FILED BY CLERK
MAY 14 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANTHONY WAYNE SHAW, Appellant.	2 CA-CR 2008-0237 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074857

Honorable Deborah Bernini, Judge

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Anthony Shaw was convicted of possession of a narcotic drug, possession of marijuana, possession of a firearm during the commission of a felony drug offense, and possession of drug paraphernalia. The trial court found he had three historical prior felony convictions and sentenced Shaw to enhanced, concurrent, substantially mitigated prison terms, the longest of which were six-year terms. Counsel has filed a brief

in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 2000). Shaw has not filed a supplemental brief.

¶2 As an arguably meritorious issue, counsel asks this court to consider whether the trial court abused its discretion in denying Shaw's motion to suppress evidence police officers seized after searching Shaw, his car, and a black bag that was in the car. We will not disturb a trial court's ruling on a motion to suppress evidence absent an abuse of discretion. *See State v. Prion*, 203 Ariz. 157, ¶ 14, 52 P.3d 189, 192 (2002). "Although we defer to the trial court's factual findings, we 'review de novo legal issues and mixed questions of fact and law.'" *State v. Barnes*, 215 Ariz. 279, ¶ 5, 159 P.3d 589, 590 (App. 2007), *quoting State v. Bonillas*, 197 Ariz. 96, ¶ 2, 3 P.3d 1016, 1016 (App. 1999); *see also State v. Valle*, 196 Ariz. 324, ¶ 6, 996 P.2d 125, 127 (App. 2000) (appellate court reviews de novo "ultimate legal determination that the search complied with the dictates of the Fourth Amendment"). Our review is limited to the evidence presented at the suppression hearing, *see State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), which we view in the light most favorable to sustaining the trial court's ruling, *State v. Rosengren*, 199 Ariz. 112, ¶ 2, 14 P.3d 303, 306 (App. 2000).

¶3 In his motion, Shaw argued the search of the car and resulting seizure of the black bag and its contents violated the Fourth Amendment to the United States Constitution and the parallel provision of Arizona's constitution, Ariz. Const. art. II, § 8, because the officers did not have probable cause to justify the search without a warrant and exigent circumstances did not exist. After an evidentiary hearing, the trial court denied the motion,

relying primarily on *California v. Acevedo*, 500 U.S. 565 (1991). That case held officers may search a container found inside a vehicle without a warrant or exigent circumstances if they have probable cause to believe there is contraband in the container. Appellate counsel concedes the court's ruling was correct under the federal constitution and that the officers did have probable cause to believe there was contraband in the black bag, but he suggests Arizona's constitution affords broader protection and recognizes greater privacy rights.

¶4 The state presented the following evidence at the suppression hearing. Tucson police officer Parrish testified he and other officers responded to a call about a situation possibly involving domestic violence. Shaw was standing near the open, passenger-side door of a vehicle and appeared to be struggling with the person sitting in the front seat. Parrish ordered Shaw to step away from the car and to get on the ground. Shaw did so reluctantly, continuing to yell at the female passenger inside the car, who was crying and yelling. Parrish and another officer placed Shaw in handcuffs for the officers' safety because Shaw was acting aggressively. Parrish escorted Shaw to his patrol car, and another officer patted him down, finding a plastic bag that contained a substance Parrish believed was cocaine. Parrish testified that officers conduct a pat-down search before placing a person in a patrol car because the person might have weapons or evidence that could be destroyed. When Parrish asked Shaw what was in the plastic bag, Shaw responded, "crack, what do you think?" Once Shaw was secured, Parrish walked back to the car, opened the passenger-side door, and immediately detected the smell of unburnt marijuana coming from inside the vehicle. Parrish saw an open black bag on the floor between the front seats. He put his head inside the car, leaned over the bag, and immediately noted the smell of marijuana was stronger.

¶5 The female passenger denied she had any belongings in the car. Officers determined the car did not belong to her or Shaw but to another woman whom Shaw had referred to as his girlfriend. They removed the bag from the car and inside it found a number of items, including a ledger, a credit card bearing Shaw's photograph, two plastic bags containing marijuana, two plastic bags containing a white powder Parrish believed was cocaine, a portable electronic scale with a white powder residue, and a loaded, .45 caliber semi-automatic gun. Shaw was arrested "at some point"; Parrish's testimony suggested he arrested Shaw only after the pat-down revealed the cocaine because, before then, Shaw was simply being detained. The car had to be towed because officers were unable to locate the owner. Parrish testified that typically a vehicle is "inventoried" before it is towed.

¶6 After the hearing, the trial court denied the motion to suppress. The court found, inter alia, that the officers had approached the car because Shaw appeared to be striking the passenger; in the process of securing Shaw, officers found cocaine on his person; and while standing in a place he was lawfully entitled to be, an officer smelled marijuana coming from the inside of the car and, leaning in, noted the odor was coming from an open, black bag in plain view. The bag was removed and searched, resulting in the seizure of evidence. These factual findings are abundantly supported by the testimony summarized above.

¶7 The trial court correctly found the search constitutional. Shaw did not challenge the pat-down search that resulted in the officers' discovery of what appeared to be and what Shaw acknowledged was cocaine. Moreover, the pat-down was permissible; Shaw had been assaulting the victim, was acting aggressively, and was about to be placed in a

patrol car. Parrish explained the pat-down was for officer safety. The discovery of drugs on Shaw, who was then apparently arrested before being placed in the patrol car, together with the strong odor of marijuana emanating from the vehicle, provided Parrish with probable cause to believe there were drugs in the car, which the officer could then search. *See Acevedo*, 500 U.S. at 580 ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."); *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975) (based on odor of marijuana, officer had probable cause to open car's trunk); *State v. Reyna*, 205 Ariz. 374, ¶ 15, 71 P.3d 366, 370 (App. 2003) (police may lawfully search car with probable cause to believe contraband in vehicle, even in absence of exigent circumstances).

¶8 Since counsel filed the brief in this appeal, the United States Supreme Court decided *Arizona v. Gant*, ___ U.S. ___, No. 07-542, 2009 WL 1045962 (U.S. Apr. 21, 2009). We have considered the propriety of the trial court's ruling in light of that decision as well. Under the circumstances of this case and based on the trial court's well-supported factual findings, the court's ruling is correct as a matter of law. As the Court stated in *Gant*, "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 2009 WL 1045962, *7, *quoting Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring). Given that drugs were found on Shaw's person and Parrish detected the odor of marijuana coming from inside the car from which Shaw had just emerged, it was reasonable for the officer to believe there were drugs in the car.

¶9 The record and the applicable law also support the trial court's conclusion that the bag inevitably would have been seized during an inventory search that would have been conducted before the car was towed. *See State v. Rojers*, 216 Ariz. 555, ¶ 33, 169 P.3d 651, 658 (App. 2007). Counsel's suggestion that the court erred based on Arizona's constitution because it provides broader privacy protections than the federal constitution was not raised below. Therefore, review for all but fundamental error has been forfeited. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also Rojers*, 216 Ariz. 555, ¶ 13, 169 P.3d at 654 (argument not raised in suppression motion or at suppression hearing forfeited absent fundamental error). But, except in the context of a home search, the Arizona Constitution provides persons no greater protection than its federal counterpart from searches and seizures conducted by the state. *State v. Juarez*, 203 Ariz. 441, ¶¶ 14-15, 55 P.3d 784, 788 (App. 2002). Thus, the outcome is no different under the Arizona Constitution; therefore, we see no error, much less fundamental error. *See Harrison*, 111 Ariz. at 509, 543 P.2d at 1144; *Reyna*, 205 Ariz. 374, ¶ 15, 71 P.3d at 370.

¶10 We have reviewed the entire record for fundamental, reversible error as counsel has requested. Finding none, we affirm the convictions and the sentences imposed.

_____
GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge