

Circuit Court for Baltimore City
Case Nos. 119072001-003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1084, 1086, 1099, September Term, 2019

KIRBY REAVES

v.

STATE OF MARYLAND

JASON MCCRAY

v.

STATE OF MARYLAND

KENNARD GARDNER

v.

STATE OF MARYLAND

Berger,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 9, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, Kirby Reaves, Jason McCray, and Kennard Gardner, entered into conditional guilty pleas in the Circuit Court for Baltimore City to various handgun offenses, after their motion to suppress was jointly litigated and denied.¹ Appellants together raise a single question on appeal: Did the suppression court err in denying their motion to suppress because the police seized them by blocking in the car in which they were occupants without reasonable articulable suspicion that they were involved in criminal activity? We shall affirm the ruling of the suppression court. Because appellants' sole question on appeal concerns their suppression motion, we shall focus on only those facts elicited at, and law related to, that hearing.

STANDARD OF REVIEW

When we review a motion to suppress, we apply the following standard of review:

[W]e view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. [W]e 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.

Corbin v. State, 428 Md. 488, 497-98 (2012) (quotation marks and citations omitted).

¹ Reaves was convicted of two crimes: possession of a firearm by a prohibited person, and wearing, carrying, or transporting a handgun in a vehicle. He was sentenced to ten years of imprisonment, all but five years suspended to be served without the possibility of parole, plus three years of supervised probation upon his release from prison, and a concurrent three years of imprisonment, respectively. McCray and Gardner were each convicted of one crime: wearing, carrying, or transporting a handgun in a vehicle. They were each sentenced to three years of imprisonment, all suspended, and three years of probation.

SUPPRESSION HEARING FACTS

Prior to trial, appellants moved to suppress evidence seized by the police from a car in which they had been occupants. Appellants argued that the police had illegally seized them and their car when the police arrived on the scene and parked in such a way that blocked their car's exit. Only one witness testified at the suppression hearing, State's witness Detective Michael Wood with the Baltimore City Police Department. The State also introduced into evidence video taken from Detective Wood's "body" camera. The following was elicited at the suppression hearing.

Around 4:00 p.m. on February 16, 2019, Detective Wood was on routine control in Baltimore City sitting in the front passenger seat of an unmarked police vehicle with three other officers. As the officers drove south in the 1800 block of Braddish Avenue, Detective Wood noticed on the left-hand side of the road a legally parked Acura with its sun roof open, its engine running, and three men sitting inside. Detective Wood testified that the residential area was known as a high-crime and drug area, and he knew from his experience that narcotics dealers will sometimes conduct drug transactions on cold days from inside a vehicle. He decided to conduct a field interview.

Detective Wood testified that he exited the police vehicle and, as he walked around the rear of the police vehicle toward the Acura, he noted the odor of marijuana. He believed the smell was coming from the Acura because its sun roof was open and he did not see any other occupied vehicles or anyone smoking in the area. As he continued walking toward the Acura, the smell became stronger.

When Detective Wood and a second officer from their police vehicle, Detective Shank, reached the Acura, it shifted into drive and began to roll forward a bit. Detective Wood exclaimed, “Whoa, whoa, whoa, whoa! . . . What’s going on? . . . Nothing crazy going on here. You guys aren’t in any trouble.” The Acura stopped. Detective Wood called for backup and began talking to the men, at which point the Acura apparently pulled forward a second time and the situation quickly escalated.

Detective Shank opened the front passenger door and told Detective Wood that the men were attempting to flee and that the rear passenger, later identified as Kirby Reaves, was advising the driver “to go.” Detective Wood drew his service revolver, yelled “I will shoot everybody in this car”, and ordered Gardner to stop the car and turn off the ignition. Detective Shank and a third officer opened the rear passenger door to remove Reaves and saw in plain view a handgun on the passenger seat next to Reaves. The occupants, including front seat passenger Jason McCray and driver Kennard Gardner, were removed from the car and arrested. The police seized the handgun, and a further search of the Acura revealed a hand-rolled cigar containing suspected marijuana that Gardner had been holding and a baggie of suspected marijuana in the center cup holder.

Detective Wood initially testified that when he exited the police vehicle, he was focused on getting out and approaching the Acura and did not recall how the police vehicle was parked in relation to the Acura. He did not know whether the Acura was blocked in when the police arrived or whether the officer operating the police vehicle blocked in the Acura when it moved forward. The State played footage from Detective Wood’s body camera, and he was questioned extensively about the position of the cars as seen on the

video. Upon further questioning by the parties and review of the video, Detective Wood testified that based on the body camera footage, it appeared that when he rounded the back of the police vehicle and smelled marijuana, nothing was blocking the Acura from leaving. He explained that, based on the body camera footage, it appeared that when the Acura tried to leave the second time, the police car moved and blocked in the Acura. He admitted on cross-examination that the steering wheel of the police vehicle was slightly turned to the left as he exited the vehicle but disagreed that the police vehicle was blocking the Acura, testifying: “Just because the wheel is turned doesn’t mean the entire nose of the car is blocking that vehicle.”

