Circuit Court for Worcester County
Case No. 23-K-16-000073

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 717

September Term, 2020

DENNIS J. CROSS

v.

STATE OF MARYLAND

Kehoe,
Gould,
Zic,

JJ.

Opinion by Kehoe, J.

Filed: July 13, 2021

In 2016, Dennis J. Cross was charged with a variety of crimes arising out of a burglary and the theft of personal property, primarily firearms and ammunition. He filed a pre-trial motion to suppress evidence that the police obtained from his cellphone. The Circuit Court for Worcester County denied the motion. Cross then pled not guilty upon an agreed statement of facts with respect to one count of second-degree burglary, three counts of theft of property valued less than $1,000, and three counts of possessing a shotgun by a prohibited person. The court convicted Cross on all charges and sentenced him to prison. Trial counsel did not file a notice of appeal.

In 2019, Cross filed a petition for post-conviction relief, which the circuit court granted. As relief, the circuit court permitted him to file this belated appeal. He raises one issue that we have reworded slightly:

> Did the circuit court err in denying the motion to suppress because police lacked probable cause to seize appellant's cellphone without a warrant?

We hold that the circuit court erred when it denied the motion to suppress.

BACKGROUND

In January 2016, Joseph Waters called the police and told them that someone had broken into his home and stole several rifles and shotguns, along with ammunition and hunting gear. When officers responded to his home, Waters informed them that he suspected that Randy Lee Morris and Kevin Beebe were involved in the burglary.

Shortly thereafter, an informant contacted the police and told them that Beebe was saying that he had stolen several rifles and shotguns and was looking for buyers. The police

enlisted the informant's help and sent him into Beebe's home to purchase a weapon. The informant came back to the officers with a rifle that he bought from Beebe and told them that there was other stolen property in the house. The officers took the rifle to Waters, who confirmed it was his. Based on all of this, the officers applied for a search and seizure warrant for Beebe's house.

In his affidavit for the warrant, Detective Scott Sears stated that he was seeking the warrant to search Beebe's home for Waters's stolen property and to seize that property as well as any other property "found otherwise to be subject to seizure under the laws of the State of Maryland." He did not mention anything about searching for or seizing an electronic device of any kind. Nor did Detective Sears assert that evidence of the burglary could be found on an electronic device. The application was granted.

Officers executed the warrant the next day. In Beebe's home, officers found guns, gun accessories, and hunting gear. For example, officers found a pistol in the living room, a gun in a bedroom, a gun cleaning kit in the kitchen, and loose ammunition throughout the home. But according to the officers' evidence inventory sheet, most of the ammunition and all of the guns linked to the burglary were found hidden under floorboards in the home's living room.

When the police executed the warrant, three other people, including Cross, were in the house with Beebe. The officers arrested Beebe and took the others to the police station for questioning. Cross told Detective Sears that he was living in the house with Beebe, that he sometimes stayed at his mother's residence, and that he was helping Beebe renovate the

house. Cross also told Detective Sears that he didn't know anything about the stolen guns. After Detective Sears ended the interview, Cross asked if he was under arrest and was told that he was not. However, Detective Sears told Cross to hand over his cellphone before he left the station. Cross gave his cellphone to Detective Sears.

Several days later, Detective Joseph Bailey sought and obtained a search warrant for the contents of Cross's cellphone. In the application for the warrant, the detective alluded to the fact that, in addition to Beebe, "Cross and two others" were present when the police executed the first warrant and that:

> Your affiant knows that cellular telephones may provide valuable information as to the subject involved in these crimes. Your affiant also knows that this information is stored temporarily in files within the cellular telephones and can be retrieved.
>
> * * *
>
> This belief is based upon
>
> - The facts provided by Detective Joseph Bailey
> - The conversations between Uff,[1] BeeBe [sic], Cross and Detective Bailey
> - The investigation conducted by members of the Worcester Bureau of Investigation
> - The seizure of [Cross's] cellular telephone.

[1] Erica Uff was another person who was present when the search warrant was executed at Beebe's residence.

After the warrant was issued, police accessed the contents of Cross's cellphone and found inculpatory evidence. Cross was then arrested and, as we have related, was charged with an assortment of crimes associated with the burglary of Waters' home.

Cross filed a motion to suppress the evidence found on his cellphone as fruits of an illegal seizure. According to Cross, Detective Sears did not have probable cause to seize his cellphone.

Detective Sears was the only witness at the suppression hearing. He testified that he did not know whether Cross was involved in the burglary, which was why he interviewed Cross. When the prosecutor asked Detective Sears why he took Cross's cellphone, Detective Sears said that he "took his cellphone based in part [on] the interviews and the investigation we had conducted prior to executing the search warrant" and because Cross was Beebe's roommate. He did not elaborate on what specifically occurred during his interview with Cross that caused him to believe that Cross was involved in the crimes. Nor did he identify anything else in the investigation that pointed to Cross as a participant.

The circuit court found that probable cause existed to seize Cross's cellphone. The court's analysis was not extensive and it made no specific findings of fact. However, it is clear that the court concluded that the fact that Cross and Beebe lived together was sufficient to establish probable cause. The court denied Cross's motion to suppress the evidence found on the cellphone. Cross appealed that decision to this Court.

THE STANDARD OF REVIEW

Our standard of review is well-established:

> When we review a circuit court's grant or denial of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment, we view the evidence adduced at the suppression hearing, and the inferences fairly deduced therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the circuit court's fact-finding at the suppression hearing, unless the circuit court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality *de novo* and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Grant v. State, 449 Md. 1, 31 (2016) (cleaned up).

ANALYSIS

The State argues that the circuit court correctly denied Cross's motion to suppress the evidence derived from his cellphone because the officers had probable cause to believe that it contained evidence relating to the burglary and thefts. The State points out that the officers were justifiably worried that if they let Cross leave the police station with his cellphone, Cross might destroy any evidence on it. Although the officers' concerns about what Cross might do regarding evidence on his cellphone were reasonable, the fact remains that the evidence presented at the suppression hearing did not establish that the police had probable cause to seize Cross's phone.

The Fourth Amendment protects the right of citizens to be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures" by the government. A seizure of property occurs when "there is a meaningful interference with an individual's

possessory interest in that property." *Soldal v. Cook County, Ill*., 506 U.S. 56, 61 (1992) (citation omitted). Generally, "a seizure of personal property" is "per se unreasonable within the meaning of the Fourth Amendment" unless accompanied by a warrant. *See, e.g., United States v. Place*, 462 U.S. 696, 701 (1983). Like most general propositions in the law, there are exceptions, and the one that is applicable in the present case is that police may seize a container in an arrestee's possession for a reasonable time to preserve evidence from destruction and to obtain a warrant to examine the contents of the container. *See Illinois v. McArthur*, 531 U.S. 326, 331–333 (2001); *United States v. Chadwick*, 433 U.S. 1, 13, and n.8 (1977), *abrogated on other grounds*, *California v. Acevedo*, 500 U.S. 565, 579 (1991). In *Riley v. California*, 573 U.S. 373, 387–88 (2014), the Supreme Court held that this rule applies to the cellphone of an arrestee.

So far, so good for the State. But at this point, the parallels between the case before us and *McArthur*, *Chadwick*, *Riley* and similar cases break down because Cross was not a suspect before the warrant was executed nor was he arrested after the warrant was executed.

The State argues that Detective Sears had probable cause to seize Cross's cellphone because Cross and Beebe were housemates, they were renovating their home together, the informant bought a gun from Beebe in the home, and the stolen guns were found in the home. We do not agree.

Before an officer can seize a person's property under the Fourth Amendment "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967). In other words, the officer

must have probable cause to believe that the evidence seized "will aid in a particular apprehension or conviction." *Id.*; *Soldal*, 506 U.S. at 65–66 (explaining that the Fourth Amendment is designed to protect against government intrusion into privacy rights and government interference with personal property equally, so "seizures can be justified only if they meet the probable-cause standard"); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (noting that even though the interest protected by the Fourth Amendment's prohibition against unreasonable searches are "quite different" from the interest protected against unreasonable seizures, "neither the one nor the other is of inferior worth or necessarily requires only lesser protection").

To determine whether an officer had probable cause to seize a person's property, "we examine the events leading up to the seizure [and decide] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (cleaned up). Because probable cause is a "fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," whether it exists depends on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

In the present case, the totality of the circumstances boils down to just three facts: Cross was present when the search warrant was executed, Cross was Beebe's housemate, and police found stolen goods during the search.

Cross's presence when the warrant was executed does not support the State's argument. "[G]uilt by association [is] one of the most odious institutions of history." *Joint Anti-*

Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178 (1951) (Douglas, J., concurring). In light of this core principle of search and seizure law, "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added). The requirement for probable cause "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Id.*; *see also State v. Zadeh*, 468 Md. 124, 154, 161–63 (2020) ("[T]he facts and circumstances that justified probable cause to grant a warrant for [the search of an automobile] could not be transferred to a person simply due to his or her presence in the [vehicle] at the time that the warrant was executed.").

Because the basis for probable cause must be particularized, that a person is present where criminal activity is taking place does not necessarily give an officer probable cause to seize a person or her property. *See United States v. Di Re*, 332 U.S. 581, 593 (1948); *Ybarra*, 444 U.S. at 91 (holding that an officer with a warrant to search a tavern had "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers"); *Poolaw v. Marcantel*, 565 F.3d 721, 730 (10th Cir. 2009) ("A search warrant resting primarily on a 'familial relation' is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.") (cleaned up); *Zadeh*, 468 Md. at 153–54 (holding that officers lacked probable cause to make a warrantless seizure of defendant's cellphone, even though he was a suspect in a murder investigation, when he

was stopped driving the car of a second suspect in the investigation, and the officers were executing a warrant to search the car).

