IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TY HENRICHS,
Appellant.

No. 2 CA-CR 2019-0283
Filed November 25, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201601238
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Ty Henrichs[1] appeals his convictions and sentences for possession of a dangerous drug and possession of drug paraphernalia. He argues the trial court erred by denying his motion to suppress evidence obtained as a result of an allegedly illegal traffic stop and search of his vehicle. For the following reasons, we affirm.

Factual and Procedural Background

¶2 When reviewing a trial court's ruling on a motion to suppress we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the trial court's order. *State v. Estrada*, 209 Ariz. 287, ¶ 2 (App. 2004). Around 12:30 a.m. one morning in April 2016, Pinal County Sheriff's Deputy Letteer was on patrol in Apache Junction near a shopping plaza parking lot known to police as a "high-drug area." He saw a vehicle enter the parking lot of a closed grocery store, where the driver talked to someone on a bicycle. Letteer parked across the street and watched them interact for a couple of minutes. Once they noticed him, however, the two quickly parted ways, suggesting to the deputy that "something may be amiss."

¶3 Letteer called for backup while the vehicle drove and parked in the same plaza, in front of a gym, and the driver got out and entered the business, which was open. Letteer informed Deputy Wheeler, who had responded to his call for assistance, what he had observed. Meanwhile, the driver spoke to an employee inside the gym for a few minutes before coming back out, getting in his car, and driving away. Letteer and Wheeler both saw that the car did not have a license plate or a license plate light. It

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[1]Multiple spellings of Henrichs's last name are found in the record on appeal. The Arizona Department of Corrections inmate database shows his name as "Henrichs" and we use that spelling in our decision.

did have what appeared to be a paper tag in the rear window, but neither officer could read it.

¶4 Wheeler followed in his patrol car and stopped the vehicle at approximately 12:45 a.m., informed the driver, Henrichs, that he had been stopped because the deputy could not see a license plate or read the paper tag, and asked Henrichs for identification, registration, and proof of insurance. Henrichs did not have proof of insurance, and Wheeler noticed that he was "extremely nervous," avoided eye contact, and his hands were shaking. Henrichs said he had left his father's house and was going to a store. Wheeler asked Henrichs to step out of his car while the deputy wrote a citation. Henrichs continued to show nervous behavior and twice started to reach into his pocket. Wheeler told him not to put his hands in his pockets and asked to pat him down for weapons; no contraband or weapons were found on his person. Henrichs's continued "nervous behavior" was "not normal and usual" in the deputy's experience.

¶5 Wheeler told Henrichs that he and Letteer had seen him at the grocery store and then the gym parking lot, which Henrichs initially disputed but then admitted. Wheeler asked if there were any illegal drugs in the vehicle, and Henrichs immediately denied it, specifically responding with "a quick 'no'" to "marijuana, cocaine, and heroin." Wheeler then asked if he had any methamphetamine, and Henrichs hesitated before saying no. Wheeler asked when was the last time Henrichs had used methamphetamine, and he said it had been "a year or two." Wheeler then asked Henrichs to show him his tongue, to which he complied, and Wheeler noted that his tongue had a "grayish tinge" and "scarring on the rear," which he testified were signs of recent methamphetamine use with a glass pipe.

¶6 Letteer, who had arrived at the scene shortly after Wheeler initiated the stop, asked Henrichs what he had been doing earlier. Henrichs said he had stopped in the grocery store parking lot because he "thought he knew" the bicyclist and had then gone into the gym to ask about nutrition information for his father. The gym employee was concurrently contacted by another deputy and said Henrichs had only asked about membership rates. The bicyclist too was questioned and he denied speaking to Henrichs at all.

¶7 Based on Henrichs's demeanor, the evasive responses by both him and the bicyclist, time of night, and the area involved, the deputies requested a K-9 unit around 1:00 a.m. Because Pinal County Sheriff's Department and Apache Junction Police Department K-9 units were not

available, the City of Mesa Police Department dispatched a unit at approximately 1:15 a.m. The K-9 officer arrived at "approximately 1:37" a.m. and the narcotics dog quickly alerted to the vehicle, which was registered to Henrichs. Drugs and paraphernalia were seized, established at trial as two bags of methamphetamine, one with forty-seven milligrams and the other 1.25 grams, a metal spoon with methamphetamine residue, a digital scale, a glass pipe containing residue, a metal measuring cup, an ice cream scoop, and medical syringes.

¶8 Henrichs was charged with possession of a dangerous drug (methamphetamine) and possession of drug paraphernalia (syringes, scales, pipe, cup, "and/or baggies"). After a three-day trial, a jury found him guilty as charged. The trial court sentenced Henrichs to concurrent terms of imprisonment, the longer of which is nine years. We have jurisdiction over Henrichs's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶9 Henrichs asserts the trial court erred in denying his motion to suppress evidence obtained as a result of the stop of his vehicle, asserting it was "not based on reasonable suspicion of criminal activity" and also that officers unreasonably detained him to "conduct a warrantless and illegal search of his vehicle." He argued below, as he does on appeal, that the deputies lacked reasonable suspicion to stop him and, even if the stop was justified, the length of the detention exceeded the permissible scope of the stop. The trial court denied the motion, finding the stop properly based on the traffic violations of having an illegible temporary license tag and no license plate light, and the detention justified by reasonable suspicion that Henrichs was engaged or attempted to engage in drug activity. The court also found the length of the detention reasonable. We address each ruling in turn.

Traffic Stop

¶10 Henrichs maintains the traffic stop violated his constitutional rights because "there was no reason to believe that [he] was violating any traffic law," nor was there "reasonable suspicion of criminal activity." We review de novo whether the police had reasonable suspicion to justify an investigatory stop. *State v. Fornof*, 218 Ariz. 74, ¶ 5 (App. 2008).

¶11 "An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment, but because such stops are less intrusive than arrests, they do not require the probable cause necessary to issue an

arrest warrant." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996). "A police officer need only have reasonable suspicion that a person is engaged in criminal activity or has violated a traffic law to conduct a stop of a vehicle." *State v. Moran*, 232 Ariz. 528, ¶ 4 (App. 2013). "[T]he reasonableness standard does not . . . require that the officer rule out possible alternative, innocent explanations for the actions observed[.] It requires only that an officer exercise common sense to determine whether the facts justify an objectively reasonable suspicion." *State v. Evans*, 237 Ariz. 231, ¶ 13 (2015) (citation omitted).

¶12 Pursuant to A.R.S. § 28-925(C), "[e]ither a tail lamp or a separate lamp shall be constructed and placed in a manner that illuminates with a white light the rear license plate and renders it clearly legible from a distance of fifty feet to the rear." Henrichs's vehicle had no such light. He nevertheless argues § 28-925(C) "cannot possibly apply in this circumstance" because there was a temporary tag affixed to his rear window, in compliance with A.R.S. § 28-2156(D), which provides: "[t]he owner or operator of the vehicle shall display the temporary general use registration so that it is clearly visible from outside the vehicle."

¶13 The requirements of § 28-925(C), however, pertain to the required equipment for a motor vehicle. Henrichs was therefore in violation of the statute because his car lacked a light for the rear license plate, even if he had no such plate. *See Whren v. United States*, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."); § 28-925(C). And even accepting Henrichs's argument that the equipment violation could be excused because he had a temporary registration, it needed to be "clearly visible," which was not the case. *See* § 28-2156(D).

¶14 Letteer testified "it appeared there was something in the window, but I couldn't read it. Assuming it was a paper tag in the window," he could not see the tag until he was "right on the vehicle" "standing behind [it]." Wheeler stated he thought there might be a temporary tag in the window because that is where such tags are commonly found, but he could not "see or make out" any numbers or letters, due to the "angle" at which the tag was positioned in the window. We thus cannot say the trial court erred in additionally finding the deputies had reasonable suspicion to believe Henrichs had violated the requirement that the temporary registration be clearly visible; the stop was therefore lawful on that basis as well. *See State v. Nevarez*, 235 Ariz. 129, ¶ 8 (App. 2014) (trial court did not err in determining officer "had a reasonable basis for

suspecting [defendant] had violated the license plate statutes" when testimony "established that the temporary registration posted on [defendant]'s car was not initially visible" to officer).

Length of Detention

¶15 Henrichs alternatively argues that even if the deputies had reasonable suspicion to stop him for a traffic violation, "their reason for the stop dissipated once Deputy Wheeler was able to see the temporary tag up close," asserting the "prolonged" detention amounted to an improper "de facto arrest." The state responds that Henrichs's continued detention was lawful because the deputies "developed reasonable suspicion that Henrichs was engaged in drug activity."

¶16 "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *State v. Boteo-Flores*, 230 Ariz. 105, ¶ 14 (2012) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)); *see also Terry v. Ohio,* 392 U.S. 1, 27 (1968). There is, however, "no rigid time limit for a *Terry* stop and the appropriate query is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Id.* ¶ 15 (quoting *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). And once a valid stop has commenced, officers may briefly question the driver of the stopped vehicle regarding registration and proof of insurance. *See Rodriguez v. United States*, 575 U.S. 348, 355 (2015). Further, a trained and experienced officer may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979).

