IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JERRY LEE SWIFT, JR.,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2015-760**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Jerry Lee Swift, Jr., was tried by jury in the District Court of Cherokee County, Case No. CF-2010-442, and convicted of Trafficking in Illegal Drugs, in violation of 63 O.S.Supp.2007, § 2-415. The jury recommended a sentence of fifteen (15) years imprisonment plus a $50,000.00 fine. The Honorable Darrell Shepherd, District Judge, sentenced Swift in accordance with the jury's verdict. Swift now appeals, alleging three propositions of error on appeal:

I. THE COURT ERRED IN ADMITTING EVIDENCE DISCOVERED FOLLOWING THE AMBIENT AIR SNIFF IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE II, § 30 OF THE OKLAHOMA CONSTITUTION;

II. APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT'S FAILURE TO INSTRUCT THE JURY ON THE DEFENSE OF DURESS; and

III. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR CONTINUANCE WAS AN ABUSE OF DISCRETION AND PREJUDICIAL.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's Judgment and Sentence is therefore **AFFIRMED.**

I

The standard of review governing this claim is straightforward:

> When reviewing the trial court's ruling on a motion to suppress evidence based on a complaint of an illegal search and seizure, this Court defers to the trial court's findings of fact unless they are not supported by competent evidence and are therefore clearly erroneous. We review the trial court's legal conclusions based on those facts *de novo*.

State v. Alba, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92 (internal citations omitted). Our review is further constrained, however, by Appellant's failure to renew his pre-trial challenge to the evidence at trial. *See* 12 O.S.2011, § 2104; *Seabolt v. State*, 2006 OK CR 50, ¶ 4, 152 P.3d 235, 237. By failing to object when testimony regarding the marijuana bundles found during the search was first elicited from Agent Graves, Appellant did not make a timely objection at trial and has waived on appeal all but plain error review. *Luna v. State*, 1992 OK CR 26, ¶ 6, 829 P.2d 69, 71; *Clopton v. State*, 1987 OK CR 189, ¶ 11, 742 P.2d 586, 588; *Lavicky v. State*, 1981 OK CR 87, ¶ 17, 632 P.2d 1234, 1238.

Appellant fails to show plain error with this claim. *Jackson v. State*, 2016 OK CR 5, ¶ 4, 371 P.3d 1120, 1121 (reciting three-part plain error test). Appellant had a right under both the United States and Oklahoma constitutions to be free from unreasonable searches and seizures. *Alba*, 2015

OK CR 2, ¶ 5, 341 P.3d at 92 (citing U.S. Const. amend. IV; Okla. Const. art. 2, § 30). As we have held:

> A traffic stop is a seizure under the Fourth Amendment. *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136. The scope and duration of such a seizure must be related to the stop and must last no longer than is necessary to effectuate the stop's purpose. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968); *McGaughey*, 2001 OK CR 33, ¶¶ 24 and 27, 37 P.3d at 136-37. If the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime.

Seabolt, 2006 OK CR 50, ¶ 6, 152 P.3d at 237-38.

Here, not only did Investigator Brown witness a traffic violation but, according to the officers' testimony, Appellant admitted the violation when confronted after the stop. Because he had probable cause to believe that a traffic violation had occurred, Investigator Brown's decision to stop the truck driven by Appellant was wholly reasonable. *Whren v. United States*, 517 U.S. 806, 809, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); *Dufries v. State*, 2006 OK CR 13, ¶ 8, 133 P.3d 887, 889. This is so regardless of either the officer's subjective intentions or the reliability of the concerned citizen's tip, discussed *infra*. In the probable cause analysis, the officer's subjective motivations for conducting the stop are irrelevant to the legality of the stop. Rather, we focus on whether the officer's actions were objectively reasonable.

Whren, 517 U.S. at 813, 116 S. Ct. at 1774; *Dufries*, 2006 OK CR 13, ¶ 9, 133 P.3d at 889.

The real issue in this case is whether the traffic stop was unnecessarily prolonged by Investigator Brown so the drug dog could be brought to the scene. The Supreme Court has held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409-10, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005). But "[a] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, __U.S.__, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015). In this sense, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Id.*, 135 S. Ct. at 1614 (internal citations omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.*

The Supreme Court has recognized that, in addition to issuing a traffic citation, an officer's mission includes "ordinary inquiries incident to [the traffic] stop" like "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*, 135 S. Ct. at 1615. Unlike a dog sniff, which is a measure aimed at detecting criminal wrongdoing, the ordinary inquiries incident to a traffic stop are aimed at ensuring that vehicles on the

road are operated in a safe and responsible manner. *Id.* Investigations and actions unrelated to the traffic stop—like questioning and a dog sniff—which do not lengthen the roadside detention are permissible under the Fourth Amendment. *Id.*, 135 S. Ct. at 1614. An officer "may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.*, 135 S. Ct. at 1615

The total time of the traffic stop before the dog's initial alert, based on Brown and Baker's collective testimony, was roughly eighteen (18) minutes. This time period was not excessive. However, this does not end the inquiry because it is the way the officers actually spent their time during the stop that counts. *Rodriquez*, 135 S. Ct. at 1616 ("The reasonableness of a seizure . . . depends on what the police in fact do."). We must examine whether the officer's actions unrelated to the traffic stop "measurably extend[ed] the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009).

Investigator Brown's delay in exiting his vehicle and seeing what was going on when Agent Baker was questioning Appellant outside the truck was not related to the mission of the traffic stop. Rather, Brown's diversion of five minutes or less was a detour related solely to Baker's unrelated investigation of the concerned citizen's tip that Appellant was hauling a load of marijuana. *Id.*, 135 S. Ct. at 1615-16. If the Drug Task Force agents had reasonable suspicion to prolong the stop, there is no Fourth Amendment violation. *State v. Feeken*,

2016 OK CR 6, ¶ 6, 371 P.3d 1124, 1126. This requires a showing of specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion that Appellant was involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968). The reasonable suspicion analysis "is dependent upon both the content of information possessed by police and its degree of reliability." *Navarette v. California*, __U.S.__, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014). To evaluate reasonable suspicion, courts look to the totality of the circumstances. *Id.*

Reasonable suspicion is not a high bar. A mere "hunch" is insufficient to establish reasonable suspicion. *Navarette*, 134 S. Ct. at 1687. The level of suspicion needed to show reasonable suspicion "is 'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause[.]" *Id.* (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)). The Supreme Court has held that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Navarette*, 134 S. Ct. at 1688. However, "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 327, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990)).

Moreover, nervous behavior alone by a motorist during a traffic stop is insufficient to warrant reasonable suspicion to search. Yet again, when

combined with other circumstances, it may be sufficient to form reasonable suspicion. *Seabolt*, 2006 OK CR 50, ¶ 10 n.6, 152 P.3d at 238 n.6. Such is the case here. As the traffic stop progressed, the veracity of the concerned citizen's claim that a large amount of drugs was being hauled in the trailer was bolstered by Wood's nervousness. The deficiencies in the concerned citizen's predictions concerning the specific timing and direction of travel by Appellant and Wood were overcome by the informant meeting with the Drug Task Force agents in person, thus providing potential consequences in case of a false tip. *See Navarette*, 134 S. Ct. at 1689-90. Along with Wood's nervousness, the totality of circumstances provided reasonable suspicion to prolong the traffic stop for the brief time it took in this case to transport and deploy the drug dog. *Id.*; *Florida v. J.L.*, 529 U.S. 266, 268, 271-72, 120 S. Ct. 1375, 1377, 1379, 146 L. Ed. 2d 254 (2000); *Alabama v. White*, 496 U.S. 325, 327-32, 110 S. Ct. 2412, 2414-17, 110 L. Ed. 2d 301 (1990). There is no Fourth Amendment violation from the dog sniff and, thus, no plain error. Proposition I is denied.

II

A defendant is entitled to an instruction on his theory of defense where there is *prima facie* evidence supporting it. *Ball v. State*, 2007 OK CR 42, ¶ 29, 173 P.3d 81, 89. *Prima facie* evidence is evidence "good and sufficient on its face," i.e., "sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports." *Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 7, 247 P.3d

1192, 1195 (quoting *Black's Law Dictionary* 1190 (6th ed. 1990)). We review the trial court's decision to reject an affirmative defense instruction for abuse of discretion. *Davis v. State*, 2011 OK CR 29, ¶ 99, 268 P.3d 86, 115; *Barnett v. State*, 2011 OK CR 28, ¶ 6, 263 P.3d 959, 962.

Title 21, O.S.2011, § 155 provides "[t]he involuntary subjection to the power of a superior which exonerates a person charged with a criminal act or omission from punishment therefor, arises from duress." Title 21, O.S.2011, § 156 provides that "[a] person is entitled to assert duress as a defense if that person committed a prohibited act or omission because of a reasonable belief that there was imminent danger of death or great bodily harm from another upon oneself, ones spouse, or ones child."

The record evidence does not support instructions on the defense of duress. We have held that "if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defense will fail." *Smith v. State*, 1985 OK CR 90, ¶ 10, 703 P.2d 201, 202 (quoting *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624, 635, 62 L. Ed. 2d 575 (1980)). In the present case, Appellant "has shown no attempt on his part to escape the alleged threat or to seek the assistance of law enforcement officials, or explore any other alternatives to committing the crime. The Appellant was not being forced to make a split second decision with a loaded gun at his, or his [son's], back." *Smith*, 1985 OK CR 90, ¶ 11, 703 P.3d at 202-03. Under the circumstances,

instructions on the defense of duress were unwarranted. *Id.*, 1985 OK CR 90, ¶¶ 11-12, 703 P.2d at 202-03. Proposition II is denied.

III

We review the district court's denial of a motion for continuance for abuse of discretion. *Warner v. State*, 2001 OK CR 11, ¶ 14, 29 P.3d 569, 574-75. There was no abuse of discretion here. Proposition III is denied.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CHEROKEE COUNTY
THE HONORABLE DARRELL SHEPHERD, DISTRICT JUDGE

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LEWIS, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
SMITH, J.: CONCUR