Circuit Court for Frederick County
Case No. 10-K-17-060027

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 324

September Term, 2019

JUSTIN G. MITCHELL

v.

STATE OF MARYLAND

Nazarian,
Wells,
Raker, Irma S. (Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: October 1, 2020

Appellant Justin G. Mitchell was convicted by a jury in the Circuit Court for Frederick County of possession of drug paraphernalia, possession of oxycodone, possession of methadone, and possession of alprazolam. Appellant presents the following re-ordered questions for our review:

1. Did the motions court err in denying appellant's motion to suppress?
2. Did the motions court err in precluding appellant from impeaching the police witness at his suppression hearing?
3. Did the trial court err in denying appellant's motion for *in camera* review of the police witness' internal personnel files?

We shall hold that the motions court erred in denying appellant's motion to suppress and shall reverse.

I.

By criminal information in the Circuit Court for Frederick County, the State charged appellant with possession of alprazolam with intent to distribute, possession of drug paraphernalia, possession of oxycodone, possession of methadone, and possession of alprazolam. After trial, the jury convicted him of possession of drug paraphernalia, oxycodone, methadone, and alprazolam. The court sentenced him to a term of incarceration of one year for possession of alprazolam, one year for possession of oxycodone to be served consecutively to the sentence for possession of alprazolam, and one year for possession of methadone to be served concurrently, all suspended, with

eighteen months' probation.[1]

Appellant filed a pre-trial motion to suppress the evidence seized from his person at the time of his arrest. The following facts are drawn from the suppression hearing. On the night of May 8, 2017, Juliana Gallucci, a manager of Madrones Restaurant on Wormans Mill Road, called the police and reported that a dining customer seemed like "a suspicious person" (in the words of police testimony). In response to the call, three Frederick County uniformed police officers, Officers Rippeon, Grimes and Rucci, arrived at the restaurant in marked cars at the same time, around 10:30 p.m. At least one of these officers, Officer Rippeon, was carrying a holstered gun that was visible on his uniform.

Officer Rippeon and Officer Grimes spoke with Ms. Gallucci and then with appellant, while Officer Rucci was also on the scene. Ms. Gallucci told the police that appellant had made numerous trips in and out of the restaurant and to the restroom. Officer Rippeon testified that Ms. Gallucci said that appellant eventually had come back to the bar and passed out.[2] When Officer Rippeon and Grimes spoke to appellant, who was eating his dinner at the bar, he struck them as "alert"; when they asked him if he was okay, appellant replied that he was fine, but tired. Officer Rippeon asked appellant for identification, and appellant retrieved it from a bag he had next to him.

[1] The court found appellant guilty of possession of drug paraphernalia and did not sentence him to a term of incarceration.

[2] Ms. Gallucci testified, however, that she did not have any recollection of a verbal exchange with the police at the restaurant other than to point them in the direction of appellant.

Officer Rippeon then asked appellant to step outside, told him that he should pay the check for his dinner, and asked appellant to bring his bag outside with him. Appellant paid his bill and walked outside with Officers Rippeon and Grimes, who were joined outside by Officer Rucci.

Outside of the restaurant, Officer Rippeon asked appellant if he had anything illegal on him. Appellant responded that he did not. Officer Rippeon then asked appellant for consent to search him, to which appellant replied, "Yeah, go ahead, I don't have anything."

Officer Rippeon proceeded to search appellant. From appellant's jacket pocket, the officer seized a blue cylinder containing white powder residue, which Officer Rippeon believed was a pill grinder. From appellant's wallet, the officer seized a clear plastic bag containing five green pills. Officer Rippeon testified that he then arrested appellant.

Officer Rippeon proceeded to further search appellant, as a search incident to arrest. He found three pills of suspected methadone from a silver canister connected to appellant's keys. Officer Rippeon then searched the bag from which appellant had earlier retrieved his identification, where the officer found forty-four bars of suspected Xanax, ten hypodermic needles, five loose needles, a spoon with residue, and cotton balls.

The Maryland State Police Forensic Sciences Division performed lab chemistry tests indicating that the forty-four bars found in appellant's bag were alprazolam (sometimes known as Xanax, which is Pfizer's trade name for the drug), the five pills in the wallet were oxycodone, and the three pills from the silver canister were methadone.

On August 20, 2018, appellant discharged his trial counsel, and from there proceeded *pro se*. On January 23, 2019, the court heard and denied appellant's motion to suppress physical evidence, reasoning as follows:

> "In this case, . . . dispatch had received a call from the restaurant for a person acting suspiciously. And when [Officer Rippeon] arrived at the restaurant, he made contact with the manager, who said that the gentleman seated at the bar, who was [appellant], had been running in and out of the restaurant, and then running around his car, and that, at one point, was asleep at the bar.
>
> [Officer Rippeon] approached [appellant]. … [H]e asked him if he was okay. He said he was okay. He was alert. He said he was fine, just tired. … He asked him to step outside with him. He voluntarily went outside. There was no physical touching, no threat of arrest. His weapon was holstered. He wasn't threatened in any manner by the evidence presented today.
>
> They were on the front sidewalk. They continued their conversation. The officer asked him if he had anything illegal on him. He said no. [The officer] [a]sked him if he could search him. He said yes, go ahead, I don't have anything on me. And then, upon searching, he initially finds a pill grinder . . . and, eventually, finds five pills in a clear baggy in his wallet, and he arrested him then.
>
> After the arrest, there was further searching, and . . . there were more drugs discovered.
>
> None of the three officers, who were present, displayed weapons. There was no physical force. The police vehicles were parked. There [were] no flashing lights on any of the vehicles to signal a heavy response. [The other officer] had no interaction with [appellant].
>
> [Appellant] never asked to leave by the testimony presented today. He seemed tired, but in no distress. He never revoked

> his consent to search. He was fine the whole time is the only evidence that the Court has before it.
>
> When looking at all of this … I believe … consent was freely and voluntarily given. He was free to, in the encounter, walk away. He elected not to. There was nothing arbitrary or oppressive about this, and, therefore, the motion to suppress is denied."

As indicated, a jury convicted appellant of the four possession charges. The court imposed sentence, and this timely appeal followed.

II.

Before this Court, appellant argues that the motions court erred in denying his motion to suppress the physical evidence seized by the police in violation of the Fourth Amendment to the United States Constitution and Article 26 of the Maryland Declaration of Rights. In support, appellant argued that the police did not have reasonable suspicion or probable cause to seize him prior to conducting the search. He contends that he did not consent to the search and that his "ostensible consent" to search him "was merely the product of an atmosphere of overt police domination [and that] no reasonable person would have felt free to decline Officer Rippeon's request for consent to search." Because the search violated his Fourth Amendment protection from unreasonable search and seizure, he argues, the court should have suppressed the fruits of that search.

Appellant argues that the full context of the three police officers' conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Implicit in appellant's argument is the related

contention that the police conduct amounted to an unreasonable seizure of his person before Officer Rippeon requested consent to a search.

In response, appellee State maintains that the circuit court was correct in finding that appellant's consent was freely and voluntarily given. Appellee argues that appellant's ostensible consent was voluntary because the request of the police to move from the restaurant to the outdoors "simply moved the encounter from one public place to another." Appellee argues that any movement of appellant was not coercive, there was no seizure of appellant, and the presence of multiple uniformed officers was not coercive.

III.

In reviewing a trial court's denial of a motion to suppress evidence, we view the evidence from the suppression hearing, along with any reasonable inferences, in a light most favorable to the prevailing party. *Davis v. State*, 426 Md. 211, 219 (2012). We give deference to the facts found by the trial court unless they are clearly erroneous. *Bailey v. State*, 412 Md. 349, 362 (2010). We review *de novo* whether the trial court's decision was in accordance with the law. *Crosby v. State*, 408 Md. 490, 505 (2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable search and seizure: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause…and particularly describing…the persons or things to be seized." U.S. Const. amend. IV. Warrantless searches and seizures are

presumptively unreasonable. *Thornton v. State*, 465 Md. 122, 141 (2019). Pursuant to *Mapp v. Ohio*, 367 U.S. 643, 655–656 (1961), evidence seized by state authorities in violation of the Fourth Amendment is excluded as substantive evidence.

The State bears the burden of proving that the search was voluntary, and must do so by a preponderance of the evidence. *State v. Wilson*, 279 Md. 189, 201 (1977). "A voluntariness determination is a second-level fact-finding function that we review *de novo*." *Collins v. State*, 138 Md. App. 300, 312 (2001).

Appellant maintains that his encounter with the police: (1) was not a voluntary encounter; (2) that the fruits of the search and seizure by the police should have been suppressed because his detention was unlawful, not supported by probable cause nor reasonable suspicion that criminal activity was afoot; and (3) his ostensible consent to search was not voluntary.

