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. ERIK G. ZETINA, Appellant.	2 CA-CR 2008-0414 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701549

Honorable Janna L. Vanderpool, Judge

AFFIRMED IN PART; VACATED IN PART

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B R A M M E R, Judge.

¶1 Erik G. Zetina appeals his convictions and sentences for felony possession of a narcotic drug for sale and transportation of a narcotic drug for sale. He contends the trial court erred in denying his motion to suppress, arguing evidence had been obtained in violation of his Fourth Amendment rights. We vacate Zetina's conviction and sentence for possessing a narcotic drug for sale and affirm his conviction and sentence for transporting a narcotic drug for sale.

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 and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). At the suppression hearing, Arizona Department of Public Safety officer Scott Armstrong testified he had been parked and monitoring highway traffic on September 19, 2008, when Zetina drove past him in a black Honda. Armstrong saw Zetina holding his arm unusually high while speaking on his cell phone. Based on his training and experience, Armstrong interpreted this as an attempt by Zetina to conceal himself. He therefore decided to follow Zetina and checked the Honda's license plate number on his computer.

¶3 The license plate check indicated the registered owner of the Honda had a suspended driver's license. Armstrong paced the Honda by driving his patrol car at approximately the same speed and noted Zetina was driving below the posted speed limit while in the left-most "fast" lane. He also observed the Honda "at one point blocking

traffic." Armstrong used his VASCAR—a computer that determines the speed of and stopping distance between vehicles—and determined the Honda was traveling at a speed that placed it within a half-second of the vehicle ahead of it. Armstrong testified that anything less than a two- or three-second interval between vehicles is unsafe. Accordingly, he activated his emergency lights and pulled the Honda over. Armstrong considered the suspended license of the Honda's owner "an aggravating circumstance" also justifying the stop but testified he did not consider the driver's unusual arm position a basis for the stop.

¶4 After Armstrong stopped the Honda, he discovered its driver, Zetina, was not its registered owner. As Zetina produced the Honda's insurance and registration, Armstrong observed a cologne bottle and air freshener in the backseat. He also noticed a "discrepancy" in the driver's-side quarter-panel. Armstrong testified the cologne bottle and air freshener were notable because their aromas may mask otherwise detectable narcotic odors. The discrepancy in the side quarter-panel was notable, he said, because panel modifications may indicate the concealment of drugs or "other criminal activity."

¶5 While writing Zetina a warning for following too closely, Armstrong engaged him in conversation about his travel plans to discover any inconsistencies or "ad-libbing" that could indicate criminal activity. Armstrong noted subtle inconsistencies in Zetina's responses, and it appeared to Armstrong that Zetina was making up his answers as he was speaking. Although Armstrong concluded the traffic stop by giving Zetina the written warning and returning all of Zetina's documents, he continued to engage Zetina in

conversation, asking if he was involved in any criminal activity. After Zetina said he was not, Armstrong requested, and Zetina gave, his oral and written consent to search the Honda. During the search, Armstrong's certified drug-detection dog alerted to the smell of narcotics inside the Honda. Armstrong and another officer thereafter discovered packages of cocaine in the car's modified quarter-panel.

¶6 Following the suppression hearing, the trial court concluded Armstrong had "at least reasonable suspicion" to stop Zetina and that Zetina's consent to search was valid. The court "f[ou]nd no need to suppress any of the contraband that was discovered pursuant to the search." After a four-day jury trial, Zetina was convicted of possessing and transporting the cocaine for sale. The court sentenced him to concurrent, presumptive, five-year prison terms, and this appeal followed.

Discussion

¶7 Although Zetina has not raised the issue, the state correctly observes that possession of a narcotic drug for sale is a lesser-included offense of transportation of a narcotic drug for sale when the offenses are based on the same transaction. *See* A.R.S. § 13-3408(A)(2), (7); *see also State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 13, 21, 965 P.2d 94, 97, 99 (App. 1998) (when based on same transaction, possessing marijuana for sale lesser-included offense of transporting marijuana for sale; conviction of both violates double jeopardy). We review de novo whether a defendant's double jeopardy rights have been violated. *State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2002). Because the transportation and possession charges here arose out of the same transaction,

conviction of both offenses violates double jeopardy, thus constituting fundamental error. *See State v. Siddle*, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002). We must therefore vacate his conviction and sentence for possession of a narcotic drug for sale. *See Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d at 99.

¶8 Zetina contends we should vacate both convictions, asserting the trial court erred in finding the traffic stop constitutional. He argues Armstrong did not have the requisite reasonable suspicion to justify the intrusion. The Fourth Amendment prohibits unreasonable searches or seizures. "'An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment.'" *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003), *quoting State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). Because investigatory detentions are "less intrusive than arrests," however, "officers need not possess probable cause to justify them." *Id.* ¶ 9, *citing United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881 (1975). Police need only possess a "reasonable suspicion" of criminal activity. *Id.*, *citing Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). Reasonable suspicion is "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778, *quoting United States v. Cortez*, 449 U.S. 411, 417-18 (1981). A traffic stop may occur if a police officer reasonably suspects the driver of having violated a traffic law. *See Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d at 1105. As long as such reasonable suspicion exists, "the subjective motives of an officer do not invalidate an otherwise lawful traffic stop." *Id.* ¶ 13, *citing Whren v. United States*, 517

U.S. 806, 812-13 (1996). "We review a trial court's decision on a motion to suppress evidence for an abuse of discretion" but review its ultimate legal conclusions de novo. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008).

¶9 At the suppression hearing, Armstrong testified he had stopped Zetina for following too closely in violation of A.R.S. § 28-730(A), which provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent and shall have due regard for the speed of the vehicles on, the traffic on and the condition of the highway." Justifying his determination that Zetina had violated § 28-730(A), Armstrong testified that his VASCAR had placed Zetina within a half-second of the vehicle in front of him; far closer than the two- to three-second time lapse Armstrong's training and experience had informed him to be reasonable and prudent. In addition, Armstrong testified he had considered the fact the Honda's registered owner's driver's license was suspended to be an "aggravating circumstance" also justifying the stop. Driving with a suspended license is a class one misdemeanor. A.R.S. § 28-3473(A). Although Armstrong later had learned Zetina was not the Honda's registered owner, his initial suspicion the Honda's driver was in violation of § 28-3473(A) was justified.

¶10 Armstrong articulated particularized and objective facts supporting his conclusion that the driver, Zetina, had violated §§ 28-730(A) and 28-3473(A). Zetina's conclusory assertions that no facts amounting to reasonable suspicion were presented at the suppression hearing and that he was stopped simply because "the officer felt like stopping

[him]" are unsupported. In addition, Zetina's characterizes as "ridiculous" Armstrong's explanation "that [Zetina] was holding his arm up too high as he talked on a cell phone." His contention is irrelevant because Armstrong testified he stopped Zetina instead for violating §§ 28-730(A) and 28-3473(A), and he pointed to specific facts to support that determination. Accordingly, the trial court did not err in concluding the traffic stop was reasonable and constitutional.

¶11 Zetina also contends the trial court erred in finding constitutional Armstrong's having continued to detain and question him after the traffic stop's conclusion, again arguing Armstrong lacked the requisite reasonable suspicion of criminal activity to justify the additional intrusion. Like traffic stops, brief investigatory stops are reasonable if officers demonstrate "particularized" or "founded" suspicion, *State v. Maldonado*, 164 Ariz. 471, 473, 793 P.2d 1138, 1140 (App. 1990), "'supported by articulable facts that criminal activity may be afoot.'" *In re Ilono H.*, 210 Ariz. 473, ¶ 4, 113 P.3d 696, 697 (App. 2005), *quoting United States v. Sokolow*, 490 U.S. 1, 7 (1989). "'[R]easonable suspicion is a commonsense, non-technical concept [ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.'" *Id.* ¶ 6, *quoting Ornelas v. United States*, 517 U.S. 690, 695 (1996) (alterations in *Ilono H.*).

