), Ariz. R. Crim. P., explains that, with a pretrial motion to suppress, "[t]he prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial." However, Rule 16.2(b) also provides that, when a defendant is entitled to disclosure of the circumstances under which evidence was taken, including evidence obtained by search or seizure, the defendant first has the burden of establishing a prima facie case that the evidence should be suppressed. *See State v. Hyde*, 186 Ariz. 252, 265-66, 921 P.2d 655, 668-69 (1996). If the defendant meets this "burden of going forward," *Hyde*, 186 Ariz. at 266, 921 P.2d at 669, the state must then satisfy its burden of persuasion by a preponderance of the evidence to avoid suppression, Ariz. R. Crim. P. 16.2(b).

¶18 Martinez-Felix met his burden by establishing a prima facie case that the evidence should be suppressed because it was seized during an unlawfully prolonged traffic stop. *See Rodriguez*, ___ U.S. at ___, 135 S. Ct. at 1612; *see also Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 10, 979 P.2d 539, 542 (App. 1999) (defendant meets burden by showing evidence seized pursuant to warrantless search). After the records check revealed no issues to justify further detention, Magos asked Martinez-Felix to step out of the vehicle and walk back to the police car. The two talked about "possible criminal activity" and made "small talk," including "talking about cars [they saw] driving down the road." *See State v. Maciel*, 240 Ariz. 46, ¶ 19, 375 P.3d 938, 943 (2016) ("'In assessing whether a detention is too long in duration to be justified as an investigative stop,' we examine whether the police 'diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'"), *quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985). Magos then called Bentley to bring his drug-detection dog to the scene to perform a sniff of Martinez-Felix's vehicle. This process took roughly ten minutes.[3]

[3]Given the length of the delay, we reject the state's additional argument that Magos relied in good faith on then-existing law under *Box* that "a de minimis delay to a traffic stop was not unreasonable

¶19 Notably, Magos admitted that he "expanded this stop from a wide turn into a drug search" without seeing any drugs in the vehicle. Orduno similarly testified that at the point Magos requested the dog they had observed no "criminal activity or drugs." The officers never issued a warning or citation to Martinez-Felix for the illegal left turn. None of the officers described the time it usually takes to issue a warning or citation, and they did not explain at what point the mission of this traffic stop was, or could have been, completed. *See Rodriguez*, ___ U.S. at ___, 135 S. Ct. at 1614. The state therefore failed to meet its burden of showing that the stop was not "'prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation."[4] *Id.* at ___, 135 S. Ct. at 1612, *quoting Caballes*, 543 U.S. at 407 (alteration in *Caballes*).

¶20 The state argues, "To the extent that the officers were addressing [Martinez-Felix's] strange behavior, which implicated their personal safety, they did not unnecessarily prolong the traffic stop under *Rodriguez*." We agree that officers can "attend to related

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under the Fourth Amendment." In *Box*, although the exact duration of the delay was unclear, this court concluded it was "necessarily short," in part, because the officer who conducted the traffic stop was traveling with a drug-detection dog. 205 Ariz. 492, ¶¶ 3-5, 23, 73 P.3d at 625, 630. However, this case is more like *Kjolsrud* because Magos had to call another officer to bring a drug-detection dog to the scene. And Orduno suggested that the delay was approximately ten minutes, which *Kjolsrud* makes clear is "not 'a de minimis intrusion on the defendant's liberty,' as described in *Box*." 239 Ariz. 319, ¶ 23, 371 P.3d at 653, *quoting Sweeney*, 224 Ariz. 107, ¶ 14, 227 P.3d at 872. Thus, the good-faith exception to the exclusionary rule does not apply. *See id.*

[4]Although *Rodriguez* had not been decided at the time of the suppression hearing, the principles outlined therein were not novel. *See Kjolsrud*, 239 Ariz. 319, ¶ 24, 371 P.3d at 654 ("*Rodriguez* applied a general rule that the Court had announced as early as 1983 . . . ."). Moreover, when Martinez-Felix filed his motion for reconsideration based on *Rodriguez*, the state did not request an additional hearing to present more evidence.

