Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000752

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1230

September Term, 2017

ROBERT ARMISTEAD

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 14, 2018

Robert Armistead, appellant, was arrested and charged, in the Circuit Court for Anne Arundel County, with illegally transporting a handgun after the police found a gun in his vehicle. Prior to trial, Armistead filed a motion to suppress the gun. Following a hearing, the circuit court denied Armistead's motion. Armistead thereafter entered a conditional plea of guilty and was fined $250.00. In this appeal, Armistead asks whether the court erred in denying his motion to suppress. For reasons to follow, we affirm.

At the suppression hearing, Anne Arundel County Police Officer Graham[1] testified that, in the afternoon hours of January 13, 2017, he was in his patrol car when he observed a vehicle commit a traffic violation. Officer Graham conducted a traffic stop of that vehicle. After Officer Graham exited his patrol car and approached the driver's side of the stopped vehicle, another vehicle "pulled behind the traffic stop." That vehicle's driver, later identified as Armistead, then exited his vehicle and approached the area where Officer Graham was conducting the stop. Upon doing so, Armistead asked the officer about the circumstances of the stop and whether the driver was "okay."

By that point, Anne Arundel County Police Officer Bernstein[2] had arrived on the scene to assist in the traffic stop. Officer Bernstein testified that, following Armistead's inquiry, the officer assured Armistead that the driver was "okay" and that Armistead "didn't need to worry about her status while in the presence of uniformed officers." Officer

[1] Officer Graham's first name was not included in the transcript of the suppression hearing.

[2] Officer Bernstein's first name was not included in the transcript of the suppression hearing.

Bernstein then told Armistead to return to his vehicle. Armistead complied, and Officer Bernstein followed Armistead back to his vehicle. Officer Bernstein explained that he did this because of "officer safety" and Armistead's "frantic demeanor."

According to Officer Bernstein, when he and Armistead reached Armistead's vehicle, the officer asked Armistead "if he had any firearms or weapons in his vehicle." Armistead responded, "I have a .22." Officer Bernstein asked Armistead where the gun was located, and Armistead stated that it "was in the center console of the vehicle." Officer Bernstein then searched the center console of Armistead's vehicle and recovered "a .22 caliber revolver." Officer Bernstein testified that he could not remember where he was standing when Armistead informed him about the gun.

Armistead also testified at the suppression hearing. He explained that, on the day of the stop, he was driving in the area where the stop occurred when he observed "two police cruisers and a little black car in front." Upon closer inspection, Armistead realized that the driver of the stopped car was his roommate. Armistead then "made a U-turn" and "pulled up behind them." After getting out of his vehicle and walking up to the stopped vehicle, Armistead asked his roommate "if she was okay." At that point, one of the officers told Armistead to go back to his vehicle, and Armistead complied. Armistead testified that he "was not frantic" and "was nothing other than concerned."

According to Armistead, as he got back to his vehicle, he turned around and saw Officer Bernstein walking toward him. Armistead asked the officer "what happened," and the officer responded that the driver had been stopped for a traffic violation and that she had admitted to "smoking weed." Officer Bernstein then asked Armistead if he "had any

drugs or anything illegal" in his vehicle. Armistead responded, "absolutely not." According to Armistead, Officer Bernstein then "turned like he was going to go into my truck." At that point, Armistead informed the officer that he did "have a handgun." Armistead testified that, when he told the officer about the gun, he felt like he "had become the object of [the] traffic stop." Armistead also testified that, at the time of the admission, Officer Bernstein was standing between him and the driver's side door of his vehicle. Although Armistead did state that he did not feel free to leave, he later testified that, had he wanted to leave, he could have asked the officer "to get out of the way."

