

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

ALEJANDRO TERRAZAS LEYVA,
Respondent.

No. 2 CA-CR 2015-0387-PR
Filed February 18, 2016

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Maricopa County
No. CR2009165556001DT
The Honorable Dawn M. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By E. Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Petitioner

G. David DeLozier, P.C., Cave Creek
By G. David DeLozier
Counsel for Respondent

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 The State of Arizona petitions for review of the trial court's February 2014 ruling granting defendant Alejandro Leyva's claim for post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., on the ground of ineffective assistance of counsel. We grant review but for the following reasons deny relief.

¶2 In October 2009, Leyva was charged with two counts of weapons misconduct. After he failed to appear for his jury trial, he was convicted of both counts and was sentenced in May 2010 to concurrent terms of imprisonment, the longer of which is 4.5 years. He filed a timely notice of and petition for post-conviction relief, as well as an amended petition filed by leave of the trial court. After evidentiary hearings, the court concluded trial counsel had been ineffective for "his failure to file a motion to suppress challenging the legality of the stop of [Leyva]" and to suppress evidence of a handgun found in a subsequent search of the vehicle in which he had been a passenger.

¶3 In its ruling, the court provided the following summary of facts leading to Leyva's arrest:

On October 10, 2009, Officer Kohler of the Phoenix Police Department responded to a report that people were fighting and screaming outside of a house where a party was going on. When he arrived on scene, he saw three people getting into a Nissan Altima parked near the house. There was no one else outside, and he observed no screaming or fighting.

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Officer Kohler positioned his patrol vehicle in front of the Altima. He approached the passenger's side of the vehicle and shined a spotlight inside. [Leyva] was seated in the front passenger seat; his brother was in the driver's seat; and a female was in the back seat behind the driver. Officer Kohler testified that when he approached the Altima, he observed no conduct by any of the occupants suggesting they were involved in the call or in any criminal activity.

Officer Kohler asked the occupants to exit the vehicle separately and patted each down. After additional officers arrived on scene, [the officer] returned to the car and saw a bottle on the front passenger floor. When he went to retrieve the bottle, he saw a gun lodged between the center console and the front passenger seat. [Leyva] had a prior felony conviction and his civil rights had not been restored.

¶4 Relying on *State v. Gomez*, 198 Ariz. 61, ¶¶ 5-7, 6 P.3d 765, 766 (App. 2000), the trial court found trial counsel performed deficiently based on his testimony at an evidentiary hearing "that he did not file a motion to suppress because he believed that as a passenger, [Leyva] did not have standing to challenge the stop of the vehicle," but "Arizona case law clearly provides . . . that while vehicle passengers have no standing to challenge a search of a vehicle, they do have standing to challenge an investigatory stop."

¶5 The trial court also determined Leyva had established "a reasonable probability that the outcome would have been different had trial counsel filed a motion to suppress based on lack of reasonable suspicion for the investigatory stop." Quoting *United*

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States v. Cortez, 449 U.S. 411, 417 (1981), the court found “Officer Kohler was unable to articulate any ‘particularized and objective basis’ for suspecting that [Leyva] or his friends were or were about to be, engaged in any criminal activity,” noting “all indications were that if any criminal activity was going on when the call was made, it was over by the time Officer Kohler arrived.” The court then found “[it] would likely have granted the motion to suppress, leaving the State with no evidence to support the charges.”

Discussion

¶6 In its petition for review, the state argues “defense counsel articulated a reasonable and sound basis for not filing a motion to suppress” and the trial court therefore abused its discretion in finding he had performed deficiently. Specifically, the state maintains trial counsel “testified that he did not challenge the stop because he believed it to be a valid investigatory stop, commonly called a ‘*Terry stop*.’” The state also argues the court “erred as a matter of law when it found that the officer’s stop of the vehicle [Leyva was occupying was illegal.”

¶7 Although portions of the record support the state’s arguments,¹ absent a clear abuse of discretion, we will not disturb a

¹For example, the state points out that the investigatory detention of the vehicle and its passengers was in response to a “priority one” emergency dispatch at 2:26 in the morning, Officer Kohler responded within five minutes of the dispatch reporting the screaming and physical fight, and testified it was his experience that individuals involved in such incidents often flee the scene—significant factors omitted from the trial court’s account. See *State v. Blackmore*, 186 Ariz. 630, 633, 925 P.2d 1347, 1350 (1996) (investigative detention reasonable where officer arrived shortly after burglary of house and found person in alley, several houses away, behind dumpster); *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993) (stop of suspects within *Terry* standard where shooting had just occurred, and within short time and distance, vehicle and two men fitting general broadcast description spotted on

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trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous, "view[ing] the facts in the light most favorable to sustaining the lower court's ruling." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). We will affirm the court's ruling if it is based on substantial evidence, and "[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*; see also *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶8 At the last evidentiary hearing, the trial court addressed the state's argument about trial counsel's testimony as follows:

[W]hile [the state] did question [trial counsel] about whether he thought the stop was supported by *Terry*, . . . sort of giving him snippets of what the trial testimony was[,] and he did say that based on the information that was presented to him . . .

side of road); see also *State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008) (assessment of reasonable suspicion is "based on the totality of the circumstances, considering such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge"); *State v. Childress*, 222 Ariz. 334, ¶¶ 21-22, 214 P.3d 422, 428 (App. 2009) (upholding officer's approach and questioning defendant and passenger as potential witnesses to a DUI offense; officer may reasonably stop potential witness when: "(1) the officer reasonably believes a crime has just occurred near the area where he finds the person; (2) the officer reasonably believes the person has material knowledge regarding the crime; and (3) stopping the person is reasonably necessary to obtain information about the person or crime").

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he would think that would be a reasonable *Terry* stop[. h]e was very clear that the only reason that he did not file a motion to suppress is because he believed that [Leyva] did not have standing to raise the issue.

We conclude the court's assessment of trial counsel's testimony is reasonably supported by the record, notwithstanding a lack of clarity in some of the testimony,² and we cannot say the court abused its discretion in finding counsel's reason for not challenging the stop was his belief that Leyva was without standing to do so.

¶9 Moreover, in arguing the trial court "err[ed] . . . when it found that the officer's stop of the vehicle . . . was illegal," the state clouds the standard for establishing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The court's ruling does not necessarily express its legal conclusion that the stop was illegal; rather, consistent with *Strickland*, it found Leyva had established a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). Leyva was not required to "show that counsel's deficient conduct" in failing to file a motion to suppress "more likely than not altered the outcome in the case," *id.* at 693; rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 693. Again, we cannot say the trial court abused its discretion in determining Leyva met that threshold burden here.³

²As the state points out, there was some ambiguity in the expert witness's opinion about the "search and seizure," as well as in the questioning of the trial attorney by Leyva's counsel at the February 7, 2014, deposition. However, the prosecutor failed to sufficiently clarify the latter, particularly at the conclusion of the attorney's testimony, and we cannot fault the trial court's reading.

³At the conclusion of the evidentiary hearing, Leyva's Rule 32 counsel stated his intention to file a motion to suppress prior to a

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Disposition

¶10 For the foregoing reasons, although we grant review, relief is denied.

new trial. Nothing in this decision precludes the trial court, upon fuller development of the evidence and relevant legal authorities, from denying a motion to suppress based, for example, on a finding that the investigatory detention of the vehicle and its passengers was permissible under *Terry* and its progeny.