We need first to look at the nature of the encounter between appellant and the police and then whether his consent to search him was voluntary. As the Court of Appeals explained in *Swift v. State*, 393 Md. 139 (2006), the Fourth Amendment is not implicated every time the police have contact with an individual. *Id.* at 151–52; *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991); *Scott v. State*, 366 Md. 121, 133 (2001). Courts have looked at three tiers of interaction between the police and individuals in analyzing the applicability of the Fourth Amendment, *i.e.*, an arrest, an investigatory stop, and a consensual encounter. *Swift*, 393 Md. at 149. An arrest requires probable cause to believe that the person has committed or is committing or is about to commit a crime. *Florida v.*

Royer, 460 U.S. 491, 499 (1983). An investigatory stop or detention, known as a *Terry* stop, requires reasonable suspicion that criminal activity is afoot and permits an officer to stop and briefly detain an individual. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968), *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984*); Ferris v. State*, 355 Md. 356, 384 (1999). A consensual encounter is based upon a person's voluntary cooperation with non-coercive police contact and is not based upon acquiescence to police authority or force. *Swift*, 393 Md. at 151–52; *see also United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

In *Swift*, the Court of Appeals discussed the parameters of a *Terry* stop, explaining as follows:

> "A *Terry* stop is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his or her suspicions. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. Factors that might indicate a seizure include a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, approaching the citizen in a nonpublic place, and blocking the citizen's path."

Id. at 150. Significantly, a *Terry* stop has to fall within a permissible scope. *Dunaway v. New York*, 442 U.S. 200, 213 (1979); *Terry*, 392 U.S. at 19. A *Terry* stop must be no longer and no more intrusive than necessary to confirm or allay the officer's suspicions. *See Dunaway*, 442 U.S. at 212–14; *Royer*, 460 U.S. at 491; *Swift*, 393 Md. at 150. Otherwise,

the stop is not a *Terry* stop but instead is an arrest and, to justify the detention, probable cause is required. *See Dunaway*, 442 U.S. at 208–10; *Royer*, 460 U.S. at 498.

Three factors considered in analysis of whether a seizure of a person falls within the permissible scope of a *Terry* stop rather than an arrest are the duration of the encounter, the location of the encounter, and the availability of less intrusive alternatives. *See Royer*, 460 U.S. at 500 ("an investigative detention must be temporary and no longer than is necessary…[and] methods employed should be the least intrusive means reasonably available"). Courts have found that a brief stop becomes an arrest when a suspect is moved unnecessarily to a separate area, especially a private area. *See, e.g.*, *Royer*, 460 U.S. at 505. *But see Mendenhall*, 446 U.S. at 544 (removal of investigatory encounter from an airport concourse to an airport DEA office was permissible and the encounter remained a *Terry* stop). The *Terry* reasonable suspicion standard justifies only "the briefest of detentions or the most limited of searches[.]" *Royer*, 460 U.S. 491, 510–11 (Brennan, J., concurring).

A consensual encounter does not require probable cause or reasonable suspicion and is premised upon the notion that an individual is free to leave at any time during the encounter. A consensual encounter thus is not a seizure; in contrast, "[w]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16.

A very common consensual encounter is one in which police approach a person in a public place, engage that person in conversation, request information, and, most

importantly, the person is free to not answer and to walk away. *See Royer*, 460 U.S. at 497; *Mendenhall*, 446 U.S. at 553–54. The Fourth Amendment is not implicated in that situation. The Fourth Amendment becomes implicated when the police officer has restrained the person's liberty by physical force or show of authority so that a reasonable person would not feel free to refuse the officer's orders or requests or would not feel free to terminate the encounter. *Mendenhall*, 446 U.S. at 554; *Terry*, 392 U.S. at 19 n.16. The essence of a consensual encounter is "simply the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement official. Because an individual is free to leave at any time during such an encounter, he is not 'seized' within the meaning of the Fourth Amendment." *Ferris*, 355 Md. at 373 n.4.

Police are not required to warn of a right to refuse consent, although lack of knowledge of the right to refuse is a factor to be considered in the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

The test for whether a person has been seized has been addressed in many cases. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (stating that the key question is whether "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business"); *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). A stop begins when: (1) a reasonable person would not feel free to leave or such person would not "feel free to decline the officer's requests or otherwise terminate the encounter[,]" *United States v. Drayton*, 536 U.S. 194, 202

(2002); *and* (2) the police officer applies force, no matter how slight, to the suspect or the suspect yields to a show of authority, *California v. Hodari D.*, 499 U.S. 621 (1991).