The circuit court found that probable cause existed to seize Cross's cellphone because the two were housemates. This is not sufficient. Probable cause does not exist because two people happen to live in the same house. Recognizing this, the State points to the fact that Cross and Beebe were renovating the house and to the number of guns found in the home.

In this context, the Court's analysis in *United States v. Di Re* is instructive. In *Di Re*, an informant told officers that he planned to buy counterfeit gasoline ration coupons from a man named Buttitta. *Id*. at 583. Based on this information, officers trailed Buttitta's car until it stopped. *Id*. Approaching Buttitta's car, officers found the informant in the backseat holding two rationing coupons, Buttitta in the driver's seat, and Di Re in the passenger seat. *Id.* All three men were frisked and taken to the police station for questioning. *Id.* At the station, officers ordered Di Re to empty his pockets. *Id*. Di Re did as he was told and pulled out two rationing coupons. *Id*. Based on this, the officers arrested him, did a thorough search of his body, and found a hundred more gasoline coupons. All the coupons turned out to be counterfeit. *Id*.

The Supreme Court held that because there was no probable cause for Di Re's arrest, evidence of the coupons had to be suppressed. *Id*. at 583. The Court concluded that the police did not have probable cause to arrest Di Re for three reasons: First, there was no evidence that Di Re was in the car when Buttitta sold the informant the gasoline coupons and no evidence that Di Re discussed the coupons with Buttitta. Second, there was nothing

suspicious about the sale between Buttitta and the informant. It took place during the day, in plain sight of others, the sale of the coupons did "not necessarily involve any act visibly criminal," and there was no evidence suggesting that Di Re knew the coupons were counterfeit. Finally, any inference that Di Re was a party to the crime disappeared when the informer singled out Buttitta as the guilty party. *Id*. at 593–595

The State's argument in the present case fails for similar reasons. As in *Di Re*, there was no evidence that Cross was in the home when Beebe sold the stolen firearm to the informant. Neither the informant nor the victim identified Cross as a possible participant in the burglary. There was nothing presented at the suppression hearing that suggested that Cross knew anything about the guns. The outcome might be different if the State had presented evidence at the suppression hearing that the stolen firearms were in plain view in the residence, but Detective Sears did not so testify. The only evidence before the suppression court as to the location of the *stolen* firearms (and most of the ammunition) was that these items were recovered from beneath the floorboards in the living room. It is true that another weapon was found in a bedroom, but there was no evidence that that gun was stolen or that the bedroom was Cross's. While other items seized may have been in plain view, they were relatively innocuous and the State does not assert that their presence supported an inference that Cross was involved in the burglary or the sale of the stolen property.

As the Supreme Court noted in *Di Re*, "[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty

person." 540 U.S. at 594. This is exactly what the informant did in the present case. When the informant returned to the officers after purchasing the stolen rifle, he told the officers that Beebe sold him the rifle. He did not mention that anyone else was involved in the sale.

The State's second contention is that the fact that Beebe and Cross were working together to renovate the home contributes to the totality of the circumstances. Under the facts of the present case, any contribution was very minor. First of all, we do not accept the proposition that evidence that two individuals were engaged in a licit enterprise is also evidence that they were engaged in an illicit one. The State also suggests that the fact that the two were renovating the house indicates that it was likely that Cross was aware that stolen property was hidden beneath the living room floor. The problem with this from the State's standpoint is that the suppression court made no such finding and there was no evidence presented as to what exactly was involved in the renovation project.

Detective Sears's testimony at the suppression hearing was nothing more than the type of conclusory statement that the Supreme Court has warned will not support a finding of probable cause. He said, "[w]e took [Cross's] cell phone based in part [on] the interviews and [on] the investigation we had conducted prior to executing the search warrant." But the investigation before the search never mentioned Cross. Nor did the warrant. Nor the informant. From the evidence presented at the hearing, Detective Sears was unaware of Cross's existence until the search warrant was executed. The officer's testimony about his interview with Cross disclosed nothing that would support the conclusion that there was evidence about the burglary on Cross's cellphone.

In conclusion, the evidence before the suppression court was that Beebe and Cross were housemates in a house in which stolen property was recovered, that Beebe and Cross were engaged in an otherwise undescribed process of renovating the house, and that Cross was present when the search warrant was executed. Whether considered separately (the suppression court seemed to have relied exclusively on the first fact) or in conjunction, this evidence was insufficient to show probable cause. The suppression court erred when it denied Cross's motion. The convictions must be reversed.

THE JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY IS REVERSED. COSTS TO BE PAID BY WORCESTER COUNTY.