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

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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STATE OF ARIZONA, Appellee, v. CHRISTOPHER MICHAEL NEACE, Appellant.	2 CA-CR 2009-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080591

Honorable Hector E. Campoy, Judge
Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By M. Edith Cunningham and David J. Euchner — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial was held in his absence, appellant Christopher Neace was convicted of possession of a dangerous drug, methamphetamine, and possession of drug paraphernalia, "a baggie." The trial court found Neace had one prior felony conviction, to which he had stipulated, and sentenced him to enhanced, concurrent prison terms the longer of which was 4.5 years. On appeal, Neace argues the trial court erred in denying his motion to suppress the evidence because the Arizona Constitution prohibits the seizure and questioning of passengers in a car stopped for a traffic violation when they do not voluntarily consent to the search of their persons. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court's ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing, which we view in the light most favorable to sustaining the ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). An officer observed a car, in which Neace was a passenger, leave an apartment complex suspected to be linked to narcotics activity. The car appeared to turn in one direction and then quickly in the other; making several abrupt turns. The officer requested the assistance of additional units that began following the vehicle until he could catch up with it. After receiving a tip from another unit, the officer stopped the car for speeding. The officer obtained identification from the driver and Neace. A records check revealed Neace had a Department of Corrections "release flag" and entries associating him with methamphetamine. The officer asked Neace to step out of the car so

that he could question him privately. The officer asked Neace if he would consent to a search of his person, which he did. The search revealed a small bag of methamphetamine in Neace's pocket.

¶3 Neace was arrested and given the *Miranda*[1] warnings. He then stated he had consented to the search because he thought the methamphetamine was in his sock. Before trial, Neace filed a motion to suppress all evidence found during the search, arguing he had been seized and searched unlawfully after the car was stopped for speeding, in violation of his rights under the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution. The trial court denied his motion after an evidentiary hearing. Neace challenges that ruling on appeal

Right to Privacy

¶4 Neace argues the trial court erred by admitting evidence from the search because the right to privacy under article II, § 8 of the Arizona Constitution provides greater protection than the Fourth Amendment of the United States Constitution. He contends that, under the Arizona Constitution, passengers should not be considered automatically seized in a traffic stop, that officers should not be permitted to question passengers about activity unrelated to the stop without reasonable suspicion that the passenger is involved in criminal activity, and that officers must inform individuals of the right to refuse before consent is found to be voluntary. He further argues that the United

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

States Supreme Court's holdings in *Arizona v. Johnson*, ___ U.S. ___, 129 S. Ct. 781 (2009), and *Muehler v. Mena*, 544 U.S. 93 (2005), are inconsistent with the Arizona Constitution. We review constitutional and legal issues de novo. *State v. Moody*, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶5 In *State v. Johnson*, 220 Ariz. 551, ¶¶ 14-15, 207 P.3d 804, 811 (App. 2009), this court found constitutional the temporary seizure of a person who had been a passenger in a car subject to a routine traffic stop, relying on "Arizona's long history of finding in our constitution no greater right to privacy in traffic stop cases than that found in the United States Constitution." This court also has declined to extend Arizona's constitutional protections in a traffic stop beyond the protections afforded by the Fourth Amendment. *State v. Teagle*, 217 Ariz. 17, n.3, 170 P.3d 266, 271 n.3 (App. 2007); *see also Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 548-49 (1926) (in vehicle searches, Arizona Constitution "although different in its language, is of the same general effect and purpose as the Fourth Amendment"); *State v. Reyna*, 205 Ariz. 374, n.5, 71 P.3d 366, 370 n.5 (App. 2003) ("[W]e do not read the court's decisions concerning home searches as evidencing a state-law departure from Fourth Amendment principles governing vehicle searches."). Although Neace has cited cases from various other states, he has given us no reason to depart from Arizona precedent. We continue to apply both federal and Arizona's Fourth Amendment precedent to article II, § 8 in vehicle search situations.

¶6 Under *Arizona v. Johnson*, ___ U.S. at ___, 129 S. Ct. at 788, the temporary seizure of a passenger ordinarily is reasonable and, consequently,

constitutional for the duration of the traffic stop. And during the detention, an officer may ask that passenger questions unrelated to the stop. The officer's questioning here was constitutionally permissible. Additionally, rather than finding that the Arizona Constitution requires knowledge of the right to refuse to consent to a search, Arizona has applied the United States Supreme Court's holding that knowledge of the right to refuse is merely one factor in determining voluntariness rather than being essential to consent. *See State v. Smith*, 123 Ariz. 231, 241, 599 P.2d 187, 197 (1979). Therefore, Neace was not seized unconstitutionally and his consent was not tainted by his seizure or invalidated by the officer's failure to inform him of his right to refuse. Accordingly, the trial court did not err in finding the evidence admissible under article II, § 8 of the Arizona Constitution.

Consent

¶7 Neace further contends the trial court erred in admitting evidence from the search of his person because his consent was not voluntary. He argues his consent was involuntary under the totality of the circumstances because of the inherently coercive nature of traffic stops, because he was seized, and because the officer did not advise him of his *Miranda* rights or his right to refuse to be searched.

¶8 Generally, officers may not conduct a search without a warrant. *See State v. Flores*, 195 Ariz. 199, ¶ 11, 986 P.2d 232, 236 (App. 1999). "One long recognized exception to the warrant requirement is consent." *State v. Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d 658, 661 (2010). The state has the burden to prove Neace voluntarily

consented, which is determined by the totality of the circumstances. *Id.* "The trial court's factual determinations on the issue of giving consent will not be overturned unless clearly erroneous." *State v. Swanson*, 172 Ariz. 579, 583, 838 P.2d 1340, 1344 (App. 1992).

¶9 Neace relies on *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *State v. Laughter*, 128 Ariz. 264, 625 P.2d 327 (App. 1980), for factors to consider in examining the totality of the circumstances.[2] *Bustamonte* states knowledge of the right to refuse to consent is a factor in determining the voluntariness of a consent to search and that consent is invalid if officers use threats or force or claim lawful authority. 412 U.S. at 233-34. *Laughter* includes factors such as whether the individual is in custody, the "inherent oppressiveness of uniformed police officers," whether guns were drawn, whether officers employed threatening words or conduct, and whether the *Miranda* warnings had been given. 128 Ariz. at 266-67, 625 P.2d at 329-30. However, consent to a search may be voluntary even when an individual is confronted by five officers with guns drawn. *State v. Watson*, 114 Ariz. 1, 7, 559 P.2d 121, 127 (1976).

¶10 Here, although Neace was seized in the traffic stop, this sort of temporary seizure is ordinarily reasonable for the length of the stop. *See Arizona v. Johnson*, ___ U.S. at ___, 129 S. Ct. at 788. The officer acted within his constitutional limits in asking

[2]Neace also suggests we consider *United States v. Chan-Jimenez*, 125 F.3d 1324 (9th Cir. 1997), for additional factors. But we see no reason to rely on an out-of-state case when both the United States Supreme Court and Arizona courts have addressed the matter.

Neace to step out of the car and in asking him questions unrelated to the traffic stop. *See id.* at 786 ("'[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.'"), *quoting Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *State v. Johnson*, 220 Ariz. 551, ¶¶ 11, 14-15, 207 P.3d 804, 809, 811 (App. 2009) (questioning of passenger on matter unrelated to stop constitutional). The officer did not handcuff or arrest Neace at any point before finding the methamphetamine. The entire encounter from the time the officer stopped the car until the driver left the scene, including Neace's arrest and the subsequent search of the car, lasted approximately twenty to twenty-five minutes. No evidence suggests that the officer threatened or attempted to intimidate Neace.[3] The officer did not give the *Miranda* warnings before asking to search Neace; however, this was not required because he was not in custody. *See State v. Dean*, 112 Ariz. 437, 439-40, 543 P.2d 425, 427-28 (1975). Additionally, the officer was not required to inform Neace of his right to refuse consent to the search. *See Bustamonte*, 412 U.S. at 232-33.

¶11 Nothing in the circumstances of this search differs from an ordinary voluntary search, and "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies." *Id.* at 231-32. We are not persuaded by Neace's unsupported argument that *Bustamonte* no longer is valid in evaluating the impact of a traffic stop on the voluntariness of consent to search. Consequently, we

[3]Neace offers no evidence to support his assertion that the officer was "presumably holding his gun."

cannot conclude the trial court's determination that Neace voluntarily consented to the search of his person was clearly erroneous.

Conclusion

¶12 Based on the foregoing, we affirm Neace's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge