

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUAN JOSE LUNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82792-COA

FILED

MAR 23 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Juan Jose Luna appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of trafficking in a schedule I controlled substance and one count of possession of a controlled substance. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Just after midnight, a gas station manager approached two law enforcement officers complaining that a vehicle had been parked at a fuel pump for an hour and a half.¹ She told the officers that another employee asked the occupants to move the vehicle, which they did not, and she asked the officers to “run them off for us.”² Deputy Trice notified dispatch that he would be at the gas station on a trespassing issue, and he and the trooper both drove their vehicles to the gas station, where they observed a car sitting at the fuel pump. Deputy Trice exited his vehicle and went to the driver’s side of the car, where Luna was, while the second officer exited his

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

²The gas station manager testified at a pretrial motions hearing that her intent in speaking with the officers was to have them “trespass” the occupants and have them move.

vehicle and approached the passenger side, where a woman was seated.³ Luna and the woman were the only two occupants of the vehicle.

Deputy Trice knocked on the driver's side window and, after Luna rolled down the window, he informed Luna that the gas station manager contacted him and that he was there on a trespass issue. Luna told Deputy Trice that he and the woman had come down from Idaho to see his children in Elko. When asked for his driver's license, Luna informed Deputy Trice that he did not have a license but provided Deputy Trice with an Idaho identification card.⁴ At approximately 12:33 a.m., Deputy Trice asked Elko dispatch to see if Luna had a valid driver's license or just an identification card. About a minute later, Elko dispatch notified Deputy Trice that Luna had an outstanding warrant for his arrest and several "cautions for violence and known to abuse drugs, escape risk, assault with a deadly weapon, and obstruct[ing] a peace officer." Immediately after dispatch listed the cautions, a sergeant radioed, stating that Luna normally has a firearm on him. At 12:34 a.m., Deputy Trice asked dispatch to confirm the warrant.

Deputy Trice testified that, throughout his interaction with Luna, he observed Luna repeatedly reach down and touch something at the front of the seat by his leg. This concerned him because of Luna's "cautions for priors with guns and violence with officers." Deputy Trice instructed Luna to shut the vehicle off, put his hands on the steering wheel, and exit

³The officer noticed the woman attempting to conceal something in her lap underneath a book. Moments later, he noticed burnt tinfoil under the book and saw several hypodermic syringes on her lap. The officer arrested her for possession of drug paraphernalia.

⁴The woman passenger also did not have a driver's license.

the vehicle. He handcuffed Luna and told him that he was being detained until the warrant could be confirmed. He then conducted a pat-down search of Luna's person for any weapons. Deputy Trice testified that he felt what he believed to be a glass pipe commonly used for methamphetamine in Luna's pants pocket. At 12:36 a.m., Deputy Trice escorted Luna back to his patrol vehicle and placed him under arrest for possession of drug paraphernalia. At 12:37 a.m., while Deputy Trice and Luna were at the side of the patrol vehicle, dispatch notified Deputy Trice that the warrant "was confirmed good."

After securing Luna in the patrol vehicle, Deputy Trice began an inventory search of the vehicle prior to an impound and tow, starting at the driver's seat where Luna had been sitting. He located a green drawstring bag on the floorboard directly in front of the driver's seat, within inches of where he observed Luna previously reaching down and touching something. He picked up the bag, which was open about an inch, and observed "a white crystalline[-]like shard that's common with methamphetamine." He opened the bag, dumped its contents, and found six separate bags containing white powder. Deputy Trice contacted a detective to assist him with weighing and Narcotics Identification Kit (NIK) testing the contents of all the bags. The detective advised him to seize the vehicle, apply for a search warrant, and execute the search warrant before completing the inventory of items, which Deputy Trice did. The detective then NIK tested and weighed the contents of each bag. One of the bags tested presumptively positive for methamphetamine with a gross weight of approximately 452 grams. The second bag tested presumptively positive for cocaine with a gross weight of approximately 3 grams. The remaining four

bags tested presumptively positive for heroin with a combined gross weight of approximately 102 grams.

