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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THE STATE OF ARIZONA, Appellee, v. RICKY EUGENE MILLER, Appellant.	2 CA-CR 2009-0287 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082779

Honorable Clark W. Munger, Judge

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 Ricky Eugene Miller appeals from his convictions and sentences for possession of a narcotic drug and drug paraphernalia. He argues the trial court erred in

denying his motions to suppress statements he had made to a police officer and evidence the officer seized during a warrantless search of his automobile. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining Miller's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Because Miller appeals only the denial of his motions to suppress, we consider only those facts presented at the suppression hearing and view them in the light most favorable to upholding the trial court's ruling. *See State v. Ellison*, 213 Ariz. 116, ¶ 25, 140 P.3d 899, 909 (2006).

¶3 On July 12, 2008, Tucson police officer Bradley Pelton stopped Miller for driving with a cracked windshield. After approaching Miller's vehicle, Pelton asked Miller for his driver's license, registration, and proof of insurance. Miller stated his license had been suspended, and Pelton then asked him to step out of the car. Noting that Miller's "yellow skin and pin-pointed pupils" were consistent with heroin use, Pelton asked Miller if he was using drugs. He responded that he was "not using heroin but he used to use heroin."

¶4 When Pelton again asked for Miller's registration and proof of insurance, Miller reached into the car's glove-box, removed a plastic "bagg[ie]" that contained a syringe with black residue on the plunger, and placed the baggie on the roof of his car. Pelton recognized the residue as black tar heroin. After confirming there was an outstanding warrant for Miller's arrest, Pelton handcuffed him and placed him in the backseat of a patrol car. Pelton then searched Miller's car "for any other elements of the

crime of drug possession," and discovered Miller's wallet between the driver's and passenger's seats, finding in it a clear plastic baggie containing foil-wrapped heroin packets.

¶5 Pelton returned to the patrol car and apprised Miller of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). After Miller waived his rights and agreed to answer questions, Pelton asked where he had acquired the heroin in his wallet. Miller told Pelton his passenger had given him the heroin and said the passenger "had more heroin hidden on his person." Pelton then searched Miller's passenger, finding heroin where Miller had described.

¶6 Miller was charged with possession of a narcotic drug and possession of drug paraphernalia. The trial court granted his motion to suppress his statement that he formerly was a heroin user but refused to suppress his post-*Miranda*-warning statements and the evidence Pelton discovered while searching Miller's car. The court concluded Miller had waived his Fifth Amendment rights and ruled the search of his vehicle was justified under the automobile exception to the Fourth Amendment's warrant requirement. After a two-day trial, a jury found Miller guilty of both charges. The court sentenced him to concurrent, presumptive terms of imprisonment, the longer of which was 4.5 years. This appeal followed.

Discussion

Post-*Miranda* Statements

¶7 Miller first argues the trial court erred in denying his motion to suppress the statements he had made after being informed of his rights pursuant to *Miranda*. We

review the factual findings underlying the court's ruling for an abuse of discretion but review its legal conclusions de novo. *See State v. Newell*, 212 Ariz. 389, ¶ 27, 132 P.3d 833, 841 (2006). Relying on *Missouri v. Seibert*, 542 U.S. 600 (2004), Miller asserts his post-warning statements had been tainted by his pre-warning statement, which the court suppressed. *See State v. Zamora*, 220 Ariz. 63, ¶ 15, 202 P.3d 528, 534 (App. 2009) (when "there is evidence the pre-*Miranda* warning statements were coerced or involuntary, then the post-*Miranda* statements are admissible only if 'the taint dissipated through the passing of time or a change in circumstances'"), *quoting United States v. Williams*, 435 F.3d 1148, 1153 (9th Cir. 2006).

¶8 In *Seibert*, a police officer had elicited a confession after questioning the defendant for more than thirty minutes. 542 U.S. at 604-05. After a twenty-minute break, the officer then gave the defendant *Miranda* warnings, obtained a waiver of her rights, and continued questioning her, immediately confronting her with her pre-warning statements and obtaining another confession. *Id.* at 605. The United States Supreme Court, noting such "question-first" interrogation techniques were a "practice of some popularity," *id.* at 611, concluded that, "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* at 613-14, *quoting Moran v. Burbine*, 475 U.S. 412, 424 (1986).

¶9 The Court then described

> a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. Applying those factors, the Court determined the facts in *Seibert* "d[id] not reasonably support a conclusion that the warnings given could have served their purpose" and thus ruled the defendant's post-warning statements inadmissible. *Id.* at 617.

¶10 Application of the *Seibert* factors here makes clear that Miller's post-warning statements were not obtained in violation of his constitutional rights. Although the statements occurred within a few minutes of each other and Pelton elicited both, his pre-warning question was neither particularly complete nor detailed. Nor did the content of Miller's two statements significantly overlap. Before giving Miller *Miranda* warnings, Pelton asked only if he was a drug user. Pelton did not ask if he was in possession of heroin, and Miller's response that he was "not using heroin but he used to use heroin" did not so suggest. The post-warning statement, in contrast, specifically addressed the heroin Pelton had found in Miller's car.