Following Armistead's testimony, defense counsel argued that Armistead's encounter with the police "clearly was a Terry stop" and that the police did not have the requisite reasonable suspicion to seize Armistead. Ultimately, the circuit court denied Armistead's motion to suppress:

> I think there's nothing from the testimony of any of the witnesses, including [Armistead], from what you can construe that he or any reasonable person could have construed that he was being detained even in the blink of an eye.
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> [Armistead] testified when asked whether he could have left, and he said, I guess I could if I had asked him to get out of the way. There's no evidence that he felt coerced, he felt detained in any way. I think he willingly engaged in the additional conversation out of his concern for [his roommate], but he equally engaged with the police officers[.]
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> I think it was certainly within the generalized safety concerns of police as [Armistead] again concedes he could understand why they might be nervous these days, that they asked what is a relatively routine question, do you have anything illegal, do you have any weapons? And I think that at the point that Mr. Armistead was candid with them, to his credit, and admitted that he had a handgun in the car, I think that certainly at that point gave them

> every justification to conduct the search and seize the weapon. That was far more than articulable suspicion, that was absolute knowledge. And as such I think there was no Terry stop or interview in this case. I think it was routine and mutual. And the motion to suppress will be denied.

In this appeal, Armistead argues, as he did below, that he had been unlawfully "seized" when he admitted to having a gun in his vehicle and that, as a result, the circuit court erred in denying his motion to suppress. We disagree. "In reviewing the denial of a motion to suppress evidence under the Fourth Amendment, we look only to the record of the suppression hearing and do not consider any evidence adduced at trial." *Daniels v. State*, 172 Md. App. 75, 87 (2006). "[W]e view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State*, 426 Md. 211, 219 (2012). Moreover, "[w]e extend great deference to the findings of the hearing court with respect to first-level findings of fact and the credibility of witnesses unless it is shown that the court's findings are clearly erroneous." *Daniels*, 172 Md. App. at 87. "We give no deference, however, to the question of whether, based on the facts, the trial court's decision was in accordance with the law." *Seal v. State*, 447 Md. 64, 70 (2016).

"The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, including seizures that involve only a brief detention." *Stokes v. State*, 362 Md. 407, 414 (2001). It is well established, however, "that Fourth Amendment guarantees are not implicated in every situation where the police have contact with an individual." *Swift v. State*, 393 Md. 139, 149 (2006). The Court of Appeals has highlighted three types of encounters that determine Fourth-Amendment applicability: (1)

an arrest; (2) an investigatory stop (known colloquially as a "stop and frisk" or "*Terry* stop"); and (3) a consensual encounter. *Id.* at 149-151.

The most intrusive of the three types of encounters, an arrest, allows the police to take an individual into custody but "requires probable cause to believe that [the individual] has committed or is committing a crime." *Id.* at 150. The second type of encounter, an investigatory stop, permits the police to briefly detain an individual, but the stop "must be supported by reasonable suspicion that [the individual] has committed or is about to commit a crime[.]" *Id.* Because both encounters involve some restraint on an individual's liberty, the Fourth Amendment is implicated, and the detaining officer must have the necessary foundation, either probable cause or reasonable suspicion, to justify the stop.

The third type of interaction, a consensual encounter, "involves no restraint of liberty and elicits an individual's voluntary cooperation with non-coercive police contact." *Id.* at 151. "Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free to not answer and walk away." *Id.* Because the person is free to end the encounter at any time, the Fourth Amendment is not implicated. Consensual encounters, therefore, "need not be supported by any suspicion…[as] an individual is not considered to have been 'seized' within the meaning of the Fourth Amendment." *Id*.

To be sure, encounters that begin as consensual can still implicate the Fourth Amendment. "An encounter has been described as a fluid situation, and one which begins as a consensual encounter may lose its consensual nature and become an investigatory detention or an arrest once a person's liberty has been restrained and the person would not

feel free to leave." *Id.* at 152. In other words, a consensual encounter becomes a seizure when an officer "by means of physical force or show of authority has in some way restrained the liberty of a citizen[.]" *Id* at 152. (citations and quotations omitted).

The Court of Appeals has identified various factors that may be probative of whether a reasonable person would feel free to leave. Those factors include "the activation of a siren or flashers, commanding a citizen to halt, display of weapons, and operation of a car in an aggressive manner to block a defendant's course or otherwise control the direction or speed of a defendant's movement." *Id.* at 153. Other factors the Court has found noteworthy include: the time and place of the encounter; the number of officers present and whether they were uniformed; whether the police moved or isolated the person; whether the person was told that he was free to leave or suspected of a crime; and, whether the police exhibited threatening behavior or physical contact. *Id.* Those factors notwithstanding, the Court has made clear that "the inquiry is a highly fact-specific one" and requires a "totality-of-the-circumstances approach, with no single factor dictating whether a seizure has occurred." *Ferris v. State*, 355 Md. 356, 376-77 (1999).

Against that backdrop, we hold that Armistead's encounter with the police was consensual and thus did not implicate the Fourth Amendment. First and foremost, the encounter was initiated by Armistead, who, upon seeing the traffic stop and without any provocation from the police, pulled to the side of the road, got out of his vehicle, and interjected himself into the officers' investigation of the traffic stop. At no time during that initial portion of the encounter did the officers do anything that would lead a reasonable person to believe that he was not free to leave. To the contrary, Officer Bernstein told

Armistead to get back in his vehicle. Although Officer Bernstein did end up following Armistead back to his vehicle for safety reasons, the officer did not do anything to indicate a show of authority or to suggest that Armistead was not still free to leave. In fact, Armistead testified that he did not even notice that the officer had followed him until he had gotten back to his vehicle. At that point, Armistead, rather than continuing his departure, initiated a conversation with Officer Bernstein. Again, Armistead's interaction with Officer Bernstein was not prompted by anything the officer did, but rather by Armistead's continued interest in the circumstances of the traffic stop. Then, after responding briefly to Armistead's inquiry, Officer Bernstein asked Armistead if he had any weapons in his vehicle, at which time Armistead stated that there was a gun in the vehicle's center console. Based upon that admission, Officer Bernstein had, at the very least, reasonable suspicion of criminal activity to justify detaining Armistead. Prior to that admission, however, there was no seizure.

Armistead maintains that a reasonable person would not have felt free to leave because Officer Bernstein "stood between" him and his truck and prevented him from leaving. Yet that contention is based solely on Armistead's own testimony and is not supported by any other evidence or testimony. Moreover, it appears that the circuit court neither credited nor considered that testimony when rendering its decision. As for the remaining factors noted by Armistead, such as the fact that the officers were in uniform at the time, we are not persuaded that those factors, when considered in their totality and in a light most favorable to the State, were indicative of some affirmative act by the police to restrain Armistead's liberty.

We are equally unpersuaded by Armistead's reliance on *Ferris v. State*, 355 Md. 356 (1999), as that case is distinguishable. There, the Court of Appeals held that a motorist had been subjected to a "second stop" after an officer, at the conclusion of a routine traffic stop, asked the motorist to "step to the back of his vehicle" so that the officer could investigate criminal activity unrelated to the traffic stop. *Id.* at 384. In so holding, the Court explained that a reasonable person in the motorist's position would not have felt free to leave because, most notably, the motorist had been subjected to a "pre-existing seizure," which "enhanced the coercive nature of the situation and the efficacy of the other factors in pointing toward the restriction of [the motorist's] liberty." *Id.* at 378. The Court also noted that, after the officer issued the motorist a ticket at the end of the traffic stop, the motorist's "immediate business" was to "be on his way," but that the officer impeded that transition when he launched into his tangential investigation. *Id.* at 377, 379 ("The trooper's immediate transition into the inquiry was so seamless that a reasonable motorist would not have believed that the initial, valid seizure had concluded."). Finally, the Court discussed several other factors as being noteworthy, namely, that the officer never told the motorist he was free to leave; that the officer affirmatively sought to move the motorist "to a more coercive atmosphere" for reasons unrelated to the traffic stop; and, that the encounter occurred "late at night on the side of a presumably desolate, rural interstate highway." *Id.* at 379-83.

Here, by contrast, Armistead was never subjected to a "pre-existing seizure," but rather had initiated the encounter by approaching the officers while they were investigating a traffic stop that had nothing to do with Armistead. *See Id.* at 378 (noting that the

motorist's situation was "markedly different from that of a person passing by or approached by law enforcement officers on the street[.]"). Then, upon returning to his vehicle and observing that Officer Bernstein had followed, Armistead, rather than continue "on his way," engaged Officer Bernstein in a conversation. Up to that point, other than simply following Armistead back to his vehicle for a legitimate reason, *i.e.*, officer safety, Officer Bernstein had not done anything to suggest that Armistead was of any concern to the officers, much less that he was the subject of any sort of investigation or that he was not free to leave the scene. Finally, although there are some similarities between the two cases, such as the fact that Officer Bernstein never told Armistead that he was free to leave, none of those similarities, when considered in conjunction with all the other circumstances, transformed the encounter into anything other than consensual. *See Id.* at 384 ("We emphasize that, although, standing alone, no single circumstance would have transformed the encounter into a Fourth Amendment seizure, the collective coerciveness of the totality of those circumstances rose to the level of a show of authority[.]").

Armistead argues, in the alternative, that even if his encounter with Officer Bernstein was consensual, the search of his vehicle was unlawful because Officer Bernstein did not have probable cause. That argument, however, was not raised in or decided by the suppression court. As a result, the issue is not preserved for our review. *Collins v. State*, 192 Md. App. 192, 217 (2010) ("'[T]he failure to argue a specific theory in support of a motion to suppress evidence constitutes waiver of that argument on appeal.'") (citations omitted).

Even so, Armistead's argument is without merit. "[A]n officer may search an automobile, without a warrant, if he or she has probable cause to believe it contains evidence of a crime or contraband goods." *Bowling v. State*, 227 Md. App. 460, 468 (2016), *cert. denied*, 448 Md. 724. "A police officer has probable cause to conduct a search when the facts available to [him] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present." *Florida v. Harris*, 568 U.S. 237, 243 (2013) (citations and quotations omitted). "The principal components of a determination of…probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to…probable cause." *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).

That said, "the probable cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life[.]" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (citations and quotations omitted). Moreover, "[t]he probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." *Id.* at 371. As the United States Supreme Court has explained, "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence…have no place in the [probable-cause] decision. All we have required is the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act." *Harris*, 568 U.S. at 243-44 (internal citations and quotations omitted).

Here, we are convinced that Officer Bernstein had probable cause to search Armistead's vehicle. Maryland law prohibits a person from "knowingly transport[ing] a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State[.]" Md. Code, Crim. Law § 4-203(a)(1)(ii). Thus, when Armistead admitted to having a gun in the center console of his vehicle, which had been traveling on a road generally used by the public, that admission generated a "fair probability" that Armistead was engaged in criminal activity and that evidence of that criminal activity was located in Armistead's vehicle. That Armistead may have been transporting the handgun under one of the enumerated exceptions to §4-203(a)(1) is immaterial in determining whether Officer Bernstein, under the circumstances presented here, had a reasonable belief of guilt, as the transporting of a concealed weapon is generally prohibited in Maryland. *See Jordan v. State*, 24 Md. App. 267, 274 (1975) ("[T]he burden is on an accused to show he comes within a statutory exception."); *See also* Md. Code, Crim. Law § 4-203. For that reason, Armistead's reliance on various out-of-state cases is inappropriate, as those States generally permit a person to openly possess a firearm. *See Burns v. State*, 149 Md. App. 526, 538 (2003) (handgun recovered from under the right front seat of a vehicle was

sufficient probable cause to arrest an individual seen fleeing from the right front door of that same vehicle).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.