Prior to trial, Luna filed a motion to suppress all evidence seized from his person and vehicle. Luna argued that his initial detention was illegal because Deputy Trice lacked reasonable suspicion that he had committed a crime, was in the process of committing a crime, or was about to commit a crime. He also argued that at the time that Deputy Trice patted him down, Deputy Trice did not have the belief that he was armed and dangerous. Finally, Luna argued that Deputy Trice's search of his car was unlawful because it was not designed to produce a genuine inventory but rather "was a ruse to find illicit drugs."

The State countered that Deputy Trice had reasonable suspicion to detain Luna for trespassing or criminal violations pursuant to NRS 171.123. The State argued that Deputy Trice was justified in frisking Luna for weapons due to the dispatch's cautions that Luna had a history of violence, was known to fight with law enforcement and carry a weapon and had an outstanding warrant for his arrest. The State argued that the pat-down search would also fall under the search-incident-to-arrest exception because although Luna had not been placed under formal arrest yet, he could have been because Deputy Trice had probable cause to believe that Luna had an outstanding warrant and that he committed the crime of trespass. Finally, the State argued that Deputy Trice conducted a valid inventory search of the vehicle.

The district court denied Luna's motion to suppress. It concluded that to the extent the encounter between Luna and Deputy Trice was a seizure from its onset, it did not violate the Fourth Amendment because there was preponderating evidence that Luna committed the crime

of trespass after Luna remained at the fuel pump after employees asked him to move. The district court found that there was clear and convincing evidence that Deputy Trice had probable cause to arrest Luna for trespass and that it was proper for Deputy Trice to frisk Luna. The district court also noted that even if Deputy Trice did not have probable cause to arrest Luna for trespassing, the totality of the circumstances justified Deputy Trice frisking Luna based on his knowledge of Luna's reputation of being armed. Finally, using the automobile exception to the warrant requirement, the district court concluded that when the second officer saw the foil and hypodermic needles, he learned of trustworthy facts and circumstances that would cause a law enforcement officer to believe it was more likely than not that illegal narcotics were in the car. Thus, the district court concluded that Deputy Trice had probable cause to immediately enter the car, seize the foil and syringes, and search the car for controlled substances.

On appeal, Luna argues that (1) the district court erred by finding that the initial encounter between himself and the officer was a lawful detention because there was no reasonable articulable suspicion that a crime was being committed, (2) the witness to the alleged trespass was not a reliable informant, (3) the district court erred by finding that the pat-down search of his person was lawful, (4) there was no probable cause to arrest, and (5) the district court erred by finding that the warrantless search of his vehicle was constitutional.⁵ We disagree.

⁵We decline to address Luna's second argument, that the gas station manager was an unreliable informant, because Luna has failed to demonstrate that the gas station manager was an informant and not simply a citizen witness or complainant. See *Maresca v. State*, 103 Nev. 669, 673,

“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). “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*.” *Beckman v. State*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013).

The initial encounter between Luna and Deputy Trice was a lawful detention

Luna argues that he was never provided a warning as required by NRS 207.200(2)(e) to vacate the gas station. He also highlights that the gas station employee’s request that the vehicle move was directed at the woman passenger, not at Luna. Luna asserts that Deputy Trice did not have the proper foundation to initially detain Luna for trespass because he did not have a reasonable articulable suspicion that Luna was committing the crime of trespassing absent an oral demand or communication for Luna to vacate the gas station. He argues that there is a lack of credible evidence

748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant’s argument that is not cogently argued or supported by relevant caselaw).

regarding whether he remained at the gas station after being warned and that the gas station manager never intended for a trespass to occur. We disagree.

“[P]olice officers may temporarily detain a suspect when officers have reasonable articulable suspicion that the suspect has committed, is committing or is about to commit a crime.” *Somee v. State*, 124 Nev. 434, 442, 187 P.3d 152, 158 (2008) (internal quotation marks omitted). “Reasonable suspicion is not a stringent standard, but it does require something more than a police officer’s hunch.” *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006). Whether reasonable suspicion exists is determined based on the totality of the circumstances. *Somee*, 124 Nev. at 442, 187 P.3d at 158.

Here, the gas station manager approached Deputy Trice and the trooper and informed them that a vehicle had been sitting at a fuel pump for approximately an hour and a half, that they had asked the occupants to move, and that the vehicle remained at the fuel pump. Deputy Trice also observed the vehicle at the fuel pump. Thus, based on the totality of the circumstances, we conclude that Deputy Trice had a reasonable suspicion that the crime of trespass was being committed.

Deputy Trice’s pat down of Luna was lawful

There was reasonable suspicion that Luna was armed and dangerous

Luna argues that even applying the collective knowledge doctrine and considering the totality of the circumstances, Deputy Trice did not have a reasonable suspicion to believe he was armed and dangerous when he performed the pat down. We disagree.

A police officer’s “limited pat-down search for weapons” is permissible when the officer reasonably believes the suspect “is armed with a dangerous weapon and is a threat to the safety of the peace officer or

another.” *Id.* (quoting NRS 171.1232(1)). The officer’s “reasonable belief . . . must be based on specific articulable facts” rather than on a mere hunch. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *State v. Lisenbee*, 116 Nev. 1124, 1128, 13 P.3d 947, 949 (2000). “Reasonable suspicion is measured by an objective standard.” *Cortes v. State*, 127 Nev. 505, 511, 260 P.3d 184, 189 (2011). “This is a fact-specific inquiry that looks at the totality of the circumstances in light of common sense and practicality.” *Id.* (internal quotation marks omitted). “An otherwise valid frisk is not objectionable because the suspect was first placed in handcuffs” Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.6(a) (6th ed. Supp. 2021), Westlaw.

When Deputy Trice responded to the gas station, he became aware of Luna’s numerous cautions, including his history of violence and that he was known to carry a firearm. He also testified that Luna’s repeated reaching down and touching something by his leg while he was in the vehicle concerned him. This furtive movement could be interpreted by an officer as an attempt at retrieval of a weapon. Therefore, based on the totality of the circumstances, even though he had been placed in handcuffs, we conclude that there was reasonable suspicion that Luna was armed and dangerous, thus justifying Deputy Trice’s pat down.

Deputy Trice’s pat-down search of Luna would have been a valid search incident to arrest

Luna argues that once Deputy Trice placed him in handcuffs, the deputy had to have probable cause to frisk him and not merely a reasonable suspicion to pat him down. Luna further argues that, because Deputy Trice did not have probable cause, he exceeded his authority when he searched Luna after Luna was handcuffed. We disagree.

Generally, a search incident to arrest occurs after the arrest. *Sibron v. New York*, 392 U.S. 50, 63 (1968) (“It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.”). However, “[w]here the formal arrest follow[s] quickly on the heels of the challenged search of [the] person,” a search can precede the arrest so long as the fruits of the search were “not necessary to support probable cause to arrest.” *Rawlings v. Kentucky*, 448 U.S. 98, 111 & n.6 (1980); cf. *Schmitt v. State*, 88 Nev. 320, 326, 497 P.2d 891, 894 (1972) (concluding that where officers do not have probable cause to arrest prior to a search, the search is not valid because the arrest may not be justified by what is found in the search).

To determine whether a search is lawfully incident to arrest, this court must first determine whether the officer had probable cause to make the arrest before the search occurred without using any resulting evidence from the search as its basis. *Rawlings*, 448 U.S. at 111 & n.6 (noting that where the formal arrest “followed quickly on the heels of the challenged search of the person” a search can precede the arrest so long as the fruits of the search were “not necessary to support probable cause to arrest”). Probable cause to arrest exists where an officer, at the time of arrest, has “reasonably trustworthy information” that the person to be arrested has committed an offense. *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). “The presence or absence of probable cause is determined in light of all the circumstances” *Deutscher v. State*, 95 Nev. 669, 681, 601 P.2d 407, 415 (1979). “Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

Here, the gas station manager informed Deputy Trice that Luna's vehicle had been sitting at a fuel pump for an hour and a half and, even after a request from an employee to move, the vehicle remained at the fuel pump. Additionally, when Deputy Trice approached Luna in the vehicle, the keys were in the ignition, the vehicle was running, and Luna was in the driver's seat. Luna informed Deputy Trice that he had driven down from Idaho to see his children in Elko, and Luna admitted that he did not have a driver's license. Thus, Deputy Trice had probable cause to arrest Luna for either trespassing or driving without a license.

Because probable cause existed to arrest Luna in advance of the search, this court must then determine whether the arrest turned "quickly on the heels" of the search in order to constitute a lawful search incident to arrest. In *United States v. Smith*, the United States Court of Appeals for the Ninth Circuit held that when there is no significant delay in the series of events from the moment probable cause arose, to the initial search, and then arrest, the arrest is sufficiently on the heels of the search. 389 F.3d 944, 951-52 (9th Cir. 2004). In *Rael v. State*, No. 81012-COA, 2020 WL 6955395, at *4 (Nev. Ct. App. Nov. 25, 2020) (Order of Affirmance), this court found that the defendant's "arrest was preceded by a very short sequence of events" where the entire event, from the time the officer arrived on scene until the time the defendant was placed in the back of the patrol car lasted 23 minutes.

In the present case, and according to a review of the body camera video and the call for service report, the entire sequence of events, from the time Deputy Trice arrived on scene until the time Luna was placed in the back of the patrol vehicle, lasted approximately ten minutes. Because Luna's arrest was preceded by a very short sequence of events from the time

Deputy Trice had probable cause to arrest Luna to the time of his arrest, the search was sufficiently “quick[] on the heels” of the arrest and permissible under *Rawlings*.

The warrantless search of Luna’s vehicle was constitutional

Luna points out that Deputy Trice did not initiate the search of the vehicle until after Luna was detained in the locked patrol car. Thus, Luna asserts that his detainment rendered him a nonthreat to officers and that absent any exigent circumstances that he could have damaged evidence or endangered officers, Deputy Trice’s warrantless search of the vehicle was unlawful.

Therefore, Luna essentially argues that incident to a lawful arrest, a warrantless search of an automobile requires both probable cause and exigent circumstances. We disagree. In 2013, the Nevada Supreme Court held that exigency is no longer a requirement of the automobile exception to the constitutional warrant requirement. *See State v. Lloyd*, 129 Nev. 739, 742, 312 P.3d 467, 468 (2013). Further, we conclude that the automobile exception to the warrant requirement applies in this case.

Under the automobile exception, if a vehicle is readily mobile and probable cause exists to believe it contains contraband, “the automobile exception to the warrant requirement imposed by the Fourth Amendment and the Nevada Constitution’s cognate provision [will justify] the search.” *Id.* at 751, 312 P.3d at 474. “The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.” *California v. Acevedo*, 500 U.S. 565, 580 (1991). “[T]he applicability of the automobile exception does not turn on whether the car’s owner or driver has already been taken into custody or the risk of mobility has otherwise been eliminated.” *United States v. Scott*, 705 F.3d

410, 417 (9th Cir. 2012). Rather, the automobile exception looks to whether “the vehicle is ‘readily mobile by the turn of an ignition key, [even if it is] not actually moving,’” and whether there is probable cause. *Id.* (alteration in original) (quoting *California v. Carney*, 471 U.S. 386, 392-93 (1985)).

Here, the record demonstrates that Luna’s vehicle was readily mobile because the car was running when Deputy Trice approached Luna and Deputy Trice instructed him to turn off the car before exiting the vehicle. The fact that Luna was arrested and in the back of a patrol vehicle when Deputy Trice began the search is immaterial. Additionally, officers had probable cause to believe that the vehicle contained contraband because the second officer discovered burnt foil and hypodermic needles on the passenger’s lap, and Deputy Trice seized a methamphetamine pipe from Luna’s pocket during the pat down. Therefore, we conclude that probable cause existed to justify the warrantless search of the vehicle.⁶

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁶In light of our disposition, we need not address whether the State also conducted a proper inventory search.

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