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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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5 JUAN JOSE LUNA,

6 Appellant,

7 vs.

CASE NO.82792

8 THE STATE OF NEVADA,

9 Respondent.

10 Appeal From The Fourth Judicial District Court
11 Of The State of Nevada
In And For The County Of Elko

12 **RESPONDENT'S ANSWERING BRIEF**

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STATEMENT OF THE CASE

The State accepts Luna's statement of the case with the following additions. Luna was charged with 3 different drug charges to account for the 3 different drugs that he possessed, methamphetamine, heroin and cocaine. JA p. 8-9. Luna alleged that the methamphetamine, heroin, cocaine, drug paraphernalia and firearm were illegally obtained in his Motion to Suppress Evidence. JA p. 88. The district court held a hearing on the motion to suppress on August 7, 2020 at which the State introduced 8 exhibits and 2 witnesses, Jennifer Gardner and Deputy Trice, and the parties stipulated to allow the district court to review the preliminary hearing transcript as well to decide the motion to suppress. JA p. 150, 152-154; RA p. 1-31. Exhibit 1 from the hearing included the body cameras from both law enforcement officers. Id. Exhibit 2 is the dispatch recording. Id.

STATEMENT OF THE FACTS

The district court made findings of fact after reviewing the preliminary hearing transcript, the 8 exhibits admitted at the hearing on the motion to suppress and after hearing from 2 witnesses at the hearing. JA p. 182-185. The court's order denying the motion to suppress details the facts in the videos quite thoroughly, although there are no references to the times on the videos. Id. One of the witnesses referenced, but who did not testify at the motions hearing, was Jacob Elmore, but he did testify at the jury trial. RA p. 34.

On the night of January 18, 2020 at approximately 11 p.m. Jennifer Gardner an employee of the Petro gas station in Wells, NV noticed a black car on one of the fuel islands. JA p. 154-155. The car remained there until her coworker, Jacob Elmore, showed up to relieve her from her shift at midnight on the 19th. Id.; RA p. 35. Her coworker went out and spoke with the people in the vehicle and told them to move, however even after this interaction the black car remained at the fuel island. Id.; RA p. 36. As the car did not move, Ms. Gardner noticed that Deputy Trice and Trooper Bringhurst were in their vehicles parked across the street from the Petro gas station where they had been monitoring a stop sign at the U.S. Highway 93

1 intersection. JA p. 36-37, 155. While there, Deputy Trice had noticed a
2 passenger car sitting at the pumps across the street. JA p. 38.

3 Ms. Gardner decided to alert the officers of the car that would not
4 move off the fuel island and came across the street to speak with the officers.
5 JA p. 38-39, 155. Ms. Gardner indicated to the officers that the car had been
6 there for approximately an hour and a half. JA p. 38-39, 155-156, 182-183.
7 On the body camera Ms. Gardner states that “we’ve asked ‘em to move, but
8 they will not move. They just keep sittin’ there.” JA p. 182-183. She
9 describes the occupants briefly as “kinda weird” and then asks the officers,
10 “So if you would run them off for us, I’d greatly appreciate it.” Id. The
11 officers confirm the car that she is talking about and then cross the street
12 without ever turning on their emergency lights or sirens and park behind the
13 vehicle, although Deputy Trice does activate a white light bar and his
14 headlights, there is also ample overhead lighting from the fuel pump island.
15 JA p. 38-41, 157-158 Deputy Trice runs the vehicle information through
16 dispatch and then contacts the driver. Id.

17 Trooper Bringhurst is on the other side of the vehicle where he
18 contacts the passenger, a female named Allison Cyr, however before doing
19 so he is able to see into the vehicle through the window and sees items of
20 drug paraphernalia, burned pieces of tinfoil and hypodermic needles, on the

1 passenger's lap that she is trying to conceal from Deputy Trice as she
2 interacts with him first. JA p. 20-22, 24.

3 Deputy Trice indicates why he is contacting Luna and Cyr and tells
4 them that he was, "...asked by management to come talk to you guys," and
5 further that "you guys been sittin' here for like an hour and a half at the
6 pump?". JA p. 183; RA p. 1 (Exhibit 1 from the Motions Hearing). Luna
7 and Cyr state they are tired and that neither of them have valid driver's
8 licenses. JA p. 183. Luna indicates that they have driven down from Idaho
9 to see his child in Elko. Id. Luna does provide an ID card which he gives to
10 Deputy Trice who runs the information through dispatch to "...identify who
11 he was for trespassing purposes." JA p. 159. Upon running Luna's
12 information through dispatch, Deputy Trice receives information "almost
13 immediately" from the dispatcher that Luna has an arrest warrant and has
14 several cautions for violence, drugs, escape, assault with a deadly weapon,
15 and obstructing an officer. JA p. 44-45, 184. This is followed by a Sgt.
16 calling out on the radio to Deputy Trice that Luna is known to carry
17 firearms. JA p. 159, 184. Deputy Trice notes several times during the
18 interaction that Luna "kept reaching down and touching something" in front
19 of his seat which concerned Deputy Trice because of the cautions he had
20 received from the dispatcher. JA p. 45, 184.

1 Deputy Trice then instructs Luna with several commands and has him
2 get out of the car, places Luna in handcuffs, and frisks him for weapons. JA
3 p. 46-48. During the frisk the Deputy feels what he immediately recognizes
4 without manipulation a pipe used for smoking methamphetamine. Id. Deputy
5 Trice removes the pipe and arrests Luna for the drug paraphernalia. JA p. 49.
6 Within a short while the warrant was confirmed by dispatch and the Deputy
7 then secures Luna in his patrol vehicle. Id.

8 Trooper Bringhurst on the other side of the vehicle after seeing the
9 paraphernalia on the passenger's lap, gets her out of the car and arrests her
10 for the possession of the paraphernalia. JA p. 23. The passenger is removed
11 prior to Luna. JA p. 46.

12 With both occupants removed and arrested the officers, having found
13 the burnt foil, hypodermic needles, and the pipe, then conduct a search of the
14 vehicle in preparation for an impound. JA p. 50. Trooper Bringhurst goes
15 back to the car to recover the tinfoil and hypodermic needles and
16 additionally finds a plastic tube used to ingest narcotics. JA p. 27-28.
17 During the front driver's seat area search, on the floorboard near the area
18 where Luna had been reaching down and touching the front of his seat,
19 Deputy Trice finds a green bag in which he discovers the drugs in question
20 which consist of approximately 452 grams of methamphetamine, 3 grams of

1 cocaine and approximately 102 grams of heroin. JA p. 51-52, 68-70. Deputy
2 Trice then calls for assistance as this is something new for him and ends up
3 sealing the vehicle and applying for a search warrant that is granted and then
4 later the shotgun is found in the trunk. JA p. 58, 62, 160-161. Incidentally,
5 the shotgun found in the trunk is not brought up at trial nor is Luna or the
6 passenger charged with any crime related to the shotgun in the trunk.

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1 may detain someone where there is reasonable suspicion that the person
2 may have committed, is committing or is about to commit a crime. NRS
3 171.123. That is clearly the case here. The officers do not need proof
4 beyond a reasonable doubt to do so, but merely reasonable suspicion.
5 Jennifer Gardner and her coworker provided all the reasonable suspicion
6 necessary to approach the vehicle with lights flashing, seize the occupants
7 and ascertain their identity for the purposes of a trespass, but the officers
8 didn't even go to that level as they just merely approached and did so in line
9 with a consensual encounter.

10 The encounter, as seen on the body camera video, is filled with polite
11 discussion. JA p. 152-153; RA p. 1. Deputy Trice asks questions and
12 demands nothing or orders nothing until he has heard that Luna has a
13 warrant for his arrest and that there are many cautions associated with
14 Luna's previous dealings with law enforcement. Id. Upon learning this is
15 when Deputy Trice instructed Luna to turn off the car and place his hands
16 upon the steering wheel and eventually to get out of the car. Id.; JA p. 46-
17 48.

18 Now Deputy Trice has two items of articulable suspicion, the trespass
19 issue and the warrant for Luna's arrest as alerted to him by dispatch. A
20 third has also arisen via the collective knowledge doctrine when Trooper

1 Bringhurst finds the paraphernalia on the passenger's lap and pulls her out
2 of the vehicle. Doleman v. State, 107 Nev. 409, 413-414 (1991); JA p. 20-
3 22, 24. A fourth as well has arisen in that both occupants of the vehicle
4 indicate that neither has a valid driver's license and yet they have driven
5 down from Idaho and are headed to Elko from Wells. NRS 483.550; JA p.
6 41-43, 158, 183.

7 Luna argues much about the "oral or written demand" in the
8 trespassing statute. NRS 207.200. However, he fails to acknowledge that
9 to detain Luna and the passenger under NRS 171.123 and thereby be
10 allowed to ascertain Luna's identity which gave rise to the finding of the
11 warrant, only reasonable suspicion is needed, not proof beyond a reasonable
12 doubt of such a "demand." The State would suggest, however, that by
13 Jennifer Gardner telling the officers the following, as seen on the video:

14 "We've asked it to move, and they just keep sitting there."

15 "...been sittin' there for like an hour and a half."

16 "And we've asked 'em to move, but they will not move. They
17 just keep sittin' there."

18 "Yeah, they're kinda weird, too. A little bit. She was writin' in
19 a notebook or sum'n and we couldn't tell what the driver was
20 doing."

"So if you would run them off for us, I'd greatly appreciate it,"

there was clearly reasonable suspicion coupled with the fact that the officers
could clearly see the vehicle sitting at the pump. JA p. 182-183; RA p. 1, 36.
The entire offense is committed in their presence, and they have sufficient

1 evidence to at least investigate it further under NRS 171.123, but based on
2 the evidence they had, there is probable cause to arrest Luna for trespassing.
3 NRS 171.124.

4 Luna goes too far in arguing that Jennifer Gardner is an unreliable
5 informant. The district court listened to her testimony at the motions
6 hearing, watched the body camera video of her request to the officers and
7 deemed her credible. JA p. 182-183. That Ms. Gardner as a lay person and
8 may not use such legal buzz words as 'trespass' or 'detain' or 'reasonable
9 suspicion' is of no consequence. Indicating to the officers that Luna and his
10 passenger had been on the fuel island for over an hour, had been asked to
11 move and they still remained and further that they were 'kinda weird,' in
12 layperson parlance is the basic equivalent. If witnesses to a crime are
13 required to articulate legalese in their reports to be deemed credible the State
14 is unaware of any such authority and Luna has cited none. The officers and
15 the court were reasonable in relying on her report to find reasonable
16 suspicion to allow the officers to detain them even though at the outset, this
17 was not a detainment and did not become one until the passenger was
18 viewed with the paraphernalia and Luna was discovered to have a warrant.

19 Finally, due to the warrant that was outstanding for Luna, even if he
20 was illegally detained, the warrant is a sufficient attenuating intervening

1 event. Torres v. State, 426 P.3d 604 (Nev. 2018) (We previously reversed
2 the judgment of conviction, holding that the attenuation doctrine stated
3 in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975),
4 did not apply because the discovery of an arrest warrant does not originate in
5 an "act of free will" by the defendant. Torres v. State, 131 Nev., Adv. Op. 2,
6 341 P.3d 652, 658 n.6 (2015). But in Utah v. Strieff, 136 S. Ct. 2056, 2061-
7 63, 195 L. Ed. 2d 400 (2016), the Supreme Court applied Brown's three-
8 factor attenuation test to hold that "the discovery of a valid arrest warrant
9 was a sufficient intervening event to break the causal chain between an
10 unlawful stop and the discovery of drug-related evidence on the defendant's
11 person." The Supreme Court then granted certiorari, vacated our decision,
12 and remanded this case "for further consideration in light of Utah v.
13 Strieff." Nevada v. Torres, 136 S. Ct. 2505, 195 L. Ed. 2d 837 (2016).)

14 There is simply nothing wrong with the initial detention of Luna. It
15 was legally permissible under the law and what's more, was in fact a
16 consensual encounter up until the point that Deputy Trice started giving
17 Luna commands to turn off the car, put his hands on the steering wheel and
18 the like, but this is only after the discovery of the warrant and the drug
19 paraphernalia with the passenger. JA p. 46-48. Even if the initial detention
20

1 of Luna were improper, the existence of the warrant attenuates any improper
2 conduct.

3 2. The pat down search for weapons or contraband by Deputy Trice is
4 governed by an inquiry regarding the totality of the circumstances:

5 "...whether an officer has a reasonable suspicion that the driver
6 and any passengers may be armed and dangerous. This "is a fact-
7 specific inquiry that looks at the totality of the circumstances in
8 light of common sense and practicality." United States v. Tinnie,
9 629 F.3d 749, 751 (7th Cir. 2011) (internal quotation omitted)
(discussing Johnson). Reasonable suspicion is measured by an
objective standard. See Ashcroft v. al-Kidd, 563 U.S. 731, 735-
36, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011)."

10 Cortes v. State, 127 Nev. 505, 511, 260 P.3d 184, 189 (2011).

11 In this case Deputy Trice was alerted to multiple dangerous cautions
12 about Luna. JA p. 44-45, 184. Luna had been touching the front of his seat
13 or leaning forward touching something on the floorboard near the front of
14 his seat. Id. There was other drug paraphernalia found with the passenger
15 and the defendant of course had not been heeding the trespass warnings and
16 was liable for arrest for the trespass offense and had a warrant for his arrest.
17 JA p. 20-22, 24, 182-183. All of this together clearly gives Deputy Trice
18 reasonable suspicion that Luna "may" be armed and dangerous. It is not
19 necessary that the officer know that the person is armed and dangerous, just
20 a reasonable suspicion that they may be and that exists here.

1 During the ensuing pat down search for weapons, Deputy Trice did
2 not manipulate the pipe, but rather immediately recognized the shape of the
3 methamphetamine pipe without manipulation and under the "plain feel"
4 doctrine he was justified in removing the pipe. JA p. 46-48, State v.
5 Conners, 116 Nev. 184, 186-87, 994 P.2d 44, 45-46 (2000) (In some
6 instances, however, a police officer conducting a Terry search may seize
7 contraband from the individual where its identification as contraband is
8 "immediately apparent" to the officer. This is analogous to the "plain-view"
9 doctrine, where the officer's means of perception is sight rather than
10 touch. 508 U.S. at 375-376.).

11 Alternatively, this is a search incident to arrest. Chimel v. California,
12 395 U.S. 752, 762-63 (1969); Brinegar v. United States, 338 U.S. 160, 175-
13 176 (1949); State v. Greenwald, 109 Nev. 808, 810 (1993); Rice v. State,
14 113 Nev. 425, 429 (1997). That Deputy Trice told Luna that he was only
15 being detained is irrelevant as probable cause existed to arrest him for the
16 trespassing and the warrant and as a co-defendant for the drug paraphernalia
17 found by Trooper Bringhurst with the passenger either as a co-conspirator or
18 principal to the possession of drug paraphernalia. Plus, even if formal arrest
19 has not occurred, if there is probable cause then the search incident to arrest
20 may precede the arrest. Rawlings v. Kentucky, 448, U.S. 98, 111 (1980). As

1 a search incident to arrest there is no need to go through the “plain feel”
2 doctrine analysis as the officers could search Luna looking for drug
3 paraphernalia similar to what had already been found with the passenger.

4 There was nothing wrong with the pat down search of Luna resulting
5 in the finding of the pipe in his pocket.

6 3. The search of the car was lawful. With both occupants under arrest
7 for possessing drug paraphernalia items, the officers had probable cause to
8 search the vehicle further for drugs. “In the automobile-exception context, a
9 police officer who has probable cause to believe the car contains contraband
10 or evidence of a crime must either seize the vehicle while a warrant is sought
11 or search the vehicle without a warrant. Given probable cause, either course
12 is constitutionally reasonable.” State v. Lloyd, 129 Nev. 739, 750, 312 P.3d
13 467, 474 (2013) See Chambers v. Maroney, 399 U.S. 42, 52 (1970).

14 Luna claims that “exigency” from the State v. Harnisch (Harnisch II),
15 114 Nev. 225 (1998) decision and its progenitors is still required, but that
16 simply is not the law in Nevada anymore.

17 Alternatively, and as these officers did, they could search the vehicle
18 pursuant to an inventory search, which they did and in fact produced an
19 inventory as noted in the exhibits admitted at the motions hearing. JA p.
20 153-154, 160-162; RA p. 23-26. The District Court did not review this

1 particular avenue having found that pursuant to Lloyd the officers were
2 justified in searching the vehicle without having to do the analysis for the
3 inventory. Regardless of the District Court's analysis, it is still a valid
4 avenue for the officers to have gotten into the car and found the drugs that
5 eventually led to the conviction. State v. Greenwald, 109 Nev. 808 (1993);
6 Weintraub v. State, 110 Nev. 287 (1994).

7 Here, Deputy Trice followed the protocols of the policy manual,
8 produced an inventory and found as a result the drugs in the green bag in the
9 front driver's seat floor board. JA p. 153-154, 160-162; RA p. 12-26.

10 The search of the green bag that was found in the car upon searching
11 the car was entirely lawful.

12 CONCLUSION

13 Deputy Trice and Trooper Bringhurst acted lawfully every step of the
14 way in their interaction with Luna and his passenger. The initial encounter
15 was permissible as either a consensual encounter or as a detainment to
16 investigate the trespassing issue. When Luna's identification turned up that
17 he had a warrant and multiple cautions for law enforcement when dealing
18 with him, and Trooper Bringhurst saw the drug paraphernalia that the
19 passenger had, things turned up a notch, to include the ability to search
20 Luna incident to his arrest for the warrant and/or trespass or at least frisk

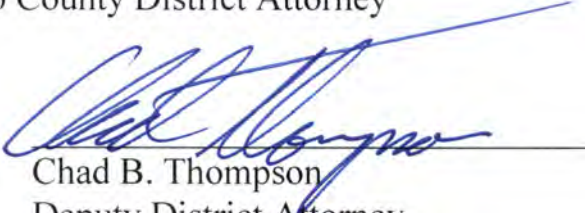
1 him for weapons, which is what the officer did. During the pat down search
2 the pipe was immediately discovered without manipulation. Between the
3 pipe in Luna's pocket and the other items of drug paraphernalia found by
4 Trooper Bringhurst, a probable cause search of the vehicle for drugs was
5 warranted and produced the items for which Luna was prosecuted.
6 Alternatively, due to his arrest on the warrant and the methamphetamine
7 pipe and the passenger also being arrested for possession of drug
8 paraphernalia, the officers could and did search the vehicle pursuant to an
9 inventory search prior to towing and found the drugs that way as well.

10 The district court was correct, and the judgment should be affirmed.

11 RESPECTFULLY SUBMITTED this 25 day of October, 2021.

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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 25 day of October, 2021.

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