

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000512-001 DT

10/17/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
H. Beal  
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

NADINE MARIE SABULSKY (001)

NADINE MARIE SABULSKY  
15402 N 28TH ST #222  
PHOENIX AZ 85032

PHX MUNICIPAL CT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 14118814.**

Defendant-Appellant Nadine Marie Sabulsky (Defendant) was convicted in Phoenix Municipal Court of driving on a suspended license and no proof of insurance. Defendant contends the trial court erred in (1) not granting her a jury trial, (2) not honoring her right to remain silent, and (3) not dismissing the charges, and further contends (1) the evidence did not support the verdict and (2) her property was taken without due process. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On October 1, 2010, Defendant was cited for driving on a suspended license, A.R.S. § 28–3473(A) & (C); no proof of insurance, A.R.S. § 28–4135(C); no current registration, A.R.S. § 28–2532(A); and cracked windshield, A.R.S. § 28–957.01(A). Prior to trial, Defendant asked the trial court for a jury trial, and the trial court denied that request. (R.T. of Jan. 13, 2011, at 6–7, 9–10.) The trial court also informed Defendant she would be subject to cross-examination and would be required to answer questions if she elected to testify in her own behalf. (*Id.* at 8.)

Officer Adam Nelson testified he was doing random checks of vehicle license plates on December 1, 2010. (R.T. of Jan. 13, 2011, at 12.) At 10:51 p.m., a license plate he checked showed it was suspended, so he stopped the vehicle, and identified Defendant as the driver. (*Id.* at 12–14.) He When Officer Nelson questioned Defendant, she admitted her driver's license was suspended, and she did not have insurance. (*Id.* at 14.) When Officer Nelson asked why the vehicle did not have a current registration, Defendant said she was buying it from a friend. (*Id.* at 16.)

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After the State rested, the trial court discussed with Defendant whether she was going to be placed under oath and testify. (R.T. of Jan. 13, 2011, at 19.) The trial court again explained Defendant would be subject to cross-examination and would be required to answer questions if she elected to testify in her own behalf. (*Id.* at 19–20.) Defendant was then placed under oath and questioned the time of the traffic citation. (*Id.* at 21.) When the prosecutor tried to cross-examine Defendant, she refused to answer, claiming the Fifth Amendment privilege. (*Id.* at 23–24.) The trial court then allowed Defendant not to answer the questions. (*Id.* at 24.)

On rebuttal, the prosecutor recalled Officer Nelson and he explained the time of the stop was 1651, which would be 4:51 p.m. (R.T. of Jan. 13, 2011, at 25.) He further testified he had no independent memory of the incident, and so he was refreshing his memory by the information he noted on that date. (*Id.* at 27.)

During closing arguments, Defendant claimed her property was seized without due process of law. (R.T. of Jan. 13, 2011, at 29.) When the trial court asked Defendant what she meant, Defendant said the officers impounded the vehicle she was driving and were holding that vehicle for ransom. (*Id.* at 29–30.) Defendant again maintained she was entitled to a jury trial. (*Id.* at 30.) The trial court found Defendant guilty of both driving on a suspended license charges and responsible for the no proof of insurance charge, but not responsible for the no current registration and cracked windshield charges. (*Id.* at 31–33.)

The trial court then proceeded to sentencing. When the trial court gave Defendant the opportunity to speak, Defendant contended that, because the trial court had found her not responsible for the no current registration charge, and because that was the reason the officers had stopped her vehicle, everything that followed from the stop was invalid. (R.T. of Jan. 13, 2011, at 34.) The trial court explained there were different standards, reasonable suspicion for the stop and preponderance of the evidence for the charge. (*Id.*) The trial court stated the facts the officers had gave them reasonable suspicion to believe the vehicle’s registration was suspended and thus gave them the legal authority to stop Defendant’s vehicle, and just because the State was not able to show by a preponderance of the evidence the registration was suspended, that did not change the conclusion that the officers had reasonable suspicion to stop Defendant’s vehicle. (*Id.* at 34–35.) The trial court then imposed sentence. (*Id.* at 35–39.) On January 26, 2011, 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 Defendant have the right to a jury trial.*

Defendant contends the trial court erred in refusing to give her a jury trial. The United States Supreme Court has said the following:

It is well established that the Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and that “there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions.”

. . . An offense carrying a maximum term of six months or less is presumed petty . . . .

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*Lewis v. United States*, 518 U.S. 322, 325–26 (1996), quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). This applies even when the defendant is charged with multiple offenses for which the defendant could receive a total sentence of more than 6 months if the court ordered the sentences were consecutive:

We conclude that no jury trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged.

*Lewis*, 518 U.S. at 323–24. Because Defendant did not face a maximum sentence of more than 6 months for any of the criminal offenses for which she was charged, she was not entitled to a jury trial under the Sixth Amendment.

Under Arizona constitutional law, to determine whether the offense mandates a jury trial, the court should consider two things: First, under Article 2, section 23, of the Arizona Constitution, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–12, 36–39 (2005). Defendant has not identified any pre-statehood common-law offense substantially similar to driving on a suspended license, thus under the first prong of the Arizona test, Defendant did not establish the right to a jury trial under this part of the Arizona Constitution.

Second, the court should consider whether, under Article 2, section 24, of the Arizona Constitution, the severity of the possible penalty; if the offense is classified as a misdemeanor punishable by no more than 6 months incarceration, the court will presume the offense is one for which the defendant is not entitled to a jury trial. *Derendal*, 209 Ariz. 416, 104 P.3d 147, ¶ 21. Again, because of the maximum sentence of not more than 6 months, Defendant did not establish the right to a jury trial under this part of the Arizona Constitution.

If the punishment is 6 months or less, a defendant is entitled to a jury trial if the defendant establishes the consequence of convictions meets three criteria: (1) the penalty must arise directly from Arizona law; (2) the consequences must be severe; and (3) the consequences must apply uniformly to all persons convicted of that particular offense. *Derendal*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 23–25. In the present case, Defendant has not established her convictions for driving on a suspended license have any additional consequences beyond the potential jail sentence, thus she has not establish the right to a jury trial under this test under of the Arizona Constitution. The trial court therefore correctly ruled Defendant was not entitled to a jury trial.

*B. Did the witness's testimony support the conviction.*

Defendant notes several inconsistencies in the witness's testimony, and essentially contends the testimony did not support the conviction. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

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We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). In the present case, this Court concludes the testimony of Officer Nelson was sufficient to support the verdicts.

Defendant contends, however, Officer Nelson did not have personal knowledge of the facts of this case. Rule 602 of the Arizona Rules of Evidence provides a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter, and that evidence to prove personal knowledge may consist of the witness’s own testimony. In this case, Officer Nelson testified he was the one who arrested Defendant, thus his testimony established he had personal knowledge of what happened.

Defendant correctly notes Officer Nelson had no independent memory of what had happened. Under Arizona law, if a police officer once had knowledge of an event but at the time of trial has insufficient recollection to testify fully and accurately, the officer may read from that officer’s report if the officer made the report when the matter was fresh in the officer’s memory and the report correctly reflects the officer’s knowledge. *Goy v. Jones*, 205 Ariz. 421, 72 P.3d 351, ¶¶ 4–12 (Ct. App. 2003). Further, when a witness does not remember what happened, a party may use a writing to refresh the witness’s memory for the purpose of testifying. *State v. Ortega*, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim’s brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened). Thus, the trial court properly allowed Officer Nelson to use his police report to refresh is memory.

*C. Did the trial court infringe on Defendant’s Fifth Amendment right to remain silent.*

Defendant contends the trial court’s rulings infringed on her Fifth Amendment right to remain silent. The United States Supreme Court has held as follows:

It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.

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*United States v. Mitchell*, 526 U.S. 314, 321 (1998). In the present case, Defendant testified voluntarily about the events leading to these charges. The trial court therefore properly ruled Defendant was not entitled to invoke the privilege against self-incrimination when questioned about the details of these events.

*D. Did Defendant properly present her claim of a taking without due process.*

Defendant contends her property was taken without due process. Failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Defendant did not claim her property was seized without due process of law until closing arguments, which was after the parties had presented their evidence to the trial court. (R.T. of Jan. 13, 2011, at 29.) Because Defendant made no claim of a taking in violation of due process prior to the start of the trial, Defendant did not properly present this claim to the trial court, and thus has waived this issue on appeal.

*E. Should the State's evidence have been excluded as "fruit of the poisonous tree."*

Defendant contends that, because the trial court found her not responsible for the no current registration charge, and because that was the reason the officers had stopped her vehicle, everything that followed from the stop was invalid. The Arizona Supreme Court has stated, however:

Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

*Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). As the trial court noted, the standard for a vehicle stop is whether the officers had a reasonable suspicion that the driver had committed a traffic violation, while the standard for a finding of civil responsibility was whether the State had shown the elements of the offense by a preponderance of the evidence, which was a higher standard than reasonable suspicion. Merely because the evidence did not meet the higher "by a preponderance of the evidence" standard did not necessarily establish that the evidence did not meet the lower "reasonable suspicion" standard. Further, the trial court specifically ruled the facts known to the officers were sufficient to give them reasonable suspicion to stop Defendant's vehicle. Defendant has thus failed to show any error.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not err in any of the proceedings below.

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**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*

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THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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