

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

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| THE STATE OF ARIZONA, |) | |
| |) | |
| Appellee, |) | 2 CA-CR 2008-0251 |
| |) | DEPARTMENT B |
| |) | |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| ALBERT LEE WATERS, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Appellant. |) | |
| _____ |) | |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073357

Honorable Hector E. Campoy, Judge

AFFIRMED

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Tucson
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V Á S Q U E Z, Judge.

¶1 Appellant Albert Waters challenges his convictions for transportation of marijuana for sale and unlawful possession of drug paraphernalia. He argues the border patrol agent lacked reasonable suspicion to stop the car he was driving and the trial court therefore erred when it denied his motion to suppress drug evidence seized during a search of the vehicle. Finding no error, we affirm.

Facts and Procedural Background

¶2 At approximately 11:40 p.m. on August 24, 2007, Border Patrol agent Jose Prado was parked and monitoring traffic at milepost 154 on State Route 86, a popular route for smuggling drugs and illegal immigrants in Pima County. As a white Chevrolet Malibu drove past him, Prado noticed it appeared to be heavily weighted down in the rear. He began to follow the vehicle and also determined it had not entered the United States through a port of entry in the last seventy-two hours.

¶3 Prado observed a piece of twine hanging from the trunk, which he recognized as a type commonly used to tie bundles of marijuana that are smuggled into the United States from Mexico. He stopped the Malibu at milepost 158, and another Border Patrol agent arrived with a drug-detection dog. After the dog alerted to the presence of contraband in the vehicle, a search revealed 324 pounds of marijuana in its trunk.

¶4 Waters was charged with transportation of marijuana for sale, possession of marijuana for sale, and possession of drug paraphernalia. A jury found him guilty of all charges, and the trial court subsequently vacated his conviction for possession of marijuana

for sale on double jeopardy grounds. The court sentenced Waters to concurrent terms of imprisonment on the remaining counts, the longest of which was 4.5 years. This appeal followed.

Discussion

¶5 Waters challenges the trial court’s denial of his motion to suppress evidence, claiming the stop violated the Fourth Amendment to the United States Constitution because it was not supported by reasonable suspicion of criminal activity. We review a trial court’s ruling on a motion to suppress for an abuse of discretion. *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). We consider only the evidence presented at the suppression hearing. *State v. Newell*, 212 Ariz. 389, ¶ 22, 132 P.3d 833, 840 (2006). And we defer to a trial court’s factual findings that are supported by the record, viewing them in the light most favorable to upholding the court’s ruling. *Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307. But we review de novo the court’s legal conclusion about whether the Border Patrol agent had reasonable suspicion to conduct an investigatory stop. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

¶6 An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment. *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997) (“When the blue lights on the patrol car begin to flash, the person being followed does not feel free to ignore them and drive on.”). Such a stop must therefore be supported by reasonable suspicion, *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), which is “a justifiable suspicion

that the particular individual to be detained is involved in criminal activity,” *State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982).

¶7 In determining whether officers had sufficient grounds for an investigatory stop, courts look to the totality of the circumstances. *State v. O’Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d 325, 327 (2000). “Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). However, we do not assess each factor individually, because “individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together.” *United States v. Diaz-Juarez*, 299 F.3d 1138, 1141 (9th Cir. 2002); *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (rejecting a “divide-and-conquer analysis” that gives no weight to factors “readily susceptible to an innocent explanation”); *State v. Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d 266, 274 (App. 2007) (noting each factor, viewed separately, “consistent with innocent travel” but suspicious when considered collectively in light of officer’s training and experience). Instead, the proper inquiry is whether, taken together, “[the factors] sufficed to form a particularized and objective basis” for the agent to stop the vehicle on suspicion of transporting marijuana. *Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d at 274, quoting *Arvizu*, 534 U.S. at 277.

¶8 Waters argues the factors Prado relied on in stopping him are, like the factors in *United States v. Rodriguez*, 976 F.2d 592, 595-96 (9th Cir. 1992), “very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch.” In

Rodriguez, the Ninth Circuit found the following factors insufficient to establish reasonable suspicion: the route was notorious for alien smuggling; the defendant did not acknowledge the agents; the car was a kind apparently used for alien smuggling; the defendant looked at the agents several times in his rearview mirror; the car appeared to be heavily loaded; and the defendant was a Hispanic male. *Id.* at 595. The court found the officers' recitation of these factors during the suppression hearing specious and noted three other cases in which the very same factors had been reported. *Id.* As summarized by the court, "the agents in this case saw a Hispanic man cautiously and attentively driving a [sixteen-]year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California." *Id.* The same cannot be said here.

¶9 First, Prado testified Waters was traveling on State Route 86, which Prado described as "a fairly popular smuggling route." *See Diaz-Juarez*, 299 F.3d at 1142 (approving as "factor[s] in the reasonable suspicion calculus" location in drug-smuggling area and proximity to border). In addition, he testified there was very little traffic on that road at the time of the stop and it was unusual "[to have] vehicles passing through [that] area at that time of night." *See State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008) (assessment of reasonable suspicion "based on the totality of the circumstances, considering such objective factors . . . as the time of day"). Moreover, Prado had confirmed the car,

bearing Texas license plates, had not passed through a port-of-entry within the last seventy-two hours. He also observed that the vehicle was riding low and appeared to be carrying a heavy load. *See Brignoni-Ponce*, 422 U.S. at 885 (whether vehicle appears weighted down a consideration in reasonable suspicion analysis). Finally, Prado had noticed, hanging from the trunk, a type of twine that was, in his experience, commonly used in packaging marijuana for smuggling into the United States from Mexico.¹ *Teagle*, 217 Ariz. 17, ¶ 26, 170 P.3d at 273 (“[This court] accord[s] deference to a trained law enforcement officer’s ability to distinguish between innocent and suspicious actions.”).

¶10 In sum, Prado noticed a heavily weighted vehicle traveling in a known drug smuggling corridor at a time of night when traffic was light and it was unusual for non-local traffic to be passing through the area. In addition, a piece of twine of the type used to tie marijuana bundles was hanging out of the trunk. Thus, contrary to Waters’s argument, the factors here are not likely to result in the “wholesale seizure of miscellaneous persons . . . who are seen driving any place near the Mexican border.” *Rodriguez*, 976 F.2d at 596. And, although “[a]ny one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel . . . , taken together they amount to reasonable suspicion.” *United States v. Sokolow*, 490 U.S. 1, 9 (1989). The factors Prado identified, when

¹At the suppression hearing, Prado was asked whether his identifying the twine was what ultimately convinced him he should make the stop. He responded: “It was actually more of all the facts. Every articulable fact that I had . . . is the reason why I stopped [the vehicle].”

considered in aggregate, provided a particularized and objective basis for him to suspect Waters was engaged in illegal activity. Therefore, the trial court did not err in denying his motion to suppress.

Disposition

¶11 For the reasons stated above, we affirm Waters's convictions.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge