

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR 09-1338

MARCUS LEVERN ALLEN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered May 12, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR2008-148]

HONORABLE HERBERT WRIGHT,
JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

In a bench trial, the Pulaski County Circuit Court found appellant Marcus Allen guilty of simultaneous possession of drugs and a firearm and possession of cocaine with intent to deliver, for which the court sentenced appellant as an habitual offender to concurrent terms of fifteen years in prison. For reversal, appellant argues that the trial court erred in denying his motions to suppress and to dismiss. We affirm.

The record of trial discloses that Officer Mark Isom of the Little Rock Police Department stopped appellant's vehicle on Geyer Springs Road on November 19, 2007. He initiated the traffic stop after observing appellant hastily enter the roadway from a gas station with the tires spinning and the truck skidding from side to side. Isom testified that he activated the blue lights on his patrol car but that appellant traveled approximately five blocks

before turning into an apartment complex. Officer Seth Thomas, who happened to be driving behind Isom in a separate patrol car, provided assistance to Isom during the stop.

Isom and Thomas testified that, when appellant finally pulled over, they could hear him laughing rather loudly. Considering appellant's overall behavior to be odd, Isom ordered appellant out of the truck, patted him down for weapons, and placed him in the patrol car. Meanwhile, Thomas approached the front passenger side of the truck where Cassandra Pye had emerged. Thomas testified that he shined a flashlight inside the truck and saw the grip of a handgun inside the console. He said that the lid of the console was open several inches and that he observed the gun in plain view. After discovering the gun, the officers arrested appellant and placed handcuffs on him. Isom then searched the pockets of appellant's pants. He testified that appellant's left pocket contained two baggies of cocaine. In the right pocket, Isom found another bag containing a white-powdery substance.

Following the officers' testimony, appellant interposed an oral motion to suppress the evidence consisting of the gun and cocaine. Citing *Arizona v. Gant*, 129 S. Ct. 1710 (2009), appellant asserted that the officers had no right to search his vehicle once the officers had secured him in the patrol car. The trial court disagreed, finding that Thomas did not enter the vehicle to conduct a search but that he observed the gun in plain view from a vantage point outside of the vehicle.

Afterwards, the State presented the testimony of Detective Wesley Butler to establish the chain of custody for the contraband. Also, Stacy Winkler, a forensic chemist at the crime

lab, testified that the white-powdery substances tested positive for cocaine and weighed a total of approximately five grams. Through these witnesses, the State introduced into evidence the gun and the cocaine.

At the close of the State's case, appellant moved for dismissal. He argued that the evidence was not sufficient to support the charges because all of the evidence should be suppressed. The trial court denied the motion.

In his testimony, appellant stated that he did not try to evade the police and that, immediately after stopping, the officers ordered him out of his vehicle at gunpoint and placed him in the patrol car. He also testified that the officer leaned inside his vehicle in order to locate the handgun. Appellant then rested and renewed his motion to dismiss. The trial court denied the motion and found appellant guilty of the charges.

As his second issue on appeal, appellant contends that the trial court erred in denying his motions to dismiss the charge of simultaneous possession of drugs and a firearm. A motion to dismiss, identical to a motion for a directed verdict in a jury trial, is a challenge to the sufficiency of the evidence. *Walker v. State*, 77 Ark. App. 122, 72 S.W.3d 517 (2002). Preservation of appellant's right against double jeopardy requires that we consider his challenge to the sufficiency of the evidence first, even though it is not listed as his first point on appeal. *Bradley v. State*, 2009 Ark. App. 714, 370 S.W.3d 263. Appellant asserts that the evidence is insufficient to support this conviction because he was not the lone occupant of the vehicle and because the State failed to produce evidence linking him to the handgun. This

argument is materially different from the one made at trial. Consequently, it is not preserved for appeal.

When a defendant challenges the sufficiency of the evidence, he must apprise the trial court of the specific basis on which the motion is made. *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000); Ark. R. Crim. P. 33.1(b). The reasoning underlying this rule is that, when specific grounds are stated and the absent proof is pinpointed, the trial court can either grant the motion or, if justice requires, allow the State to reopen its case and to supply the missing proof. *Tester, supra*. A further reason that the motion must be specific is that we may not decide an issue for the first time on appeal. *Phillips v. State*, 361 Ark. 1, 203 S.W.3d 630 (2005). It is settled law that arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Abshire v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002).

Here, appellant argued below that the evidence was not sufficient because the evidence offered against him should have been suppressed. On appeal, appellant raises a joint-occupancy argument. We must affirm because this contention is raised for the first time on appeal. *Id.*

Returning to appellant's first issue, he contends that the plain-view doctrine does not apply to the facts of this case. He argues that Thomas conducted a search by entering his vehicle, and he maintains that the lid of the console was closed when the officer entered his

vehicle. The State takes the position that appellant's argument is not preserved for appeal because appellant moved for suppression at trial and did so after the officers had given testimony about the contraband that they discovered during the stop. Rule 16.2 of the Arkansas Rules of Criminal Procedure governs motions to suppress. Subsection (b) of the rule requires suppression motions to be filed no later than ten days before trial, "except that the court for good cause shown may entertain a motion to suppress at a later time." By the terms of the rule, appellant's failure to file a motion to suppress within ten days of trial would have justified the trial court's refusal to decide the motion. *Lee v. State*, 102 Ark. App. 23, 279 S.W.3d 496 (2008). However, Rule 16.2 does not mandate the denial of every motion that is untimely. *Kimble v. State*, 331 Ark. 155, 959 S.W.2d 43 (1998). In this instance, the case was tried to the court, not a jury. Where, as here, the trial court exercises its discretion to decide the motion, and in the absence of any objection by the prosecution at trial, we cannot conclude that the motion to suppress was not properly before the trial court or that the trial court's ruling is not properly preserved for our review. *Id.*; *Lee, supra*. Therefore, we will address the merits of appellant's argument.

The plain-view doctrine may be used to uphold a warrantless seizure of items where, first, the officers were lawfully located in a place to plainly view the object and, second, the object was in plain view and its incriminating nature was immediately apparent. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). The rationale behind the plain-view doctrine is that the observation of items in plain view is not a search. *Johnson v. State*, 291 Ark. 260, 724

S.W.2d 160 (1987). Also, objects are nonetheless considered to be in plain view, even though a flashlight is used for illumination. *Freeman v. State*, 37 Ark. App. 81, 824 S.W.2d 403 (1992).

We review suppression challenges de novo based on the totality of the circumstances, reviewing findings of historical facts for clear error and giving due weight to the inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Boldin v. State*, 373 Ark. 295, 283 S.W.3d 565 (2008). Additionally, we defer to the trial court's superior position to judge the credibility of witnesses. *Cain v. State*, 2010 Ark. App. 30, 373 S.W.3d 392.

The trial court's decision is not clearly erroneous. The trial court gave weight to Thomas's testimony that he was standing outside appellant's vehicle and that the console was open such that the gun was in plain view. By contrast, the court gave no credence to appellant's testimony that Thomas entered the vehicle to conduct a search, and despite appellant's assertion on appeal that the console was closed, no witness, including appellant, gave testimony to contradict Thomas's claim that the console was open when he looked inside the vehicle. The court's ruling is supported by the evidence, and we affirm on this point.

Affirmed.

GLADWIN and BROWN, JJ., agree.