

FILED BY CLERK

MAY 19 2009

COURT OF APPEALS
DIVISION TWO

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0212
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RENE AMADOR-GALICIA,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073167

Honorable Hector Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

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PELANDER, Chief Judge.

¶1 Appellant Rene Amador-Galicia appeals his convictions for possession of more than four pounds of marijuana for sale and transportation of more than two pounds of marijuana for sale. In the sole issue raised on appeal, he maintains the trial court erred in denying his motion to suppress evidence of the marijuana found in a search of his vehicle. Finding no error, we affirm.

Background

¶2 In reviewing a trial court's denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the court's ruling. *State v. Weekley*, 200 Ariz. 421, ¶ 3, 27 P.3d 325, 326 (App. 2001). In August 2007, Arizona Department of Public Safety (DPS) Officer Keith Duckett stopped an extended-cab pickup truck he had observed following the vehicle in front of it too closely. As he approached the truck, Duckett smelled "a cover odor" and saw "something in the back[seat] . . . covered by a blanket which had some suitcases on top."

¶3 When Duckett asked the driver, Amador-Galicia, for his driver's license, Amador-Galicia appeared nervous and "his hand was shaking" when he gave the license to Duckett. The truck passenger's hand also shook when he provided identification to Duckett, and Duckett suspected the passenger's identification was "fake." The passenger gave Duckett a false name, and Amador-Galicia gave Duckett two different names for the passenger, neither of which was correct. Amador-Galicia also told Duckett the truck was

registered to a third person and gave an incorrect name for that person as well. In addition, Amador-Galicia and his passenger told Duckett two different stories about where they were going.

¶4 After issuing Amador-Galicia a warning for following another vehicle too closely, Duckett, suspecting “some type of criminal activity going on,” asked Amador-Galicia if he had anything illegal in the vehicle. Amador-Galicia said he did not and initially consented to a search of the truck. But when Duckett gave him a consent form to sign, he was “hesitant.” Therefore, Duckett brought out from his patrol car a drug-sniffing dog to conduct a “sniff.” The dog alerted to the vehicle, and when Duckett looked inside he found twenty “bales of marijuana with an approximate weight of 524 pounds.”

Discussion

¶5 Amador-Galicia argues the trial court erred in denying his pretrial motion to suppress. “We review a trial court’s order suppressing evidence for an abuse of discretion.” *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). ““We defer to the trial court’s factual findings that are supported by the record and are not clearly erroneous.”” *Id.*, quoting *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000). But we review de novo the court’s legal conclusion that Officer Duckett did not violate Amador-Galicia’s Fourth Amendment right to be free from unreasonable searches and seizures. *See id.*

¶6 Although Amador-Galicia asserts Duckett stopped his vehicle based on “nothing more than a hunch,” he does not expressly argue the initial traffic stop was invalid. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). In any event, an officer may conduct an investigatory traffic stop of a vehicle based on reasonable suspicion of illegal activity. *See State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008); A.R.S. § 13-3883(B). And when an officer reasonably suspects “a traffic violation has occurred[,]’ [the stop] does not violate the Fourth Amendment even if the officer[] had ulterior motives.” *State v. Vera*, 196 Ariz. 342, ¶ 5, 996 P.2d 1246, 1247 (App. 1999), *quoting Whren v. United States*, 517 U.S. 806, 810 (1996); *see also* A.R.S. § 28-730(A) (prohibiting driver from “follow[ing] another vehicle more closely than is reasonable and prudent”).

¶7 Amador-Galicia maintains, however, Duckett “det[ained him] after the traffic warning . . . without reasonable suspicion” and, therefore, “any evidence gathered thereafter must be suppressed as a matter of law.” In support of that contention, he relies primarily on *United States v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001). But, to the extent Amador-Galicia relies on that case for the proposition that an officer may only ask questions related to the traffic stop unless particularized, objective factors exist to raise suspicion of other criminal activity, we agree with the state that the United States Supreme Court has implicitly overruled *Chavez-Valenzuela* on that point. *See Muehler v. Mena*, 544 U.S. 93, 100-01 (2005); *see also United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007).

