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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN WESLEY HOWARD, JR., Appellant.	)	2 CA-CR 2008-0208 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700305

Honorable Charles A. Irwin, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant John Howard was convicted of one count of possessing marijuana and one count of possessing drug paraphernalia. On appeal, Howard claims the trial court abused its discretion in denying his motion to suppress evidence. Because the trial court did not err, we affirm.

¶2 When reviewing the denial of a motion to suppress evidence, "we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). A police officer, Jock Russell, observed Howard driving a car. Russell knew that as recently as approximately two weeks earlier, Howard's out-of-state driver's license had been suspended for about two years. Russell observed Howard pull his car into a gas station parking lot and stop. Russell contacted another police officer, Michael Mitchell, and asked him to "come to [Russell's] location to make an arrest for driving on a suspended license." Mitchell had previously arrested Howard for driving without a license and had done license checks on him in the past. Mitchell also knew that Howard had been stopped by several other officers for driving without a license.

¶3 While Russell was observing Howard at the gas station, he saw Howard engage in what Russell believed to be, based on his training and experience, a "hand to hand drug transaction" with someone else in the parking lot. Russell called Mitchell and reported these observations. When Mitchell arrived, he informed Howard he was under arrest. According to Mitchell's testimony, Howard became belligerent and actively resisted Mitchell's attempts

to put him in handcuffs. He also became physically aggressive by repeatedly trying to head-butt Mitchell and kick him in the head. Eventually, Mitchell was able to take Howard into custody. He then removed Howard's shoes and found evidence of "marijuana stem, seeds and shake" inside. Mitchell used a dog certified to detect drugs to sniff Howard's car. When the dog alerted to the presence of an illegal drug in the glove compartment, Mitchell opened the compartment and found marijuana inside cigars that had been split open.

¶4 At the conclusion of the suppression hearing, the trial court found, that "an appropriate arrest" had been made, based on the officers' "collective knowledge or wisdom or belief" that Howard was driving on a suspended license. The court concluded that, because the arrest was proper, the subsequent searches were also proper and therefore denied the motion to suppress.

¶5 On appeal, Howard argues the officers did not have reason to stop or detain him and did not have probable cause to arrest him. Therefore, he contends, the evidence discovered during the subsequent searches was fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963). We review the trial court's ruling on a motion to suppress evidence for clear and manifest error. *See State v. Dean*, 206 Ariz. 158, ¶ 9, 76 P.3d

429, 432 (2003).[1] We defer to the court's factual findings, but review de novo the court's "ultimate legal conclusion." *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000).

¶6 Section 28-3473, A.R.S., prohibits driving a motor vehicle while the driver's privilege to do so is suspended. A police officer may make a warrantless arrest when the officer has "probable cause to believe both that a crime has been committed and that the person to be arrested committed the crime." *State v. Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d 119, 122 (App. 2003); *see also* A.R.S. § 13-3883. Probable cause is determined by considering "all of the facts and circumstances known at the time of the arrest, and . . . those facts may include collective knowledge of all of the officers involved in the case." *Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d at 122. "'Probable cause is something less than the proof needed to convict and something more than suspicions.'" *State v. Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d 571, 576 (App. 2005), *quoting State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989).

¶7 Howard contends the officers lacked probable cause because they had not checked the status of his driver's license immediately before arresting him. The question of staleness of information used to establish probable cause "depends more on the nature of the activity than on the number of days that have elapsed since the factual information was

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[1]Both parties cite authority asserting the standard of review is for an abuse of discretion. In *Dean*, our supreme court articulated the standard of review as clear and manifest error but then noted that this is essentially the same thing as abuse of discretion. 206 Ariz. 158, ¶ 9, 76 P.3d at 432; *see also State v. Jones*, 203 Ariz. 1, ¶ 8, 49 P.3d 273, 277 (2002).

gathered." *State v. Hale*, 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982) (information in affidavit for search warrant application not stale where suspected offenses inherently involved "[p]rotracted and continuous illegal activity"). When information about the suspected illegal activity demonstrates the "activity is of a continuous nature or in a course of conduct, the passage of time becomes less significant." *State v. Smith*, 122 Ariz. 58, 60, 593 P.2d 281, 283 (1979).

¶8 Here, the officers knew that Howard's license had been suspended for at least two years and that he had been stopped several times and had been arrested at least once for driving while his license was suspended. The officers had periodically checked the status of that suspension, and they knew that, as recently as two weeks before, the status had not changed. Although the officers may not have obtained the proof required to convict Howard when Mitchell approached him, under these circumstances, they clearly had more than a mere suspicion that Howard was driving illegally. *See Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d at 576. The officers had probable cause to believe Howard was driving on a suspended license and could therefore arrest him without a warrant. *See Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d at 122.

¶9 Moreover, Howard's actions in resisting Mitchell's attempt to place him in custody provided independent probable cause for an arrest. In *State v. Tassler*, 159 Ariz. 183, 184, 765 P.2d 1007, 1008 (App. 1988), this court considered a situation in which officers, upon entering a house to investigate a domestic violence call, were confronted by

the defendant who attempted to grab a knife and physically resisted the officers' efforts to subdue him. The court concluded that, even if the officers' entry had been illegal, the "defendant's resistance was a new crime [and] the arrest for it and search incident to it were lawful." *Id.* at 185, 765 P.2d at 1009; *see also State v. Windus*, 207 Ariz. 328, ¶¶ 9-16, n.3, 86 P.3d 384, 386-87, 387 n.3 (App. 2004) (collecting cases and noting exclusionary rule should not be used to "insulate from prosecution motorists who flee at high speeds from unlawful traffic stops or suspects who use weapons to forcibly resist unlawful arrests"); *United States v. Bailey*, 691 F.2d 1009, 1018, 1018 n.10 (11th Cir. 1982) (search incident to arrest that produces evidence of contraband is proper "even when lawful arrest followed an unlawful one").

¶10 Resisting arrest constitutes a criminal offense under A.R.S. § 13-2508. *See State v. Lee*, 217 Ariz. 514, ¶ 11, 176 P.3d 712, 714-15 (App. 2008). And, pursuant to A.R.S. § 13-404(B)(2), Howard was not justified in resisting Officer Mitchell's attempt to arrest him even if Howard believed the arrest was unlawful. Additionally, Howard's aggressive actions towards Mitchell, including his attempts to kick and head-butt him, constituted the criminal offense of aggravated assault under A.R.S. § 13-1204 (A)(8)(a). *See State v. Fontes*, 195 Ariz. 229, ¶ 12, 986 P.2d 897, 901 (App. 1998). Thus, even if probable cause did not exist when Mitchell informed Howard he was under arrest, Howard's ensuing actions afforded probable cause for an arrest, and the search incident to that arrest was permissible. *See Tassler*, 159 Ariz. at 185, 765 P.2d at 1009.

¶11 Because the arrest was supported by probable cause, we reject Howard's assertion that the resulting evidence was fruit of the poisonous tree.[2] The trial court did not err in refusing to suppress the evidence, and we therefore affirm Howard's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge

[2]Because we conclude Mitchell had probable cause to arrest Howard—either before approaching him, or alternatively, upon his committing new criminal acts after approach—we need not address Howard's separate argument regarding whether, in the absence of probable cause, Mitchell would have had reasonable suspicion to detain him to investigate possible criminal activity.