

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000542-001 DT

03/15/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

STEVEN A MCKAMEY (001)

MICHAEL D KIMERER

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 13792798.

Defendant-Appellant Steven A. McKamey (Defendant) was convicted in Phoenix Municipal Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the officer did not have reasonable suspicion to place him in investigatory detention. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On April 8, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1) (0.15 or more); failure to yield while turning left, A.R.S. § 28–772; and leaving the scene of an accident involving damage to a vehicle, A.R.S. § 28–662(A). The State subsequently filed an Amendment alleging Defendant was driving under the extreme influence, A.R.S. § 28–1382(A)(2) (0.20 or more). Prior to trial, Defendant's then attorney, Gordon Thompson, filed a Motion To Suppress alleging "Officer Feist's actions of seizing, handcuffing and placing the defendant into a patrol car, constituted an arrest of the defendant." (Motion To Suppress, dated Aug. 19, 2010, at 4.) That Motion further contended "the officers, had no probable cause to arrest the defendant." (*Id.* at 5.) On September 8, 2010, Judge Lori Metcalf held a hearing on Defendant's Motion To Suppress and denied that motion as follows:

THE COURT: Okay. After listening to the evidence, I do agree with Mr. Thompson that there was no probable cause for an arrest at the time he was placed in handcuffed (sic) and put in the car.

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I also don't think that he was arrested at that time. I think he was detained, and I think that they had the right to detain him to investigate further. I agree that he was detained roughly. I think that can be—has been explained by the fact that Mr. McKamey wasn't responding, clearly because he didn't hear them.

But the officers did not have that information and so when they asked him to respond twice, and [he] did not respond and [they] went to grab his arm, and there was resistance, I think that that resulted obviously in the rough detention of the—pulling—pushing him to the ground and handcuffing him.

But I think that at that moment in time they had the right to detain him and question him further, based on the information they had, which came from the witnesses and came from the fact that an accident had occurred. They had information that the person that had been involved had left, that the witnesses had followed him. When they contacted the witnesses, the witnesses pointed out that person. He was right there.

That's—I don't believe at this point, under these facts, an arrest[,] which would require probable cause—I think that there was investigative detention and that information came to light after that, which had led to probable cause to arrest Mr. McKamey for both crimes, not just the original leaving the scene of the accident. So for those reasons I'm going to deny the motion to suppress.

(R.T. of Sep. 8, 2010, at 47–48.) Defendant then submitted the matter on the record, and the trial court found him guilty of the criminal charges and responsible for the civil traffic charge.

Defendant filed a notice of appeal, and the superior court gave the matter Cause Number LC 2011–000338. Defendant obtained a new attorney, Michael Dew, who filed an Appellant's Memorandum contending Judge Metcalf had not properly advised Defendant prior to the submission on the record. Mr. Dew did not, however, raise any issue about Judge Metcalf's denial of Defendant's Motion To Suppress. The superior court (Comm. Myra Harris) issued a ruling finding Judge Metcalf had not properly advised Defendant prior to the submission on the record, and “remanded to the trial court to determine if Defendant would have agreed to submit his case to the trial court if the trial court had conducted a proper colloquy.” (Ruling/Remand, filed July 25, 2011, at 3–4.)

On August 22, 2011, the parties appeared before Judge Metcalf, with Defendant now being represented by Julie Mata. Judge Metcalf held a contested hearing, with Defendant testifying in his own behalf. (R.T. of Aug. 22, 2011, at 2.) After hearing Defendant's testimony and the arguments of the attorneys, Judge Metcalf ruled Defendant did not make a knowing waiver of the right to a jury trial, and thus granted him a new trial. (*Id.* at 29–30.) Judge Metcalf told Defendant he made too much money for a court-appointed lawyer, and so he would have to hire his own attorney. (*Id.* at 30.)

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On September 9, 2011, Jeffery Mehrens filed a Notice of Appearance for Defendant, and on September 13, 2011, filed a Notice of Change of Judge for Judge Metcalf pursuant to Rule 10.2 of the Arizona Rules of Criminal Procedure. On October 13, 2011, the parties appeared before Judge Eric Jeffery to discuss the State's motion to have the matter re-assigned to Judge Metcalf. Judge Jeffery noted Rule 10.4(b) of the Arizona Rules of Criminal Procedure provides the rights to a change of judge are renewed when the matter is remanded for a new trial. (R.T. of Oct. 13, 2011, at 35–36.) The prosecutor argued the matter had not been remanded for a new trial, but instead had been remanded for a hearing to determine whether Defendant had been prejudiced by the failure of Judge Metcalf to give a complete litany when Defendant submitted the matter. (*Id.* at 36–37.) Nobody addressed the fact that Rule 10.4(a) provides a party loses the right to a change of judge when the party participates before that judge in any contested matter or any pretrial hearing (which arguably happened on August 22, 2011, when the parties appeared before Judge Metcalf and contested whether Defendant had been prejudiced), nor did they address the fact that Rule 10.2(c) provides a party must file a notice of change of judge within 10 days of the assignment of a case to a judge (which arguably happened on August 22, 2011, when Judge Metcalf granted Defendant a new trial and set that trial before her for the week of October 16, 2011). (R.T. of Aug. 22, 2011, at 32.) Judge Jeffery denied the State's motion and reaffirmed his ruling assigning the matter to a new judge. (R.T. of Oct. 13, 2011, at 42.)

Mr. Mehrens filed a Motion To Suppress asserting “that the police lacked the necessary particularized and articulable facts necessary to give a reasonable suspicion that [Defendant] committed an offense.” (Motion To Suppress, filed Oct. 20, 2011.) The State responded, contending Judge Metcalf had already resolved that issue, and thus Defendant was precluded from re-litigating that issue. (Response, filed Nov. 4, 2011, at 1.) Mr. Mehrens filed a reply, contending the previous Motion To Suppress was based on “an illegal arrest” and “a lack of probable cause to arrest.” (Reply, filed Nov. 16, 2011, at 2.) Mr. Mehrens did note, “Judge Metcalf denied the motion, however, on the grounds that Mr. McKamey was not under arrest but merely detained.” (*Id.* at 2, ll. 14–15.)

On January 12, 2012, the parties appeared before Judge Laura Lowery to resolve Defendant's Motion To Suppress. (R.T. of Jan. 12, 2012, at 47.) The prosecutor argued Judge Metcalf had resolved that issue, “basically finding that it was an investigative detention that was supported by reasonable suspicion.” (*Id.* at 48.) Mr. Mehrens contended his Motion To Suppress raised an entirely different issue:

It's an entirely different issue.

It's similar, but previous counsel had filed a motion to dismiss [*sic*] based upon a lack of probable cause to arrest. The issue of whether my client was illegally detained pursuant to *Terry* doctrine was never litigated, has not been litigated and this is the first time the issue has been raised.

(R.T. of Jan. 12, 2012, at 50.)

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And your Honor will see [from reading the transcript] that she—whether he was arrested or not, which was the issue before the Court. And if Your Honor had time to review the entire transcript, you would see that at no point was it ever argued whether the detention was illegal or not, only whether the arrest was legal or not.

(R.T. of Jan. 12, 2012, at 53.) In response, the prosecutor argued reasonable suspicion to detain is incorporated within probable cause to arrest:

And if the prior counsel phrased it in terms of probable cause to arrest, that wholly includes and incorporates anything up to that point[,] which would be what Judge Metcalf explicitly found, which would include the fact that she found there was an investigative detention and it was supported by reasonable suspicion.

(R.T. of Jan. 12, 2012, at 53–54.) Judge Lowery seemed to be of the opinion that a defendant’s having a new attorney gives a defendant the right to re-litigate an issue already decided:

And in this case we have a new attorney, and so things can be written in a different fashion, and of course no two attorneys will do the same work.

(R.T. of Jan. 12, 2012, at 56.) Judge Lowery read the transcript of Judge Metcalf’s ruling denying the original Motion To Suppress filed by Thompson. (*Id.* at 62.) She acknowledged Judge Metcalf had already found the officers had **reasonable suspicion** to **detain** Defendant, but ruled that, because the original Motion To Suppress alleged the officers did not have **probable cause** to **arrest** Defendant, she would permit Defendant to litigate whether the officers had **reasonable suspicion** to **detain** Defendant. (*Id.* at 62–63.)

Judge Lowery then proceeded to take testimony about the events of April 8, 2010. Emanuel Junc testified that, at about 8:00 p.m. that evening, he was about ¼ mile away from the intersection of Happy Valley Road and 67th Avenue when he saw smoke or steam coming from vehicles in the middle of the intersection. (R.T. of Jan. 12, 2012, at 66–67.) Once he arrived at the intersection, he saw an Infiniti SUV had been involved in a collision, but it then drove away, so he realized it was a hit-and-run. (*Id.* at 67–68.) He did not follow the Infiniti, but instead stayed to attend to the driver of the other vehicle. (*Id.* at 67.) He did see that the Infiniti drove away north on 67th Avenue. (*Id.* at 68–69.)

Daniel Martin testified at about 8:00 p.m., he was about 40 feet from the intersection of Happy Valley Road and 67th Avenue when he saw a collision involving a blue car and a silver SUV. (R.T. of Jan. 12, 2012, at 70–71.) He did not see the actual collision, but he “probably missed it by seconds.” (*Id.* at 71.) When the SUV took off north on 67th Avenue, he followed behind and called 9-1-1, giving the description of the SUV and later a description of the license plate, which read “McKamey.” (*Id.* at 71–72, 75.) The SUV turned into a neighborhood, leaving a trail of smoke and a trail of fluids on the street. (*Id.* at 72.) Mr. Martin was able to keep up with the SUV, except for the corners where his tires kept spinning in the fluids the SUV was leaving. (*Id.*) He did not lose sight of the SUV except for when it made one of its turns, but he was able to follow the trail of smoke and regain sight of the SUV. (*Id.* at 72–73.)

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The SUV then stopped and the drive driver got out, and Mr. Martin identified Defendant as the driver of the SUV. (R.T. of Jan. 12, 2012, at 73–74.) All the while, Mr. Martin was still on the phone to 9-1-1. (*Id.* at 73.) He asked Defendant why he left the scene of the collision, but Defendant would not talk to him and only asked him who he was. (*Id.* at 73, 77.) Defendant then started walking up to houses and checking back gates, as if trying to get into a back yard. (*Id.* at 73–75.)

Another vehicle that had been at the scene of the collision arrived, apparently having followed the trail of fluids, and a man and a woman got out. (R.T. of Jan. 12, 2012, at 74–75.) Defendant started walking down the street, so Mr. Martin and the other man followed after him. (*Id.* at 74.) Mr. Martin was still on his phone to 9-1-1, so he stayed back about 20 feet, and the other man stayed with Defendant. (*Id.* at 75–76.) Mr. Martin was on his phone the “entire time” and described the incident as it was happening. (*Id.* at 75.) He saw a police vehicle make a wrong turn, so he gave that information to the 9-1-1 operator, and the police vehicle immediately turned around and drove to where they were. (*Id.* at 76–77.) When the officer got out of his vehicle, Mr. Martin pointed to Defendant, and the officers went over to him. (*Id.* at 77.)

Officer Michael Feist testified he received a call at about 8:00 p.m. on April 8, 2010, and was told to investigate a collision at Happy Valley Road and 67th Avenue involving a silver SUV that had left the scene. (R.T. of Jan. 12, 2012, at 78–79, 87.) He said there was a citizen on the 9-1-1 line giving constant updates on the driver who had fled the scene. (*Id.* at 79.) He drove past the scene of the collision and into the neighborhood, where he saw witnesses waiving their arms and pointing at Defendant and yelling, “that’s him.” (*Id.* at 80–81, 89, 90–91.) Defendant was at the front door of a residence at that time, so Officer Feist used his spotlight to illuminate the front porch area, got out of his vehicle, and yelled at least twice to Defendant, “Phoenix Police, can you come over and talk to me.” (*Id.* at 81, 92.) It appeared to Officer Feist that Defendant was trying to get into the door of the house, so he walked up to Defendant and grabbed one of his arms. (*Id.* at 82.) Defendant pulled away, so Officer Feist shoved Defendant to the ground, handcuffed him, and placed him in the back of the patrol vehicle. (*Id.*) Officer Feist then began talking to the witnesses to determine exactly what was going on. (*Id.* at 82, 87, 88.) After speaking to the witnesses and Officer Young, he returned to the patrol vehicle and read Defendant the *Miranda* warnings, but Defendant did not want to talk to him, so he did not ask any questions. (*Id.* at 83.) Officer Feist did smell the strong odor of alcohol coming from Defendant. (*Id.* at 84.)

Officer Andrew Young testified he received a call at about 8:00 p.m. on April 8, 2010, and was told to investigate a collision at Happy Valley Road and 67th Avenue. (R.T. of Jan. 12, 2012, at 94.) As he was heading to the scene, he received information that one of the vehicles had left the scene and several witnesses were following that vehicle. (*Id.* at 95.) He arrived at the scene, made sure no one there needed medical attention, and then continued to the location where the witnesses said the other vehicle was. (*Id.*) He received a description of the other vehicle (a SUV), which had a license plate that read “McKamey.” (*Id.* at 96–97.) He received information that the

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witnesses had continuous sight of the vehicle, and that it had left a trail of fluids leading from the scene of the collision into the nearby neighborhood. (*Id.* at 98, 102, 111.) He received information that the witnesses said the suspect was then on foot and ended up at the front doorstep of a house. (*Id.* at 99, 104–05.) Officer Young was able to follow the trail of fluids from the scene of the collision to where Defendant left his vehicle. (*Id.* at 107.) When Officer Young got to where the suspect was, the suspect was already in investigative detention. (*Id.* at 100, 108.)

After the State rested, Mr. Mehrens presented the testimony of Christopher McClellan, a former officer in the Phoenix Police Department, who gave his opinion of how the officers should have handled the situation. (R.T. of Jan. 12, 2012, at 113–16.) Mr. Mehrens presented no other witness. (*Id.* at 117.) The prosecutor then called Officer Feist in rebuttal. (*Id.* at 117, 120, 123–24.)

The attorneys then presented arguments, with the prosecutor arguing the officers had reasonable suspicion to detain Defendant. (R.T. of Jan. 12, 2012, at 124–26.) Mr. Mehrens began his argument by admitting he set a trap for the prosecutor:

I have to admit, I set a bit of a trap for opposing counsel on this, because I suspected the argument would be, well, they're investigating this leaving the scene of an accident. . . .

. . . .

Now it has to be a particularized basis that a crime has occurred. And the trap I set was this: It is not against the law to drive away from the scene of an accident. That's perfectly legal. What's illegal is to drive away from the scene of the accident if you haven't exchanged information. Not one scintilla of evidence has been presented that they knew that.

(R.T. of Jan. 12, 2012, at 127.) The prosecutor argued the evidence showed Defendant fled the scene immediately after colliding with the victim's vehicle, therefore Defendant did not have time to exchange any information with the victim. (*Id.* at 130–31.) Judge Lowery denied Defendant's Motion To Suppress. (*Id.* at 133.)

Mr. Mehrens then presented Judge Lowery with a document entitled Bench Memorandum re Rule 16.1, and now argued for the first time that Officer Feist placed Defendant under arrest and Officer Feist lacked probable cause to do so. (R.T. of Jan. 12, 2012, at 134, 136–38.) When Judge Lowery said she would need a motion before she could grant any relief, Mr. Mehrens said he was making one orally now. (*Id.* at 138.) After more discussion, Mr. Mehrens told Judge Lowery he had a second bench memorandum, this one dealing with probable cause to arrest. (*Id.* at 140–41.) Judge Lowery then took the lunch recess. (*Id.* at 142.)

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Upon returning after the recess, Judge Lowery gave the basis for her decision denying Defendant's Motion To Suppress, giving a recap of the evidence presented, and concluding by finding all the evidence was sufficient to give the officers reasonable suspicion to detain Defendant. (R.T. of Jan. 12, 2012, at 143–46.) For Mr. Mehrens' oral motion to revisit Judge Metcalf's decision and his oral motion to suppress based on his contention that the officers did not have probable cause to arrest, she found the motions were clearly untimely and denied them by not addressing them. (*Id.* at 146.)

Mr. Mehrens had previously stated his client wanted a bench trial, so Judge Lowery went through the waiver litany with Defendant. (R.T. of Jan. 12, 2012, at 133, 146–47, 150–54.) The State then presented the testimony of Emanuel Junc, who again related what he had seen of the collision on April 8, 2010. (*Id.* at 155–59.) Daniel Martin again testified and again related what he had seen of the collision on April 8, 2010, and his actions in following Defendant as he left the scene of the collision. (*Id.* at 174–81.) The parties then entered into several stipulations, including that fact that Defendant's BAC was 0.241. (*Id.* at 201.) Officer Feist testified about his involvement in this matter. (*Id.* at 206–17.)

With that, both the State and the defense rested. (R.T. of Jan. 12, 2012, at 217.) Mr. Mehrens said he would make his Rule 20 motion, but gave no argument. (*Id.* at 217–18.) Judge Lowery said there was no testimony for count 5, so she dismissed that count, but denied the motion on the other counts. (*Id.* at 219.)

Judge Lowery subsequently imposed sentence on Defendant. (R.T. of Feb 21, 2012, at 234–39.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

- A. *Did Judge Lowery abuse her discretion in finding Defendant's claim that he was illegally arrested without probable cause was untimely and therefore refusing to rule on that claim.*

After the parties had presented evidence at the hearing on Defendant's Motion To Suppress, the attorneys had made their arguments to Judge Lowery, and she had denied Defendant's Motion, Mr. Mehrens present Judge Lowery with a bench memorandum supporting his position that Judge Lowery had the legal authority to re-litigate Judge Metcalf's previous ruling, and supporting his position that the officer placed Defendant under arrest, but he did not have probable cause to do so, and made an oral motion to suppress based on that claim:

I'm asking this Court to fix that manifest injustice [*sic*] and find that my client was illegally arrested without probable cause.

(R.T. of Jan. 12, 2012, at 138, ll. 23–25; see also *id.* at 134, 136–38.) Judge Lowery found that motion to suppress was clearly untimely and denied it by not addressing that claim:

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Now with respect to the other motions, I did review it, and reviewed Rule 16.1, and it is clearly untimely, and I am going to deny that motion meaning addressing it at this time.

(R.T. of Jan. 12, 2012, at 146.) Rule 16.1(b) of the Arizona Rules of Criminal Procedure provides a party shall make all motions no later than 20 days prior to trial, and Rule 16.1(c) provides any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis of the motion, defense, objection, or request was not then known.

In the present matter, Judge Lowery began the hearing on Defendant's Motion To Suppress the morning of January 12, 2012, and the judge and the parties were in the courtroom continuously until right before lunch when Mr. Mehrens gave to Judge Lowery his bench memoranda and made his oral motion to suppress based on his claim that Defendant "was illegally arrested without probable cause." It is apparent from the record Mr. Mehrens had prepared these memoranda prior to the start of the hearing, thus he knew long before that hearing the basis of the claims presented in those memoranda. Further, Mr. Mehrens gave no reason why he waited until Judge Lowery had essentially concluded the proceedings on the Motion To Suppress before giving those memoranda to her and to the prosecutor. And finally, the position taken by Mr. Mehrens in those memoranda was diametrically opposed to the numerous statements he made that morning that he was not challenging Judge Metcalf's ruling that Officer did not place Defendant under arrest. (R.T. of Jan. 12, 2012, at 50, 50, 53, 55, 62.) Judge Lowery therefore did not abuse her discretion in finding Defendant was precluded from contending he was illegally arrested without probable cause.

B. *If Judge Lowery had refused to re-litigate Judge Metcalf's previous ruling, would she have abused her discretion in doing so.*

Defendant contends Judge Lowery had the legal authority to re-litigate the issue whether Officer Feist placed Defendant under arrest and whether he had probable cause to do so. As discussed above, Judge Lowery ruled that Mr. Mehrens' motion to suppress based on the arrest/probable cause issue was precluded as untimely, thus Judge Lowery never ruled on whether she had the legal authority to re-litigate that claim. The Arizona Rules of Criminal Procedure provide as follows:

d. Finality of Pretrial Determinations. Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered.

Rule 16.1(d), ARIZ. R. CRIM. P. Defendant contends Judge Lowery was permitted to re-litigate Judge Metcalf's previous ruling because "the record is ambiguous whether Officer Feist spoke with witness Martin before slamming the Appellant to the ground and restraining him" (Appellant's Opening Brief at 7, ll. 18-20.) An examination of Judge Metcalf's ruling shows why Defendant's contention is without merit:

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THE COURT: Okay. After listening to the evidence, I do agree with Mr. Thompson that there was no probable cause for an arrest at the time he was placed in handcuffed (sic) and put in the car.

I also don't think that he was arrested at that time. I think he was detained, and I think that they had the right to detain him to investigate further. I agree that he was detained roughly. I think that can be—has been explained by the fact that Mr. McKamey wasn't responding, clearly because he didn't hear them.

(R.T. of Sep. 8, 2010, at 47.) Thus, Judge Metcalf's ruling was (1) Officer Feist did not have probable cause, but (2) what Officer Feist did was not an arrest. Whether Officer Feist spoke to witness Martin before restraining Defendant would go only to the issue of probable cause, and Judge Metcalf had already ruled there was no probable cause, so any "ambiguity" would have no effect on that ruling. What Defendant wanted to challenge was Judge Metcalf's ruling that what Officer Feist did was not an arrest, but there was no change in the testimony about what Officer Feist did to detain Defendant. Because there was no change in the evidence that supported Judge Metcalf's ruling that what Officer Feist did was not an arrest, there was no basis to re-litigate that ruling. Thus, Judge Lowery would have been within her discretion if she had ruled she would not re-litigate the issue of whether Defendant was placed under arrest.

That was not, however, the only ruling Judge Metcalf made. Judge Metcalf also ruled Officer Feist had reasonable suspicion to detain Defendant. (R.T. of Sep. 8, 2010, at 47–48.) The evidence supporting reasonable suspicion and the subsequent detention did not change, so it appears Judge Lowery would have been within her discretion if she had accepted the State's argument and refused to allow Defendant to re-litigate that issue.

C. Did Judge Lowery abuse her discretion in finding the officer had reasonable suspicion to detain Defendant.

Defendant contends Judge Lowery abuse her discretion in finding Officer Feist had reasonable suspicion to detain him. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004) (motion to dismiss); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) (motion to suppress); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010) (motion to suppress). For reasonable suspicion, the Arizona Supreme Court has said:

Police officers may briefly detain an individual who they have reasonable suspicion to believe is involved in a crime. In assessing the reasonableness of a *Terry* stop, we examine "(1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place."

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. . . Reasonable suspicion requires “a particularized and objective basis for suspecting that a person is engaged in criminal activity.” Officers [may not] act on a mere hunch, but seemingly innocent behavior [may] form the basis for reasonable suspicion if an officer, based on training and experience, can “perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer.” The totality of the circumstances, not each factor in isolation, determines whether reasonable suspicion exists. (Noting that *Terry* forbids a “divide-and-conquer analysis”).

State v. Boteo-Flores, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 11–12 (2012) (citations omitted), *accord*, *State v. Lawson*, 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985) (police officer has reasonable suspicion to detain person if there are articulable facts for officer to suspect person is involved in criminal activity or commission of a traffic offense). The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer’s presence. A.R.S. § 28–1594; A.R.S. § 13–3883(B). Thus, in order for a trial court to find that an officer was legally justified in stopping a suspect, it must find the officer (1) knew of articulable facts that (2) raised a reasonable suspicion of criminal activity or a traffic violation.

In the present matter, Mr. Martin arrived at the intersection “seconds” after the collision. When he saw the driver of the SUV leave the scene of the collision, he followed the SUV and called 9-1-1 on his cell phone. He described the vehicle as a silver SUV, and later said the license plate read “McKamey.” He followed the SUV as it left a trail of fluids until it stopped. He saw the driver get out of the SUV and try to get into the back yards of various residences, apparently trying to hide his whereabouts. After another eyewitness joined the pursuit, Mr. Martin followed approximately 20 feet behind, all the while talking on his cell phone to 9-1-1 and giving up-to-the-second reports of what was happening, which was relayed to the arriving officers. This is shown by Mr. Martin’s testimony that, when he saw the police vehicle turn on the wrong street, he so informed the 9-1-1 operator, and the officer turned around and arrived at the right location. When the officer got out of his vehicle, both Mr. Martin and the other eyewitness yelled and pointed to Defendant. Officer Feist then approached Defendant and ultimately detained him. This Court concludes Officer Feist was aware of sufficient articulable facts to suspect Defendant was involved in criminal activity or the commission of a traffic offense. Judge Lowery therefore did not abuse her discretion in denying Defendant’s Motion To Suppress.

D. *Does the record show the officer placed Defendant under arrest, and if so, does the record show the officer had probable cause to do so.*

Defendant contends Officer Feist placed him under arrest when he handcuffed him and placed him in the patrol vehicle, and further contends Officer Feist did not have probable cause to arrest him. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154–55, 812 P.2d 626, 627–28 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). In the present matter, Judge Lowery ruled Mr. Mehrens’ motion to suppress based on the arrest/probable cause was untimely and thus

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did not rule on the merits. Because Mr. Mehrens did not make a timely motion and did not get a ruling on the merits, Defendant is entitled to relief only if he can show fundamental error. Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). Based on the evidence presented, this Court finds no error, fundamental or otherwise.

1. *Was Defendant under arrest.*

Defendant contends he was under arrest once Officer Feist placed him in handcuffs. In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court clarified that there is no rigid time limit for a *Terry* stop, and the appropriate query is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." 470 U.S. at 686. Moreover, the use of handcuffs does not necessarily turn investigative detention into arrest. *State v. Blackmore*, 186 Ariz. 630, 633, 925 P.2d 1347, 1350 (1996). In the present matter, Officer Feist knew Defendant had fled from the scene of a vehicle collision; Mr. Martin saw Defendant trying to get into back yards of house, apparently trying to hide, and had conveyed that information to the 9-1-1 operator; and Officer Feist saw Defendant trying to get into the front door of a house. This Court concludes it was necessary for officer Feist to detain Defendant so he could continue his investigation in order to confirm or dispel his suspicions quickly, and thus handcuffing Defendant and placing him in the patrol vehicle was not an arrest under the facts of this case.

Defendant contends he was under arrest the instant Officer Feist laid hands on him. As the State notes, the Supreme Court has held "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis original). And as noted above, physical force to the extent of handcuffing the person does not necessarily turn a detention into an arrest. *See also Boteo-Flores*, 230 Ariz. 105, 280 P.3d 1239, ¶¶ 5, 11–16 (2012) (police had reasonable suspicion to detain defendant and placing him in handcuffs did not turn detention into arrest; holding defendant in handcuffs for longer than necessary did turn detention into arrest). Here Officer Feist held Defendant for no longer than necessary to investigate the situation, and once he had confirmed his suspicions, placed him under arrest and read him the *Miranda* warnings.

2. *Assuming Officer Feist placed Defendant under arrest as soon as he handcuffed him, did he have probable cause to do so.*

Defendant contends Officer Feist did not have probable cause to arrest him. As discussed above, this Court has concluded Officer Feist had reasonable suspicion to detain Defendant. The difference between reasonable suspicion to detain and probable cause to arrest has been described as follows. An officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect the person is involved in criminal activity. *Lawson*, 144 Ariz. at

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551, 698 P.2d at 1270. An officer has probable cause to arrest a person if the officer has reasonable grounds to believe the person is committing or has committed an offense. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272. In the present matter, Officer Feist did know there had been a collision and Defendant had immediately left the scene of the collision. Thus Officer Feist had reasonable grounds to believe Defendant had committed the offense of leaving the scene of a collision.

Defendant contends, however, Officer Feist did not have probable cause because he did not know whether Defendant had in fact committed the offense of leaving the scene of a collision. The Arizona Supreme Court has previously rejected just such an argument:

We are not impressed with the argument which says that in the classic nursery rhyme situation of “John, John, the Piper’s son, stole a pig and away he run,” that the police officers, who saw John run by with the squealing pig and a bystander hollering “stop thief,” have to find the pig’s owner and establish the theft before they can give chase.

State v. Franklin, 104 Ariz. 324, 325, 452 P.2d 498, 499 (1969). Defendant also notes the offense of leaving the scene of a collision requires not just leaving the scene, it requires leaving the scene without giving the driver’s name, address, and registration, and there was no showing he did not give that information to the victim. The evidence presented was that Defendant only stopped because he ran head-on into the front of the victim’s vehicle, and that he immediately drove away. There was the suggestion that Defendant could have given the necessary information to the victim over the cell phone. But the only way Defendant could have given the necessary information to the victim over the cell phone would have been if Defendant knew the victim well enough to have her number on the speed dial on his cell phone, but did not care enough about the victim to stop and determine whether she had been injured. It was therefore reasonable for Officer Feist to believe Defendant had not contacted the victim and given to her the required information.

III. CONCLUSION.

Based on the foregoing, this Court concludes Judge Lowery did not abuse her discretion in denying Defendant’s Motion To Suppress based on reasonable suspicion, and did not abuse her discretion in determining Defendant’s oral motion to suppress based on probable cause was not timely.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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