IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD EDWARD WOOD,
Appellant.

No. 2 CA-CR 2019-0093
Filed March 26, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20134031001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Nicholas Chapman-Hushek, Assistant Attorney General, Phoenix
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Richard Edward Wood appeals from his four convictions for aggravated driving under the influence ("DUI"), arguing the trial court erroneously denied his motion to suppress evidence used against him that was obtained as a result of an unlawful seizure. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to support the trial court's ruling on a motion to suppress." *State v. Hernandez*, 244 Ariz. 1, ¶ 8 (2018) (quoting *State v. Cook*, 115 Ariz. 188, 192 (1977)). In September 2013, a border patrol agent in an unmarked vehicle saw Wood driving on a rural stretch of highway in Pima County. Wood was traveling ten miles per hour below the speed limit even though there were no cars in front of him, and he drifted onto the shoulder and opposite lane several times. He then pulled over to the side of the road on his own and the agent stopped to conduct a welfare check.

¶3 As the agent approached Wood's truck, he saw an open case of beer in Wood's backseat. The agent identified himself as a border patrol agent and asked Wood if he was okay. Wood claimed he was fine but had pulled over because he needed to urinate; there were no restrooms in that area. The agent noticed the smell of alcohol coming from Wood and asked Wood for his driver license but Wood was only able to provide an identification card. Wood claimed he had gone to the Motor Vehicle Division to take care of his suspended license but he had no paperwork to show the agent.

¶4 The agent radioed to check for warrants and requested that the Pima County Sheriff's Department (PCSD) be contacted to conduct a DUI investigation. While waiting for the warrants check to return, the agent casually conversed with Wood and noticed that his speech was slurred and delayed. During the conversation, Wood admitted to drinking two beers approximately two hours before. Because the agent had no DUI training or experience, he waited for PCSD officers to arrive, which took

almost an hour because of the remote location. The PCSD officers confirmed that there was an odor of intoxicants coming from Wood and that he had slow, slurred speech, and red-watery bloodshot eyes. After a DUI investigation, Wood was arrested.

¶5 After a two-day trial, a jury found Wood guilty of four counts of aggravated DUI. He was sentenced to presumptive, concurrent, ten-year prison sentences for each count. Wood filed a delayed appeal and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Motion to Suppress

¶6 At trial, Wood asked to approach the bench during the cross-examination of the border patrol agent, and moved to suppress the evidence obtained by the PCSD officers on the ground he was unlawfully detained for almost an hour by an agent with no DUI training.[1] The state argued the motion was untimely because it should have been made before trial. The trial court did not address the state's argument but did deny Wood's motion, reasoning that the agent needed to detain Wood after he observed factors suggesting impairment and for safety purposes.[2]

¶7 On appeal, Wood essentially concedes the agent had the authority to conduct a welfare check and to determine whether he had any outstanding warrants. However, Wood contends the trial court erred by denying his motion to suppress because once the agent learned he had no outstanding warrants, the agent was not constitutionally allowed to detain him for further investigation. Specifically, Wood contends the evidence obtained after the warrant check should have been suppressed because the agent only had a mere suspicion that Wood was impaired.

¶8 As an initial matter, we address the state's contention that the trial court erred by considering Wood's untimely motion. Although parties must normally make all motions no later than twenty days before trial, *see* Ariz. R. Crim. P. 16.1(b), the trial court has the "discretion to hear late motions." *State v. Vincent*, 147 Ariz. 6, 8 (App. 1985) ("[I]f a court in its discretion may extend the time for filing motions, it has the discretion to

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[1]PCSD officers performed the field sobriety tests in this case and obtained Wood's blood draw.

[2]In explaining its reasoning and the factors of impairment it relied upon, the trial court incorrectly noted that the agent had testified that Wood exhibited bloodshot watery eyes. The agent did not provide such testimony.

hear late motions."). Because the trial court was within its discretion when it decided to rule on Wood's motion, we address the merits of Wood's argument.

¶9 We review rulings on motions to suppress for an abuse of discretion, *State v. Havatone*, 241 Ariz. 506, ¶ 11 (2017), and we generally defer "to the trial court's factual determinations, including its evaluation of the credibility of witness testimony," *State v. Sweeney*, 224 Ariz. 107, ¶ 12 (App. 2010). "But we review de novo mixed questions of fact and law, including whether the totality of the circumstances gave rise to reasonable suspicion to support an investigative detention and whether the duration of that detention was reasonable." *Id.*

