

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD NUNEZ,
Appellant.

No. 2 CA-CR 2013-0451
Filed October 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NOT FOR PUBLICATION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. CR20112008003
The Honorable Richard S. Fields, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Alan L. Amann, Assistant Attorney General, Tucson
Counsel for Appellee

Vanessa C. Moss, Tucson
Counsel for Appellant

STATE v. NUNEZ
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, Richard Nunez was found guilty of transportation of marijuana for sale with a weight of two pounds or more and possession of marijuana for sale with a weight of four pounds or more. He was sentenced to concurrent, enhanced 15.75-year terms of imprisonment. On appeal, Nunez argues the trial court erred in denying his motions to suppress evidence or dismiss the charges¹ based on the duration of the traffic stop which led to his arrest. Nunez also contends evidence found on his person should have been suppressed as a product of a warrantless, nonconsensual, nonexigent search. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court's denial of a motion to suppress, we view the facts in the light most favorable to upholding its ruling, considering only the evidence presented at the suppression hearing. *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). On June 4, 2011, Arizona Department of Public Safety (DPS) Officer Keith Duckett initiated a traffic stop of a Dodge Durango and a Kia Soul travelling together on Interstate 10 in Pima County. Although he suspected drug trafficking,² before stopping

¹Nunez has not made any argument in support of dismissal of the charges below and we therefore do not address this claim of error.

²Officer Duckett had a previous encounter with the same Dodge Durango, which had appeared to act as an "escort" for another vehicle in which a large quantity of drugs had been found.

STATE v. NUNEZ
Decision of the Court

the vehicles Duckett had observed the Kia traveling sixty-five miles per hour in the fast lane of a seventy-five mile per hour zone, thereby causing traffic to backup, and the Durango following too closely behind the Kia, in violation of A.R.S. § 28-730.

¶3 Officer Duckett approached the Kia first and spoke to both occupants. The female driver handed him a driver's license and the passenger verbally identified himself as Michael Simpson. When Duckett spoke to Simpson separately, he identified the driver as Jennifer Etzel-Elaqad, which was different from the name on the license she had provided. The two also provided inconsistent information about their travel plans, the nature of their relationship, and their association with the Dodge Durango's occupants. Etzel-Elaqad initially denied any association with the Durango, but after further questioning, said she "had some tire problems earlier in the day" and the occupants of the Durango had helped her.

¶4 Officer Duckett then approached the Durango and spoke with the driver, Nunez. He appeared nervous and denied traveling with the Kia, but the officer could see a "plastic tray" in the back seat that he thought belonged to the Kia. Duckett testified the tray was one that goes "underneath the floor area where they put the spare tire and tools" and was "just laying on the . . . back seat, kind of tilted up, leaning against . . . the back seat."

¶5 After Duckett informed Nunez he would only receive a warning for following the Kia too closely, Nunez continued exhibiting nervousness that the officer deemed "excessive," given

We need not, however, determine whether that incident gave rise to reasonable suspicion to stop the vehicles here because Nunez has not challenged the validity of the stop on appeal. And, in any event, both encounters involved violations of Arizona traffic laws preceding the stop. *See State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (App. 1990) (violation of traffic law provides sufficient grounds to stop a vehicle); *see also State v. Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d 1103, 1106 (App. 2003) (officer's subjective motives do not invalidate an otherwise lawful traffic stop).

STATE v. NUNEZ
Decision of the Court

the minor nature of the violation. At this point, Duckett felt “something was going on” and requested assistance.

¶6 Approximately ten minutes later, DPS Officer Richard Bochs arrived, and Duckett asked Etzel-Elaqad if he could search the Kia. She initially agreed, but changed her mind when Duckett presented a consent form. Duckett then searched the Kia’s exterior using a drug detection canine. The dog “alerted” on the trunk, and a search revealed eighty-nine bricks of marijuana in the space where the spare tire and plastic tray-cover would normally be found. All occupants of both vehicles were then arrested and taken into custody.

Reasonableness of the Detention

¶7 Nunez argues, for the first time on appeal, that there was an absence of “both reasonable suspicion and probable cause” to extend his detention beyond the length necessary to issue a traffic citation or to support “a de facto arrest.” Although Nunez argued below that there was no reasonable suspicion to justify his traffic stop, he did not raise the issue of an unconstitutionally lengthy detention or de facto arrest; therefore, we review this issue solely for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *cf. State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) (“[A]n objection on one ground does not preserve the issue on another ground.”).

¶8 To prevail under fundamental error review, a defendant bears the burden of demonstrating “both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 23, 115 P.3d at 607-08; *see also State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Nunez does not argue the trial court committed fundamental, prejudicial error in denying his motion, nor has he cited any authority to support such a position. Therefore, the argument is waived on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008); *see also State v. Estrella*, 230 Ariz. 401, n.1, 286 P.3d 150, 153 n.1 (App. 2012) (“Enforcement of our waiver standards is especially appropriate in the context of a motion to suppress

STATE v. NUNEZ
Decision of the Court

because in such cases we are limited to the record presented at the hearing on that motion.”).

Search of Nunez’s Wallet

¶9 Nunez next argues the trial court erred in allowing evidence found on his person to be admitted at trial because it was obtained during a warrantless, nonconsensual, nonexigent search at the police station one to two hours after his arrest. In reviewing a ruling on a motion to suppress, we defer to the court’s factual determinations, but we review its legal conclusions de novo. *State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010).

¶10 After the marijuana was found in the Kia, Nunez was arrested and his wallet was seized from his pocket at the scene. Nunez was then transported to the police station, where Officer Bochs searched the wallet, outside Nunez’s presence, an hour or two after the initial arrest. Bochs discovered a piece of paper containing the handwritten words “12 [b]ig [and] 77 little,” consistent with the seventy-seven small and twelve large bricks of marijuana seized from the Kia. At the conclusion of the suppression hearing, the trial court denied Nunez’s motion to preclude this “ledger,” finding the search of the wallet valid as incident to Nunez’s arrest.

¶11 Nunez does not appear to dispute the validity of the search of his person or the seizure of his wallet incident to his arrest; instead, he contends the warrantless search of its contents an hour or two after his arrest was unlawful. Specifically, he relies on *Arizona v. Gant*, 556 U.S. 332 (2009), to argue the search of his wallet did not fall within the search-incident-to-arrest exception to the Fourth Amendment’s prohibition against unreasonable searches and seizures because he was “in custody, handcuffed and in another location out of reach when the wallet was searched.” Nunez asserts that for a search incident to arrest to be valid under *Gant*, it must be “objectively grounded in specific officer safety concerns,” and that, once the threat to officer safety is extinguished, a warrant must be obtained. Nunez’s reliance on *Gant* is misplaced, however, because its holding applies to the search of a vehicle incident to arrest, not to searches of the person. See *Gant*, 556 U.S. at 343 (police may search passenger compartment of vehicle incident to arrest only when

STATE v. NUNEZ
Decision of the Court

arrestee unsecured and within reaching distance of the passenger compartment at time of search or reasonable to believe vehicle contains evidence of offense).

¶12 It is well-settled that a search incident to a lawful arrest is an exception to the warrant requirement. *United States v. Robinson*, 414 U.S. 218, 224 (1973). A search may be made of the arrestee’s person “by virtue of the lawful arrest,” *id.*, due to the “reduced expectations of privacy caused by the arrest,” *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1290 (9th Cir. 1981), quoting *United States v. Chadwick*, 433 U.S. 1, 16 n.10 (1977), abrogated on other grounds by *California v. Acevedo*, 500 U.S. 565 (1991). In conducting a lawful search of a person, an officer is also entitled to inspect the contents of an item found on that person. See *Robinson*, 414 U.S. at 236 (officer was entitled to inspect package of cigarettes found in arrestee’s pocket). In contrast, “[u]nlike searches of the person, searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest.” *Chadwick*, 433 U.S. at 16 n.10 (citations omitted).

¶13 Since Nunez’s wallet was found on his person, no showing of further justification was necessary to search it. See *Riley v. California*, ___ U.S. ___, ___, 134 S. Ct. 2473, 2483 (2014) (“a ‘custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification’”), quoting *Robinson*, 414 U.S. at 218. Additionally, courts have specifically concluded that a wallet found in a person’s pocket is “an element of his clothing, his person, which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest.” *United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980); cf. *Monclavo-Cruz*, 662 F.2d at 1290-91 (unlike a wallet, purse could not be characterized as element of arrestee’s clothing or person).

¶14 Nor does the existence of a one- to two-hour delay between Nunez’s initial arrest and the search invalidate it, because “searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.” *United States v. Edwards*, 415 U.S. 800, 803

STATE v. NUNEZ
Decision of the Court

(1974); *see also United States v. Basurto*, 497 F.2d 781, 792 (9th Cir. 1974) (where defendant's arrest valid and wallet taken from his person at time of arrest, search of wallet not invalid because made thirty minutes after arrest); *United States v. Gordon*, 895 F.Supp.2d 1011, 1022-23 (D. Haw. 2012) (upholding search of wallet an hour after arrest).

¶15 In sum, Nunez's wallet having been seized in the course of a lawful search incident to his arrest, the officer was entitled to inspect it, regardless of whether the inspection occurred at the time of arrest or later at the station. *See Edwards*, 415 U.S. at 803; *Robinson*, 414 U.S. at 236. And when that inspection revealed the drug ledger, that evidence was properly seized as probative of criminal conduct. *See Robinson*, 414 U.S. at 236.

Disposition

¶16 Because the trial court did not err in denying Nunez's motions to suppress and his motion to dismiss, his convictions and sentences are affirmed.