Distinct from consensual investigative encounters but governed by the same reasonableness standard, a consensual search under the Fourth Amendment and Article 26 must be "voluntary, *i.e.*, free from coercion." *Varriale v. State*, 444 Md. 400, 412 (2015). To determine whether a consent to search was voluntary, courts look to whether, under the totality of the circumstances, a reasonable person would feel free to decline the search. *Drayton*, 536 U.S. at 207; *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *State v. Green*, 375 Md. 595, 610 (2003). The Court of Appeals in *Ferris*, 355 Md. at 377, highlighted several factors courts consider in determining whether consent was voluntary (in the context of an encounter), and in *Green* the Court applied those factors in the context of consent to search. *See Green*, 375 Md. at 615. Those factors are as follows:

> "[T]he time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave."

Id. at 613.

In the instant case, we hold that the motions court erred in declining to suppress the fruits of the seizure and search of appellant. He was seized in violation of the Fourth Amendment without probable cause or reasonable suspicion, and his consent to search,

under the totality of the circumstances, was not voluntary. Appellant was seized illegally before any search or conversation about a search; appellant did not voluntarily leave the restaurant, and his detention cannot be justified as a *Terry* stop. By the time appellant walked out of the restaurant with the police officers, the encounter was no longer voluntary but rather submission to lawful authority under circumstances such that a reasonable person would not feel free to terminate the encounter. Because appellant was illegally seized shortly before the conversation about a search, his so-called consent to search was not freely or voluntarily given.

Appellant was eating dinner at the bar of the Madrones restaurant when he was confronted by two uniformed, armed police officers, while a third officer, who had entered with them, was present on the scene. Apparently at the time of the officers' arrival, appellant's behavior was unremarkable. After appellant presented his identification in response to the police request (or demand), Officer Rippeon not only asked him to go outside but also told him to pay his restaurant bill. The police "request" that appellant pay his check implied clearly that appellant would not be returning to the restaurant, suggesting that appellant was not free to leave on his own. At that point, the unmistakable implication to a reasonable person was that appellant was not free to decline to walk outside with the officers. The clear implication was that he would not be free to return and complete his dinner.[3] Considering all the facts of the encounter, appellant was seized by the police when

[3] That Officer Rippeon told appellant to bring his bag outside, and appellant's compliance, is not necessary to this analysis. This circumstance nevertheless is (footnote continued…)

they escorted him outside of the restaurant. Acquiescence to authority under these circumstances was not consensual.

Having found that the encounter was not a consensual one, and that the police lacked probable cause to arrest appellant, we turn to the remaining basis for any detention—a *Terry* stop. Although the record appears devoid of any basis for police to have reasonable articulable suspicion that appellant was committing or was about to commit a crime, even assuming such basis *arguendo*, the seizure exceeded the permissible scope of a *Terry* stop. The police had no reasonable basis to remove appellant from the public restaurant space. There was no basis to believe he was committing a crime or about to commit a crime. He was alert when they approached him and was merely eating his dinner. The removal of appellant to a new location, outside the restaurant, was outside the scope of a *Terry* stop. Appellant responded to the police investigative questions inside the restaurant. He said he was fine; he produced his identification. A less intrusive alternative would have been to continue any investigation in that location. These facts indicating a detention beyond the scope of a *Terry* stop are enough for the seizure of appellant's person to fail constitutional muster. *See Royer*, 460 U.S. at 491, 505–07 (holding that an airport detention for interrogation in a private room was outside the permissible scope of a *Terry* stop); *Terry*, 392 U.S. at 19; *Swift*, 393 Md. at 150 (the investigatory stop must be "less intrusive than a formal arrest").

further evidence that the officer was giving instructions to appellant and that appellant was submitting to the officer's authority.

