FILED BY CLERK
DEC 18 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUIS ZAID ANDRADE-FELIX, Appellant.	2 CA-CR 2009-0076 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701976

Honorable Boyd T. Johnson, Judge

AFFIRMED

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

Law Offices of Ramiro S. Flores, P.L.L.C.
By Ramiro S. Flores — Tucson
Attorney for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a bench trial, appellant Luis Andrade-Felix was convicted of transportation of a narcotic drug for sale and possession of a narcotic drug. He was

sentenced to two concurrent terms of four years' imprisonment. On appeal, Andrade-Felix argues the court erred in denying his pretrial motion to suppress the evidence found in his vehicle because the stop of the vehicle was illegal. Finding no error, we affirm.

Factual Background and Procedural History

¶2 In reviewing the denial of a motion to suppress, we view the facts in the light most favorable to sustaining the trial court's ruling, considering only the evidence presented at the suppression hearing. *State v. Box*, 205 Ariz. 492, ¶ 2, 73 P.3d 623, 624 (App. 2003). In November 2007, Arizona Department of Public Safety Officer David Cesolini was observing westbound traffic while parked in the median of Interstate 10 when he saw Andrade-Felix's vehicle following another vehicle with less than half a second's distance between them. He stopped Andrade-Felix and issued him a written warning for following the other vehicle too closely, in violation of A.R.S. § 28-730.[1] At the conclusion of the stop, Officer Cesolini searched the vehicle and discovered cocaine inside.

¶3 Andrade-Felix thereafter filed a pretrial motion to suppress the cocaine, arguing the stop was unlawful. Following an evidentiary hearing, the trial court denied the motion, found Andrade-Felix guilty of the two charges, and sentenced him as outlined above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

[1]Section 28-730(A) requires that drivers not "follow another vehicle more closely than is reasonable and prudent" and have "due regard for the speed of the vehicles on, the traffic on[,] and the condition of the highway."

Discussion

¶4 As he did below, Andrade-Felix argues he was stopped in violation of the Fourth and Fourteenth Amendments to the United States Constitution as well as article II, § 8 of the Arizona Constitution, therefore requiring suppression of the evidence seized from his vehicle. In reviewing a denial of a motion to suppress, "[w]e review the court's decision 'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). In addition, "the question of whether [a law enforcement officer] had reasonable suspicion to conduct an investigatory stop is a mixed question of law and fact that we review *de novo*." *In re Ilono H.*, 210 Ariz. 473, ¶ 3, 113 P.3d 696, 697 (App. 2005).

¶5 Andrade-Felix first challenges the trial court's denial of his motion to suppress on the ground the stop was pretexual and based on a "subjectively determined traffic violation." He argues that pretextual stops are permissible only when premised on an "objective basis" and contends that § 28-730(A), which prohibits a driver from "follow[ing] another vehicle more closely than is reasonable and prudent," is "the antithesis of objectivity."

¶6 In support of his argument, he attempts to distinguish *Whren v. United States*, 517 U.S. 806 (1996). There, the defendants were stopped for failing to give '"full time and attention"' while driving, turning without signaling, and speeding. *Id.* at 810,

quoting D.C. Mun. Reg. tit. 18, § 2213.4 (1995). Although Andrade-Felix claims *Whren* "involved an uncontested, objectively determined traffic offense," his characterization of *Whren* is unavailing. To the contrary, the defendants in *Whren* were stopped for three violations, two of which were based on arguably subjective laws: "'giv[ing] full time and attention to the operation of the vehicle'" and prohibiting driving at speeds "'greater than is reasonable and prudent under the conditions.'" *Id.* at 810, *quoting* D.C. Mun. Regs. tit. 18, §§ 2213.4, 2200.3 (1995). In fact, the speeding regulation in *Whren* included the same "reasonable and prudent" language as § 28-730(A).

¶7 It is well established that in order to conduct a lawful traffic stop, an officer must "possess a reasonable suspicion that the driver has committed an offense," *State v. Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d 1103, 1105 (App. 2003), and that his or her "subjective motives . . . do not invalidate an otherwise lawful traffic stop," *id.* ¶ 13; *see also Whren*, 517 U.S. at 813; *Jones v. Sterling*, 210 Ariz. 308, ¶ 11, 110 P.3d 1271, 1274 (2005); *State v. Vera*, 196 Ariz. 342, ¶ 5, 996 P.2d 1246, 1247 (App. 1999). In addition, we have previously upheld traffic stops based on § 28-730, *see State v. Orendain*, 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (App. 1996), *vacated in part on other grounds*, 188 Ariz. 54, 932 P.2d 1325 (1997), and Andrade-Felix concedes he is not challenging the statute's general application.[2] *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, n.23, 121

[2]We likewise have upheld stops based on other arguably "subjective" traffic violations. *See, e.g.*, *State v. Starr*, 222 Ariz. 65, ¶¶ 13, 25, 213 P.3d 214, 218, 221 (App. 2009) (concluding officer had reasonable suspicion to stop defendant based on violation of statute requiring use of turn signal if "'any other traffic may be affected by the movement'"), *quoting* A.R.S. § 28-754; *Vera*, 196 Ariz. 342, ¶¶ 2, 6-7, 996 P.2d 1246,

P.3d 1256, 1273 n.23 (App. 2005) (appellate courts "should avoid addressing constitutional issues relating to a statute unless absolutely necessary to resolve a case").

¶8 Moreover, the record does not support Andrade-Felix's argument that the stop violated the Fourth Amendment. Officer Cesolini testified he had observed Andrade-Felix following another vehicle "at less than half a second distance behind that vehicle." Although Andrade-Felix argues that violations of § 28-730(A) are common and subjectively determined, he does not dispute that he was following another vehicle too closely. *See Livingston*, 206 Ariz. 145, ¶ 9, 75 P.3d at 1105 (officer "need only possess a reasonable suspicion that the driver has committed an offense" for lawful stop). In addition, the trial court stated it "observed nothing" in Officer Cesolini's testimony that would call into question the credibility of the officer's statements that Andrade-Felix's vehicle was a half second behind the car he was following and that such an interval was unsafe. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004) (trial court, not appellate court, determines credibility of witnesses). Because both the law and the record support the trial court's finding that the stop "was made upon the apparent violation of a traffic law," we conclude the trial court did not abuse its discretion in denying Andrade-Felix's motion to suppress.[3]

1247-48 (App. 1999) (holding officer had reasonable suspicion for stop based on apparent violation of statute requiring "'adequate windshield'" and rejecting defendant's argument that statute encouraged arbitrary enforcement), *quoting* A.R.S. § 28-957.01(A).

[3]Andrade-Felix also cites *State v. Livingston*, 206 Ariz. 145, 75 P.3d 1103 (App. 2003), and invites us to find, as a matter of law, that there was no violation of § 28-730 "under the circumstances presented" because "traffic patterns on [Interstate] 10 between

¶9 Andrade-Felix next argues that even if the stop did not violate the Fourth Amendment, it nevertheless violated article II, § 8 of the Arizona Constitution, which states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." But the privacy right afforded by article II, § 8 has not been expanded beyond protections provided by the Fourth Amendment except in cases involving warrantless entries into the home. *See State v. Teagle*, 217 Ariz. 17, n.3, 170 P.3d 266, 271 n.3 (App. 2007); *State v. Juarez*, 203 Ariz. 441, ¶ 14, 55 P.3d 784, 787-88 (App. 2002); *cf. State v. Ault*, 150 Ariz. 459, 465-66, 724 P.2d 545, 551-52 (1986); *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984). Moreover, as the state points out, "[o]ur supreme court long ago held that [a]rticle [II], [§] 8 of the Arizona Constitution 'is of the same general effect and purpose as the Fourth Amendment' and that the decisions concerning the scope of allowable vehicle searches under the federal constitution are 'well on point.'" *State v. Reyna*, 205 Ariz. 374, ¶ 14, 71 P.3d 366, 369 (App. 2003),

---

Tucson and Phoenix are so heavy it is nearly impossible not to be following too closely at some point." A similar argument was considered and rejected by the Supreme Court in *Whren*, where the defendants had argued the "'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop." 517 U.S. at 817-18, *quoting Delaware v. Prouse*, 440 U.S. 648, 661 (1979). *Livingston*, likewise, is inapposite because there this court determined the trial court did not abuse its discretion in finding the defendant had not committed a lane-usage violation, 206 Ariz. 145, ¶ 12, 75 P.3d at 1106, whereas here Andrade-Felix seeks a determination that the trial court did abuse its discretion in ruling that there was reasonable suspicion that he violated the law. In any event, there was no evidence presented at the evidentiary hearing about traffic conditions at the time Andrade-Felix was stopped or that it was otherwise unavoidable for him to be following the car in front of him so closely.

quoting Malmin v. State, 30 Ariz. 258, 261, 246 P. 548, 549 (1926). Accordingly, we need not conduct an independent analysis of the stop under article II, § 8 and do not address Andrade-Felix's arguments based on Washington's state constitution.

¶10 Last, Andrade-Felix argues the trial court erred in denying his motion to suppress because, he alleges, he was stopped as a result of his race and ethnicity, in violation of the Fourteenth Amendment. Our supreme court has held that "proof of a violation of the Fourteenth Amendment through selective enforcement . . . can be offered by a defendant in defense of criminal charges." *Jones*, 210 Ariz. 308, ¶ 15, 110 P.3d at 1275. Although the trial court found that Andrade-Felix had introduced exhibits establishing Officer Cesolini "reported stops of an inordinately high percentage of non-Caucasian motorists," it nevertheless determined that, "in the absence of better demographic information and more refined statistical analysis," this did not establish "unlawful or prohibited racial profiling."

¶11 We need not question the trial court's finding on this issue, however, because the court also found the officer had no knowledge of Andrade-Felix's race or ethnicity prior to the stop. The court explained that "nothing in [Officer Cesolini's] mannerisms, presentation or delivery of . . . testimony . . . would call into question the credibility of his testimony that, prior to the stop of and contact with [Andrade-Felix], he had no knowledge of [his] racial or ethnic heritage." *See Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453 (trial court, not appellate court, determines credibility of witnesses). Additionally, the court's finding is consistent with the evidence presented at the

suppression hearing, which included Officer Cesolini's testimony that he had been parked in the median of Interstate 10 when he had seen Andrade-Felix drive by, that he was unable to see Andrade-Felix's race or ethnicity at that time, and that he could not see Andrade-Felix's Mexican license plate until he had caught up with him. *See Jones*, 210 Ariz. 308, ¶ 34, 110 P.3d at 1279 (selective enforcement claim requires showing that "police treated the defendants differently than other similarly situated motorists of another race"). We have no basis for concluding the court abused its discretion in finding the officer had no knowledge of Andrade-Felix's race or ethnicity when the officer decided to stop him, or for setting aside the court's denial of Andrade-Felix's motion to suppress.

Disposition

¶12 For the foregoing reasons, Andrade-Felix's convictions and sentences are affirmed.

_____
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Chief Judge

_____
ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003)