Circuit Court for Baltimore County
Case No. C-03-CR-19-001096

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0812

September Term, 2020

STEPHEN MCDOWELL

v.

STATE OF MARYLAND

Friedman,
Beachley,
Zic,

JJ.

Opinion by Zic, J.
Dissenting Opinion by Friedman, J.

Filed: June 23, 2022

In the Circuit Court for Baltimore County, Stephen McDowell, appellant, was charged with possession with intent to distribute cocaine, possession of cocaine, second-degree assault, resisting arrest, failure to obey a lawful order of a law enforcement officer, disorderly conduct, and destruction of evidence. Mr. McDowell moved to suppress drugs obtained and statements made by him following a traffic stop, arguing that he did not consent to a search and, if he did, such consent was not voluntarily given. After his suppression motion was denied, Mr. McDowell entered a conditional guilty plea to possession of cocaine with intent to distribute. The circuit court sentenced him to ten years imprisonment, with all but five years suspended, and two years of probation. This appeal followed.

Mr. McDowell presents one question for our review: Did the circuit court err in denying Mr. McDowell's motion to suppress drugs obtained and his statements made during the police encounter? For the reasons that follow, we answer that question in the negative and affirm the judgment of the circuit court.

BACKGROUND

On April 7, 2019, Officer Mohibbur Mulla initiated a traffic stop of a vehicle in which Mr. McDowell was a passenger. During the suppression hearing, the circuit court heard testimony from Officer Mulla detailing this incident. The court also admitted, in addition to other evidence, Officer Mulla's body-camera footage.

Officer Mulla testified that, at approximately 7:57 a.m., he observed a Ford van leaving Lakebrook Circle, taking a right turn onto Charleston Avenue, without signaling.

He also "observed an odor emanating from the vehicle, as [he] was behind it, and no other vehicles [were] in sight." Based on those observations, Officer Mulla testified that he "continued to follow the vehicle for a couple blocks, and confirmed that the odor of marijuana was emanating from the vehicle, and observed the vehicle making a couple more . . . turns without signal[]ing in a hundred feet."

Officer Mulla then conducted a traffic stop on Hollins Ferry Road near Fifth Avenue. Approaching the van from the passenger's side to avoid the traffic on Hollins Ferry Road, Officer Mulla informed the driver that he failed to use a turn signal when exiting Lakebrook Circle and that he used the turn signal too late when turning onto Fifth Avenue and on another occasion.

Officer Mulla asked the driver for his license and registration, which he provided. When asked for his identification, Mr. McDowell responded, "What do I got to do with anything?" Officer Mulla explained that "we just like getting everyone in the vehicle identified." Mr. McDowell told Officer Mulla that he left his identification at home but handed Officer Mulla his government issued Independence Card,[1] which listed his full name and date of birth.

After Officer Mulla requested the driver's and Mr. McDowell's documentation, and before Officer Mulla made any comment about an odor emanating from the vehicle,

[1] Independence Card is a common name for the Maryland electronic benefit transfer card, which is used by eligible low-income households to access certain public assistance benefits. *See Spending Supplemental Nutrition Assistance Program Benefits*, Md. Dep't of Hum. Servs., https://dhs.maryland.gov/supplemental-nutrition-assistance-program/spending-food-supplement-program-benefits/ (last visited Dec. 21, 2021).

the driver asked Officer Mulla if the smell in the car was bothering him. Officer Mulla responded by asking the driver what the smell was, and the driver handed him incense. The driver claimed that the scent emanating from the vehicle was caused by the burning of the incense. At the suppression hearing, Officer Mulla testified that the scent differed from that of the incense.

Officer Mulla returned to his vehicle with both the driver's and Mr. McDowell's documents where he then requested backup. Thereafter, Officer Jones Bethea arrived at the scene. The two officers had a brief conversation during which Officer Mulla told Officer Bethea:

> They failed to signal 100 feet before a turn, and when I got behind them, all I smelled was the odor of marijuana. They tried to cover it up with incense. I smelled the incense and it's not -- I mean it doesn't smell anything like the marijuana smell.
>
> The front passenger was kind of agitated. Both of them seem to be on probation. So, I'm going to pull them out of the car one by one, ok? I'm going to pull the driver first and try to talk to him, and then see what's the deal. Just watch the passenger.

Officer Mulla approached the driver's side of the van and instructed the driver to step out, stating "[c]ome back here let me talk to you real quick." The driver complied and accompanied Officer Mulla to the back of the van. There, Officer Mulla asked the driver if he was on parole or probation and inquired about the odor of marijuana. Officer Mulla also asked, "Do you mind if I check you?" to which the driver replied, "Yes, sir." The driver denied having drugs or weapons on his person or in his car, though he later

stated that he does smoke marijuana. Mr. McDowell remained in the passenger seat as the driver was being searched behind the van.

After searching the driver and directing him to sit on the curb, Officer Mulla approached the passenger's side of the van where Officer Bethea was standing. At that point, Officer Mulla's body-camera footage showed Mr. McDowell recording the encounter with his phone.[2] Officer Mulla told Mr. McDowell to exit the vehicle while Officer Bethea opened the van door. Officer Mulla confirmed, during the suppression hearing, that he "d[id not] have anything on [Mr. McDowell] at the time." While he was stepping out of the van, Officer Mulla said to Mr. McDowell, "Like I told your partner, there's an odor of marijuana coming, okay. He said he smokes. I mean it's understandable." Mr. McDowell responded, "Yeah, he smokes."

Officer Mulla then asked Mr. McDowell, "Do you have anything on you?" As the question was being asked, Mr. McDowell turned around to face the van with his back to Officer Mulla, raised his arms, and responded "no." Officer Mulla proceeded to search Mr. McDowell. Officer Mulla testified that he conducted a search of Mr. McDowell "initially[] [to] check for weapons" but later in his testimony confirmed that "there[] [was] never a point when [he] g[o]t any indication that somebody ha[d] a weapon" and that he "search[ed] because [he] ha[d] what [he] believe[d] [was] implied consent to search." Officer Mulla further testified that he believed that Mr. McDowell gave implied

[2] Mr. McDowell pulled his phone from his pocket before Officer Mulla asked him for his identification.

consent to search by turning his back to him, raising his arms, and saying "no" when asked if he "ha[d] anything on [him]."

During the search, Officer Mulla eventually felt what he believed to be contraband in Mr. McDowell's groin area. After checking his front waistband area, Officer Mulla instructed Mr. McDowell to widen his stance. Mr. McDowell did so, stating "I ain't got nothing on me bro." Officer Mulla responded, "Nah, I got you" and continued the search, moving to Mr. McDowell's groin area. Officer Mulla testified that he then felt "numerous capsule vials" in that area, "which are similar to those of packaging narcotics that are commonly placed in the dip area." Mr. McDowell then began to lower his arms and Officer Mulla instructed, "Just keep your hands, keep your hands up, sir. Just keep your hands up. I just gotta check, it's nothing." After discovering what he believed to be contraband in Mr. McDowell's front private area, Officer Mulla instructed Mr. McDowell to put his hands behind his back. As Officer Mulla grabbed his hands, Mr. McDowell "pushed off" Officer Mulla and they both fell to the ground. Mr. McDowell then stood up and ran across the street away from the officers. While running, Officer Mulla testified that Mr. McDowell removed several vials from his front private area and threw them in the air. Officer Mulla recovered most of the vials, but some of them were crushed by cars driving on the street. The vials were later found to contain cocaine.

Officers Mulla and Bethea chased Mr. McDowell across the street and a struggle ensued as they tried to subdue and arrest him. During the struggle, Mr. McDowell punched Officer Mulla in the face. To subdue Mr. McDowell, who was still resisting

arrest, Officer Mulla sprayed him with mace. Officer Mulla testified that, while they were still on the ground, Mr. McDowell tried to discard additional vials. The struggle continued until more officers arrived. At that point, the officers were able to place Mr. McDowell in handcuffs and they called for medical assistance to treat Mr. McDowell for injuries he sustained during the struggle.

Mr. McDowell was indicted in the Circuit Court for Baltimore County. He was charged with possession with intent to distribute cocaine, possession of cocaine, second-degree assault, resisting arrest, failure to obey a lawful order of a law enforcement officer, disorderly conduct, and destruction of evidence. Before trial, Mr. McDowell moved to suppress the vials seized and his statements made during the police encounter, arguing that there was no lawful basis to search him and that he did not consent to a search. The State contended that Mr. McDowell's conduct amounted to implied consent to search but conceded that absent his consent "everything goes out."

At the conclusion of the suppression hearing, which was held on January 6, 2020, the circuit court made the following findings:

> [A]bsent a consent to the search the [c]ourt would find that the search was not lawful. That there was no other valid reason. The . . . Officer had the right to get the passenger out of the vehicle and had the right to search him, if necessary, for weapons in order to protect Officer safety. However, he said, pretty candidly, that that's not what he was concerned about. So that, at that point, had nothing further taken place, if the Officer was to search Mr. McDowell at that point, then the [c]ourt would find under those circumstances that the search was unlawful.

> The question . . . is whether Mr. McDowell's conduct in turning, exposing his back, raising his hands, and not objecting during the stop could be viewed as consent to the search which, if it is a valid consent, then would authorize the search and, ultimately, the discovery of the vials of [c]ocaine in Mr. McDowell's crotch area.

The court then denied Mr. McDowell's motion to suppress based on the totality of the circumstances, explaining:

> [A]t the time the driver was being searched the Defendant[] could hear that that search was being conducted.
>
> When the Officers next came to the passenger's side the Defendant could reasonably have expected that he would be next, and that he would be subject to search. He was asked to step out. And the basis -- the, the first thing that the -- Officer Mulla says is that -- he says, I smelled marijuana; your partner said he was smoking. And, then, he says immediately, do you have anything on you?
>
> The Defendant turns, raises -- presents his back to the Officer, does not object at any point -- raises his hands over his head. Court finds that under the totality of the circumstances that, based on those facts, that the Defendant consented to the search that, ultimately, discovered the drugs on his person.
>
> * * *
>
> In fact, at some point in time when, when he was asked to spread his legs more to make, -- to facilitate the search, and he did so.
>
> So, based on all those circumstances, the [c]ourt finds that Mr. McDowell consented to the search that, ultimately, produced the drugs in the case that the search was valid and, for those reasons, the [c]ourt will deny the Defendant's Motion to Suppress the fruits of that search.

On January 7, 2020, Mr. McDowell entered a conditional guilty plea to possession of cocaine with intent to distribute, which the circuit court accepted.[3] On October 8, 2020, the court sentenced Mr. McDowell to ten years imprisonment, with all but five years suspended, and two years of probation. Mr. McDowell filed a notice of appeal on October 13, 2020.

DISCUSSION

Mr. McDowell asserts that the circuit court erred in denying his motion to suppress the evidence because he did not consent, verbally or through his conduct, to the search and, even if his conduct constituted consent, it was not voluntarily given.[4] Regarding the former contention, Mr. McDowell explains that he "turned around and raised his arms in order to keep his arms visible to Officer Mulla and to dispel any concern that [he] posed a safety threat" and that "[t]his conduct was an effort to survive the police encounter, not a consent to a search." As for the latter argument, Mr. McDowell references the following as having created a coercive environment: he was detained by two armed, uniformed officers; the officers indicated they were investigating a marijuana odor; he was not informed of his right to refuse to be searched; he was "isolated" from the driver during the encounter; the officers retained his identification and "exerted tight physical control over [him]"; and "by nature of being a Black person,

[3] The State entered a *nolle prosequi* on the balance of the counts contained within the indictment.

[4] Mr. McDowell does not challenge the stop itself, which the circuit court concluded was lawful.

[he] felt vulnerable during the stop." Additionally, Mr. McDowell argues that if his "raised arms communicated consent, . . . [then] [his] repeated lowering of his arms was withdrawal of that consent." Conversely, the State contends that Mr. McDowell, "by turning around and placing his hands in the air in response to a question about whether he had 'anything,'" gave nonverbal consent for a search and that he did so voluntarily.

As explained further below, we affirm the circuit court's decision to deny the motion to suppress the evidence.

I. STANDARD OF REVIEW

When reviewing a denial of a motion to suppress evidence seized pursuant to a warrantless search, an appellate court bases its decision on the record of the suppression hearing rather than that of the subsequent trial. *Bowling v. State*, 227 Md. App. 460, 466-67 (2016). We view the evidence "in the light most favorable to the party that prevailed on the motion" and "give due regard to the [suppression] court's opportunity to assess the credibility of witnesses." *Scott v. State*, 247 Md. App. 114, 128 (2020) (quoting *Crosby v. State*, 408 Md. 490, 504 (2009)); *Bowling*, 227 Md. App. at 467 (quoting *Taylor v. State*, 224 Md. App. 476, 487 (2015)). In doing so, we accept the court's factual findings and do not set those findings aside unless clearly erroneous. *See Bowling*, 227 Md. App. at 467. "We review the court's legal conclusions de novo, however, making our own independent constitutional evaluation as to whether the officers' encounter with appellant was lawful." *Daniels v. State*, 172 Md. App. 75, 87 (2006).

II. THE CIRCUIT COURT DID NOT ERR BY DENYING THE MOTION TO SUPPRESS THE EVIDENCE.

We are first called upon to determine whether Officer Mulla's search, which revealed the contraband in Mr. McDowell's private area, was performed with valid consent. We then address Mr. McDowell's argument that he subsequently withdrew consent.

A. Mr. McDowell Impliedly Consented to the Police Search.

We begin our analysis by recognizing that "unreasonable searches and seizures" by the government are prohibited pursuant to the Fourth Amendment to the U.S. Constitution, which was made applicable to the states by the Fourteenth Amendment. *State v. Green*, 375 Md. 595, 608 (2003) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). Warrantless searches and seizures are per se unreasonable unless there is an applicable exception to the warrant requirement. *Jones v. State*, 407 Md. 33, 51 (2008). "A search conducted pursuant to valid consent, i.e[.], voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement." *Id*.

Consent to search may be given expressly or implied by conduct or gesture. *Scott*, 247 Md. App. at 132. "The State bears the burden of proving consent." *Turner v. State*, 133 Md. App. 192, 201-02 (2000) ("The State bears the burden of proving the existence of an exception to the warrant requirement to justify, and thereby make reasonable, an otherwise presumptively unreasonable search."). This burden is not satisfied "by showing nothing more than acquiescence to a claim of lawful authority." *Id.* at 202. The court must determine whether, considering the totality of the circumstances, the State has

established that the defendant consented and that she or he did so freely and voluntarily. *See id.* at 201-03; *Scott*, 247 Md. App. at 132.

There are several relevant federal circuit and Maryland cases that we have examined to differentiate instances of conduct rising to the level of implied consent from conduct that falls short. These cases generally indicate that implied consent may be found when an officer communicated a desire to conduct a search and the defendant, in response, took some affirmative act that facilitated the search. For instance, in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), the defendant was standing outside a nightclub when a patrolling officer approached him and, after some preliminary questions, asked if he could search him for weapons. *Id*. at 1113. The defendant did not respond verbally but instead "placed his hands on his head" and the officer searched him, finding a gun in his waistband. *Id*. at 1113-14. The Ninth Circuit affirmed the denial of the defendant's motion to suppress the gun, determining that the district court's finding that the "[defendant]'s act of raising his hands to his head constituted implied consent to search" was not clearly erroneous. *Id*. at 1120.

In *United States v. Chrispin*, 181 F. App'x 935 (11th Cir. 2006), an officer asked the defendant if he was carrying weapons or drugs and then asked if he could frisk the defendant. *Id*. at 937. The defendant, without saying anything, turned around and put his hands on the officer's police cruiser. *Id*. The officer proceeded to search the defendant during which he discovered a gun on his person. *Id.* In upholding the denial of the defendant's motion to suppress the firearm, the Eleventh Circuit held that, "although [the

defendant] did not express verbal assent to be searched, his body language—turning away from [the officer] and placing his hands on the police cruiser as if preparing to be searched—gave implied consent." *Id*. at 939.

Another relevant federal case is *United States v. Mendoza-Cepeda*, 250 F.3d 626 (8th Cir. 2001). There, the defendant, who did not speak English, was approached by an officer who used gestures and, in Spanish, asked to search the defendant's boots. *Id*. at 627. The defendant held out one foot at a time for the officer to search. *Id*. The officer then requested to search the defendant's torso by asking "yes" or "no" in Spanish while pointing at the defendant's torso. *Id*. In response, the defendant raised his arms, allowing the officer to touch his torso. *Id*. The officer discovered bundles containing methamphetamine taped to the defendant's torso. *Id*. The Eighth Circuit considered the totality of the circumstances and upheld the district court's finding that the defendant consented to the search. *Id*. at 629.

The Eighth Circuit addressed a similar scenario in *United States v. Jones*, 254 F.3d 692 (8th Cir. 2001), where the defendant, after an officer asked to search his person, "held his arms out away from his body about ten to eighteen inches from his midsection, with his palms turned out." *Id*. at 694. The officer then discovered a package of cocaine strapped to the defendant's back. *Id*. The Eighth Circuit held that the district court's finding of consent based on the defendant's gesture of opening his arms was not clearly erroneous. *Id.* at 695-96. Likewise, in *United States v. Wilson*, 895 F.2d 168 (4th Cir. 1990), the Fourth Circuit concluded that the record supported the district court's finding

that the defendant's conduct, specifically shrugging his shoulders and raising his arms following a federal agent's request to search him, amounted to consent. *See id.* at 170-72.

Turning to our jurisprudence, there are a few noteworthy cases. In *Charity v. State*, 132 Md. App. 598 (2000), this Court held that the defendant's consent to a pat down, given while he was unconstitutionally detained, was invalid as "fruit of the poisoned tree." *Id*. at 633-34. We then concluded, as an additional, independent reason for reversing the defendant's conviction, that his consent was involuntary. *Id.* at 634-39. The officer, rather than requesting permission, expressed his desire to conduct a pat down of the defendant. *Id.* at 634-35. The defendant, in turn, did not give express permission but did "h[o]ld his arms out to his side." *Id.* We did not, however, decide whether the defendant's conduct amounted to consent—our holding focused strictly on the voluntariness of the consent. *See id.* at 634-36.

Additionally, in *Turner v. State*, 133 Md. App. 192 (2000), this Court addressed whether there was implied consent to enter the defendant's apartment. *Id*. at 200. We held that the circuit court erred in finding implicit consent when the defendant, following the officers' request for identification, walked into his apartment leaving the door open and the officers entered behind him. *Id*. at 196-98. We explained that the defendant's act of "entering his apartment was not taken in response to a police request to enter" and that there was no other affirmative conduct by the defendant that could be understood as an invitation to enter his apartment. *Id.* at 208-15. We further noted that the court's ruling

was erroneously based on the "[defendant]'s lack of action to bar the police from following him, not any overt or positive conduct on his part." *Id.* at 208; *see also Chase v. State*, 120 Md. App. 141, 150 (1998) (affirming the denial of the defendant's motion to suppress evidence and holding that his wife impliedly consented to police entry when she answered the door and responded to officers' inquiry about whether the defendant was home by "open[ing] the door wider and step[ping] out of the doorway").

With these legal principles in mind, we turn to the facts of this case. The circuit court found, and we accept the finding, that "at the time the driver was being searched [Mr. McDowell] could hear that that search was being conducted." As the circuit court explained, and we agree, "[w]hen the [o]fficers next came to the passenger's side [Mr. McDowell] could reasonably have expected that he would be next." Although Officer Mulla did not explicitly request Mr. McDowell's permission to conduct a search, Officer Mulla's question—"Do you have anything on you?"—reasonably indicated that he sought to search Mr. McDowell's person. Mr. McDowell responded to the question by turning around to face the van with his back toward Officer Mulla, raising his arms, and stating "no."

In line with the caselaw outlined above, we conclude that Mr. McDowell's conduct gives rise to a reasonable inference that he was granting Officer Mulla permission to conduct the search. *See Chrispin*, 181 F. App'x at 939 (finding implied consent to search where no verbal consent was given but the defendant's body language—"turning way from [the officer] and placing his hands on the police cruiser as

if preparing to be searched"—indicated his assent). While we recognize that Mr. McDowell asserts his conduct was an effort to survive the encounter, it is persuasive that this affirmative act followed Officer Mulla's question to him. *See Turner*, 133 Md. App. at 207 ("[I]n all of these cases, the police made it known, either expressly or impliedly, that they wished to enter the defendant's house, or to conduct a search, and within that context, the conduct from which consent was inferred gained meaning as an unambiguous gesture of invitation or cooperation or as an affirmative act to make the premises accessible for entry."). We thus conclude that the circuit court did not err in finding implied consent when Mr. McDowell turned around with his back toward Officer Mulla, raised his arms, and said "no" in response to Officer Mulla asking whether he "ha[d] anything on [him]."

