

SUPREME COURT OF ARIZONA

State of Arizona v. Nelson Ivan Boteo-Flores

230 Ariz. 105 (2012) · No. CR-11-0180-PR · Decided July 3, 2012

SUMMARY

The Arizona Supreme Court held that although police had reasonable suspicion to initially detain Nelson Boteo-Flores during a stolen-vehicle investigation, the continued use of handcuffs and unexplained delay while awaiting a detective transformed the detention into a de facto arrest. Because officers lacked probable cause at that point, the court vacated the court of appeals’ decision and remanded for consideration of whether Boteo-Flores’s confession was sufficiently attenuated from the unlawful arrest.

CASE DETAILS

COURT	Supreme Court of Arizona
WRITING FOR THE COURT	Robert M. Brutinel, Justice; Rebecca White Berch, Chief Justice; W. Scott Bales, Vice Chief Justice; A. John Pelander, Justice; Andrew D. Hurwitz, Justice
JURISDICTION	Arizona
DECIDED	July 3, 2012
DOCKET	CR-11-0180-PR
DISPOSITION	vacated
PROCEDURAL POSTURE	Boteo-Flores was convicted by a jury of facilitating the theft of a means of transportation and sentenced to the presumptive prison term. After the trial court denied his motion to suppress statements, the court of appeals affirmed. The Arizona Supreme Court granted review, vacated the court of appeals' decision, and remanded for further proceedings.
STANDARD OF REVIEW	Whether an illegal arrest occurred is a mixed question of fact and law reviewed de novo. The reasonableness of an investigative detention is assessed under the totality of the circumstances.
PRECEDENTIAL VALUE	Published, precedential Arizona Supreme Court opinion decided en banc.
PARTIES	Nelson Ivan Boteo-Flores v. The State of Arizona

TOPICS

fourth amendment

search and seizure

probable cause

suppression of evidence

criminal procedure

PRACTICE AREAS

criminal procedure

constitutional law

evidence

QUESTIONS PRESENTED

1. Whether the officer had reasonable suspicion to conduct an investigative stop of Boteo-Flores.
2. Whether the lawful Terry stop became a de facto arrest when Boteo-Flores remained handcuffed for approximately thirty to forty minutes while officers awaited and briefed an auto theft detective, without probable cause.
3. Whether Boteo-Flores's confession was sufficiently attenuated from the allegedly unlawful arrest to purge the taint, and whether the State had waived that issue.

HOLDINGS

1. The officer had reasonable suspicion to detain Boteo-Flores based on the totality of the circumstances, including reliable information that the truck was stolen, the driver's suspicious behavior and flight in the stolen truck, the timing and conduct of Boteo-Flores, and the driver's interaction with him.
2. The lawful Terry stop became a de facto arrest before the auto theft detective questioned Boteo-Flores because the State failed to show that the officers diligently pursued the investigation or that continued handcuffing and detention were reasonable, and the officers lacked probable cause at that time.
3. The court did not decide whether the confession was sufficiently attenuated from the illegal arrest. That issue had not been considered below and was remanded to the court of appeals for consideration in the first instance.

KEY QUOTATIONS

“an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” (¶ 14)

“It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.” (¶ 16)

“The lack of evidence that officers acted diligently in investigating Boteo-Flores’s connection to the stolen pickup truck and the continued use of handcuffs when there was no ongoing safety threat or flight risk transformed the valid Terry stop into a de facto arrest before Boteo-Flores was questioned by the auto theft detective.” (¶ 21)

FACTUAL BACKGROUND

Police investigating a stolen black pickup truck observed suspicious conduct by a maroon-car driver who later drove the stolen truck away, as well as suspicious conduct by Boteo-Flores near the apartment complex. After the truck was abandoned, an officer approached Boteo-Flores, handcuffed him because he was alone and did not

know whether Boteo-Flores was armed, and advised him of his Miranda rights. Boteo-Flores remained handcuffed beside a police car for at least fifteen minutes while awaiting an auto theft detective and then remained detained during another approximately fifteen-minute briefing before the detective questioned him and obtained admissions.

PROCEDURAL HISTORY

Police detained Boteo-Flores during an investigation of a stolen pickup truck and obtained incriminating statements after handcuffing him and waiting for an auto theft detective to arrive. The superior court denied his suppression motion, and a jury convicted him. The court of appeals affirmed, but the Arizona Supreme Court held that the continued handcuffed detention became a de facto arrest unsupported by probable cause and remanded the attenuation issue to the court of appeals.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The case was remanded to the Arizona Court of Appeals for further proceedings consistent with the opinion, including consideration in the first instance of whether Boteo-Flores's confession was sufficiently attenuated from the de facto arrest and whether the State waived that issue.

