

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

EDWARD LOUIS FIGUEROA,
Appellant.

No. 2 CA-CR 2012-0458
Filed January 24, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20091364001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Edward Figueroa was convicted of aggravated driving with an alcohol concentration (AC) of .08 or more while his license was suspended, revoked, or restricted. The trial court sentenced him to a three-year prison term. On appeal, Figueroa contends the court erred by denying his motions to dismiss and suppress evidence, arguing his detention, arrest, and blood draw were illegal. For the reasons stated below, we vacate the criminal restitution order but otherwise affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Figueroa's conviction. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 2, 185 P.3d 135, 137 (App. 2008). In May 2008, two off-duty Pima County Sheriff's Department deputies were driving to a convenience store when they noticed a man, later identified as Figueroa, driving recklessly behind their vehicle in "an older model, two door sedan." The deputies did not report the incident but continued watching the vehicle as they pulled into the convenience store's parking lot and the car pulled in and stopped at the fuel pumps.

¶3 As the deputies were walking out of the store, Figueroa was walking inside. One of the deputies smelled "a strong odor of intoxicants" on Figueroa. Figueroa purchased beer and walked out of the store, and the deputies confronted him as he approached his vehicle. The deputies testified that they showed their badges and told Figueroa they wanted to talk to him.

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¶4 According to the deputies, Figueroa ignored them and continued walking toward his vehicle. Figueroa put the beer inside the car and, when he started to get in, one of the deputies grabbed him and shoved him against a pillar, and both deputies then “slam[med him] onto the back of the car” and wrestled him to the ground. During the struggle, the deputies told Figueroa “he was under arrest for exhibition of speed and reckless driving at that point, and possibly under the influence, DUI.” Figueroa sustained several injuries, including a broken orbital socket and torn ligament in his ankle.

¶5 A bystander who had witnessed the scuffle called 9-1-1. One of the uniformed sheriff’s deputies who had responded to the call administered a horizontal gaze nystagmus (HGN) test, and Figueroa displayed six out of six possible cues of impairment. That same deputy performed a blood draw, which revealed Figueroa’s AC was .191 at the time of his arrest.

¶6 Figueroa was indicted for aggravated driving under the influence (DUI) while his license was suspended, revoked, or restricted; aggravated driving with an AC of .08 or more while his license was suspended, revoked, or restricted; and, resisting arrest. Before trial, Figueroa moved to dismiss the charges or, in the alternative, to suppress evidence resulting from his detention and arrest, arguing the detention and arrest were illegal. The trial court denied the motions.¹

¶7 At the close of the state’s case, the trial court granted Figueroa’s motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., on the aggravated DUI and resisting arrest charges. The jury found Figueroa guilty of aggravated driving with an AC of .08, and the court sentenced him as noted above. This

¹The trial court granted Figueroa’s motion to suppress evidence obtained during a search of his vehicle following his arrest. The court found that the deputies had lacked probable cause to conduct the search, and, during the evidentiary hearing, noted that, in any event, no evidence had been found.

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appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).²

Standard of Review

¶8 We review a trial court's ruling on motions to dismiss and to suppress for an abuse of discretion. *State v. Espinoza*, 229 Ariz. 421, ¶ 15, 276 P.3d 55, 58 (App. 2012) (dismiss); *State v. Peterson*, 228 Ariz. 405, ¶ 6, 267 P.3d 1197, 1199 (App. 2011) (suppress). We consider only the evidence presented at the evidentiary hearing, which we view in the light most favorable to sustaining the court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). Unless wholly unsupported by the record, we defer to the trial court's findings of fact, "including findings on credibility and the reasonableness of the inferences drawn by the officer." *State v. Moran*, 232 Ariz. 528, ¶ 5, 307 P.3d 95, 98 (App. 2013), quoting *State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007); see *State v. Mohajerin*, 226 Ariz. 103, ¶ 23, 244 P.3d 107, 110 (App. 2010). However, "we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusion" regarding the reasonableness and the constitutionality of a seizure. *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000).

Reasonable Suspicion

¶9 Figueroa first argues the trial court erred "in finding that the deputies had reasonable suspicion to stop and detain" him. He maintains the actions of the off-duty deputies constituted "an unreasonable and illegal seizure" and "not a mere investigatory detention." He contends that, because "the detention certainly represented a de facto arrest if not a formal one," probable cause

²Although Figueroa's opening brief was filed late, in the exercise of our discretion we have considered it nevertheless. Cf. *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012) ("[W]e may use our discretion in determining whether to address issues not raised below.").

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was required and the court thus erred by “upholding the detention based upon reasonable suspicion.”

¶10 A police officer may briefly detain a person for investigative purposes if the officer has reasonable suspicion that the person has committed or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). By definition, the reasonable suspicion requirement for an investigatory stop is something short of the probable cause required for an arrest. *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). Here, one of the off-duty deputies testified that he had “explained to . . . Figueroa who [he] was, [Figueroa] wasn’t free to leave, [and Figueroa] was under arrest for exhibition of speed and reckless driving.” We therefore agree that the detention was more than an investigatory stop and probable cause was required. But, Figueroa has mischaracterized the trial court’s ruling to the extent he suggests it was based entirely on a finding of reasonable suspicion and nothing more. The deputy also stated that they had suspected Figueroa of driving under the influence of intoxicants, and we interpret the court’s reference to reasonable suspicion as relating to that determination. In any event, the court found the deputies’ actions were supported both by reasonable suspicion and probable cause.³

³The trial court did not address whether there was probable cause to arrest Figueroa for reckless driving, but it is apparent that the court credited the deputies’ testimony that he had been driving recklessly. At the suppression hearing, the court pointed out to defense counsel that it was necessary to “look at the big picture.” The court then asked rhetorically, “[D]id [the off-duty deputies] think [Figueroa] had been driving the white car *that was driving recklessly?*” Although the court further suggested that this amounted to “reasonable suspicion to stop him, to detain him, to talk to him, to do whatever they were going to do,” the record supports our conclusion, given the court’s factual finding of reckless driving, that there was probable cause to arrest for that crime as well.

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Probable Cause

¶11 Figueroa next argues the trial court erred in finding probable cause for the DUI arrest following the confrontation with the off-duty deputies. Although he characterizes the DUI arrest as a “second arrest,” he was never released from custody after his initial arrest by the off-duty deputies for reckless driving. We therefore disagree with that characterization, and, instead, consider the “totality of the circumstances,” beginning with the initial observations made by the off-duty deputies and continuing throughout Figueroa’s detention before the deputies told him he was under arrest for DUI in determining whether probable cause existed. *United States v. Edwards*, 885 F.2d 377, 390 (7th Cir. 1989) (existence of probable cause based on totality of circumstances); *see also State v. Peterson*, 171 Ariz. 333, 335, 830 P.2d 854, 856 (App. 1991) (probable cause may be established by collective knowledge of all law enforcement personnel involved).

¶12 “Probable cause exists where the arresting officers have reasonably trustworthy information of facts and circumstances which are sufficient in themselves to lead a reasonable [person] to believe an offense is being or has been committed and that the person to be arrested is committing or did commit it.” *State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974). “When assessing whether probable cause exists, ‘we deal with probabilities. . . . [T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” *State v. Dixon*, 153 Ariz. 151, 153, 735 P.2d 761, 763 (1987), quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Thus, in the DUI context, probable cause does not require a law enforcement officer to establish that the person was in fact under the influence of an intoxicant; rather, the probability of intoxication is the standard for probable cause. *Moran*, 232 Ariz. 528, ¶ 10, 307 P.3d at 99.

¶13 Here, the off-duty deputies observed Figueroa driving erratically before the encounter at the grocery store. One of the deputies testified that the two-door sedan had “peeled out” at an intersection and Figueroa had lost control of it, nearly swerving into oncoming traffic. Figueroa then tried to pass the deputies’ vehicle twice on a two-lane roadway, forcing the deputies to accelerate in

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order to avoid a collision. One deputy stated that Figueroa had stumbled when exiting his vehicle at the store. Both deputies observed Figueroa purchase a forty-ounce bottle of beer, and one of the deputies testified that as Figueroa walked by him at the store, the deputy “noticed a really strong odor of intoxicants on him.” This evidence established the probability that Figueroa had been driving a vehicle while impaired. *See Moran*, 232 Ariz. 528, ¶ 10, 307 P.3d at 99.

¶14 Figueroa contends the evidence did not establish probable cause for a number of reasons. First, he argues the off-duty deputies could not have known he was the driver of the sedan because they “never saw the face of the reckless driver” while on the road and “could not identify him except that he . . . was a Hispanic male.” But, as the trial court pointed out, the deputies did see Figueroa walk to the same vehicle they had seen earlier and no one else was inside. Thus, the court reasonably could infer that Figueroa had been the driver of the vehicle.

¶15 Figueroa next contends the signs of impairment “were readily attributable to the visible injuries that [Figueroa] had suffered when being violently detained by [the] off-duty [deputies].” Although the injuries certainly could explain the signs of impairment, neither the deputies nor the court were bound by that explanation. And, notably, not all of the deputies’ observations of impairment occurred after the physical altercation between Figueroa and the two off-duty deputies. As noted above, one of the off-duty deputies testified he had observed Figueroa stumble when he got out of his vehicle at the store, before the confrontation.

¶16 Figueroa last contends the deputy who formally arrested him for DUI “lacked any evidence of [Figueroa] driving when she made the arrest.” Although he acknowledges probable cause may be established by the “collective knowledge of officers,” Figueroa maintains “the State [was required to, but] did not show that [the] information [obtained by the off-duty deputies] was conveyed to the arresting officer.” We disagree that the information possessed by the deputies separately had to be imparted to the arresting officer before an arrest was made. “It is . . . not essential that the arresting officer personally be in possession of all the facts

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as long as ‘probable cause exists from the collective knowledge of all the law enforcement agents involved in this operation.’” *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985), quoting *State v. Sardo*, 112 Ariz. 509, 514, 543 P.2d 1138, 1143 (1975).

¶17 In sum, the evidence known to the officers would have warranted “a man of reasonable caution to believe that a [DUI offense] had been committed.” *State v. Green*, 111 Ariz. 444, 446-47, 532 P.2d 506, 508-09 (1975). Thus, we conclude the trial court did not err in finding the deputies had probable cause to arrest Figueroa for DUI. See *Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d at 395.

Blood Draw

¶18 Figueroa next challenges the trial court’s denial of his motion to suppress the blood draw conducted after his arrest. Specifically, he states, “Without a warrant or probable cause and exigency, any supposed consent under ‘Admin Per Se’ is rendered meaningless.”⁴ The reasonableness of a blood draw is a mixed question of fact and law, which we review de novo. See *State v. Noceo*, 223 Ariz. 222, ¶ 3, 221 P.3d 1036, 1038 (App. 2009); *State v. Flannigan*, 194 Ariz. 150, ¶ 12, 978 P.2d 127, 129 (App. 1998).

¶19 “[A] compelled blood draw, even when administered pursuant to [A.R.S.] § 28-1321, is a search subject to the Fourth Amendment’s constraints.”⁵ *State v. Butler*, 232 Ariz. 84, ¶ 10, 302

⁴By “Admin Per Se,” Figueroa is referring to A.R.S. § 28-1321(B), which requires that law enforcement officers inform drivers that if they refuse to consent, “the violator’s license or permit to drive will be suspended or denied for twelve months.”

⁵Under § 28-1321(A), Arizona’s “implied consent” statute, a motorist

gives consent . . . to a test or tests of the person’s blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for . . .

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P.3d 609, 612 (2013), *citing Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1556 (2013). And, “[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1561. Warrantless searches “are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Probable cause coupled with exigent circumstances is one such exception, *see State v. Decker*, 119 Ariz. 195, 197, 580 P.2d 333, 335 (1978), but the state has not argued that this exception applies here. And, although consent also constitutes an exception to the warrant requirement, *State v. Guillen*, 223 Ariz. 314, ¶ 11, 223 P.3d 658, 661 (2010), Figueroa claims his consent was involuntary. We assess voluntariness “from the totality of the circumstances.” *Butler*, 232 Ariz. 84, ¶ 13, 302 P.3d at 612.

¶20 A uniformed deputy read information regarding Arizona’s “admin per se” law to Figueroa, *see* § 28-1321, who then consented to have his blood drawn. But Figueroa argues his consent was “meaningless, especially from a man who reasonably believed that he was just assaulted by two men subsequently discovered to be off-duty police officers.” Because Figueroa does not expand his argument beyond this brief assertion, we could reject it without addressing it further.⁶ *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). The argument lacks merit in any event.

¶21 “[O]vert acts or threats of force” used to coerce a suspect into giving consent can render that consent involuntary. *State v. Smith*, 123 Ariz. 231, 241, 599 P.2d 187, 197 (1979). But, here,

driving or [being] in actual physical control
of a motor vehicle while under the
influence of intoxicating liquor or drugs.

⁶We do, however, reject Figueroa’s claim in his reply brief that the state failed to respond to this assertion and thus conceded the issue.

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there is no indication that any force, threats, or coercion were used against Figueroa after uniformed police officers arrived at the store. And, although Figueroa was apparently still upset, the record shows he was cooperative. *See State v. Laughter*, 128 Ariz. 264, 266-67, 625 P.2d 327, 329-30 (App. 1980) (defendant's cooperation indicates consent was not coerced). The trial court therefore did not err by finding Figueroa's blood draw reasonable. *See Noceo*, 223 Ariz. 222, ¶ 3, 221 P.3d at 1038; *Flannigan*, 194 Ariz. 150, ¶ 12, 978 P.2d at 129.

Excessive Force

¶22 Figueroa next argues the trial court "erred in finding that the two off-duty deputies did not use excessive force in detaining [him]." First, even assuming the off-duty deputies used excessive force in detaining him, it is unclear precisely what remedy Figueroa is seeking. He has cited no authority, and we are aware of none, for the proposition that a defendant is entitled to dismissal of a criminal prosecution or the suppression of evidence when police officers use excessive force in making an arrest.

¶23 Several other jurisdictions that have addressed this issue expressly rejected the notion that excessive force used during an arrest necessitates suppression of evidence. *See United States v. Collins*, 714 F.3d 540, 543-44 (7th Cir. 2013) (surveying cases). Thus, without any argument supported by authority to the contrary, we decline to further address Figueroa's excessive force claim.⁷

Criminal Restitution Order

¶24 Although Figueroa has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states "all assessments are reduced to a Criminal Restitution Order [(CRO)], with no interest, penalties or collection fees to accrue while

⁷As part of his excessive-force claim, Figueroa contends that "[t]he video surveillance [from the convenience store] clearly disproved the two off-duty deputies' false claims that they had identified themselves to [Figueroa] as police by showing their badges." But, because we reject Figueroa's excessive-force claim, we need not address this contention.

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the defendant is in the Department of Corrections.” “[T]he imposition of a CRO before the defendant’s probation or sentence has expired ‘constitutes an illegal sentence, which is necessarily fundamental, reversible error.’” *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), quoting *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). And we will not ignore fundamental error that we find in the course of reviewing other issues a defendant has raised on appeal. See *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). The error is not cured even when, as here, the trial court delays the accrual of interest. Nothing in A.R.S. § 13-805,⁸ which governs the imposition of CROs, “permits a court to delay or alter the accrual of interest when a CRO is ‘recorded and enforced as any civil judgment’ pursuant to § 13-805(C).” *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

Conclusion

¶25 For the foregoing reasons, we vacate the criminal restitution order but otherwise affirm Figueroa’s conviction and sentence.

⁸Section 13-805 has been amended since the date of the offense. See 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. The changes are not material here.