¶10 The United States and Arizona Constitutions prohibit all unreasonable seizures. *See* U.S. Const. amends. IV, XIV; Ariz. Const. art. II, § 8. "Whether a citizen was seized by a police officer in the context of the Fourth Amendment depends on the totality of the circumstances and whether a reasonable person under those circumstances would have felt free to leave." *State v. Childress*, 222 Ariz. 334, ¶ 11 (App. 2009) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). When the Fourth Amendment or its state counterpart is violated, the exclusionary rule requires the suppression at trial of any evidence directly or indirectly gained as a result of the violation. *State v. Schinzel*, 202 Ariz. 375, ¶ 28 (App. 2002). "A police officer may make a limited investigatory stop if the officer has an 'articulable, reasonable suspicion' that 'the suspect is involved in criminal activity.'" *State v. Woods*, 236 Ariz. 527, ¶ 11 (App. 2015) (quoting *State v. Teagle*, 217 Ariz. 17, ¶ 20 (App. 2007)).[3] Officers may rely "on their specialized training—as well as their common sense knowledge about human behavior—to form their particularized and articulable basis for a stop." *Id*. However, "[a]n investigative detention must last no longer than necessary to effectuate the purpose of the stop." *State v. Solano*, 187 Ariz. 512, 516 (App. 1996) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)).

¶11 "By definition, reasonable suspicion is something short of probable cause." *State v. O'Meara*, 198 Ariz. 294, ¶ 10 (2000). While officers must have more than a mere hunch, reasonable suspicion only "requires a 'minimal level of objective justification' and is 'considerably less than proof

[3] Although a federal border patrol agent may lack authority to enforce state traffic laws, *see State v. Grijalva*, No. 2 CA-CR 2014-0051, ¶ 7 (Ariz. App. Feb. 17, 2015) (mem. decision), we do not address this issue because the parties have not raised it on appeal or before the trial court.

of wrongdoing by a preponderance of the evidence.'" *Woods*, 236 Ariz. 527, ¶ 11 (quoting *Teagle*, 217 Ariz. 17, ¶¶ 25-26). In determining whether an officer had a reasonable suspicion, courts must look at the totality of the circumstances rather than "parse out each individual factor, categorize it as potentially innocent, and reject it." *See Teagle*, 217 Ariz. 17, ¶ 25 (quoting *O'Meara*, 198 Ariz. 294, ¶ 10).

¶12 Here, the state does not argue that there was a consensual encounter once the agent finished conducting the warrant check, *see State v. Serna*, 235 Ariz. 270, ¶ 8 (2014) (consensual encounters do not implicate the Fourth Amendment), effectively conceding there was a seizure at that point.[4] However, this seizure was lawful because the agent reasonably suspected Wood of DUI based on the totality of the circumstances. The agent testified he saw Wood drift onto the opposite lane three times, drift onto the shoulder twice, and drive ten miles below the speed limit even though there were no cars in front of him. After the agent saw an open case of beer in Wood's back seat, Wood admitted he had at least two beers and had stopped his truck to urinate. The agent also smelled an odor of alcohol coming from Wood and observed that Wood's answers were delayed and his speech was slurred.

¶13 Contrary to Wood's suggestion, officers do not need special training or experience to suspect impairment because officers may rely on common knowledge about human behavior. *See Woods*, 236 Ariz. 527, ¶ 11; *State v. Slater*, 986 P.2d 1038, 1045-46 (Kan. 1999) (objective signs of intoxication admissible as matters of common knowledge and experience); *State v. Larson*, 243 P.3d 1130, 1143 (Mont. 2010) (slurred speech, delayed reactions, and lack of judgment admissible as non-expert testimony); *State v. Bealor*, 909 A.2d 226, 233 (N.J. 2006) (lay testimony describing alcohol intoxication admissible as common observation and knowledge). In this case, the observations that led the agent to suspect impairment—poor driving behavior, an open case of beer in the backseat, an odor of alcohol,

[4]There is nothing in the record confirming whether the agent told Wood he was not free to leave and Wood does not point to any other indicia of detention suggesting a reasonable person in Wood's position would have concluded they were not free to leave. *See Childress*, 222 Ariz. 334, ¶ 11 (person seized if a reasonable person under those circumstances would not feel free to leave). Nevertheless, we assume for purposes of our analysis that there was a seizure given the state's apparent concession, the length of the encounter, and the agent's conclusory testimony that at some point in the encounter Wood was not free to leave.

slurred and delayed speech, intent to urinate on the side of the highway, and admission to consumption of alcohol—did not require specialized training or expertise because it is within the common knowledge of laypersons that these factors suggest impairment.

¶14 The agent's observations, coupled with Wood's admissions, gave the agent more than a mere hunch that Wood had been driving impaired and the agent did not unnecessarily prolong Wood's detention by waiting for officers with DUI training to arrive to conduct a full investigation. Therefore, the trial court did not err.

Disposition

¶15 We affirm Wood's convictions and sentences.