CASES CITED

- State v. Blackmore, 186 Ariz. 630, 631-34, 925 P.2d 1347, 1348-51 (1996)
- State v. Jarzab, 123 Ariz. 308, 310, 599 P.2d 761, 763 (1979)
- Terry v. Ohio, 392 U.S. 1, 5-6, 20, 27-28 (1968)
- State v. O'Meara, 198 Ariz. 294, 295-96 ¶¶ 7, 10, 9 P.3d 325, 326-27 (2000)
- State v. Richcreek, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997)
- Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)
- United States v. Arvizu, 534 U.S. 266, 274-75 (2002)
- United States v. Pontoo, 666 F.3d 20, 30 (1st Cir. 2011)
- Florida v. Royer, 460 U.S. 491, 500 (1983)
- United States v. Sharpe, 470 U.S. 675, 686-87 (1985)
- State v. Spreitz, 190 Ariz. 129, 143-44, 945 P.2d 1260, 1274-75 (1997)
- United States v. Bautista, 684 F.2d 1286, 1289-90 (9th Cir. 1982)
- State v. Buti, 964 P.2d 660, 664 (Idaho 1998)
- State v. Teagle, 217 Ariz. 17, 26-27 ¶¶ 33-37, 170 P.3d 266, 275-76 (App. 2007)
- State v. Winegar, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985)
- State v. Reffitt, 145 Ariz. 452, 457, 702 P.2d 681, 686 (1985)
- Wong Sun v. United States, 371 U.S. 471, 488 (1963)

- Brown v. Illinois, 422 U.S. 590, 602 (1975)

OPINION

BRUTINEL, J.

SUPREME COURT OF ARIZONA En Banc THE STATE OF ARIZONA,) Arizona Supreme
Court) No. CR-11-0180-PR Appellee,)) Court of Appeals v.) Division Two) No. 2 CA-CR 10-
0106 NELSON IVAN BOTE0-FLORES,)) Pima County Appellant.) Superior Court) No.
CR20092575002)) O P I N I O N _____) Appeal from the

Superior Court in Pima County The Honorable Terry L. Chandler, Judge

Memorandum

Decision of the Court of Appeals Division Two Filed Apr.

12, 2011 VACATED AND REMANDED

THOMAS C.

HORNE, ARIZONA ATTORNEY GENERAL Phoenix By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Amy Thorson, Assistant Attorney General Tucson Attorneys
for State of Arizona ROBERT J. HIRSH, PIMA COUNTY PUBLIC DEFENDER Tucson By Lisa
M. Hise, Deputy Public Defender Attorney for Nelson Ivan Boteo-Flores

B R U T I N E L,

Justice ¶1 Nelson Boteo-Flores was detained by police during a stolen vehicle investigation.

We consider here whether a lawful investigative stop had become a de facto arrest before Boteo-Flores confessed to the crime. Based on the totality of the circumstances, we find a de facto arrest.

I. FACTS AND PROCEDURAL HISTORY ¶2 Tucson police officers went to an apartment complex and saw a black pickup truck matching the description of a stolen vehicle.¹ The officers took up surveillance positions to watch the truck and the apartment complex driveway. ¶3 A maroon car pulled into the driveway of the complex.

Its lone occupant was the driver, who was talking on a cell phone and then used binoculars to look up and down the street a few times before driving away. A few minutes later the car returned, this time with three occupants, who the officer could not identify.

The car drove to the back of the complex and out of sight. ¶4 Several minutes later, Boteo-Flores walked down the driveway, stood at the edge of the street, and looked up and down the street several times. The person who had driven the car then drove the black pickup truck from the complex.

As he approached the street, the driver slowed and shouted to Boteo- Flores, who did not respond. All but one of the surveilling officers unsuccessfully pursued the truck; it was later found 1 We consider only the evidence presented at the suppression hearing. State v. Blackmore, 186 Ariz.

630, 631, 925 P.2d 1347, 1348 (1996). 2 unoccupied. ¶5 While the pursuit was underway, the remaining officer approached Boteo-Flores.

Because there was at least one other person unaccounted for from the maroon car and the officer did not know if Boteo-Flores was armed, the officer handcuffed him. He did not frisk Boteo-Flores or ask him if he had a weapon. ¶6 After handcuffing Boteo-Flores, the officer advised him of his Miranda rights and began questioning him. Shortly thereafter, a police unit returned and the officers called an auto theft detective to assist with the investigation.

Boteo- Flores was left handcuffed and standing by a police car for at least fifteen minutes, until the detective arrived. The record does not reveal what the other officers were doing during this time or why Boteo-Flores remained handcuffed. ¶7 After arriving, the detective was briefed by the officers at the scene for another fifteen minutes. He then advised Boteo-Flores of his Miranda rights and began interviewing him.

The detective arrested Boteo-Flores based on his admissions during the interview. ¶8 Boteo-Flores was indicted for facilitating the theft of a means of transportation, a class six felony. He moved to suppress his statements, arguing that his initial detention was not supported by reasonable suspicion and, alternatively, that the initial detention had become a de facto arrest unsupported 3 by probable cause before he was interrogated.

The State countered that reasonable suspicion supported the stop and that, although there was no probable cause to arrest until he made incriminating statements, the detention never became a de facto arrest. After an evidentiary hearing, the trial court denied the motion. A jury found Boteo-Flores guilty, and the trial court sentenced him to prison for the presumptive term of 1.75 years. ¶9 The court of appeals affirmed the conviction and sentence.

State v. Boteo-Flores, 2 CA-CR 10-0106, 2011 WL 1379805 (Ariz. App. Apr. 12, 2011) (mem. decision). The court determined that the record supported “the [trial] court’s finding that the officer had a reasonable, articulable suspicion that Boteo-Flores was involved in criminal activity.” Id. at *2 ¶ 8.

Although the court deemed it a “close question” whether a de facto arrest had thereafter occurred, it concluded that the trial “court did not abuse its discretion in determining Boteo- Flores was not under arrest” because “[t]he officer acted reasonably to protect his own safety and to prevent Boteo-Flores from fleeing, and he diligently pursued the purpose of the stop.” Id. at *3 ¶ 12. ¶10 We granted review to consider relevant factors in determining when a lawful detention becomes a de facto arrest, an issue of statewide importance.

We have jurisdiction pursuant 4 to Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 12–120.24 (2003). II. DISCUSSION ¶11 Police officers may briefly detain an individual who they have reasonable suspicion to believe is involved in a crime. Terry v. Ohio, 392 U.S. 1, 27 (1968).

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.” *State v. Jarzab*, 123 Ariz. 308, 310, 599 P.2d 761, 763 (1979) (internal citation omitted); see *Terry*, 392 U.S. at 20.

A valid Terry stop, however, can later become a de facto arrest. See *State v. Blackmore*, 186 Ariz. 630, 633-34, 925 P.2d 1347, 1350-51 (1996). “Whether an illegal arrest occurred is a mixed question of fact and law” that we review de novo. *Id.* at 632, 925 P.2d at 1349. ¶12 *Boteo-Flores* first argues that the officer lacked reasonable suspicion to detain him.

Reasonable suspicion requires “a particularized and objective basis for suspecting that a person is engaged in criminal activity.” *State v. O’Meara*, 198 Ariz. 294, 295 ¶ 7, 9 P.3d 325, 326 (2000). Officers cannot act on a mere hunch, *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997), but seemingly 5 innocent behavior can 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.” *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979).

The totality of the circumstances, not each factor in isolation, determines whether reasonable suspicion exists. See *United States v. Arvizu*, 534 U.S. 266, 274-75 (2002) (noting that *Terry* forbids a “divide-and-conquer analysis”); *O’Meara*, 198 Ariz. at 296 ¶ 10, 9 P.3d at 327. ¶13 We agree with the courts below that the officer had reasonable suspicion to stop *Boteo-Flores*.

The officer had reliable information that the truck was stolen. He saw suspicious behavior by the car’s driver, who later drove off in the stolen truck. The officer’s suspicions were further justifiably aroused by the timing of *Boteo-Flores*’s arrival, his actions, and the truck driver’s shouting to him.

The officer testified that based on his training and experience, he suspected *Boteo-Flores* was acting as a lookout. Because this suspicion was reasonable given the totality of the circumstances, *Boteo-Flores*’s initial detention was legal. See, e.g., *Terry*, 392 U.S. at 5-6, 28. ¶14 What happened subsequently, however, presents a different question.

Although “[t]here is no bright line that distinguishes a valid Terry stop” from a de facto arrest, “Terry 6 stops must be tailored to fit the exigencies of particular situations.” *United States v. Pontoo*, 666 F.3d 20, 30 (1st Cir. 2011). “[W]hether the scope of an investigatory stop is reasonable demands careful consideration of the totality of the circumstances.”² *Id.* “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). ¶15 *United States v. Sharpe*, 470 U.S. 675 (1985), 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.” Id. at 686.

The Court cautioned that in assessing the reasonableness of a detention, courts should “consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.” Id. It noted that “[t]he question is not simply whether some other alternative was 2 Although we have suggested in the past that the test is “whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested,” State v. Winegar, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985), the Supreme Court has indicated that the appropriate focus is on the totality of the circumstances and reasonableness of the officer’s actions.