¶12 At the suppression hearing, Armstrong testified he had observed a cologne bottle and an air freshener in the backseat, both indicators of possible narcotics concealment. He also observed "some discrepancy" in the driver's-side quarter-panel,

another indicator narcotics might be present in the modified panel. In addition, he noted subtle inconsistencies in Zetina's responses to casual questions, and it appeared to him that Zetina was "ad-libb[ing]" his story. Armstrong made all of these observations before the traffic stop had ended. Accordingly, Armstrong demonstrated founded suspicion and provided articulable facts supporting his belief that Zetina was involved in criminal activity. He therefore was justified in detaining Zetina briefly after concluding the traffic stop to ask if he were involved in criminal activity and to request his consent to search the Honda.

¶13 Zetina cites numerous cases supporting his contention that Armstrong lacked reasonable suspicion to detain him after the conclusion of the traffic stop. All are factually distinguishable. *See United States v. Wood*, 106 F.3d 942, 946-48 (10th Cir. 1997) (no reasonable suspicion for continued detention where officer believed defendant could not financially afford vacation, defendant misidentified city where he rented car, food wrappers present in car); *State v. Riddle*, 843 S.W.2d 385, 387 (Mo. Ct. App. 1992) (no reasonable suspicion for continued detention where police noted cooler on front floorboard, map with highlighted routes, few shirts for four-day trip, defendant traveling alone while unemployed but driving car rented by another person); *Commw. v. Parker*, 619 A.2d 735, 738 (Pa. Super. Ct. 1993) (no reasonable suspicion for continued detention based on defendant's previous drug arrest).

¶14 Zetina also asserts his further detention was constitutionally infirm because Armstrong's testimony was "easily applicable to a large population of innocent travelers

and, as such, [was] simply too broad and generalized to create a reasonable, individualized suspicion that [Zetina] was engaged in drug trafficking." We disagree with Zetina's characterization of the facts and find inapplicable those cases he cites in support of his claim. *See United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989) (holding "factors . . . describe too many individuals to create a reasonable suspicion" where driver of car with large trunk and two-way antenna reduced speed from sixty-five to fifty-five miles per hour, car owner resided near Mexican border in neighborhood suspected of narcotics activity, car purchased from dealership associated with drug trafficking); *Gonzalez-Gutierrez*, 187 Ariz. at 119-21, 927 P.2d at 779-81 (no reasonable suspicion because factors "easily applicable" to general population where defendant glanced at border patrol vehicle, passenger appeared to pretend to sleep, defendant drove at same speed as other traffic, incident occurred during morning rush hour, defendant and passenger were Hispanic); *Maldonado*, 164 Ariz. at 472, 474, 793 P.2d at 1139, 1141 (no reasonable suspicion because factors "describe too many individuals" where defendant drove "profile type of vehicle" with wide passenger and trunk space; defendant and passenger were Hispanic, not speaking to each other, and avoided eye contact with officer; defendant wore Western-style clothing).

¶15 As noted above, Armstrong had founded suspicion and provided articulable facts supporting his belief that Zetina was involved in criminal activity. These facts—the Honda's modified quarter-panel, cologne bottle and air freshener, and Zetina's inconsistent story—were specific to Zetina and not applicable to the general population. Accordingly,

the trial court did not err in concluding Armstrong's further brief detention of Zetina and subsequent search of the vehicle were constitutional.

Disposition

¶16 For the foregoing reasons, we vacate Zetina's conviction and sentence for possession of a narcotic drug for sale but affirm his conviction and sentence for transportation of a narcotic drug for sale.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge