

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

STEVEN RICHARD WEISNER JR.,  
*Appellant.*

No. 2 CA-CR 2015-0055  
Filed October 26, 2015

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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NOT FOR PUBLICATION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.

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Appeal from the Superior Court in Pima County  
No. CR20140571001  
The Honorable Christopher C. Browning, Judge  
The Honorable Teresa Godoy, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
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*Counsel for Appellee*

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Steven R. Sonenberg, Pima County Public Defender  
By David J. Euchner, Assistant Public Defender, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

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

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ECKERSTROM, Chief Judge:

¶1 Appellant Steven Weisner appeals from his convictions and sentences for two counts of drug offenses. He claims the trial court erred in denying his motion to suppress evidence and denying his motion for judgment of acquittal. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 In January 2014, Sergeant G.E. of the University of Arizona Police Department was patrolling the campus in the hours after a basketball game. At “about ten minutes before midnight,” when the area “had pretty much cleared out,” the sergeant observed a person acting suspiciously. He followed the man and saw him enter the back seat of a car that had two other occupants. The sergeant talked to Weisner, who was in the driver’s seat, identified the passenger as a woman named Wendy,<sup>1</sup> identified the man he had been following as Wendy’s son Mark, and asked for consent to search the car. Weisner consented.

¶3 During the search, the sergeant located a “glass smoking pipe” wrapped in a jacket in the back seat. He also found “a small container of a white crystalline substance” in the console

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<sup>1</sup> Because the two passengers in the car happen to have identical initials, we have identified them by pseudonyms for ease of reference.

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between the driver's seat and the passenger's seat, along with "paperwork indicating that those papers belonged to Mr. Weisner." He field tested the white substance, and it was "presumptive positive" for methamphetamine. Wendy admitted to owning the jacket and the glass pipe, but denied ownership of the methamphetamine.

¶4 After a jury trial, Weisner was convicted of possession of a dangerous drug based on the methamphetamine and possession of drug paraphernalia based on the container it was in. He was sentenced to concurrent terms of probation, the longer of which was four years. This appeal followed.

**Reasonable Suspicion**

¶5 Weisner challenges the trial court's denial of his motion to suppress the drugs and the pipe, arguing Sergeant G.E. did not have reasonable suspicion to stop his vehicle.

In reviewing a trial court's decision on a motion to suppress evidence based on an alleged Fourth Amendment violation, we defer to the trial court's factual findings . . . but we review de novo . . . the trial court's ultimate legal conclusions as to whether the totality of the circumstances warranted an investigative detention.

*State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007) (footnote omitted). We consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶6 The sergeant stopped Weisner's car based on Mark's suspicious actions. See *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997) (stop of automobile may be based on reasonable suspicion that passenger was engaged in criminal activity). The sergeant initially observed Mark late at night in an area of the university where no buildings were open. Mark appeared to be

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“meandering” rather than walking to a particular destination. When Mark saw the sergeant, he turned and walked in the other direction. The sergeant made a U-turn to follow Mark. Mark again reversed his direction to avoid the sergeant. Throughout this time, Mark was “[c]onstantly looking back to see where [the sergeant] was.”

¶7 The sergeant continued to watch Mark as he entered a parking lot. Mark walked between two vehicles and looked inside one of them. After seeing the sergeant’s car enter the parking lot, Mark immediately headed toward Weisner’s car.

¶8 Flight from police officers in a high-crime area may constitute reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *State v. Ramsey*, 223 Ariz. 480, ¶¶ 21, 26, 224 P.3d 977, 981-82 (App. 2010). State courts have come to differing conclusions on the issue of whether, standing alone, flight from police officers can justify a finding of reasonable suspicion. *See* Keven Jay Kercher, Case Comment, *Criminal Law – Search and Seizure: The Investigative Stop: What Happens When We Run?* *Illinois v. Wardlow*, 528 U.S. 119 (2000), 77 N.D. L. Rev. 123, 133-34 (2001). Neither Weisner nor the state has presented us with any Arizona authority governing this issue, and we have found none.<sup>2</sup>

¶9 But we need not decide whether Mark’s behavior constituted flight and whether flight from police, standing alone, may constitute reasonable suspicion. In addition to his evasive behavior, Mark stopped to peer into the window of a parked car. The sergeant testified that this behavior is typical of people “looking for items of property that they may be able to take.” *See State v. Sweeney*, 224 Ariz. 107, ¶ 22, 227 P.3d 868, 873 (App. 2010) (court considers “officer’s relevant knowledge, experience, and training”).

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<sup>2</sup>Weisner cites *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996), and *State v. Stricklin*, 191 Ariz. 245, 955 P.2d 1 (App. 1996), in support of the proposition that a person’s presence in a deserted area late at night is insufficient to support reasonable suspicion. We agree with this proposition, but, as noted below, conclude these were not the only circumstances supporting the sergeant’s decision to stop Mark.

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The time of day likewise is relevant to reasonable suspicion considerations. *State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008). And while evasive behavior may or may not be sufficient to justify a stop, in and of itself, it is a relevant factor in the determination. *Ramsey*, 223 Ariz. 480, ¶ 20, 224 P.3d at 981. Given the late hour of the evening, Mark's evasion of the sergeant, and his peering into parked vehicles, we conclude the trial court did not err in finding the officer had reasonable cause to conduct a brief investigative detention.

**Sufficiency of the Evidence**

¶10 Weisner next claims the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim.P. He argues, as he did below, that his nonexclusive possession of the vehicle in which the methamphetamine was found was not sufficient evidence to support a finding beyond a reasonable doubt that the drug was his. Whether sufficient evidence exists to support a conviction is an issue of law, which we review de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We review the evidence to determine whether substantial evidence, that is, "evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt'" exists. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), quoting *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). We view the facts in the light most favorable to upholding the verdict, and we resolve all inferences against the defendant. *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). "And in reviewing the sufficiency of the evidence, we do not distinguish circumstantial from direct evidence." *State v. Borquez*, 232 Ariz. 484, ¶ 11, 307 P.3d 51, 54 (App. 2013).

¶11 Possession of a dangerous drug under A.R.S. § 13-3407(A)(1) and possession of drug paraphernalia under A.R.S. § 13-3415(A) require that a person "knowingly . . . have physical possession or otherwise . . . exercise dominion or control over" the drug and paraphernalia. A.R.S. § 13-105(34). Possession may be actual or constructive, and a person constructively possesses an item if he "exercises dominion or control over [the] property." *State v. Gonsalves*, 231 Ariz. 521, ¶ 9, 297 P.3d 927, 929 (App. 2013), quoting

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*State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998). The “mere presence of a person where narcotics or marijuana is found is insufficient to establish that the person knowingly possessed or exercised dominion and control over the drugs.” *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (App. 1976).

¶12 A number of states have adopted the principle that “where the defendant is in nonexclusive possession of premises on which illicit drugs are found, it cannot be inferred that he knew of the presence of such drugs and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference.” Emile F. Short, *Conviction of Possession of Illicit Drugs Found in Premises of Which Defendant Was in Nonexclusive Possession*, 56 A.L.R.3d 948, 957 (1974); see *State v. Driskell*, 167 S.W.3d 267, 269-70 (Mo. Ct. App. 2005) (when methamphetamine found in center console, court concluded “[c]onstructive possession . . . cannot be inferred from the defendant’s mere ownership of the vehicle when passengers . . . had equal access”).

¶13 Weisner directs us to Arizona cases that similarly require some showing of possession beyond a defendant’s non-exclusive control. In *Miramon*, marijuana was found underneath the passenger seat of a car. 27 Ariz. App. at 452, 555 P.2d at 1140. The bag containing the marijuana protruded from underneath the seat in such a manner that it would have touched the passenger’s trousers. *Id.* at 452-53, 555 P.2d at 1140-41. The passenger also had two marijuana cigarettes hidden in his sock. *Id.* at 452, 555 P.2d at 1140. The court nonetheless concluded this was not sufficient evidence to show that the passenger “exercised dominion and control” over the marijuana found under the seat. *Id.* at 453, 555 P.2d at 1141.

¶14 Likewise, in *In re Maricopa County Juvenile Action No. J-72773S*, officers approached a car and smelled burning marijuana. 22 Ariz. App. 346, 347, 527 P.2d 305, 306 (1974). The officers searched the car and located a brass pipe and some marijuana. *Id.* The defendant was in the back seat but was seen leaning over the front console. *Id.* We stated this was insufficient evidence to

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establish he possessed the marijuana. *Id.* at 348, 527 P.2d at 307.<sup>3</sup> Given that the state must present sufficient evidence from which a jury could conclude beyond a reasonable doubt that the illicit drugs were knowingly possessed by the defendant—and not merely by another person sharing access to a location—we understand the logic of these cases.

¶15 However, our supreme court appears to have rejected the theory that nonexclusive possession of contraband is insufficient evidence. In *State v. Villavicencio*, a box containing drugs was found on the open back porch of the defendant’s apartment. 108 Ariz. 518, 519, 502 P.2d 1337, 1338 (1972). The defendant’s wife shared the apartment, and the porch was located between two rows of apartments and “completely open and accessible to anybody who would want to walk through.” *Id.* The court concluded this was nonetheless sufficient evidence to support a conviction for possession of drugs. *Id.* at 520, 502 P.2d at 1339. In so doing, the court noted that constructive possession may be applied when a drug is “found in a place under [a defendant’s] dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics. Exclusive control of the place in which the narcotics are found is not necessary.” *Id.*

¶16 This court is “bound by the decisions of the Arizona Supreme Court and ha[s] ‘no authority to overrule, modify, or disregard them.’” *State v. Thompson*, 194 Ariz. 295, ¶ 20, 981 P.2d 595, 598 (App. 1999), quoting *Myers v. Reeb*, 190 Ariz. 341, 342, 947 P.2d 915, 916 (App. 1997). We believe the reasoning of *Villavicencio*—that evidence is sufficient when an illegal item is found within a place over which the defendant has dominion and

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<sup>3</sup>Even *State v. Cox*, which the state relies upon to show the evidence was sufficient here, did not rest solely upon the defendant’s status as the owner and driver of the car. 214 Ariz. 518, ¶ 15, 155 P.3d 357, 360 (App. 2007). Rather, the defendant admitted that he was transporting the weapons in the trunk and “spoke to the officer as though he was aware of, and had consented to, the plan to transport them.” *Id.*

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control, regardless of whether other persons also exert dominion and control—is directly applicable and therefore determines the outcome here. 108 Ariz. at 520, 502 P.2d at 1339. Because Weisner was the driver of the car, the owner of the car, and present in the car at the time the methamphetamine was found, and because it was discovered in the console, a location usually used primarily by the driver and owner of the vehicle, the trial court did not err in concluding the evidence was sufficient to support a finding, beyond a reasonable doubt, that Weisner exercised dominion and control over the methamphetamine and its container.

**Disposition**

¶17 For the foregoing reasons, Weisner’s convictions and sentences are affirmed.