IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

RANDY IGNACIO CHARGUALAF
Defendant-Appellant

OPINION

Filed: January 16, 2001

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Supreme Court Case No. CRA00-002
Superior Court Case No. CF0317-97

Appeal from the Superior Court of Guam
Argued and submitted on October 26, 2000
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, JR., Associate Justice, and JOHN A. MANGLONA, Designated Justice.

SIGUENZA, J.:

[1] Randy Ignacio Chargualaf (hereinafter "Chargualaf") was convicted of Second Degree Robbery (as a Second Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, Conspiracy to Commit Robbery (as a Second Degree Felony), and Theft (as a Misdemeanor) after a jury trial in the Superior Court of Guam. Chargualaf appeals his convictions on the following grounds: (1) that the trial court erred when it denied his motion to suppress evidence on the ground that his Fourth Amendment rights were violated; (2) that the trial court erred when it refused to exclude the identification testimony of the victim; and (3) that the convictions should be overturned because the jury returned an inconsistent verdict. For the reasons set forth in this opinion, we reject each of these arguments and hereby affirm his convictions.

I.

[2] At approximately 11:00 p.m. on July 20, 1997, Nobuyo Certeza (hereinafter "Certeza") was robbed at gunpoint in her home by three individuals, two males and one female.[1] The perpetrators took an envelope containing cash and Certeza's purse which contained her wallet and credit card.

[3] At 9:45 a.m. on July 21, 1997, police officer Christopher Dawson (hereinafter "Dawson") of the Guam Police Department, while on routine patrol along Route 1, stopped a car driven by Chargualaf after he noticed that the vehicle had a cracked front windshield and a missing license

[1] One male was cross-dressed and thus appeared to Certeza to be a female.

plate. Candelaria Quidachay Mendiola (hereinafter "C. Mendiola") was the passenger. Dawson testified that Chargualaf looked particularly nervous upon being stopped. He then asked Chargualaf whether there were narcotics or weapons present in the car and Chargualaf said no. Dawson asked if he could search the vehicle and Chargualaf consented. Dawson then directed both Chargualaf and C. Mendiola to step out of the vehicle. At that point, Chargualaf pulled up the door panel and made furtive movements with his hands, out of Dawson's view. Chargualaf explained that he was trying to jimmy the lock to open the vehicle door. Dawson then opened the door from the outside at which point Chargualaf pulled the door shut. Dawson then drew his weapon, opened the door, and ordered Chargualaf to step in front of the car. Chargualaf complied. Unbeknownst to Dawson, Chargualaf had taken a pistol from the car. While Dawson was searching the car, Chargualaf placed the firearm on the ground at the front of the car where he was directed to stand. Dawson inspected the door panel and did not find anything. A back-up police officer, Santo Tomas, arrived and asked Chargualaf whether he had previously given permission to Dawson to search the car for firearms or drugs. Chargualaf answered in the affirmative.

[4] Dawson also requested that C. Mendiola exit the car along with Chargualaf. Upon exiting the car, C. Mendiola carried a black pouch with her. Dawson searched the pouch after getting C. Mendiola's consent, and found a credit card with Japanese Kanji characters, drugs and drug paraphernalia. Santo Tomas then recognized both C. Mendiola and Chargualaf as matching the description of the suspects of the Certeza robbery the previous night. At around 10:00 a.m., Santo Tomas noticed the pistol on the ground at the front of the vehicle, he then drew his weapon and ordered Chargualaf to raise his hands. Dawson then searched Chargualaf's person and cuffed him.

[5] As a result of the above circumstances, Chargualaf was implicated in the Certeza robbery the previous night and was arrested. His room at the Golden Motel was searched which yielded additional evidence linking him with the crime. C. Mendiola was also arrested.

[6] Following his arrest, the police officers took Chargualaf to the Tamuning police koban and, while there, Ms. Certeza arrived to identify the credit card found in C. Mendiola's black pouch. A police officer asked Ms. Certeza, "Is this the guy?" She replied that she did not remember. At that point Mr. Certeza, Ms. Certeza's husband, requested that his wife close her eyes and try to remember. Ms. Certeza then identified Chargualaf as being the perpetrator stating, "Yes, that's him."

[7] At the koban, Chargualaf revealed that Don Allen Borja Mendiola (hereinafter "D. Mendiola") was a participant in the robbery. The police arrested D. Mendiola at his home later that day.

[8] Chargualaf was indicted on July 31, 1997, and charged with one count of Second Degree Robbery (as a Second Degree Felony), a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, one count of Conspiracy to Commit Robbery (as a Second Degree Felony), one count of Theft (as a Misdemeanor), one count of Possession of a Firearm Without an Identification Card, and one count of Possession of a Concealed Firearm. Also charged in the Indictment were Co-Defendants, C. Mendiola and D. Mendiola.

[9] Chargualaf filed a motion to dismiss and suppress the evidence obtained as a result of the traffic stop detention and arrest on Fourth Amendment grounds. Chargualaf also filed a motion to exclude the in-court identification testimony by Ms. Certeza. The lower court denied both motions. Prior to trial, the two co-Defendants entered into Plea Agreements whereby each pleaded guilty to

one count of Robbery in exchange for testimony against Chargualaf.

[10] A jury trial was held on November 1-9, 1999. The jury found Chargualaf guilty on the Second Degree Robbery, the Special Allegation, Conspiracy and Theft counts, and acquitted on the Possession of a Firearm Without an Identification Card and Possession of a Concealed Firearm counts. The court sentenced Chargualaf on February 1, 2000, and filed its written judgment on March 9, 2000, which was entered on the docket on March 15, 2000. Chargualaf filed a Notice of Appeal on March 15, 2000.

II.

[11] We have jurisdiction over this appeal pursuant to Title 8 GCA § 130.15(a) (1993) and Title 7 GCA §§ 3107 and 3108 (1994).

III.

A. Fourth Amendment Search and Seizure

[12] Chargualaf appeals the trial court's denial of his motion to suppress evidence. He claims his Fourth Amendment right to be free from unreasonable searches and seizures was violated when Officer Dawson detained him and searched his vehicle, and that such violation warrants the exclusion of all evidence which resulted from the search and seizure. We review a trial court's decision on a defendant's motion to suppress evidence *de novo*. *People v. Hualde*, 1999 Guam 3, ¶ 19. Where a motion to suppress is grounded on a Fourth Amendment violation, the issue of the lawfulness of a search or seizure is reviewed *de novo*. *See People v. Manibusan*, 1990 WL 320756, **3 (D. Guam App. Div. Feb. 16, 1990) ("The court reviews findings of probable cause, exigent

circumstances, and the overall lawfulness of a search *de novo*.") (citations omitted); *United States v. Botero-Ospina*, 71 F.3d 783, 785 (10th Cir. 1995).

[13] We hold, as a matter of law, that Chargualaf's Fourth Amendment rights were not violated and the trial court's denial of his motion to suppress was therefore proper.

[14] The Fourth Amendment protects against unreasonable searches and seizures and is made applicable to Guam via section 1421b(c) of the Organic Act of Guam. *See People v. Johnson*, 1997 Guam 9, ¶ 4. "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular government invasion of a citizen's personal security'." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968)). Every search or seizure must be reasonable under the circumstances to pass muster under the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772 (1996). A search or seizure made without a warrant is presumed to be unreasonable. *See Pennsylvania v. Strickler*, 757 A.2d 884, 888 (Pa. 2000) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973)). In the absence of a warrant, the police may lawfully conduct a search or seizure only if an exception to the warrant requirement applies. *See id.*; *see generally United States v. Woodrum*, 202 F.3d 1, *6 (1st Cir. 2000) (recognizing that reasonable suspicion of criminal activity and voluntary consent are two situations which justify the seizure of the person in an automobile absent a warrant) (citations omitted). Voluntary consent is a recognized exception to the warrant requirement. *See People v. Santos*, 1999 Guam 1, ¶ 33 (citations omitted).

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[15] In the instant case, Chargualaf gave consent to search his vehicle. Thus, the issue is whether Chargualaf's consent was valid. If consent is given during either a lawful encounter or a lawful detention, as opposed to an illegal seizure, the validity of the consent turns on whether it was voluntarily given. *See Santos*, 1999 Guam at ¶¶ 33-34; *Strickler*, 757 A.2d at 888-889. Where the consent is given during an unlawful detention, all evidence that is the fruit of the search must be suppressed "absent a demonstration by the government both of a sufficient break in the causal chain between the illegality and the seizure of evidence, thus ensuring that the search is not an exploitation of the prior illegality, and of voluntariness." *Strickler*, 757 A.2d at 889 (citing *Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319, 1323, 1326 (plurality opinion)).

i. Illegal detention at time of consent

[16] Our first inquiry is whether Chargualaf was illegally detained at the time he gave his consent. Chargualaf argues that while the initial detention for purposes of the traffic violation was valid, he was subsequently illegally detained when the police questioned him about the presence of drugs or weapons in the vehicle. He further argues that this illegal detention tainted his consent. We agree that the initial detention was valid; however, we disagree that Chargualaf was detained at the time he gave his consent.

a. Initial detention

[17] It is clear that the act of pulling Chargualaf over for the traffic violation was a seizure. *See Whren*, 517 U.S. at 809-10, 116 S.Ct. at 1772 (citations omitted); *see also Woodrum*, 202 F.3d at *5 (citations omitted); *United States v. McSwain*, 29 F.3d 558, 561 (10th Cir. 1994) (citation omitted). It is equally clear that this initial detention was reasonable and within the bounds of permissible action under the Fourth Amendment. "As a general matter, the decision to stop an

automobile [without a warrant] is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810, 116 S.Ct. at 1772 (citations omitted). Further, it is reasonable to stop a car where the police merely have reasonable suspicion to believe the driver has committed a traffic violation. *See United States v. Lopez-Soto*, 205 F.3d 1101, 1104-05 (9th Cir. 2000) ("We [ ] reaffirm that the Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops."); *cf. Mimms*, 434 U.S. at 109, 98 S.Ct. at 332 (stating that it is entirely proper to stop and detain a driver who violated a provision in the state motor vehicle code).

[18] Here, the police stopped Chargualaf for a cracked front windshield and a missing front license plate. The parties do not dispute that the pull over constituted a valid detention.

b. Continuing detention

[19] The next inquiry is whether the initial detention for the traffic violation ended and, if so, whether Chargualaf was subjected to a subsequent detention. Officer Dawson's inquiry into whether Chargualaf possessed drugs or weapons, while constitutionally permissible, strongly indicates that the original investigation of the traffic violation ended. *See United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (recognizing that the mere questioning of a detainee is neither a search nor a seizure but may indicate that the justification behind the initial detention has evaporated). At that point, Dawson was inquiring into illegal activities unrelated to the traffic violations.

[20] Investigative questioning regarding criminal activity does not, in itself, implicate the Fourth Amendment. *See Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983) (plurality opinion). The Fourth Amendment protects against unreasonable searches and seizures. Accordingly, the Fourth Amendment is only at issue where the police detain or seize an individual

while posing investigative questions. *See id.* Because, in this case, the police had ended its investigation into the traffic stop and initiated a new, albeit limited, investigation, we must determine whether Chargualaf was detained or was subjected to a second seizure when being questioned regarding the presence of drugs or weapons and while Chargualaf gave consent immediately following the investigation into drugs or weapons.

[21] A seizure occurs where a reasonable person would not believe he is free to leave. *See Manibusan*, 1990 WL 320756 at **4 (citing *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988)); *see also People v. Cruz*, 1997 WL 208994, **3 (D. Guam App. Div. April 21, 1997). "A person is deemed to be seized for the purposes of the Fourth Amendment if a police officer has, by means of physical force or show of authority, restrained the person's freedom to walk away." *Cruz*, 1991 WL 208994 at **3 (citation omitted); *see also Woodrum*, 202 F.3d at *9. In determining whether a person was seized, a court views the totality of the circumstances. *See People v. Brownlee*, 713 N.E.2d 556, 564 (Ill. 1999). If the person would feel free to leave, then the continued presence of the person is not a seizure; rather, it is a consensual encounter with the police that does not implicate the Fourth Amendment. *See United States v. Soto*, 988 F.2d 1548, 1557 (10th Cir. 1993) (citing *Florida v. Bostick*, 501 U.S. 429, ---, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991)); *Strickler*, 757 A.2d at 901, fn. 27.

[22] In *Strickler*, 757 A.2d 884, the court found that the defendant was not seized. The court recognized that in the context of a post-detention interaction, (i.e., after the initial lawful detention ends), "the failure by law enforcement to inform a citizen that he or she is free to terminate the encounter is a significant factor suggesting a continued seizure under the Fourth Amendment." *Id.* at 899 (internal quotations and citations omitted). The *Strickler* court found that while the police

did not tell the driver he was free to terminate the encounter, the defendant-driver was not subjected to a seizure because the police officer's actions and the tone of the encounter suggested that the driver was free to go. *Id.* at 900. Relevant factors included: the fact of returning the driver's documentation, the fact that the initial investigative detention was less intrusive than a normal traffic stop because the police did not have to order the driver out of the car as the driver was already outside the vehicle; there was no show of weapons or use of language or tone unwarranted under the circumstances; and the police told the driver he had a right to refuse to consent to the search. *Id.*

[23] Circumstances illustrating a seizure are found in *Cruz*, 1997 WL 208994 at **5, where the defendant was stopped at a roadblock. The court found that assuming this initial seizure at the roadblock was constitutional, "any continuing seizure [beyond the reason for the roadblock] must be independently justified." *Id.* (citing *Terry*, 392 U.S. at 16). The court determined that the defendant was seized when further questioned because "her driver's license was never returned to her; she was unable to drive forward because the street was blocked by several cars, including a police car with its top lights flashing; . . . and she was surrounded by six law enforcement officers who were under instructions not to allow her to leave." *Id.*

[24] In the present case, while Dawson held Chargualaf's driving documentation while questioning regarding the presence of drugs or weapons and while asking for consent to search, this fact, standing alone, does not amount to a seizure of Chargualaf. The overall circumstances of the encounter show that Chargualaf was not seized or detained at the time he gave his consent. Like *Strickler*, there is no showing in the record that Dawson was overly aggressive during the initial detention. Dawson did not pull out his firearm during the initial detention for the traffic violation

or use language incommensurate with the circumstances. Chargualaf was also inside the vehicle at the time he consented. Unlike the defendant in *Cruz*, Chargualaf was not blocked into his parking spot by police cars, nor was he surrounded by police officers instructed to keep him at the scene. The absence of coercive behavior by the police objectively show that Chargualaf was free to end the encounter and proceed on his way. Absent other coercive behavior on the part of the police, we cannot say that a person does not feel free to leave by virtue of the fact that the officer held his license and registration. There is nothing exceptional about a person requesting the return of their documentation and leaving upon an officer's initiation of questions regarding matters outside the scope of the traffic violation.[2] The encounter between Chargualaf and Dawson was a mere consensual encounter and not a detention, thus, the Fourth Amendment is not implicated.[3]

ii. Voluntariness of consent

[25] Having decided that Chargualaf was not seized or detained, the next inquiry is whether his consent was voluntary. The government has the burden to prove by a preponderance of the evidence that Chargualaf gave consent voluntarily, and voluntariness is determined from the totality of the circumstances. *See Santos*, 1999 Guam 1 at ¶¶ 33- 34; *Shabazz*, 993 F.2d at 438. Factors in determining voluntariness include: 1) whether the defendant was detained and the length of time of the questioning; 2) whether the defendant was threatened or intimidated by the police; 3) whether the defendant relied on misrepresentations or promises made by the police; 4) whether the person

[2] We note that a police officer's refusal to return the documents upon request is the type of coercive behavior that would likely lead to a finding that a seizure has been affected.

[3] So long as a driver fells free to leave, a police officer may asks questions regarding criminal activity absent reasonable suspicion. The police may question the driver about the presence of drugs or weapons or whether he has been drinking alcohol or possesses alcohol inside the vehicle. The driver is not required to answer such questions, *see Royer*, 460 U.S. at 497-98, 103 S.Ct. at 1324, just as surely he is not required to submit to a request to search.

was in custody or under arrest when the consent was given; 5) whether the person was in a public or a secluded place; and 6) whether the defendant objected to the search. *Santos*, 1999 Guam 1 at ¶ 36.

[26] While finding that Chargualaf's consent was valid, the trial court wholly failed to determine whether such consent was voluntary. However, because the record is adequate, we proceed to determine whether the consent was voluntary viewing the totality of the circumstances. *Accord McSwain*, 29 F.3d at 562 (relying on a sufficient record of the proceedings below to make a determination of whether the defendant's consent was tainted by a preceding illegal detention notwithstanding that the trial court failed to make the analysis).

[27] We find that in the totality of the circumstances, Chargualaf's consent was voluntary. First, Chargualaf was not detained at the time he consented and Dawson's questioning was only for a brief period. Second, the record reveals that Dawson did not assert any coercive behavior when questioning Chargualaf and prior to asking for consent. Third, Dawson did not make any representations regarding the consent to search, Dawson merely asked for consent and nothing more. Fourth, Chargualaf was not in custody or under arrest when he gave consent. Finally, Chargualaf made absolutely no objections to the search, rather, he readily granted consent and even verified to a second officer, Santo Tomas, that he had given consent. Viewing all the circumstances, we hold that Chargualaf voluntarily gave consent and therefore find that the trial court did not err in denying Chargualaf's motion to suppress. *Cf. Soto*, 988 F.2d at 1558 (determining that consent was voluntary where only one police officer was present, the police officer did not unholster his weapon, did not use an insisting tone or manner or physically harass the defendant, the request for consent occurred on the shoulder of the highway and in public view, and the defendant's consent was

unequivocal and specific).

B. Inconsistent Verdicts

[28] The jury found on the Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, and acquitted Chargualaf on the counts of Possession of a Firearm Without an Identification Card and Possession of a Concealed Firearm. Chargualaf asserts that the finding on the Special Allegation was inconsistent with the acquittals, thereby showing that the finding was based on insufficient evidence and must therefore be overturned. We disagree.

[29] We review the issue of whether to set aside a conviction based on an inconsistent verdict *de novo*. *See People v. Angoco*, 1996 WL 875777, **6 (D. Guam. App. Div. Oct. 16, 1996) (citing *United States v. Hart*, 963 F.2d 1278 (9th Cir. 1992)); *see also United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998) (recognizing that the issue of whether inconsistent verdicts render a conviction improper constitutes a question of law and is reviewed *de novo*).

[30] A conviction generally may not be overturned solely on the ground that the jury reached an inconsistent verdict. *United States v. Powell*, 469 U.S. 57, 68-69, 105 S.Ct. 471, 479 (1984); *see also Angoco*, 1996 WL875777 at **6 (holding that *Powell* requires the court to reject the appellant's claim that the conviction should be vacated due to an inconsistent verdict); *United States v. McCall*, 85 F.3d 1193, 1197-98 (6th Cir. 1996) (holding that even if the verdict was inconsistent, the conviction "remains 'insulated' from review") (citing *Powell*, 469 U.S. at 69, 105 S.Ct. at 479); *United States v. Birges*, 723 F.2d 666, 673 (9th Cir. 1984); *United States v. Torres*, 809 F.2d 429, 431-32 (7th Cir. 1987). The rationale behind the rule is set forth in *Powell*, wherein the court asserted:

> [W]here truly inconsistent verdicts have been reached, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt" . . . . It is equally possible the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Powell, 469 U.S. at 64-65, 105 S.Ct. at 476 (internal citations omitted). Courts should accept the collective judgment of the jury and should refrain from delving into the jurors' thought processes. *See id*. 469 U.S. at 67, 105 S.Ct. at 478.

[31] Inconsistent verdicts are not a bar to a conviction so long as there is sufficient evidence to support the guilty verdict. *United States v. Gieger*, 190 F.3d 661, 664 (5th Cir. 1999) (citations omitted); *see also Birges*, 723 F.2d at 673 ("Inconsistent verdicts may stand, even when a conviction is rationally incompatible with an acquittal, provided there is sufficient evidence to support the guilty verdict.") (citations omitted); *Bates v. Maryland*, 736 A.2d 407, 416 (Md. Ct. Spec. App. 1999) (holding that one instance where an inconsistency will not be permitted is where "the evidence was insufficient to support the [ ] conviction."); *Mitchell*, 146 F.3d at 1345 ("[A]s long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count.").

[32] In this case, we find no inconsistency in the jury's verdict. Chargualaf was indicted for possessing a concealed firearm and possessing a firearm without a license on or about the July 21, 1997 and for a Special Allegation of possessing a firearm in the commission of the robbery on or about July 20, 1997, in violation of section 80.37 of Title 9 of the Guam Code Annotated, which provides: "Whoever unlawfully possesses or uses a deadly weapon in the commission of a felony punishable under the laws of Guam shall, in addition to the punishment imposed for the commission

of such felony, be imprisoned for a term not less than five (5) years . . . ." Title 9 GCA § 80.37 (1996).

[33] The jury's acquittal on the firearm charges is not inconsistent with the finding on the Special Allegation that Chargualaf possessed a deadly weapon during the commission of the Certeza robbery. The charges were for different offenses allegedly committed on different days. The jury could have decided that Chargualaf did not possess and conceal the firearm recovered during the July 21, 1997 traffic stop and still determine that Chargualaf possessed or used a deadly weapon during the July 20, 1997 robbery.

[34] In fact, we find there was sufficient evidence to make a finding on the Special Allegation. Certeza and D. Mendiola both testified that Chargualaf wielded a firearm during the robbery. C. Mendiola, who was also present during the robbery, testified that during the robbery Chargualaf was holding an object and was waiving it around. This evidence supports a finding on the Special Allegation that the defendant used a deadly weapon during the commission of the robbery. *See Gieger*, 190 F.3d at 664. Therefore, the jury's finding on the Special Allegation will stand.

C. In-Court Identification

[35] Chargualaf asserts that the trial court erred in denying his motion to suppress the in-court identification by Ms. Certeza. He argues that the admission of the identification evidence was a violation of his due process rights. A trial court's decision regarding the admission of an in-court identification is reviewed for an abuse of discretion. *See United States v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993). "A trial judge abuses his [or] her discretion [ ] when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could

have rationally based the decision." *Midsea Industrial Inc. v. HK Engineering, Ltd.*, 1998 Guam 14, ¶ 4 (citation omitted). We hold that the trial court properly admitted the in-court identification.

[36] In determining the admissibility of an in-court identification, we must make two inquiries. First, whether the defendant has proven that the pre-trial identification was unnecessarily suggestive, and second, if so, whether the in-court identification was nevertheless sufficiently reliable viewing the totality of the circumstances. *See United States v. Hill*, 967 F.2d 226, 230 (6th Cir. 1992); *see also Burkett v. Fulcomer*, 951 F.2d 1431, 1448 (3d Cir 1991) ("The general inquiry is whether the procedure was unnecessarily suggestive, and if so, whether its corrupting influence outweighs the reliability of the identification testimony.") (citations omitted); *Ford v. Armontrout*, 916 F.2d 457, 459 (8th Cir. 1990); *Archuleta v. Kerby*, 864 F.2d 709, 711 (10th Cir. 1989); *Ponce v. Cupp*, 735 F.2d 333, 336 (9th Cir. 1984). If the defendant fails to show that the identification procedures were impermissibly suggestive, or if the totality of the circumstances indicates that the identification was sufficiently reliable, then there has been no due process violation by the admission of the identification evidence. *Hill*, 967 F.2d at 230.

[37] A pre-trial identification can be so suggestive that it taints the in-court identification. *See United States v. Montgomery*, 150 F.3d 983, 991 (9th Cir. 1998) (quoting *United States v. Bagley*, 772 F.2d 482, 492 (9th Cir. 1985)). However, where an in-court identification is sufficiently reliable, the identification is admissible notwithstanding that the identification was made pursuant to an unnecessarily suggestive pre-trial identification procedure. *See id.* at 993; *see also Cossel v. Miller*, 2000 WL 1511702, *5 (7th Cir. 2000) ("An in-court identification that follows an impermissibly suggestive pre-trial identification is admissible if under the 'totality of the circumstances' the in-court identification was reliable.") (citations omitted). A court may admit a

sufficiently reliable in-court identification without offending the defendant's right to due process. Determinations of reliability are case-specific, and are adjudged looking at the totality of the circumstances. *See Montgomery*, 150 F.3d at 993*; see also United States v. Brown*, 200 F.3d 700, 707 (10th Cir. 1999) ("The admission of an in-court identification testimony violates due process only when, under the totality of the circumstances, it was tainted by unnecessarily suggestive pretrial identification procedures creating a 'very substantial likelihood of misidentification'.") (citation omitted).

[38] In the instant case, the trial court held that the pre-trial identification procedure at the koban was "unnecessarily suggestive".[4] Because Chargualaf does not contest this finding, the only remaining issue is whether the trial court erred in determining that notwithstanding the suggestibility, the identification was sufficiently reliable so as to render admissible the in-court identification.

[39] Courts consider five factors in determining whether an in-court identification is reliable. These are: "[1] the opportunity of the witness to view the criminal at the time of the incident; [2] the witness' degree of attention; [3] the accuracy of the witness' prior description of the defendant; [4] the level of certainty demonstrated by the witness at the [pre-trial identification]; and [5] the length of time between the crime and the [pre-trial identification]." *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382 (1972); *see also Ponce*, 735 F.2d at 337-38 (clarifying that in evaluating the

[4] Factors in the record that suggest that the pre-trial procedure was "suggestive" are that the defendant was the only person in the koban besides police officers and the victim and her husband, the encounter amounted to a show-up instead of a line-up, the encounter was at the police station, and Chargualaf was in police custody. *Cf. United States v. Brierton*, 699 F.2d 917, 924 (7th Cir. 1983) (acknowledging that because there was a show-up instead of a line-up, the identification was made in a police station, various high ranking police officers were present, the defendant was in a jail cell at the time of the identification, and the defendant was the only black man present, the identification procedure was highly suggestive).

reliability of an in-court identification, the reviewing court must consider the witness' level of certainty at the *prior confrontation*, not the in-court identification, and the amount of time which elapsed between the crime and the *pre-trial identification*, not the in-court identification); *Brown*, 200 F.3d at 707; *Hill*, 967 F.2d at 230; *Cossel*, 2000 WL 1511702 at * 5; *Archuleta*, 864 F.2d at 711; *Ponce*, 735 F.2d at 336; *United States v. Brierton*, 699 F.2d 917, 924 (7th Cir. 1983). The court must determine whether the in-court identification was based upon the witness' recollection of the defendant from the time of the crime, rather than on the suggestive nature of the pretrial identification. *See United States v. Johnson*, 859 F.2d 1289, 1294 (7th Cir. 1988) (citation omitted); *Brierton*, 699 F.2d at 924-25 ("The propriety of admitting into evidence the identification testimony . . . depends, therefore, upon whether [the witness'] in-court identification was reliable, that is, based on a source independent of the police suggestion.") (footnote omitted). The government has the burden to prove, by clear and convincing evidence, that the in-court identification was not based upon the suggestive pre-trial identification procedure. *See Brierton*, 699 F.2d at 925 (citing *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967)).

[40] Whether an in-court identification is sufficiently reliable so as to warrant its admission is determined by weighing the *Biggers* factors against the corrupting effect of the suggestive pre-trial identification procedure. *See Ponce*, 735 F.2d at 337, 338 (applying this balancing test in analyzing the reliability of both a pre-trial and in-court identification); *see also Hill*, 951 F.2d at 459. If the identification is sufficiently reliable, then the court may properly admit the evidence because the reliability of the identification undercuts any substantial likelihood of irreparable misidentification. *See Armontrout*, 916 F.2d at 459 (using the *Biggers* reliability factors in determining that the confrontation between the rape victim and the defendant did not create a substantial likelihood of

misidentification). "It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which [is] the basis of the exclusion of evidence. . . ." *Biggers*, 409 U.S. at 198, 93 S.Ct. at 381- 82 (1972).

[41] Analyzing the first *Biggers* factor, the question is whether Ms. Certeza had a good opportunity to view Chargualaf during the robbery. At the hearing regarding the motion to suppress the in-court identification, Ms. Certeza testified that the three robbers entered her house at around 11:00 p.m., and remained in her home for about five to eight minutes. She testified that she got a good look at the three assailants. This amount of time is enough to get a good view of Chargualaf. Further, Ms. Certeza testified that during the incident the lights were bright because she was cooking dinner. Therefore, we find that Certeza had more than sufficient opportunity to view Chargualaf. *Cf. Archuleta*, 864 F.2d at 712 (determining that the identifying witness had ample opportunity to identify the defendant where the witness got a good look at the defendant's face even if only for a total observation time of two minutes) (citing other cases where an observation made in a matter of seconds was sufficient so long as the witness got a close-up look at the defendant) (citations omitted); *Cossel*, 2000 WL 1511702 at * 5 (determining that a ten-second observation of the defendant in moon and street lights satisfies the first factor).

[42] Turning to the witness' degree of attention, Ms. Certeza was able to recall many events of the encounter, such as that the first entrant, a woman, asked her to use the phone, a second woman entered with her shoes on, and that Ms. Certeza asked her to take her shoes off. Further, she was able to recall that Chargualaf had a gun, wore certain colors of clothing and had a moustache. The ability to remember details like this is a demonstration of her focus during the encounter. *Cf. Archuleta*, 864 F.2d at 712 (recognizing that the ability to recall a number of descriptive details is

sufficient to satisfy the second factor).

[43] Next, the accuracy of the witness' prior identification of the defendant leads us to similarly conclude that her in-court identification was reliable. As stated above, Ms. Certeza testified that she described the only man of the three as Chamorro, holding a gun, wearing a hat, a dark green polo shirt, and black pants, he had a moustache, black hair, and a tattoo. While cross-examination revealed that Ms. Certeza never mentioned Chargualaf's tattoo to the police, the general level of description shows that Ms. Certeza was accurate in her description of Chargualaf. *Cf. id.* (holding that the witnesses' identification was accurate where they described the victim as "a Spanish male with dark hair and a moustache, wearing a black t-shirt with an emblem and blue jeans".) The failure to recall a detail like the tattoo is not dispositive here. *Cf. id.* (determining that in light of the other details the witness was able to recall, the fact that the height was inaccurate and the failure to recall tattoos "appears to be a minor error"); *see also Dodd v. Nix*, 48 F.3d 1071, 1074 (8th Cir. 1995) (holding that the victim's failure to describe a goatee and tattoos was not fatal to the reliability determination where the description of the defendant was otherwise largely accurate) (citation omitted).

[44] Additionally, Certeza's level of certainty at the pretrial identification favors a finding that her in-court identification was reliable. Ms. Certeza testified that the police asked her whether the Chargualaf was "the guy"[5] The record shows that Certeza initially responded that she did not remember if Chargualaf was her attacker, but identified him after her husband told her to close her eyes and think hard about it. Ms. Certeza testified that she identified Chargualaf at the police koban

[5] As a note, Ms. Certeza first testified that the police did not ask her to identify Chargualaf, however, she clarified that the police in fact asked her whether Chargualaf was "him", in which she responded in the affirmative. Transcript, vol. 1, pp 53-55 (Motion to Suppress Identification Hearing, May 14, 1999).

because she remembered his face, and not because the police suggested that Chargualaf was the robber. Although Ms. Certeza did not definitely identify Chargualaf at first sight, she has never identified anyone else as her attacker. *Cf. Archuleta,* 864 F.2d at 712 (rendering significant the fact that the witness was certain about the defendant's identity and that the identification remained "unequivocal at all times").

[45] Finally, Ms. Certeza identified Chargualaf the day after the robbery. This is a relatively short amount of time and thus supports the conclusion that the in-court identification was reliable. *Cf. Montgomery,* 150 F.3d at 993 (implicitly finding that one year between the incident and the identification did not cut against reliability); *Ponce*, 735 F.2d at 337 (recognizing that in *Manson v. Brothwaite,* 432 U.S. 98, 116, 97 S.Ct. 2243, 2253 (1977), an identification made two days after the incident was "unobjectionable"); *Cossel*, 2000 WL 1511702 at *6 (determining that three years was too long).

[46] The trial court pointed out many of the above factors in determining that the in-court identification was reliable. Thus, we cannot say that the court's finding of reliability by clear and convincing evidence was erroneous.

[47] We further find that the in-court identification was sufficiently reliable so as to warrant its admission. Because the facts in this case favor a finding of reliability under each of the *Biggers* factors, the reliability of the identification outweighs the corrupting effect of the suggestive pre-trial identification procedure. The pre-trial identification procedure did not produce a substantial likelihood of misidentification. Accordingly, the lower court did not abuse its discretion in admitting the in-court identification.

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IV.

[48] We find that there was no Fourth Amendment violation, that the jury in this case did not reach inconsistent verdicts, and that the in-court identification was sufficiently reliable. Accordingly, we **AFFIRM** the trial court's denial of the Appellant's motions to suppress the evidence and in-court identification and the judgment of conviction.

PETER C. SIGUENZA, JR.
Associate Justice

JOHN A. MANGLONA
Designated Justice

CRUZ, C.J., Dissenting:

[49] Chargualaf was pulled over because his vehicle had a cracked windshield and was missing a license plate. There is no question that this initial stop was a seizure and that it was constitutionally permissible. *See e.g.*, *Whren*, 517 U.S. at 809-810, 116 S.Ct. at 1772. However, the Majority, while admitting that the initial traffic violation detention ended, finds that there was no new seizure of Chargualaf when Officer Dawson began questioning him on subject matter completely unrelated to the initial pull-over and that the subsequent exchange was merely a consensual encounter. I do not agree.

[50] I find that a second seizure occurred when Officer Dawson began to question Chargualaf on narcotics and weapons. The test for whether a seizure has been effected involves a determination of whether, in the light of all surrounding circumstances, a reasonable person would have believed he was free to leave. *Royer*, 460 U.S. at 501, 103 S.Ct. at 1326 (citing *United States v. Mendenhall*, 466 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980)). In this case, after the pull-over, Officer Dawson requested and was given Chargualaf's driver's license and vehicle registration. These documents were never returned Chargualaf. Officer Dawson informed Chargualaf of the reasons for the pull-over. There is no indication from the record that Officer Dawson then told Chargualaf he was going to be issued a citation or a warning. Instead, Officer Dawson then asked if there were any drugs or weapons in the vehicle. Clearly, a reasonable person could have thought that the traffic stop was still in effect, that such questions were part of the stop, and that he was not free to leave. This is especially true given that Officer Dawson had not returned Chargualaf's license and registration. *See e.g.*, *Soto*, 988 F.2d at 1557 (observing that a driver who is pulled over cannot drive away without a license and registration which are required by law to operate a motor vehicle on a public

road). Thus, the second seizure cannot be characterized as merely a consensual encounter during which a police officer may generally ask questions of the individual without a reasonable suspicion. *See Florida v. Bostick*, 501 U.S. 429, 433-435, 111 S.Ct. 2382, 2386 (1991).[6]

[51] The question becomes whether the second seizure was constitutional. I believe it was not. Officer Dawson testified that the reason he asked if there were drugs or weapons in the car was because Chargualaf was more nervous than other drivers he had encountered in normal pull-overs. This testimony offers little support. Concededly, Officer Dawson was within his authority to question Chargualaf on weapons or to even ask him to alight from the vehicle if Officer Dawson feared for his safety. *See Mimms*, 434 U.S. at 111, 98 S.Ct. at 333. However, Officer Dawson's question regarding narcotics indicates that he was not merely motivated by fear, but that he was investigating Chargualaf for other reasons.

[52] The next inquiry is whether Officer Dawson had a reasonable and articulable suspicion that criminal activity, namely the possession of illegal narcotics, was afoot. *See Johnson*, 1997 Guam 9, at ¶ 4 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Officer Dawson testified that his suspicions were aroused by Chargualaf's nervousness and the presence of a large amount of household items in the rear of the vehicle. However, nervousness, by itself, does not usually give rise to a reasonable suspicion. *See Soto*, 988 F.2d at 1556 (citing *United States v. Walker*, 933 F.2d 812 (10th Cir. 1991) and finding that nervousness with other factors may give rise to a reasonable suspicion). Further, I cannot see how the additional fact that household items were in the car can support a reasonable suspicion. Under these circumstances, I cannot find that Officer Dawson had a reasonable

[6] The same holds true for the initial detention for Chargualaf's traffic violations. This was also not a consensual encounter, it was a detention, the scope of which should have been tailored to its underlying justification and the length of which should have lasted no longer than necessary to effect the purpose of the stop. *Royer*, 460 U.S. at 500, 103 S.Ct. at 1325.

suspicion to question Chargualaf on narcotics. Thus, I must conclude that the second seizure of Chargualaf violated his Fourth Amendment right to be free from an unreasonable seizure.

[53] Notwithstanding an illegal seizure, a subsequently given consent remains valid if it was voluntary in fact under the totality of the circumstances. *McSwain*, 29 F.3d at 562. Three factors annunciated by the United States Supreme Court are relevant in this analysis: 1) the temporal proximity of the illegal detention and consent; 2) any intervening circumstances; 3) the purpose and flagrancy of the office's unlawful conduct. *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262 (1975) (citations omitted).

[54] From his testimony, it appears that Officer Dawson asked for consent to search the vehicle immediately after Chargualaf denied having drugs or weapons in the car. Chargualaf gave his consent, and Officer Dawson asked him to step out of the vehicle. Mere moments passed between the time the illegal seizure occurred and the time Officer Dawson asked for consent. Almost no time passed by the time consent was given and no intervening circumstances occurred. I note that had Officer Santo Tomas arrived prior to Chargualaf's consent and identified the vehicle occupants as fitting the descriptions of persons involved in the Certeza robbery, then a valid intervening circumstance would have occurred sufficient to support a further search and the consent would have been valid. However, Officer Santo Tomas arrived after the occupants were ordered out of the vehicle and after the search had commenced. Thus, his identification of the occupants after the search began does not cure its illegality.

[55] The flagrancy of Officer Dawson's conduct is clear as the initial stop was made strictly on the basis of a traffic violation and an investigation for narcotics ensued. That Chargualaf confirmed his consent to Officer Santo Tomas, offers no support. Officer Santo Tomas arrived at the scene

after Chargualaf gave his involuntary consent. Chargualaf's confirmation does nothing to validate the unconstitutional search.

[56] I must find therefore that Chargualaf's consent was not voluntarily given and that any evidence flowing therefrom is fruit of the poisonous tree and should have been suppressed. Thus, I respectfully dissent.

BENJAMIN J. F. CRUZ
Chief Justice