The key remaining question is whether the fruits of the search are admissible. The fruits of the search would be admissible if the consent to the search was voluntary *and* the evidence from the search did not arrive by exploitation of the illegal seizure. "It is well established that, under the 'fruits of the poisonous tree' doctrine, evidence obtained subsequent to a violation of the Fourth Amendment is tainted by the illegality and is inadmissible, despite a person's voluntary consent, unless the evidence obtained was 'purged of the primary taint.'" *United States v. Washington*, 490 F.3d 765, 774 (9th Cir. 2007) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). *See also* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(d) (6th ed.) ("the fruit of the poisonous tree doctrine also extends to invalidate consents which are voluntary") (citing federal and state courts that have so held, at footnotes 134 and 137); *Ferguson v. State*, 301 Md. 542, 548–49 (1984). Once a defendant has demonstrated the existence of a primary illegality, the burden shifts to the State to prove that the resulting evidence was not derived from that illegality. *Alderman v. United States*, 394 U.S. 165, 183 (1969); *see also Dunaway*, 442 U.S. at 218 ("the burden of showing admissibility rests, of course, on the prosecution"); *Ferguson*, 301 Md. at 548–49. Evidence is purged of its taint if its discovery was inevitable, if it was derived from an independent source, or if there is sufficient attenuation between the poison of the illegal government conduct and the evidence. *Miles v. State*, 365 Md. 488,520–21 (2001).

In the instant case, the fruits of the search of appellant are not admissible because that search fails the voluntariness test for consent, and the evidence was not purged of the

primary taint of the illegal seizure. Appellant was in police custody when the officers asked to conduct the search, which weighs heavily against a finding that his consent was voluntary. *See Washington*, 490 F.3d at 775. Further, under the factors identified in *Ferris* and *Green*, the removal to the different location and the instruction that he first pay the restaurant bill weigh against a finding of voluntariness in the consent for the search. With three uniformed, armed police officers standing outside the restaurant, a reasonable person would not have felt free to walk away or to refuse the request to search. Factors weighing against voluntariness include: (1) the number of officers present; (2) the removal from the restaurant (and the related context of an illegal seizure); and (3) the absence of any police statement or behavior that would have intervened and ended the seizure and clarified that appellant was free to leave (if in fact he was). Although the police were not holding appellant's documents and they did not overtly threaten appellant, these factors alone are insufficient to find, under the totality of the circumstances, that appellant consented voluntarily to the search.

Moreover, and superseding the voluntariness issue, the fruits of the search are not admissible because the search fails to fall within an exception to the fruits-of-the-poisonous-tree doctrine. The inevitable-discovery doctrine and the independent-source rule do not fit the circumstances of the case at bar. Nor is there any basis to find attenuation between the unlawful detention and the search.

Analysis of attenuation requires consideration of: (1) the proximity between the illegal government act and the evidence sought to be suppressed; (2) the presence of

intervening factors; and (3) the purpose and flagrancy of the governmental misconduct involved in the case.[4] *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975); *Miles*, 355 Md. at 522. In the instant case, there was no time lapse. There were no appreciable intervening circumstances, despite any contention that voluntary consent to search was an intervening circumstance. The third factor, purpose and flagrancy of the misconduct, weighs against the State because the Fourth Amendment proscribes fishing expeditions. *See Brown*, 422 U.S. at 605. Courts have emphasized in attenuation analysis that an illegal seizure that yields evidentiary fruits shortly thereafter, and in a continuous transaction of events, is itself flagrant and so weighs against the government. *See Washington*, 490 F.3d at 777; *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003). "Where there is a close causal connection between an illegal seizure and [evidence yielded thereafter]," *Dunaway*, 442 U.S. at 218, the State will not prevail in the multi-factor attenuation analysis. The bottom line in attenuation analysis of evidence based on consent purportedly given subsequent to a Fourth Amendment violation is this: where there is "no proof at all that a break in the chain of illegality had occurred…consent was invalid as a matter of law." *Royer*, 460 U.S. at 497.

In the case at bar, there was no break in the chain of events between the time when the police officers seized appellant and removed him from the restaurant and the moments thereafter when the officers "requested" his consent for a search of his clothes, wallet, keys,

[4] In many cases, the existence of a *Miranda* warning would be a fourth relevant factor.

and (not coincidentally) the bag that the police told him to bring outdoors with him. We hold that the search of appellant was unlawful.

The motions court erred in denying the motion to suppress because appellant was seized in violation of the Fourth Amendment, the evidence from the search arrived by exploitation of the illegal seizure, and moreover any consent to search was not voluntary. The evidence should have been suppressed.

JUDGMENTS OF THE CIRCUIT COURT FOR FREDERICK COUNTY REVERSED. COSTS TO BE PAID BY FREDERICK COUNTY.