See United States v. Sharpe, 470 U.S. 675, 685 (1985). Whether a reasonable person would believe he or she was being arrested is but one factor to consider. 7 available, but whether the police acted unreasonably in failing to recognize or to pursue it.” Id. at 687; cf. State v. Spreitz, 190 Ariz. 129, 143-44, 945 P.2d 1260, 1274-75 (1997) (finding forty-five minute detention of blood-smeared defendant, who voluntarily cooperated with police and was not restrained, “no more than that necessary to accomplish a reasonable investigation of the unusual circumstances the officers encountered”). ¶16 Here, the State, whose burden it is to demonstrate that the continued detention was reasonable, presented no evidence to meet that burden.

See Royer, 460 U.S. at 500 (“It is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.”).

Although Boteo-Flores was properly detained and questioned initially, he remained handcuffed for another thirty to forty minutes after the other officers returned. The State does not suggest that probable cause supported that continued detention, and nothing in the record explains why it was reasonable to detain him in handcuffs to await interrogation by the detective. ¶17 Nor has the State explained why it was necessary to wait for a detective to question Boteo-Flores.

Although an extended detention might be reasonable under Terry while 8 officers await specialized equipment such as a drug sniffing dog, see, e.g., State v. Teagle, 217 Ariz. 17, 26-27 ¶¶ 33-37, 170 P.3d 266, 275-76 (App. 2007) (concluding one hour and forty minute detention to wait for drug sniffing dog reasonable), such concerns do not justify the continued detention here.

Nothing in the record shows any reason for detaining Boteo-Flores to await the detective’s arrival. ¶18 To be sure, it may be reasonable for an officer initiating a Terry stop to wait for another officer. But the record must reflect the reason.

The officers at the scene had the information about the stolen vehicle and actually observed Boteo-Flores's suspicious actions. Nothing in the record suggests why the detective was necessary to question Boteo-Flores for purposes of completing the investigative stop. ¶19 The trial court and court of appeals relied on *State v. Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996), in determining that the officer acted reasonably in handcuffing and detaining Boteo-Flores throughout the investigation.

But that case focused on the initial use of handcuffs after an officer detained a suspect and not their continued use once the officer's safety concerns were allayed. *Id.* at 631, 925 P.2d at 1348. Significantly, the restraint and detention in *Blackmore* lasted "for only a few minutes," 186 Ariz. at 633, 925 P.2d at 1350, but Boteo-Flores was detained in handcuffs for 9 considerably longer, with no articulated concerns for preserving officer safety or preventing him from fleeing. ¶20 *Blackmore* does not control our analysis in this case.

The detaining officer was justified in initially handcuffing Boteo-Flores because the officer was alone and did not know whether Boteo-Flores was armed. That threat clearly ended when the other officers returned. Boteo-Flores was compliant and nothing indicates he had a weapon; he was not even frisked.

Although the use of handcuffs does not automatically transform a Terry stop into an arrest, see *Blackmore*, 186 Ariz. at 633-34, 925 P.2d at 1350-51, their continued use when no ongoing threat exists suggests the detainee is under arrest. See *United States v. Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982); cf. *State v. Buti*, 964 P.2d 660, 664 (Idaho 1998) (finding the use of handcuffs and removal of suspects at gunpoint transformed stop into an arrest when several officers were present, there was no indication that the suspects were armed, and suspects were compliant).

The State argues that the continued use of handcuffs was justified because at least one passenger from the car had not been located. But any threat based on the unknown whereabouts of another possible suspect, without more, was purely speculative. ¶21 The lack of evidence that officers acted diligently in investigating Boteo-Flores's connection to the stolen pickup 10 truck and the continued use of handcuffs when there was no ongoing safety threat or flight risk transformed the valid Terry stop into a de facto arrest before Boteo-Flores was questioned by the auto theft detective.

The State conceded that police officers did not have probable cause to arrest Boteo-Flores until he confessed to the detective. ¶22 Even when a confession results from an illegal arrest, however, it need not be suppressed if it "was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" *State v. Reffitt*, 145 Ariz. 452, 457, 702 P.2d 681, 686 (1985) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)); see also *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

The State argues that the confession here was sufficiently attenuated from the illegal arrest; Boteo-Flores argues that the State waived this issue by not raising it below. These arguments were not considered in the decision below and should be addressed by the court of appeals in the first instance. III. CONCLUSION ¶23 For the foregoing reasons, we vacate the decision of the court of appeals and remand the case to that court for further proceedings consistent with this opinion.

____ Robert M. Brutinel, Justice 11 CONCURRING:
____ Rebecca White Berch, Chief Justice
____ W. Scott Bales, Vice Chief Justice
____ A. John Pelander, Justice

____ * * Before his resignation on June 27, 2012, as a result of his appointment to the United States Court of Appeals for the Ninth Circuit, Justice Andrew D. Hurwitz participated in this case, including oral argument, and concurred in this opinion's reasoning and result.