safety concerns" without exceeding the permissible scope of a traffic stop. *Id.* at ___, 135 S. Ct. at 1614. However, as the state acknowledges, Magos did not testify at the suppression hearing that he had asked Martinez-Felix to step out of his vehicle out of concern for officer safety. Indeed, neither Magos nor Orduno expressed any safety concerns related to the traffic stop. *See Kjolsrud*, 239 Ariz. 319, ¶ 14, 371 P.3d at 651. Thus, removing Martinez-Felix from the vehicle for additional questioning and a dog sniff was a detour from the mission of the traffic violation and constituted an additional seizure under the Fourth Amendment. *See Rodriguez*, ____ U.S. at ___, 135 S. Ct. at 1615-16; *see also Kjolsrud*, 239 Ariz. 319, ¶ 14, 371 P.3d at 651.

¶21 Because Magos prolonged the detention beyond the traffic stop, we must next determine whether he had reasonable suspicion or consent to do so. *See Sweeney*, 224 Ariz. 107, ¶ 17, 227 P.3d at 873. In denying Martinez-Felix's motion for reconsideration, the trial court concluded the officers had reasonable suspicion to continue Martinez-Felix's detention and conduct the dog sniff; we therefore address that issue first.

¶22 "By definition, reasonable suspicion is something short of probable cause." *State v. O'Meara*, 198 Ariz. 294, ¶ 10, 9 P.3d 325, 327 (2000). "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *State v. Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d 266, 272 (App. 2007). When considering whether reasonable suspicion exists, "we look at the 'whole picture' or the 'totality of the circumstances.'" *O'Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d at 326-27, *quoting United States v. Cortez*, 449 U.S. 411, 417-18 (1981). "If all the circumstances taken together, along with the reasonable inferences derived from them, describe behavior that is entirely ordinary, then that behavior cannot reasonably give rise to particularized suspicion." *State v. Evans*, 237 Ariz. 231, ¶ 12, 349 P.3d 205, 209 (2015).

¶23 The trial court found that Magos had reasonable suspicion based on Martinez-Felix's statement that "there shouldn't be" anything illegal in his vehicle. However, as Martinez-Felix points out, this statement came from the state's recitation of the facts in its response to the motion to suppress. The state concedes that there was

no such testimony at the suppression hearing. It is therefore beyond the scope of our review and not a proper basis for a finding of reasonable suspicion. *See Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d at 394; *see also State v. Rojo-Valenzuela*, 237 Ariz. 448, n.2, 352 P.3d 917, 921 n.2 (2015).

¶24 The state nevertheless asserts that Magos had reasonable suspicion based on Martinez-Felix's "profound nervousness" and the area they were in. Both of these factors can contribute to a finding of reasonable suspicion based on the totality of the circumstances. *See, e.g.*, *State v. Primous*, 242 Ariz. 221, ¶¶ 23-24, 394 P.3d 646, 651 (2017) (presence in "dangerous neighborhood" relevant for reasonable suspicion); *State v. Magner*, 191 Ariz. 392, ¶ 15, 956 P.2d 519, 524 (App. 1998) ("'[D]ramatic' indications of nervousness may contribute substantially to a suspicion of criminal activity."), *disapproved of on other grounds by O'Meara*, 198 Ariz. 294, ¶ 9, 9 P.3d at 327.

¶25 However, the evidence of Martinez-Felix's conduct does not rise to the level of "profound" or "dramatic" nervousness. Given that the officers were in an unmarked police car, Martinez-Felix's initial reaction in sticking his head out the window as the officers approached his vehicle was reasonable. *See United States v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980) (describing defendant's evasive actions and flight from unmarked police car as "natural reactions"). In addition, some degree of "shaking" upon contact with law enforcement and looking around do not necessarily indicate criminal activity. *United States v. Roelandt*, 827 F.3d 746, 749 (8th Cir. 2016); *United States v. Santos*, 403 F.3d 1120, 1126-27 (10th Cir. 2005). The officers did not describe Martinez-Felix's shaking as "extraordinary and prolonged."[5] *Santos*, 403 F.3d at 1127. Rather, Magos conceded

[5]Magos did describe Martinez-Felix's conduct as "unusual," but it is not clear whether he was referring to Martinez-Felix's initial reaction in sticking his head out of the window with his sunglasses on or his shaking and looking around. To the extent the state relies on this testimony as the basis for reasonable suspicion, it also does not constitute "profound" or "dramatic" nervousness. *See* Ariz. R. Crim. P. 16.2(b) (state has "burden of proving . . . the lawfulness in all respects of acquisition of all evidence").

it could be characterized as a "light tremor." In addition, while Martinez-Felix was "looking from side to side," he was flanked by Magos and Orduno. And nervousness is generally one factor among several that contribute to a finding of reasonable suspicion. *See O'Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d at 326; *see also United States v. Wilson*, 506 F.3d 488, 495 (6th Cir. 2007) ("Nervous behavior, standing alone, is not enough . . . .").