¶11 Further, unlike in *Seibert*, there was a drastic change in circumstances between the pre- and post-warning statements. When retrieving his proof of insurance and vehicle registration at Pelton's request, Miller placed on the roof of his car a clear plastic baggie containing a syringe. Pelton recognized the black residue on the syringe's

plunger as likely being black tar heroin, and Pelton found heroin during his subsequent search of Miller's car. Only then did Pelton inform Miller of his rights and question him further. Thus, Pelton's post-warning questioning cannot reasonably be described as a continuation of his earlier question. Nothing in these facts suggests that Pelton's *Miranda* warnings were ineffective to apprise Miller of his rights or that Miller's waiver of those rights somehow was either inadequate or involuntary. The trial court therefore did not err in denying Miller's motion to suppress his post-warning statements.

Search of Miller's Car

¶12 Miller next contends the trial court legally erred in denying his motion to suppress the evidence seized during Pelton's search of his car. He argues the court should have analyzed the constitutionality of the search only under the search-incident-to-arrest exception to the warrant requirement because Pelton subjectively believed that exception controlled. Miller thus contends our inquiry is governed by *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710 (2009), and asserts the search here violates *Gant*.

¶13 The Fourth Amendment to the United States Constitution prohibits unreasonable searches or seizures. Warrantless searches and seizures are unreasonable per se unless a recognized exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception, the "automobile exception," permits a warrantless search when probable cause exists to believe there is contraband in a stopped, but readily mobile vehicle. *State v. Reyna*, 205 Ariz. 374, ¶ 5, 71 P.3d 366, 367 (App. 2003). Another such exception, the "search-incident-to-arrest exception," permits a warrantless search incident to a lawful arrest and "derives from interests in

officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, ___ U.S. at ___, 129 S. Ct. at 1716.

¶14 Although Pelton testified at the suppression hearing he believed he was searching the vehicle as a search incident to arrest, and no other basis justified the search, an officer's subjective motivations are irrelevant to the determination whether a search is justified. *Cf. Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (action reasonable regardless of officer's subjective mental state if circumstances, viewed objectively, justify action). The relevant inquiry is whether the facts objectively justify the search under any established exception to the warrant requirement. *Cf. id*; *see also Gant*, ___ U.S. at ___, 129 S. Ct. at 1723-24 ("When [search-incident-to-arrest] justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."); *State v. Kempton*, 166 Ariz. 392, 395-96, 803 P.2d 113, 116-17 (App. 1990) (noting "basic constitutional rule" that warrantless search per se unreasonable unless "falls within one " recognized exception).

¶15 The trial court here concluded Pelton's search fell squarely within the automobile exception to the warrant requirement, and we agree. In his interaction with Miller, Pelton observed that Miller exhibited yellowish skin and pinpointed pupils. He testified these observations generally were "sign[s] or symptom[s] of usage of heroin." He explained that yellowish skin generally was attributable to hepatitis, contracted by heroin abusers using dirty needles. He further explained that pinpointed pupils "is a reaction from the drug itself."

¶16 Moreover, in response to Pelton's request for his driver's license and registration, Miller voluntarily pulled from the car's glove compartment a clear plastic baggie containing a syringe with black residue and placed it on the roof of his car in Pelton's plain view. Based on Pelton's training and experience with heroin and heroin users, he believed the black residue to be black tar heroin. Although Miller asserts that in some instances a syringe may have a legitimate medical use, the presence of black residue here indicated this was not such an occasion. Pelton therefore had probable cause to believe Miller's car contained contraband. *Cf. State v. Donovan*, 116 Ariz. 209, 211, 568 P.2d 1107, 1109 (App. 1977) (drug paraphernalia in plain view provided probable cause for search of residence); *see also United States v. Fladten*, 230 F.3d 1083, 1086 (8th Cir. 2000) (observation of "an item commonly used in the manufacture of methamphetamine . . . in plain view in the back seat" of automobile gave officers probable cause for warrantless search); *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995) ("combination of the odor of marijuana on [defendant] and [a] marijuana pipe lying in plain view" in defendant's truck provided probable cause for warrantless search).

¶17 Although not necessary to our analysis, we also note *Gant* does not support Miller's argument that the search was constitutionally infirm. The United States Supreme Court in *Gant* clarified the search-incident-to-arrest exception to the warrant requirement, explaining that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search . . . ." ___ U.S. at ___, 129 S. Ct. at 1723. The

court elaborated further, however, noting that police may also search a vehicle if "it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* The "offense of arrest" here was not simply driving with a suspended license, as Miller suggests, or with a cracked windshield, but also possession of drug paraphernalia. And it was reasonable for Pelton to believe Miller's car contained evidence of the latter offense.

¶18 Accordingly, Pelton's search was constitutionally permissible, and the trial court did not err in denying Miller's motion to suppress the evidence discovered during that search.

Disposition

¶19 For the reasons stated, we affirm Miller's convictions and sentences.

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

CONCURRING:

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

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