Circuit Court for Prince George's County
Case No. CT180884B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 950

September Term, 2019

DEANDRE MALIK JACOB

v.

STATE OF MARYLAND

Nazarian,
Reed,
Truffer, Keith R.
(Circuit Court Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 24, 2020

Deandre Malik Jacob ("Appellant") was charged with two (2) counts of possession of a regulated firearm by a person under the age of 21; two (2) counts of carrying a handgun on his person; and two (2) counts of carrying or transporting a handgun in a vehicle while on the public roads, highways, waterways, airways or parking lots. On March 1, 2019, Appellant filed a Motion to Suppress physical evidence seized from his person and the car in which he was a passenger, on the grounds that his Fourth Amendment rights were violated when the police officers conducted an unlawful stop, lacking the necessary reasonable articulable suspicion to conduct the stop. The Appellant in his motion argued that the subsequent search and seizure was therefore illegal.

At the end of the suppression hearing, the motions court denied Appellant's Motion to Suppress. On April 1, 2019, a jury in the circuit court for Prince George's County convicted Appellant of: (1) possession of a firearm by a person under the age of 21; (2) wearing, carrying, and transporting a handgun in a vehicle on a public highway; and (3) wearing, carrying and transporting a handgun upon his person. Appellant was sentenced to three (3) years imprisonment, suspending all but nine (9) months. Appellant raises a single question on appeal, which we have rephrased for clarity:[1]

I. Did the court err in denying Appellant's Motion to Suppress?

Finding no error, we affirm.

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[1] Appellant presents the following question:

1. Did the motions court err in denying [Appellant's] motion to suppress the evidence recovered from the vehicle in which [Appellant] was a passenger?

FACTUAL AND PROCEDURAL BACKGROUND

Around 11:30 p.m. on May 1, 2018, Sergeant William Weathers ("Sergeant Weathers") was on his way to monitor a standard traffic stop during a "spot-and-stop" operation,[2] when he noticed a Toyota Camry parked at the 24-hour BP gas station ("the BP") on Marlboro Pike. Sergeant Weathers returned to the area of the BP to watch the vehicle from across the street. At the suppression hearing, Sergeant Weathers testified that he observed the car parked for approximately five to fifteen minutes, which was first parked at the air pump station, and then at a gas pump. When questioned about why Sergeant Weathers thought the vehicle was suspicious, he provided two reasons:

> [Sergeant Weathers]: Normally when you watch vehicles like – it's a high robbery area, to watch a car just sitting there for a long time, no one pumping gas or putting air in the tires, that's what, you know – and especially coming back to narcotics from robbery, it just made me think of a robbery.
>
> [Assistant State's Attorney]: When you say coming back to narcotics from robbery, do you mean - -
>
> [Sergeant Weathers]: So when I got promoted to Sergeant, I went to robbery suppression.
>
> ****
>
> [Assistant State's Attorney]: Okay. So then based on all these observations, you went ahead and called it in. And was there anything else that you – what, if anything else, did you observe regarding the vehicle?
>
> [Sergeant Weathers]: As I was watching the vehicle, it appeared to me that

[2] Sergeant Weathers explained a "spot-and-stop" as: "when you might have some undercovers on the street, [and] you have your OP, or your observation post, for your surveillance and you're just driving up and down seeing who's out. Sometimes we call out guys you may want the undercover to go talk to, to try to buy drugs, or you might see a suspicious vehicle that we would watch for a little bit, or different traffic stops that we'll call out."

> the driver had lit a cigarette, or he lit something.
>
> [Assistant State's Attorney]: How could you tell that he had lit something?
>
> [Sergeant Weathers]: I just saw a spark.
>
> [Assistant State's Attorney]: And what was the significance of that to you?
>
> [Sergeant Weathers]: I mean, it was a gas station, the signs say no smoking all around, on all of—all over the pumps.

Because Sergeant Weathers was in an undercover vehicle at the time and couldn't personally approach the vehicle, he put in a call over the police radio, stating that "the vehicle in question was moving from pump to pump and the occupants of the vehicle were smoking a cigarette at the pump."

Detective Mohammed Ashkar ("Detective Ashkar") responded to the call and testified that when he arrived at the BP, the vehicle was still parked at a gas pump. Detective Ashkar stated that he drove his vehicle to the pump in front of the suspect vehicle, and indicated that there was about six feet between the nose of his vehicle and the nose of the vehicle in question. Detective Ashkar also elaborated that he and the other officer with him at the scene, Detective Rasuli, were not in full uniform, but that they did have on vests with the word "POLICE" and a badge on the front, and their vehicle was an SUV with police lights, but did not have any markings that said "police."

Explaining that everything happened in "less than 10 seconds from when [he] parked," Detective Ashkar testified that he approached the vehicle's passenger side, while Detective Rasuli approached the driver's side, and that they "could see the driver and the passenger of the vehicle kind of moving their hands around in the vehicle." Detective

Ashkar and Detective Rasuli immediately instructed the occupants of the vehicle to stop moving and they complied. By this time, Detective Ashkar was at the passenger's side of the vehicle, the side the Appellant was on. While the gas station was well lit, and the vehicle was without tint, Detective Ashkar indicated that he used his flashlight to "scan[] around," … "trying to figure out what they were reaching for, what the reason was." Detective Ashkar testified that it was at this point that he saw the corner of what he considered to be handgun – based on his knowledge and experience – under Appellant's right thigh. Detective Ashkar could not recall what part of the gun it was specifically, just that it was indeed the corner of a handgun. So that the scene didn't escalate, Detective Ashkar stated that he instantly opened the passenger's side of the vehicle and removed Appellant from the car, placing him in handcuffs. After Appellant was handcuffed, Detective Ashkar noted that he observed a handgun in the passenger's seat. A second handgun was also recovered from the vehicle. Appellant was charged with two (2) counts of possession of a regulated firearm by a person under the age of 21; two (2) counts of carrying a handgun on his person; and two (2) counts of carrying or transporting a handgun in a vehicle while on the public roads, highways, waterways, airways or parking lots.

On March 1, 2019, Appellant filed a Motion to Suppress, requesting suppression of the physical evidence seized from his person and from the car in which he was a passenger, on the grounds that his Fourth Amendment rights were violated when the police officers conducted an unlawful stop, lacking the necessary reasonable articulable suspicion to conduct the stop. In denying the motion, the motions court found that under the totality of the circumstances, there was reasonable articulable suspicion to stop the vehicle. The

motions court explained that in consideration of *Terry v. Ohio*:[3]

> You're in a high crime area, they're sitting at a pump and not pumping gas. The experience of the officers, the length of time between five and fifteen minutes, there's a flame at the gas pump—or a spark, excuse me, to use the words of the Sergeant—all of those together, I believe, gives them reasonable articulable suspicion to investigate.
>
> And when they approach the vehicle that reasonable articulable suspicion raised even higher with the furtive movements of the two individuals in the car.

On April 1, 2019, a jury convicted Appellant of possession of a firearm being under the age of 21; wearing, carrying, and transporting a handgun in a vehicle on a public highway; and wearing, carrying and transporting a handgun upon his person. Appellant was acquitted of the corresponding counts related to the second handgun recovered from the vehicle. During the sentencing hearing on June 7, 2019, Appellant was sentenced to three (3) years imprisonment, suspending all but nine (9) months, with the charges of (1) wearing, carrying, and transporting a handgun in a vehicle on a public highway and (2) wearing, carrying and transporting a handgun upon his person merging into the charge of possession of a firearm being under the age of 21. This timely appeal followed.

DISCUSSION

A. Parties' Contentions

Appellant argues that the motions court erred in denying his motion to suppress the evidence recovered from the vehicle in which he was a passenger. Appellant claims that the officers conducted an "unlawful" stop based on the spark of a cigarette lighter in a

[3] 392 U.S. 1 (1968).

legally parked car. Appellant maintains that the officers had no reasonable articulable suspicion to justify the stop and subsequent seizure and was therefore in violation of Appellant's Fourth Amendment rights. The State asserts that the motions court correctly denied the motion to suppress because the challenged stop was lawful and was reinforced by reasonable articulable suspicion of a violation of the county's fire code and by suspicion of a potential robbery.