¶26 All the record shows in addition to Martinez-Felix's nervousness is Magos's statement that he expanded the stop into a drug search "just given the area [they] were in." But "[t]he fact that the encounter occurred in a high-crime neighborhood was insufficient," given there was "no indication that [Martinez-Felix] was involved in a crime or posed an imminent threat to the officers." *Primous*, 242 Ariz. 221, ¶ 24, 394 P.3d at 651. Notably, Magos did not elaborate on his experience with that area or, specifically, how it provided him with reasonable suspicion of criminal activity. *See Magner*, 191 Ariz. 392, ¶ 35, 956 P.2d at 528 (no reasonable suspicion where officer did not testify that "his specialized drug interdiction training taught him that exhibiting nervousness of some particular degree, keeping a registration form on the seat, wearing a particular form of attire, or placing an overnight bag on the back seat were, collectively or individually, signs of a drug courier").

¶27 Simply put, these two factors considered together describe ordinary behavior. *See Evans*, 237 Ariz. 231, ¶ 12, 349 P.3d at 209; *cf. Sweeney*, 224 Ariz. 107, ¶¶ 23-24, 227 P.3d at 874 (among other factors, defendant's nervousness and vague answers during traffic stop, combined with strong smell of deodorizer, clean car, and Canadian citizenship, did not amount to reasonable suspicion for continued detention); *State v. Houpt*, 169 Ariz. 550, 551, 821 P.2d 211, 212 (App. 1991) (defendant's purchase of airline ticket for cash, heavy suitcase, and extreme nervousness while waiting to board flight did not constitute reasonable suspicion that defendant was involved in narcotics transaction). Magos therefore lacked reasonable suspicion to prolong the traffic stop. *See Kjolsrud*, 239 Ariz. 319, ¶ 8, 371 P.3d at 650.

¶28 An officer can also prolong a traffic stop if the encounter becomes consensual. *See Sweeney*, 224 Ariz. 107, ¶ 17, 227 P.3d at 873.

At the suppression hearing, the trial court also suggested the search was proper because Martinez-Felix had consented. Because this court is required to affirm a ruling on a motion to suppress for any legally correct reason, *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 8, 288 P.3d 111, 113 (App. 2012), we remanded this case to the trial court to clarify whether the state also had sustained its burden of proving Martinez-Felix voluntarily consented to the search. After reviewing the transcript of the suppression hearing and considering Magos's credibility, the trial court concluded the state had established that Martinez-Felix voluntarily consented to a search of his vehicle.

¶29 "To be valid, consent must be voluntarily given, and whether the consent was voluntary 'is a question of fact to be determined from the totality of the circumstances.'" *State v. Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d 658, 661 (2010), *quoting State v. Davolt*, 207 Ariz. 191, ¶ 29, 84 P.3d 456, 468 (2004); *see also State v. Ballesteros*, 23 Ariz. App. 211, 214, 531 P.2d 1149, 1152 (1975) (discussing factors of voluntariness). It is the state's burden to establish by a preponderance of the evidence that the consent was voluntary, meaning it was not coerced, "by explicit or implicit means, by implied threat or covert force." *Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d at 661, *quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 228 (1973) (describing test for voluntariness as whether "defendant's will was overborne"); *see also State v. Valenzuela*, 239 Ariz. 299, ¶ 11 & n.1, 371 P.3d 627, 630-31 & n.1 (2016).

¶30 Martinez-Felix appears to question the veracity of Magos's testimony that he had consented to the search, given that Magos failed to mention it in his report. But the trial court, not this court, determines credibility. *See State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004). And the court found Magos's uncontroverted testimony credible. We will not substitute our own judgment on appeal. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). Nevertheless, given that the trial court first raised during the suppression hearing the subject of whether Martinez-Felix had consented to the search, the parties did not present any argument or testimony on whether his consent was tainted by the potentially unconstitutional prolonged stop.

¶31 "Evidence seized following consent to a search must be suppressed if the consent is tainted by a prior constitutional violation." *Guillen*, 223 Ariz. 314, ¶ 13, 223 P.3d at 661. "In other words, the unconstitutional acts of an officer taint a consensual search unless there are sufficient intervening circumstances between the unlawful conduct and the consent to truly show that it was voluntary." *State v. Kempton*, 166 Ariz. 392, 398, 803 P.2d 113, 119 (App. 1990). However, suppression "is not required if the unconstitutional conduct is sufficiently attenuated from the subsequent seizure." *Guillen*, 223 Ariz. 314, ¶ 13, 223 P.3d at 661.

¶32 In *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), the Supreme Court established a test to determine whether the taint of unconstitutional conduct is sufficiently attenuated from the evidence subsequently obtained by voluntary consent. "Under that test, courts consider (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) 'particularly, the purpose and flagrancy of the official misconduct.'" *Guillen*, 223 Ariz. 314, ¶ 14, 223 P.3d at 661, *quoting Brown*, 422 U.S. at 604. The state has the burden of showing that the consent was "'the product of a free will' independent of the [constitutional violation], rather than the 'fruit of the poisonous tree.'" *State v. Monge*, 173 Ariz. 279, 281, 842 P.2d 1292, 1294 (1992), *quoting Brown*, 422 U.S. at 600, 603.

¶33 Here, the trial court simply concluded the state had established "by a preponderance of the evidence that . . . [Martinez-Felix] voluntarily consented to a search of his vehicle." Because the court found the officers had reasonable suspicion to continue their detention of Martinez-Felix, it had no reason to consider whether the prolonged stop was unconstitutional and, if so, how it affected Martinez-Felix's consent.[6] In addition, although it

[6]*Sweeney* makes clear that a prolonged stop is permissible if the "encounter" is consensual. 224 Ariz. 107, ¶ 17, 227 P.3d at 873; *see also State v. Serna*, 235 Ariz. 270, ¶¶ 8-12, 331 P.3d 405, 407-08 (2014) (discussing consensual encounters generally); *cf. United States v. Chavira*, 467 F.3d 1286, 1290 (10th Cir. 2006) ("[A] traffic stop may become a consensual encounter, requiring no reasonable suspicion, if

appears that Martinez-Felix gave consent after Magos asked him to step out of his vehicle—when the stop presumably could have been terminated—it is unclear from the record when Magos asked for consent in relation thereto and what exactly happened in the interim. *See Guillen*, 223 Ariz. 314, ¶ 14, 223 P.3d at 661. And the court made no related factual findings.

¶34 Consequently, this court can neither affirm nor reverse the trial court's ruling on Martinez-Felix's motion to suppress. We therefore remand the matter to the trial court to conduct an additional evidentiary hearing at which the parties may present argument and testimony addressing whether Martinez-Felix's consent was tainted by an unconstitutional prolonged stop. *See State v. Havatone*, 241 Ariz. 506, ¶ 36, 389 P.3d 1251, 1259-60 (2017) (where legal issue not extensively addressed, case remanded to trial court to consider); *see also State v. Huez*, 240 Ariz. 406, ¶ 29, 380 P.3d 103, 111 (App. 2016) (remanding for new evidentiary hearing on issue not raised below). If the court concludes that Martinez-Felix's consent was tainted, the evidence obtained during the search of his vehicle should be suppressed as fruit of the poisonous tree. *See Guillen*, 223 Ariz. 314, ¶ 13, 223 P.3d at 661.

Disposition

¶35 For the reasons stated above, we remand to the trial court for an additional evidentiary hearing on the motion to suppress. If the court determines that the evidence was admissible, Martinez-Felix's convictions and sentences are affirmed, subject to any appeal from that decision. However, if the court determines that the evidence was inadmissible, it shall suppress the evidence and vacate Martinez-Felix's convictions and sentences, subject to any appeal from that decision.

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the officer returns the license and registration and asks questions without further constraining the driver by an 'overbearing show of authority.'"), *quoting United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000). The trial court made no such finding here.