¶17 The deputies conducted the traffic stop in an area known for drug activity. Henrichs was at the outset "extremely nervous" when contacted by Deputy Wheeler, with hands visibly shaking when asked for routine documents. He then was deceptive about what he had been doing, and hesitated when Wheeler asked him if he had any methamphetamine in his vehicle, in contrast to his immediate denial of having other specific drugs. Wheeler, during the time he was still writing Henrichs's citation, observed that Henrichs's tongue had a "grayish tinge" and "scarring on the rear," consistent with recent methamphetamine use. Henrichs also gave a different reason for going into the gym than what the gym employee had contemporaneously said. The officers' suspicion of drug activity reasonably arose from these factors within a very short period of time and justified the deputies extending their detention of Henrichs. *Cf. State v.*

Kjolsrud, 239 Ariz. 319, ¶¶ 15-17 (App. 2016) (no reasonable suspicion justifying extended detention after traffic stop in area that was not "high-crime area" and officer continued investigation only because of defendant's criminal history). The initial detention and investigation here lasted only about fifteen minutes from the beginning of the stop until the deputies called for a K-9 unit. On this evidence, the trial court could find the deputies acted diligently and efficiently to confirm or dispel their suspicions, and the duration of the detention to that point in time was justified and reasonable. *See Sharpe*, 470 U.S. at 677-79, 687-88 (twenty-minute detention, following stop of potentially overloaded camper-truck in area under surveillance for drug trafficking during which officers questioned defendant and waited for arrival of DEA agent not unreasonable under circumstances).

¶18 Henrichs also argues the detention was impermissibly prolonged to await the K-9 unit. As discussed above, however, the deputies developed reasonable suspicion that Henrichs was engaged in drug activity, warranting further delay while they obtained a K-9 unit to further investigate. *See Rodriguez*, 575 U.S. at 353, 355 (police need reasonable suspicion to "extend an otherwise-completed traffic stop . . . to conduct a dog sniff"). The deputies called for a unit at approximately 1:00 a.m. and eventually located an available one that was dispatched around 1:15 a.m. and arrived at 1:37 a.m., a total delay of less than forty minutes. An "extended detention might be reasonable under *Terry* while officers await specialized equipment such as a drug sniffing dog." *Boteo-Flores*, 230 Ariz. 109, ¶ 17; *see State v. Teagle*, 217 Ariz. 17, ¶¶ 33-37 (App. 2007) (concluding that one hour and forty minute detention awaiting drug sniffing dog reasonable under the circumstances). Here, the delay was due to the deputies attempting to find the closest available K-9 unit. *See Teagle*, 217 Ariz. 17, ¶ 35 ("When police need the assistance of a drug dog in roadside *Terry* stops, it will in general take time to obtain one; local government police forces and the state highway patrol cannot be expected to have drug dogs immediately available to all officers in the field at all times." (quoting *United States v. Bloomfield*, 40 F.3d 910, 917 (8th Cir. 1994))).

¶19 Henrichs also argues Wheeler's visual inspection of his mouth was an illegal search, presumably because it was conducted without a warrant. Because Henrichs did not raise this issue below, we consider it only for fundamental and prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

> [T]he first step in fundamental error review is determining whether trial error exists. If it does,

> an appellate court must decide whether the error is fundamental. In doing so, the court should consider the totality of the circumstances. A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not possibly have received a fair trial. If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice, which also involves a fact-intensive inquiry. If the defendant establishes the third prong, he has shown both fundamental error and prejudice, and a new trial must be granted. The defendant bears the burden of persuasion at each step.

Id. ¶ 21 (internal quotation marks and citations omitted).

¶20 Although Henrichs acknowledges that this claim is subject to fundamental error review, he has presented minimal argument on appeal with respect to this issue, failing to cite any case law or provide any argument pertaining to searches of a person; he has therefore failed to show any error in the first instance. *See id.* (defendant must first demonstrate error); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005) (appellant must show both that error exists and that it resulted in prejudice); *State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."); Ariz. R. Crim. P. 31.10(a)(7) (argument must contain "supporting reasons for each contention . . . with citations of legal authorities").

¶21 And while we will not ignore fundamental error if it is apparent in the record, *see State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007), we see none here. Henrichs contends the deputy "made [him] open his mouth and stick out his tongue." At the suppression hearing, Wheeler testified, "I asked him if I could see his tongue," and he "stuck [it] out." When viewed in the light most favorable to upholding the trial court's denial of the suppression motion, it can be reasonably concluded that Henrichs had consented to Wheeler's request and a warrant was therefore not required. *See State v. Valenzuela*, 239 Ariz. 299, ¶ 1 (2016) ("Although the Fourth Amendment generally prohibits warrantless searches, they are permitted if there is free and voluntary consent to search."); *Cf. Adams v.*

State, 521 P.2d 365, 366 (Nev. 1974) (no Fourth Amendment violation where defendant complied with officer's request to open hand, revealing contraband).

Disposition

¶22 For the foregoing reasons, Henrichs's convictions and sentences are affirmed.