B. Standard of Review

In reviewing a trial court's decision to grant or deny a motion to suppress, this Court limits its review to the record of the motions hearing. *Trusty v. State*, 308 Md. 658, 669–72 (1987). The evidence is viewed in the light most favorable to the prevailing party, and the trial court's fact findings are accepted unless clearly erroneous. *Williamson v. State*, 413 Md. 521, 531 (2010). "The ultimate determination of whether there was a constitutional violation, however, is an independent determination that is made by the appellate court alone, applying the law to the facts found in each particular case." *Belote v. State*, 411 Md. 104, 120 (2009) (citations omitted); *see also Carter v. State*, 367 Md. 447, 457 (2002).

C. Analysis

Stop and Seizure

As applied to the States through the Fourteenth Amendment, the Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures…." U.S. Const. Amend. IV; *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961). It is well established that the Fourth Amendment guarantees are not implicated in every interaction between the police and an individual.

Scott v. State, 366 Md. 121, 131 (2001). In Maryland, like in many states, courts analyze the applicability of the Fourth Amendment in three tiers of interaction between a citizen and the police: (1) an arrest, which requires probable cause; (2) a *Terry* stop, demanding that an officer has reasonable articulable suspicion that criminal circumstances exist; and (3) a consensual encounter, which does not invoke the Fourth Amendment at all. *See, e.g.*, *Ferris v. State*, 355 Md. 356, 374 n. 5 (1999). For the purposes of this case, however, we are only concerned with Appellant's argument that the officers unlawfully "stopped" and "seized" the Appellant while he was a passenger in a vehicle.

Commonly known as a *Terry* stop, a police officer may engage in an investigatory detention without violating the Fourth Amendment if the officer has a reasonable, articulable suspicion of criminal activity. *Crosby v. State*, 408 Md. 490, 505-06 (2009) (citing *Terry*, 392 U.S. at 17); *see also Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Florida v. Royer*, 460 U.S. 491, 498 (1983). 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 suspicions. *Ferris*, 355 Md. at 372–73. The stop becomes a seizure 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. *See Swift v. State*, 393, Md. 139, 151 (2006); *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988) ("taking into account all of the circumstances surrounding the encounter, [a seizure occurs when] 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.'"). The Court of

Appeals in *Ferris* outlined several pertinent factors to be considered by the court when determining whether an individual was seized for the purposes of a Fourth Amendment analysis:

> the 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.

Ferris, 355 Md. at 377; *see also Swift*, 393 Md. at 153; *Chesternut,* 486 U.S. at 575; *cf. Royer,* 460 U.S. at 502–03.

Whether a reasonable person would have felt free to leave a police officer's presence is a highly fact-specific inquiry. As the Court stated in *Swift*, "'[t]he test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.'" *Swift,* 393 Md. at 156 (quoting *Chesternut*, 486 U.S. at 573). The Court further emphasized that "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Id*. at 156.

Both parties encourage this Court to consider *Pyon v. State*, for divergent reasons, obviously. *See Pyon v. State,* 222 Md. App. 412 (2015). In response to a dispatch concerning drug activity, an officer noticed a Honda with its engine off, and parked her police cruiser "catercorner" to the rear of the vehicle in question, partially blocking the

vehicle and therefore preventing the driver of the vehicle from backing out or leaving. *Pyon*, 222 Md. App. at 425. The officer then approached the vehicle and asked for identification of the car's occupants, calling for back up once she noticed that there was more than one individual in the vehicle. *Id*. at 426-28. While at the vehicle, the officer detected the odor of marijuana, searched the vehicle and found baggies of marijuana in the glove compartment, prompting her to arrest the occupants in the car, including Pyon. *Id*. at 428. In reversing the trial court's denial of the motion to suppress the baggies found in the vehicle, we found that not only was the positioning of the police's cruiser "aggressive and intimidating," and an "indisputable unfriendly gesture," we also held:

> [I]t is inconceivable that [the driver] would have felt free to respond, 'It is none of your business,' to have turned on the Honda's ignition switch, and to have started to drive away. Without such a feeling of freedom, however, he was 'seized' for Fourth Amendment purposes, and so was the appellant.

Pyon, 222 Md. App. at 448, 453.

Neither Appellant nor the State denies that there was in fact a seizure; the point of contention is when the seizure happened and if, at the time of the seizure, the officers had a valid legal basis to seize the vehicle Appellant was in. Therefore, our inquiry first determines when the seizure in this case takes place. Appellant argues that he was stopped and seized when Detective Ashkar first parked at the gas pump directly in front of the vehicle he was in, "nose-to-nose" with it. The State asserts that the Appellant wasn't seized until seconds later, when he complied with the Detectives' directive to show his hands. Under totality of the circumstances, we find that the Appellant was seized when he

acquiesced to the officer's request to stop moving and keep his hands where they could be seen.

Detective Ashkar testified that when he pulled into the BP, he parked nose-to-nose with the Toyota Camry. When asked about whether the Camry was free to drive off, Detective Ashkar responded that the vehicle did have enough room to turn right and take off if it wanted. On direct examination, Detective Ashkar indicated that the nose of his vehicle was about six feet from nose of the vehicle in question. Additionally, there were no other cars in the parking lot at the BP. At this point, the driver of the Camry has two options of escape: (1) pulling off to the right, or (2) backing up and leaving the BP. This is quite distinguishable from *Pyon*, where the officer parked catercornered, therefore blocking the vehicle's egress. *Pyon*, 222 Md. App. at 446. We agree with the State that there was nothing "aggressive" or "intimidating" about the Detectives parking at the gas pump in front of the vehicle Appellant was in, and singularly, this does not indicate that Appellant was not free to leave. A reasonable person parked at a gas station would recognize that another person may be pulling in to use another pump at the station. A seizure has not yet occurred.

A seizure had also not taken place when the Detectives Ashkar and Rasuli got out of their vehicles to approach the Toyota Camry. We accept Appellant's points that the Detectives got out of the SUV with mounted lights (although there are no facts that suggest that these lights were on), "donning clearly marked 'POLICE' vests and badges and approached the vehicle on either side." However**,** we held in *Lawson v. State* that "[o]rdinarily, approaching a parked vehicle to question occupants about their identity and

actions is a mere accosting and not a seizure." *Lawson v. State*, 120 Md. App. 610, 614, (1998) (citing *Royer*, 460 U.S at 497). As described in *Crosby, "*[a]n "accosting," as ordinarily discussed in Fourth Amendment jurisprudence, does not implicate Fourth Amendment protection because such an encounter does not entail any show of authority by the police." *Crosby*, 408 Md. 503, n. 14 (citations omitted). Here, by simply approaching the vehicle, the Detectives were not "showing any authority." Consequently, at this juncture, there is still no indication of a seizure.

Nevertheless, within a matter of seconds, the encounter did become a seizure, as Detective Ashkar testified that he could see the driver and Appellant moving their hands around in the vehicle, and at that moment, both occupants were instructed to stop moving and to keep their hands where the Detectives could see them, and they respected the command. Pursuant to *Mendenhall*, "seizure based on a show of authority does not occur unless the subject *yields* to the authority." *Carter v. State*, 243 Md. App. 212, 229 (2019), *cert. granted*, No. 462, Sept. Term, 2019) (citing *California v. Hodari*, 499 U.S. 621, 626–27 (1991)) (emphasis added). Acknowledging that "a reasonable person would not feel free to decline [the Detectives'] request," the State submits that by this point, while still within mere seconds of the Detectives arriving at the scene, Appellant was now seized for the purposes of the Fourth Amendment. We accept the State's concession. As indicated above, Detective Ashkar was quickly at the Passenger's side of the vehicle, and as he shined his flashlight into the vehicle, he noticed what appeared to him to be part of a handgun. Now that we have defined when the seizure took place, we must now examine the more

important question of whether the Detectives had reasonable articulable suspicion to conduct the *Terry* stop and the seemingly simultaneous seizure.

Reasonable Articulable Suspicion

In order to lawfully stop and detain an individual, an officer must have a "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30). The Supreme Court has explained "reasonable articulable suspicion" as "a particularized and objective basis for suspecting the person stopped." *United States v.* Cortez, 449 U.S. 411, 417 (1981). While a "particularized and objective basis" is in no way a bright line rule, what shapes reasonable suspicion is "a 'common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.'" *Crosby*, 408 Md. at 507 (citing *Bost v. State*, 406 Md. 341, 356 (2008)).

Given that reasonable suspicion is evaluated under the totality of the circumstances, the court is required to consider the conditions known to the officer and "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. We "give due deference to a law enforcement officer's experience and specialized training, which enable the law enforcement officer to make inferences that might elude a civilian." *Norman v. State*, 452 Md. 373, 387 (2017) Therefore, the court does not engage in a "divide and conquer analysis," considering only individual instances, since "a circumstance may be innocent by itself, but appear suspicious when considered in combination with other circumstances." *Norman*, 452 Md. at 387. And even still, while the "likelihood of criminal activity need not rise to the level required for probable cause," the

officer's reasonable suspicion must be more than a "hunch." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Additionally, the reasonable suspicion rule "does not allow [a] law enforcement official to simply assert that innocent conduct was suspicious to him or her. Rather, the officer must explain how the observed conduct, when viewed in the context of all the circumstances known to the officer, were indicative of criminal activity." *Crosby*, 408 Md. at 508. (internal citation omitted).

Sergeant Weathers testified to two reasons why he called in the vehicle as suspicious: (1) his observation of the vehicle parked at the air pump and then a gas pump, with no indication that the occupants intended to utilize those services, in a high robbery area and (2) and a spark, that indicated that the driver had lit a cigarette, while sitting at a gas pump. Taken as a whole, we find that these two circumstances do give rise to reasonable articulable suspicion, justifying the stop and seizure that instantaneously followed.

In general, while "an individual's presence in a "high robbery area," standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity, [] a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation *Illinois v. Wardlow,* 528 U.S. 119, 119 (2000); *See also Chase v. State*, 224 Md. App. 631, 644 (2015) ("In a totality of the circumstances analysis, the nature of the area is important in our consideration.") (citation omitted). Here, even though Sergeant Weathers watched the vehicle for five to fifteen

minutes due to the vehicle's actions – or lack of action – in a "high robbery area,"[4] he didn't make a call over the police radio until he saw the spark in the vehicle, elaborating that "I mean, it was a gas station, the signs say no smoking all around, on all of – all over the pumps" and "gas and fire doesn't mix. It could cause a fire." Detective Ashkar testified that when the call came over the radio, he was informed that "the occupants of the vehicle were smoking a cigarette at the pump." While we do agree with Appellant that it is *normally* not illegal to light a cigarette in one's car, it is illegal to light a cigarette in one's car while you are in close proximity to a gas pump, at least in Prince George's County. Prince George's County Code ("PGGC") § 11-281(d)[5] states that:

> It shall be unlawful for any person to smoke, throw, or deposit any lighted or smoldering substance in any place where "no smoking" signs are posted **or** in any other place where smoking would occasion or constitute a fire hazard.

(emphasis added). Violation of this subtitle, entitled Fire Safety, constitutes a misdemeanor, making it a criminal offense. Because Appellant does not deny that the driver did in fact light a cigarette at the gas pump, and has inadvertently admitted to it by erroneously arguing that there is nothing illegal about it, we find that there was more than

[4] When asked about the area of "Marlboro Pike," Detective Ashkar testified that his division "gets multiple complaints of problems in the neighborhoods. We've conducted a number of buy-bust operations. There's been a lot of activity as far as robbery and contact shootings and things, car-jackings, on Marlboro Pike."

[5] The Prince George's County Code is available online at https://www.municode.com/library/md/prince_george's_county/codes_of_ordinances

enough reasonable articulable suspicion for Seargeant Weathers to call in the activity for further inquiry.

We do acknowledge that the Prince George's County's fire code was not addressed as part of the motion court's decision in finding that there was reasonable suspicion and denying Appellant's Motion to Suppress. In considering the totality of the circumstances, the motions court found that the observations made in a high robbery area and the spark at the gas pump were grounds for reasonable suspicion, meriting more investigation. Regardless, "where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm." *Robeson v. State*, 285 Md. 498, 502 (1979). Here, Sergeant Weathers was able to explain that there were "no smoking" signs all over the pumps and demonstrated his knowledge about the danger of lighting a cigarette at a gas pump, noting that "gas and fire doesn't mix. It could cause a fire." The motions court had more than adequate "articulated logic" to defer to in finding that reasonable suspicion did exist to stop the vehicle Appellant was in. *Crosby*, 408 Md. at 509. We find no error in the motion court's denial of the Appellant's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.