

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LINDA IEZZA,
Appellant.

No. 2 CA-CR 2014-0229
Filed March 5, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County

No. S1100CR201301344

The Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Linda Iezza was convicted after a jury trial of possession of marijuana for sale, transportation of marijuana for sale, conspiracy to commit transportation of marijuana for sale, and human smuggling and sentenced to concurrent prison terms, the longest of which was 15.75 years. On appeal, she contends the trial court erred by denying her motion to suppress the evidence discovered in a vehicle in which she was a passenger. Iezza also alleges error because the court, rather than the jury, found that she had two prior convictions for purposes of sentence enhancement. For the following reasons, we affirm the court's rulings but vacate Iezza's conviction and sentence on the count of possession of marijuana for sale because it is a lesser-included offense of the count of transportation of marijuana for sale.

Factual and Procedural Background

¶2 Because Iezza's appeal primarily concerns the denial of her motion to suppress, we focus on the testimony presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling. *See State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). In January 2013, United States Border Patrol agents responded to a call that ground sensors had been activated along the El Paso Pipeline, a known smuggling route through the Tohono O'odham Reservation. Two agents followed fresh tire tracks along the El Paso Pipeline road while a third positioned himself north of the area to intercept an anticipated vehicle. That agent spotted a vehicle, the body of which showed multiple scratches and was covered in dirt as if it had been off road.

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The agent testified the vehicle was in an area restricted to those who work on the Tohono O’odham Reservation, and the driver did not appear to be Native American. The agent followed the vehicle and ran the license plate through dispatch, determining it was a rental vehicle out of Miami, Florida. Another agent communicated that he had encountered the same vehicle a day earlier in Ajo, which is located much farther south and is known as a smuggling hub for drug trafficking organizations. The pursuing agent stopped the vehicle on a highway leading to Phoenix, a major drug trafficking hub, and performed an immigration inspection on the vehicle’s three occupants. The rear passenger did not have identification and was ordered out of the vehicle. As he exited, an assisting agent identified bundles of marijuana in plain view on the vehicle’s backseat. All three passengers were subsequently removed from the vehicle and placed under arrest.

¶3 Iezza was charged with possession of marijuana for sale, transportation of marijuana for sale, conspiracy to commit transportation of marijuana for sale, and human smuggling. After a jury trial, she was convicted as charged and sentenced as described above. This timely appeal followed.

Suppression Hearing

¶4 Iezza first argues the trial court erred in denying her motion to suppress evidence seized as a result of what she argues was an illegal stop of the vehicle in which she was a passenger. We review a court’s ruling on a motion to suppress for an abuse of discretion. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶5 Although Iezza frames the issue as whether there was probable cause to stop the vehicle, we limit the determination to whether the Border Patrol agent had reasonable suspicion to stop the vehicle in which Iezza was a passenger. “An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment, but because such stops are less intrusive than arrests, they do not require the probable cause necessary to issue an arrest warrant.” *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776,

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778 (1996). Rather, the “totality of the circumstances” surrounding the stop “must provide ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *Id.*, quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). “This ‘reasonable suspicion’ requirement for an investigatory stop . . . falls short of the probable cause required for an arrest.” *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008).

¶6 In assessing whether a law enforcement officer had reasonable suspicion to conduct an investigatory stop, we examine the totality of the circumstances, “considering such objective factors as the suspect’s conduct and appearance, location, and surrounding circumstances, such as time of day, and taking into account the officer’s relevant experience, training, and knowledge.” *Id.* ¶ 6; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1972) (“Officers may consider the characteristics of the area in which they encounter a vehicle.”). Each factor is not assessed individually because “[i]ndividual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together.” *United States v. Diaz-Juarez*, 299 F.3d 1138, 1141 (9th Cir. 2002); see also *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (rejecting “divide-and-conquer analysis” that gives no weight to factors “readily susceptible to an innocent explanation”); *State v. Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d 266, 274 (App. 2007) (noting each factor, viewed separately, “consistent with innocent travel” but suspicious when considered collectively from officer’s perspective and in light of officer’s training and experience). Instead, the proper inquiry is whether, taken together, the factors “sufficed to form a particularized and objective basis” for the agent to stop the vehicle on suspicion of criminal activity. *Teagle*, 217 Ariz. 17, ¶ 29, 170 P.3d at 274, quoting *Arvizu*, 534 U.S. at 277. We review de novo whether there was reasonable suspicion to justify an investigatory stop, but defer to the trial court’s findings of fact, “including findings on credibility and the reasonableness of the inferences drawn by the officer.” *Id.* ¶ 19.

¶7 After a hearing, the trial court denied Iezza’s motion and made the following factual findings:

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1. The area of the stop is a known “drug corridor”;
2. There was very little to no other traffic;
3. Ground sensors had previously determined the direction of and approximate location of a vehicle traveling on the limited access and use “pipeline road[,]” which [was] very near the location of the stop;
4. The persons in the vehicle on the Reservation territory did not appear to be Native Americans, indigenous to the area of the stop, nor gas pipeline workers;
5. The appearance of the vehicle indicated that it had very recently been driven through brush and on dirt roads;
6. The registration for the vehicle, determined before the stop, stated it was a rental vehicle registered in Miami, Florida;
7. A similar appearing vehicle had been reportedly observed by another officer traveling south near Ajo the day before;
8. The vehicle observed on the “pipeline road” was driving “erratically with lights off[.]”;
9. Tire tread mark tracks observed along the “pipeline road” appeared to match, in general, the tires on the vehicle;

gave rise to reasonable suspicion that criminal activity might be occurring

Each of these nine points was supported by testimony at the suppression hearing. In addition, the agent explained it was significant that he had encountered the vehicle at night when he would not expect to find authorized workers or ranchers travelling on the road. The agent also explained that “rental vehicles are often used to smuggle” and that the presence of a rental vehicle on the reservation was unusual. Moreover, he testified that Ajo—where the vehicle had been seen the day before the stop—was a major hub

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for drug smuggling operations and that vehicles will go there to “load up narcotics before they drive north.” Furthermore, the vehicle was stopped while traveling north on a road toward Phoenix, which is “where most [of] the smuggling from our area is going to.”

¶8 Iezza does not contest the presence of any of the factors noted above but argues only that “there was almost no evidence regarding ground sensors.” This argument does not vitiate the multitude of circumstances demonstrating reasonable suspicion of criminal activity. Additionally, the record contains evidence explaining how the ground sensors functioned.

¶9 In sum, under the totality of the circumstances present here, the agent had reasonable suspicion to stop the vehicle in which Iezza was traveling. Thus, the trial court did not err in denying Iezza’s motion to suppress.

Enhanced Sentences

¶10 Iezza next argues it was error for the trial court rather than the jury to find she had two prior convictions for purposes of sentence enhancement. She concedes, however, that under current law, prior convictions need not be proved to a jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998) (holding that prior conviction used as sentencing enhancement is not an element of an offense). Iezza states that she merely wishes to preserve her argument in the event the United States Supreme Court decides to “revisit” the issue. We are “bound by the decisions of the United States Supreme Court interpreting the Federal Constitution” and, based on those decisions, we reject the argument. *State v. Sherrick*, 98 Ariz. 46, 52, 402 P.2d 1, 5 (1965).

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Double Jeopardy

¶11 Although Iezza has not addressed the propriety of her convictions for both possession of marijuana for sale and transportation of marijuana for sale, the state raises and acknowledges that Iezza's conviction for both offenses violates her double jeopardy rights. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 11-15, 965 P.2d 94, 97-98 (App. 1998). When, as here, "the possession for sale charge was incidental to the transportation for sale charge, it was therefore a lesser-included offense, and the conviction on the lesser offense should therefore be vacated." *Id.* ¶ 21.

Conclusion

¶12 For the foregoing reasons, Iezza's conviction and sentence for possession of marijuana for sale is vacated. Iezza's remaining convictions and sentences are affirmed.