¶8 Amador-Galicia also asserts that, like the defendant in *Chavez-Valenzuela*, he “was never free to leave.” Thus, he contends, this case is distinguishable from *State v. Box*, 205 Ariz. 492, 73 P.3d 623 (App. 2003), on which the state relies. In that case, we noted that after the officer had given Box a warning and returned his documents, he was free to leave. *Id.* ¶ 21. As the state points out, we also said in *Box* the officer was “equally free to ask . . . additional questions unrelated to the traffic stop.” *Id.* That statement, however, was in the context of a “consensual encounter.” *Id.* In this case, Duckett expressly testified that Amador-Galicia had not been free to leave after he received his written warning. But the record of the suppression hearing does not reflect whether Duckett ever communicated to Amador-Galicia that he was not free to leave. *See Arizona v. Johnson*, ___ U.S. ___, 129 S. Ct. 781, 788 (2009).

¶9 In any event,

a driver does not “ha[ve] a right to be released the instant the steps to check license, registration, and outstanding warrants, and to write a ticket, ha[ve] been completed. It is therefore not necessary to determine whether the officers’ conduct added a minute or so to the minimum time in which these steps could have been accomplished. . . . What the Constitution requires is that the entire process remain reasonable. Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention.”

United States v. Turvin, 517 F.3d 1097, 1103 (9th Cir. 2008), quoting *United States v. Childs*, 277 F.3d 947, 953-54 (7th Cir. 2002) (alterations in *Turvin*); see also *Johnson*, ___ U.S. ___, 129 S. Ct. at 788. As the trial court pointed out, only about three or four minutes passed

between Duckett's giving Amador-Galicia the warning and the dog alerting to the drugs in the vehicle. We cannot say that a few minutes added to the duration of the traffic stop created an unreasonable detention. *Turvin*, 517 F.3d at 1103; *see also Box*, 205 Ariz. 492, ¶¶ 23-24, 73 P.3d at 630.

¶10 Additionally, even were we to accept Amador-Galicia's apparent assertion that his continued detention after Duckett gave him the warning was essentially a separate investigation that required reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), we agree with the trial court that there were "particularized objective factors here." "[A] police officer may make a limited investigatory stop in the absence of probable cause if the officer has articulable, reasonable suspicion, based on the totality of circumstances, that the suspect is involved in criminal activity." *Box*, 205 Ariz. 492, ¶ 16, 73 P.3d at 628.

¶11 "By definition, reasonable suspicion is something short of probable cause.' 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), quoting *State v. O'Meara*, 198 Ariz. 294, ¶ 10, 9 P.3d 325, 327 (2000); *see also Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d at 956. Duckett testified that both Amador-Galicia and his passenger had been nervous and that he had noticed a "cover odor" coming from the truck. Based on his sixteen years of experience, *see United States v. Arvizu*, 534 U.S. 266, 273 (2002), he stated that persons smuggling drugs use various "strong odor items in order to cover the odor

of the drugs in the vehicle so that the officer doesn't smell them." *See Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d at 274 (on review of suppression ruling, we give due deference to officer's training and experience). Amador-Galicia and his passenger also provided inconsistent and incorrect information about their destination, their own identities, and the identity of the third-party vehicle owner. And Duckett testified it was common for drug smugglers to "buy a vehicle and register it in somebody else's name . . . so that the . . . person who's smuggling the drugs cannot be located because the name on the registration is different than theirs and the address is different." Duckett further testified, based on his training and experience, it was common for drug smugglers to use extended-cab pickups like the one Amador-Galicia was driving and to "put drug contraband in the back and . . . cover it with something so you can't see directly in." Therefore, he was reasonably suspicious when he noticed "something in the back [that was] covered by a blanket which had some suitcases on top."

¶12 Viewed in their totality, *see O'Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d at 326, these facts were sufficient to meet the requisite level of reasonable suspicion required to detain Amador-Galicia for a reasonable period to investigate for criminal activity. *See id.* ¶ 11 (officer had reasonable suspicion to detain when he observed multiple u-turns, "car switching," and smell of fabric softener); *Teagle*, 217 Ariz. 17, ¶ 28, 170 P.3d at 273 (unusual travel plans considered as factor in establishing reasonable suspicion); *cf. Fornof*, 218 Ariz. 74, ¶¶ 18-19, 179 P.3d at 959 (vehicle stop justified where officer observed item changing hands at night in known high-drug area). Thus, the trial court did not abuse its

discretion in denying Amador-Galicia's motion to suppress. *See Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453.

Disposition

¶13 Amador-Galicia's convictions and sentences are affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge