IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE RIVERA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82402-COA

FILED

OCT 21 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jose Rivera, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of possession of a controlled substance, concealing or destroying the evidence of the commission of a felony, and possession of a firearm by a prohibited person. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Officer Joshua Taylor initiated a traffic stop after observing a vehicle make an illegal right turn.[1] Officer Taylor approached the vehicle on the passenger side and immediately recognized the passenger as Rivera, a convicted felon with whom he had dealt during previous criminal investigations involving narcotics. The driver, who was unknown to Officer Taylor, verbally identified herself as Brittany Tomes.

Officer Taylor initially spoke to both Tomes and Rivera after approaching the vehicle. After identifying herself, Tomes searched for her driver's license, registration, and insurance information while Officer Taylor attempted to ask her questions about the traffic violation. However, Rivera repeatedly interjected himself into the conversation, apparently in an aggressive manner, trying to answer the questions for Tomes.

[1]We do not recount the facts except as necessary to our disposition.

Officer Taylor considered that Rivera might have outstanding warrants pursuant to the previous narcotics investigations and asked Rivera if he would like to get out of the vehicle and discuss them, but Rivera refused. While Rivera remained seated on the passenger side, Officer Taylor then asked if there were any narcotics in the vehicle, to which Rivera responded, "Why would you ask that?" Officer Taylor also asked if there were any weapons in the vehicle, to which Rivera responded, "No, I don't think so – no, there isn't." Officer Taylor then specifically inquired as to whether there were any guns in the vehicle, to which Rivera responded by looking down at his feet, briefly pausing, and then purportedly gave an equivocal answer such as, "I don't think so."

After Rivera continued to interrupt Tomes, Officer Taylor moved to the driver's side window in an attempt to speak directly to Tomes without interference from Rivera. However, Rivera continued to hamper his efforts to speak directly to Tomes, so Officer Taylor asked Tomes to step out of the vehicle away from Rivera. Officer Taylor questioned Tomes about her narcotics history, during which she admitted to prior methamphetamine use. Officer Taylor asked Tomes if she would consent to a search of the vehicle, which she declined, but Tomes consented to a "dog sniff" drug detection test to be conducted on the outside of the vehicle to rule out the presence of drugs inside of the vehicle.[2] Around this time, Officers Klint Ratliff and Dean Pinkham arrived on scene to assist Officer Taylor.

Officer Taylor then informed Rivera that he needed to step out of the vehicle so that the dog sniff test could be conducted. Rivera did so, leaving the passenger-side door open. Officer Taylor next advised Rivera

[2]The voluntariness of Tomes' consent is not at issue on appeal.

that he would be conducting a pat down for weapons, to which Rivera did not object. Nearly contemporaneously with Officer Taylor's pat down, Officer Ratliff, who was standing by the vehicle, indicated to Officer Taylor that through the open passenger door he was able to see the butt of a gun on the floorboard of the passenger-side. After being alerted to the presence of a gun, and viewing it for himself, Officer Taylor directed Officer Ratliff to place Rivera in handcuffs, which he did.

Officer Pinkham, who was also standing nearby, witnessed a small bag fall from Rivera's waistband onto the sidewalk as Rivera was being placed in handcuffs. Rivera immediately covered it with his left foot. Officer Pinkham directed Officer Taylor to check underneath Rivera's foot. When Officer Taylor ordered Rivera to lift his left foot, Rivera lifted his right foot. Officer Taylor again directed Rivera to lift his left foot, and Rivera dragged his left foot on the ground, eventually lifting it to reveal a small bag containing white powder that Officer Taylor suspected to be a controlled substance. Officer Taylor confiscated the bag, later confirmed to contain methamphetamine, as well as the gun inside the vehicle. Officer Taylor proceeded to conduct the dog sniff test around the vehicle, which resulted in the canine alerting him to the presence of drugs inside. Because of this, Officer Taylor searched the inside of the vehicle, finding ammunition and another small bag containing a suspected illegal drug, later identified as methamphetamine.

Rivera was arrested, taken into custody, and charged with numerous felonies. Before trial, Rivera moved the district court to suppress admission of the gun, ammunition, and controlled substances, alleging that they were the products of an unlawful search and seizure. The district court denied this motion. At trial, a jury found Rivera guilty of all charges.

On appeal, Rivera argues that the district court erred by failing to suppress the gun, ammunition, and controlled substances because (1) the traffic stop was unlawfully prolonged, and therefore Rivera was unlawfully detained at the time the evidence was obtained; (2) Rivera was subject to an illegal pat down search, making the subsequently seized evidence fruit of the poisonous tree; and (3) the gun, ammunition, and controlled substances were otherwise illegally seized. In turn, the State argues that the traffic stop was not prolonged, the pat down was legal, and the gun, ammunition and controlled substances were not seized as a result of the pat down, but rather found inside the vehicle pursuant to a lawful search. We agree with the State and therefore affirm.

"Suppression issues present mixed questions of law and fact." *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). "This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013); *see State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000). "The reasonableness of a seizure is a matter of law reviewed de novo." *Beckman*, 129 Nev. at 486, 305 P.3d at 916.

First, Rivera argues that because the traffic stop was unlawfully prolonged, he was unlawfully detained when Officer Taylor ordered him out of the vehicle and initiated a pat down search. Therefore, the district court should have suppressed the gun, ammunition, and controlled substances seized as a result of the illegal detention.

Employing practically identical language, the United States and Nevada Constitutions both guarantee "[t]he right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Beckman*, 129 Nev. at 486, 305 P.3d at 916 (quoting U.S. Const. amend. IV); *see also* Nev. Const. art. 1, § 18. "Temporary detention of individuals during a traffic stop constitutes a 'seizure' of 'persons' within the meaning of these constitutional provisions." *Beckman*, 129 Nev. at 486, 305 P.3d at 916. "An automobile stop is thus subject to the constitutional imperative that it not be unreasonable under the circumstances." *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)). "A traffic stop that is legitimate when initiated becomes illegitimate when the officer detains the car and driver beyond the time required to process the traffic offense, unless the extended detention is consensual, de minimis, or justified by a reasonable articulable suspicion of criminal activity." *Id.* at 484, 305 P.3d at 915.

With respect to the length of time for a traffic stop, for Fourth Amendment purposes, "it is lawful for police to detain an automobile *and its occupants* pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." *Cortes v. State*, 127 Nev. 505, 510, 260 P.3d 184, 188 (2011) (quoting *Arizona v. Johnson*, 555 U.S. 323, 327 (2009)) (emphasis added). Further, a passenger during a lawful traffic stop is legitimately detained "just as the driver is" because the risk of a violent encounter during a traffic stop stems from "the fact that evidence of a more serious crime might be uncovered during the stop; a passenger's motivation to employ violence to prevent apprehension of such a crime . . . is every bit as great as that of the driver." *See Cortes*, 127 Nev. at 511, 260 P.3d at 188 (internal quotation marks omitted). Additionally, NRS 171.123(1) allows a police officer to "detain any person whom the officer encounters under

circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime."

Here, it is undisputed that Officer Taylor initiated a lawful traffic stop, as there was probable cause to believe that Tomes had committed a traffic violation by making an illegal right turn. *See Whren*, 517 U.S. at 810 ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). Thus, based on the foregoing, Rivera, as the passenger of the vehicle, was also lawfully detained after the vehicle was lawfully pulled over and stopped on the side of the road. *See Cortes*, 127 Nev. at 511, 260 P.3d at 188.

Further, Officer Taylor did not unlawfully prolong the traffic stop. Any resulting extension of the traffic stop was related to the dog sniff drug detection test, to which Tomes consented, such that if the stop was prolonged, it was lawful. *See Beckman*, 129 Nev. at 484, 305 P.3d at 915 (noting that a prolonged traffic stop and extended detention of vehicle's occupants remain lawful when it is consensual).

After Tomes consented to the dog sniff around the outside of the vehicle, Officer Taylor was within his authority to ask Rivera to step outside of the vehicle, as removal of occupants from a vehicle is apparently part of the dog sniff test. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (holding that so long as there was a legitimate traffic stop, law enforcement, without more, can order the driver or passenger to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures); *see also Padilla v. State*, Docket No. 73353 (Order of Reversal, Dec. 12, 2019) (citing to *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), for the proposition that when law enforcement's traffic stop is lawful,

officers may request an occupant of a vehicle to step out of it so that further inquiry may be pursued with greater safety). Thus, Officer Taylor lawfully detained both Tomes and Rivera from the time of the initial stop through the completion of the dog sniff drug detection test. *See Johnson*, 555 U.S. at 333 (stating that temporary seizure of vehicle's occupants "ordinarily continues, and remains reasonable" for the duration of a stop).

Moreover, Officer Taylor's pat down of Rivera occurred during a legal period of time associated with the stop. As explained above, Tomes consented to the dog sniff drug detection test and Officer Taylor was within his authority to order Rivera out of the vehicle in order to accomplish this. Officer Ratliff testified that he spotted the handgun just as Officer Taylor initiated the pat down, to which Rivera did not object. Thus, it is unclear how Officer Taylor's pat down of Rivera illegally extended the time of the stop so as to allow Officer Ratliff an unlawful amount of time to observe the gun since Officer Ratliff saw the gun, in plain view, nearly contemporaneously with the pat down. Any resulting extension of time from the pat down itself would have been de minimis, particularly in light of the dog sniff that was to be performed. *See Beckman*, 129 Nev. at 489, 305 P.3d at 918 (noting that "a modest delay [of a traffic stop] may be reasonable, depending on the circumstances surrounding the stop").

Next, Rivera argues that his Fourth Amendment rights were violated during Officer Taylor's pat down search, and that therefore the gun, ammunition, and the controlled substance found inside the vehicle should have been suppressed. Specifically, Rivera asserts that there is nothing in the record to support law enforcement's reasonable suspicion to believe that Rivera was armed and dangerous that would have justified the

pat down, ultimately leading to the search of the vehicle and to the illegally obtained evidence.

"The Fourth Amendment to the United States Constitution and the Nevada Constitution proscribe all unreasonable searches and seizures." *Camacho v. State*, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003). "Warrantless searches are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions." *Id.* (internal quotation marks omitted). "The exclusionary rule, while not acting to cure a Fourth Amendment violation, is a remedial action used to deter police from taking action that is not in accordance with proper search and seizure law." *State v. Allen*, 119 Nev. 166, 172, 69 P.3d 232, 235–36 (2003). "The government cannot benefit from evidence that officers obtained through a clear violation of an individual's Fourth Amendment rights." *Beckman*, 129 Nev. at 491, 305 P.3d at 919; *see Segura v. United States*, 468 U.S. 796, 815 (1984) (holding that suppression of evidence is justified when the challenged evidence is "the product of illegal governmental activity" (internal quotations omitted)).[3]

In this case, the exclusionary rule does not apply to the gun, ammunition, and the controlled substance found inside the vehicle because this evidence was not directly obtained from Officer Taylor's pat down of Rivera. Rather, the handgun inside the vehicle was lawfully seized from the vehicle *after* Officer Ratliff observed the gun in plain view.[4] The plain

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[3]In addition to the exclusionary rule, NRS 171.1232(2) makes evidence seized in violation of NRS 171.1232 inadmissible.

[4]Rivera was the passenger in the vehicle and there is nothing in the record demonstrating Rivera's ownership or control over the vehicle. It is unclear how Rivera has standing to challenge the search of the vehicle as

view doctrine is an established exception to the warrant requirement of the Fourth Amendment, which holds that (1) "if police are lawfully in a position from which they view an object"; (2) "if its incriminating character is immediately apparent"; and (3) "if the officers have a lawful right of access to the object," then "they may seize it without a warrant." *State v. Conners*, 116 Nev. 184, 187 n.3, 994 P.2d 44, 46 n.3 (2000) (*quoting Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)).

Here, law enforcement lawfully seized the gun pursuant to the plain view exception. First, the police were in a lawful position enabling them to view the gun through the open passenger door after ordering Rivera out of the vehicle to complete the dog sniff, to which Tomes consented. Second, upon discovery of the gun, the incriminating nature of it was immediately apparent, as Officer Taylor knew Rivera was a convicted felon, making it illegal for him to possess a firearm. *See* NRS 202.360(1)(b). Third, law enforcement had a lawful right of access to the interior of the vehicle to seize the gun through the automobile exception. *See United States v. Galaviz*, 645 F.3d 347, 357 (6th Cir. 2011) (reasoning that the automobile exception gives law enforcement a legal right of access to seize evidence in plain view inside a vehicle and subsequently search the interior so long as there was probable cause to believe the vehicle contained contraband).

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he had no reasonable expectation of privacy to the contents therein. *See Scott v. State*, 110 Nev. 622, 627-28, 877 P.2d 503, 507 (1994) (determining that defendant lacked standing to object to the search of a vehicle after he failed to show or assert that he had possessory interest in the vehicle, where he was a passenger). However, neither party addresses this issue on appeal, so we address Rivera's arguments on the merits.

The automobile exception also justified the subsequent search of the vehicle and the seizure of the ammunition and the controlled substance discovered therein, because after seeing the gun in plain view, law enforcement had probable cause to believe that the vehicle contained contraband.[5] *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) ("[A] police officer who has probable cause to believe the car contains contraband or evidence of a crime must either seize the vehicle while a warrant is sought or search the vehicle without a warrant. Given probable cause, either course is constitutionally reasonable."). Pursuant to the plain view exception, Officer Taylor had a lawful right to seize the gun, and the automobile exception also allowed law enforcement to search the vehicle, resulting in the confiscation of the ammunition, and ultimately what was determined to be a bag of methamphetamine.

Thus, we conclude that the gun, ammunition, and the controlled substance seized from inside the vehicle were not obtained as a result of the pat down search. Additionally, there was no relevant evidence obtained

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[5]Although not addressed on appeal, when the drug sniffing dog alerted Officer Taylor to the presence of drugs inside the vehicle, this also amounted to probable cause justifying the search the inside of the vehicle and the seizure of the ammunition and the controlled substance found therein. *Lloyd*, 129 Nev. at 751, 312 P.3d at 474 (holding that the district court properly found that the alert of a drug detection dog gave the officers probable cause to search a vehicle pursuant to the automobile exception) (citing to *Florida v. Harris*, 568 U.S. 237, 246-46 (2013) (holding that a court can presume, subject to any conflicting evidence offered, that the properly certified drug detection dog's alert provides probable cause to search)).

from the search requiring exclusion.[6] Thus, excluding the evidence seized from the vehicle based on the pat down would fail to serve the purpose of the exclusionary rule, because the State gained nothing from the pat down search, seized all relevant evidence independent of it, and deterrence would not be promoted by its exclusion. *See Segura*, 468 U.S. at 805. Therefore, because the exclusionary rule would not apply to exclude the gun, ammunition and the controlled substance found inside the vehicle, Rivera's argument for suppression of this evidence based on the pat down fails.

Rivera also argues that the officers asking him to lift his foot amounted to an illegal search of his person. We disagree. In order for an unreasonable search or seizure to exist, the complaining individual must have a reasonable expectation of privacy, which requires both a subjective and an objective expectation of privacy in the place searched or the item seized. *Osburn v. State*, 118 Nev. 323, 327, 44 P.3d 523, 526 (2002). A subjective expectation of privacy is exhibited by conduct that shields or

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[6]Even if the seized evidence was a product of the pat down, no Fourth Amendment violation occurred because there was a lawful traffic stop and Officer Taylor had reasonable suspicion to believe that Rivera was armed and dangerous, justifying the pat down. *See Johnson*, 555 U.S. at 326-27. Whether an officer has a reasonable suspicion that an occupant of a vehicle may be armed and dangerous "is a fact-specific inquiry that looks at the totality of the circumstances in light of common sense and practicality." *Cortes*, 127 Nev. at 511, 260 P.3d at 189 (quoting *United States v. Tinnie*, 629 F.3d 749, 751 (7th Cir. 2011)). Here, Officer Taylor was aware that Rivera was a convicted felon, Officer Taylor knew that Rivera's prior conviction involved narcotics and Tomes admitted to prior illegal drug use, Officer Taylor testified that Rivera was acting aggressively by continuously interjecting, and Rivera answered equivocally to Officer Taylor's inquiries regarding the presence of drugs, weapons, and guns. Under the totality of the circumstances, the facts support Officer Taylor's reasonable suspicion that Rivera was armed and dangerous.

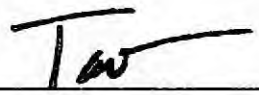
hides the area from others. *Id.* However, "an individual is not cloaked with Fourth Amendment protection simply by taking steps to conceal his activities. An objective expectation of privacy, i.e., one which society recognizes as reasonable, must also exist." *Young v. State*, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993).

Here, Rivera had no objective expectation of privacy for his property located on a public sidewalk, even if he initially tried to shield it from view with his foot. The bag of suspected drugs was seized from a public sidewalk, an area open to public view and susceptible to casual inspection by the passerby. *Osburn*, 118 Nev. at 327, 44 P.3d at 526 (determining that a defendant did not have an objective expectation of privacy in the exterior to his vehicle.) Additionally, the sidewalk was an area that was freely accessible to others. *See California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (concluding that defendant did not have a reasonable expectation of privacy in plastic trash bags which were "readily accessible" by the public); *see also Com. v. Sheridan*, No. 08-P-1521, 2009 WL 3047495, 913 N.E.2d 932 (Mass. App. Ct., Sept 25, 2009) (holding that defendant had no expectation of privacy in a knife recovered on a public sidewalk because the area was not controlled by the defendant and was freely accessible); *Flores v. United States*, 769 A.2d 126, 130 (D.C. 2000) (holding that law enforcement moving defendant backwards in order to retrieve a Chapstick container suspected of containing a controlled substance merely amounted to investigatory measures during the lawful detainment). Thus, the resulting investigation to identify the bag underneath Rivera's foot and the bag's subsequent confiscation, ultimately found to contain methamphetamine, did not

amount to an illegal search violating Rivera's Fourth Amendment rights.[7] Therefore, we

ORDER the judgment of conviction AFFIRMED.[8]

_____, C.J.
Gibbons



_____, J.
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cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

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[7]Any hypothetical search underneath Rivera's foot met the requirements for the search incident to arrest exception to the Fourth Amendment. *See United States v. Robinson*, 414 U.S. 218 (1973) (noting that the search incident to an arrest is a well-settled exception to the warrant requirement of the Fourth Amendment and "no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee"). Here, Officer Taylor had cause to arrest Rivera once he and Officer Ratliff saw the butt of the gun, warranting Rivera's arrest as a convicted felon in possession of a firearm and the search of his person.

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief, or need not be reached given the disposition of this appeal.