Mr. McDowell relies on *Charity* and *Graham v. State*, 146 Md. App. 327 (2002), to support his contention that his conduct did not amount to consent to search. We believe that both cases are distinguishable. In *Charity*, which we discussed above, this Court concluded that, under the totality of the circumstances, the defendant's consent to a pat down was involuntary. *See* 132 Md. App. at 639. When explaining that holding, we observed that the officer "expressed his desire to conduct a pat-down" rather than requesting permission to do so and that the defendant, in turn, "simply held out his arms in what may have been nothing more than an act of acquiescence." *Id.* at 634. Mr. McDowell's response to Officer Mulla's question amounted to more than him raising his arms—Mr. McDowell also turned around so his back was facing the officer. Further, in

Charity, we did not hold that the defendant's conduct did not amount to consent. *See id.* at 634-39. Instead, our holding addressed the voluntariness of the defendant's ostensible consent to the pat down. *Id.*

In *Graham*, this Court held that the State failed to carry its burden of proving that the defendant voluntarily consented to a frisk of his person. 146 Md. App. at 368-70. The only relevant evidence presented was the officer's testimony that he asked the defendant for permission to conduct a search and that the defendant neither replied nor resisted. *See id.* We explained that the officer's testimony "gave no indication that the [defendant] ever said a thing or did anything other than quietly submit to the officer's pat-down" and that "[t]he failure expressly to object or the failure physically to resist may be indicative only of acquiescence and not necessarily of voluntary consent." *Id.* at 369-70. By contrast, here, there is evidence that Mr. McDowell, through his actions, consented to the search by Officer Mulla.

B. Mr. McDowell Voluntarily Consented to the Search Based on the Totality of the Circumstances.

We next examine whether Mr. McDowell's consent was voluntarily given or the product of duress or coercion. The voluntariness of consent to search is "a question of fact[] to be decided based upon a consideration of the totality of the circumstances." *Jones*, 407 Md. at 52 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). "Assessing voluntariness therefore requires 'analyzing all the circumstances of [the] individual consent' and 'careful sifting of the unique facts and circumstances of each

case.'" *Scott*, 247 Md. App. at 133 (alteration in original) (quoting *Schneckloth*, 412 U.S. at 233).

In examining the totality of the circumstances, Maryland courts have considered various factors to determine whether police obtained voluntary consent to search, including:

> [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.

State v. Green, 375 Md. 595, 613 (2003) (quoting *Ferris v. State*, 355 Md. 356, 377 (1999)); *see also Charity*, 132 Md. App. at 636 (explaining that the analysis in *Ferris*, which concerned "the voluntariness of . . . consent to exiting a car and then submitting to questioning," is pertinent to examining the voluntariness of consent to search). Another pertinent factor is whether the defendant knew that he or she had the right to refuse consent, though the absence of such knowledge, on its own, is not determinative. *See Scott*, 247 Md. App. at 134 (noting that "Supreme Court jurisprudence is clear that an individual may give voluntary consent to a search without knowing he [or she] has the right to withhold consent"). "Likewise, the fact that a person is being temporarily detained by the police when he gives consent to search is one factor in the total circumstances." *Id.*

Applying the above factors, we hold that, considering the totality of the circumstances, Mr. McDowell voluntarily consented to the search. The encounter took place at approximately 7:45 a.m. in daylight on a busy street. Although Mr. McDowell argues that this factor should be neutral, we believe that the time and place of the police encounter lean more toward a finding of voluntariness. *See id.* at 143 (stating that the traffic stop during which the defendant consented to a search "took place on the side of a major road in a populated area in daylight and clear weather," which is "not an environment ordinarily conducive to intimidation"). Additionally, there were two uniformed officers present, which this Court has recognized may "increase[] the coerciveness of the encounter." *Charity*, 132 Md. App. at 638. It is noteworthy, however, that Officer Mulla was the officer primarily interacting with Mr. McDowell when he consented to the search. *See Scott*, 247 Md. App. at 140-41 (concluding that the presence of five officers did not make for a coercive environment "[g]iven the non-threatening conduct of the officers and that . . . only [one] officer interact[ed] with [the defendant] when he sought consent to search").

Mr. McDowell asserts that the officers indicated they were investigating him for criminal activity, which weighs against a finding of voluntariness. Initially, Officer Mulla informed both Mr. McDowell and the driver that he stopped the vehicle for a traffic violation. Once the driver exited the vehicle and moved to the back of the van as instructed, Officer Mulla asked the driver whether he was on parole or probation and inquired about the marijuana odor. At that point, Mr. McDowell was still in the car.

When Mr. McDowell stepped out of the van, Officer Mulla stated, "Like I told your partner, there's an odor of marijuana coming [from the van]." But Officer Mulla then informed Mr. McDowell that the driver admitted to smoking marijuana. The record indicates that, at that point, the officers suspected the driver, not Mr. McDowell, of potential criminal activity.

Prior to the search, Officer Mulla told Mr. McDowell to step out of the van. Mr. McDowell argues that he was isolated from the driver who was sitting on the curb "at a distance" from him. We acknowledge that the removal of an individual from his or her vehicle can increase the coerciveness of a police encounter. *See Ferris*, 355 Md. at 382-83. But in this instance, the body-camera footage shows that Mr. McDowell was a short distance from the driver and the van and that the driver was visible and within speaking distance of Mr. McDowell as he was being searched.

We also must take into consideration that Mr. McDowell was not informed that he was free to withhold consent and that Officer Mulla retained possession of his Independence Card during the search. These factors weigh against a finding of voluntariness. *See Scott*, 247 Md. App. at 133-34. Another relevant factor to consider is whether the officers exhibited threatening behavior. Mr. McDowell references the following as evidence that the officers exerted "tight physical control" over him: Officer Bethea stood by the passenger's door and was instructed to watch Mr. McDowell while Officer Mulla interacted with the driver; Officer Mulla "commanded" him to exit the car; Officer Bethea "grasped the passenger door handle and opened the door"; and both

officers were armed. The State argues that the officers had the right to ask Mr. McDowell to exit the van and that they exercised that right in a calm, nonintimidating manner. When considering all the circumstances of the encounter, we cannot conclude that the officers' conduct rises to the level of threatening behavior that would reasonably suggest that consent was coerced.

Officer Mulla's body-camera footage shows that Officer Bethea was stationed nearby Mr. McDowell while the driver was being searched, though he appears to be standing a few feet from the van. There is no evidence indicating that Officer Bethea, when stationed by the vehicle, acted or spoke aggressively toward Mr. McDowell. The recording also shows that Officer Mulla told Mr. McDowell to step out of the van and that Officer Bethea subsequently opened the door for Mr. McDowell. While Officer Mulla's command might be viewed as coercive, this is tempered by the fact that he did not raise his voice and spoke in a calm tone. *See Scott*, 247 Md. App. at 140-41 (concluding that the interactions between the defendant, who was ordered to exit the vehicle and eventually consented to a search, and the police were "innocuous" given that "[t]he officers did not speak loudly, were not rude, and did not accuse any of the occupants of having committed a crime"). Officer Bethea's act of opening the car door could not be reasonably understood as communicating that consent to a police search was required.[5] Moreover, both officers had their weapons holstered when Officer Mulla

[5] The circuit court found that:

started the search. *See id.* at 136 (noting that "[t]he presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon" (quoting *United States v. Drayton*, 536 U.S. 194, 195 (2002))).

As a final factor, Mr. McDowell contends that we should consider the "lived reality of Black Marylanders." He asserts that "his race did contribute to his apprehension and vulnerability during the encounter, which weighs against a finding of voluntariness." Mr. McDowell states in his reply brief that he "raised his arms and turned around out of concern for his safety[] and that concern was grounded in the statistical reality that Black persons are disproportionately subject to police use of force." He also points to the fact that he recorded the encounter as demonstrating his feelings of vulnerability.

In his brief, Mr. McDowell states that "[a]ccording to the Governor's Office on Crime Control and Prevention's 2020 Report on Deaths Involving a Law Enforcement Officer, there were 18 homicides by law enforcement in Maryland in 2019, all of which involved fatal shootings." (Citing Governor's Off. of Crime Prevention, Youth, & Victim Servs., *Fifth Report to the State of Maryland - Deaths Involving a Law Enforcement Officer* 6 (2020), http://goccp.maryland.gov/wp-content/uploads/PS-

> Following the completion of the search of the driver[,] Officer Mulla goes around to the passenger's side of the vehicle where the other Officer is standing [by the] door -- that Officer Mulla says to Mr. McDowell, step out of the car, please, sir. Mr. McDowell steps out voluntarily. The door's open. In fact, Mr. McDowell unlocks the door to permit him to come out. He's got his cell phone in his right hand . . . .

%C2%A7-3-507e_-GOCPYVS-2019-Deaths-Involving-a-Law-Enforcement-Officer-MSAR-12665.pdf). We acknowledge, as discussed in his brief, Mr. McDowell's feelings of vulnerability and apprehension when interacting with law enforcement. Indeed, the Supreme Court has observed that race is "not irrelevant" in assessing whether an individual voluntarily consented to police questioning, though it is also not "decisive." *See United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980).

We take Mr. McDowell's race into consideration with all the factors as discussed above. Among those factors are the acknowledged validity of the stop, that the encounter took place in daylight on a busy street, and that, although the two uniformed officers were armed, held onto Mr. McDowell's Independence Card, and did not inform him of his right to withhold consent, Officer Mulla was primarily the officer interacting with him and the officers' weapons remained holstered. And we consider that Mr. McDowell was told to exit the vehicle but that he remained a short distance from the driver. Further, neither officer exhibited threatening conduct reasonably suggesting that Mr. McDowell's consent was coerced.

We note that our review is limited to the evidence presented at the suppression hearing, Officer Mulla's testimony and the body-worn camera footage, and that Mr. McDowell, as is his right, did not testify at the hearing. Viewing the evidence in the light most favorable to the party that prevailed on the motion, the State, and considering all of the above factors in the totality of the circumstances of this case, we conclude that the

evidence weighs more toward a finding of voluntariness in this case. Accordingly, the circuit court's ruling that Mr. McDowell consented to the search was not in error.

C. Mr. McDowell's Withdrawal of Consent Argument Was Not Preserved for Appellate Review.

In his reply brief, Mr. McDowell contends that if his "raised arms communicated consent, . . . [then] [his] repeated lowering of his arms was withdrawal of that consent." This argument, however, was not raised in the circuit court and, "[g]enerally, an appellate court will not address an issue not raised in or decided by the trial court." *Harris v. State*, 251 Md. App. 612, 636 (2021) (citing Md. Rule 8-131(a)). Although this Court may review unpreserved issues at its discretion, "the Court of Appeals has explained that 'appellate courts should rarely exercise' their discretion under Maryland Rule 8-131(a)." *Harris*, 251 Md. App. at 660 (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)) (explaining that considerations of "fairness and judicial efficiency ordinarily require that all challenges . . . be presented in the first instance to the trial court so that . . . [the] parties and the trial judge are given an opportunity to consider and respond to the challenge" (quoting *Chaney*, 397 Md. at 468)). Consequently, we decline to address whether Mr. McDowell withdrew consent when he lowered his arms while being searched by Officer Mulla.

In sum, we hold that the circuit court did not err in concluding that Mr. McDowell validly consented to the search. As such, the judgment of the circuit court is affirmed.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Circuit Court for Baltimore County
Case No. C-03-CR-19-001096

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0812

September Term, 2020

STEPHEN MCDOWELL

v.

STATE OF MARYLAND

Friedman,
Beachley,
Zic,

JJ.

Dissenting Opinion by Friedman, J.

Filed: June 23, 2022

I accept the circuit court's factual findings as correct, as well as the well-articulated legal analysis adopted by my colleagues in the majority. In my independent constitutional appraisal, however, I would hold that McDowell may have acquiesced in police authority to conduct a pat-down of his person for weapons, but that he did not give voluntary consent to a search of his person. *First*, in the cases on which my colleagues rely, the police clearly asked for consent to search before the defendant gave what those courts found to be implied consent. Slip Op. at 11-13 (citing *Vongxay*, *Chrispin*, *Mendoza-Cepeda*, *Jones*, and *Wilson*). Here, the absence of such a request by the police weighs heavily against my thinking that McDowell voluntarily consented to a search of his person. *Second*, I think McDowell's actions themselves—turning around, raising his arms, and saying "no" when asked if he "ha[d] anything on [him]"—are insufficient to carry the State's burden to show voluntary consent to search his person. Without voluntary consent, this search was unconstitutional. I dissent.