After the parties presented their evidence to the suppression court, they proceeded to argument. The appellants argued that the Acura had been seized when the police arrived because the police had parked their vehicle in a way that blocked the Acura from leaving, citing *Mack v. State*, 237 Md. App. 488, 494-95 (2018), where we held that immobilizing a car constitutes a seizure. Appellants argued that the seizure was illegal because, at that point, the police did not have reasonable articulable suspicion to conduct a stop. The State argued that the Acura was not blocked in when the police arrived on the scene and was not seized until after Detective Wood smelled marijuana coming from it, at which point the police had reasonable articulable suspicion to search it. The State pointed out that the appellants clearly felt free to leave when the police initially arrived because they attempted to do so. The State cited to *Robinson v. State*, 451 Md. 94, 125 (2017), where we held that an officer has probable cause to search a vehicle when he smells marijuana, and argued

that *Mack* was factually distinguishable because, in that case, the police had in fact blocked in the suspect’s car and did not have reasonable articulable suspicion to seize it.

The suppression court denied the appellants’ motion to suppress based on the totality of the circumstances. The court concluded that the police had not blocked in the Acura when the police initially arrived, noting that the body camera footage showed that once Detective Wood approached the Acura, the driver of the Acura clearly tried to leave, turning his steering wheel to the right as he tried to maneuver away.

DISCUSSION

Appellants argue, as they did below, that the Acura was seized when the police initially arrived and blocked the Acura’s ability to leave, and because the police did not have reasonable articulable suspicion at that point to believe that the occupants were engaged in criminal activity, the seizure was illegal. The State argues, as it did below, that the seizure of the Acura and its occupants occurred after Detective Wood smelled marijuana, at which point the police were authorized to detain appellants and search the Acura.

The Fourth Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, does not forbid all searches and seizures but protects against unreasonable government searches and seizures.² *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). *See also Stanford v. State*, 353 Md. 527, 532-33 (1999) (citing *Michigan*

² The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” U.S. Const., amend. IV.

v. Summers, 452 U.S. 692, 700 (1981)). There are three tiers of interaction between a citizen and the police for purposes of the Fourth Amendment: an arrest, requiring probable cause to believe that a person has committed a crime; an investigatory stop or detention, requiring reasonable, articulable suspicion to believe that a person has committed or is about to commit a crime; and a consensual encounter, which does not implicate the Fourth Amendment at all. *State v. Dick*, 181 Md. App. 693, 702 (2008) (citing *Swift v. State*, 393 Md. 139, 150-51 (2006)). Because the question before us is whether the police seized the Acura and its occupants before Detective Wood smelled marijuana, we shall look more closely at the law of investigatory detentions and consensual encounters.

The Court of Appeals has described a consensual encounter as follows:

Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away. The guarantees of the Fourth Amendment are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter.

Swift, 393 Md. at 151 (citations omitted). See also *Graham v. State*, 146 Md. App. 327, 366 (2002) (Accostings are “mutual and voluntary exchanges” in which the officer and civilian “stand as equals of each other.”).

In determining whether an officer employed coercive tactics raising a consensual encounter into a stop, the Court of Appeals has listed the following facts that might indicate a seizure: “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.” *Swift*, 393 Md. at 150 (citations omitted). The Court of Appeals also recognized other factors that might communicate to a reasonable person that he was not free to leave, including “activation of a siren or flashers, commanding a citizen to halt . . . , and operation of a car in an aggressive manner to block a defendant’s course or otherwise control the direction or speed of a defendant’s movement.” *Id.* at 153 (citation omitted). Additionally, the Court of Appeals in *Ferris v. State*, 355 Md. 356, 377 (1999), listed the following relevant factors in determining whether a reasonable person would have felt free to leave: the time and place of the encounter; whether the officers were uniformed; whether the police moved 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 demonstrated any threatening behavior or physical contact to indicate to a reasonable person that he or she was not free to leave.

Viewing the evidence in the light most favorable to the prevailing party, the State, we find no error by the suppression court. When the police stopped their car, the officers had not activated their siren or flashers, displayed any weapon, nor commanded the occupants to “halt.” Appellants’ sole argument on appeal is that a seizure occurred because the police blocked in their car. Appellants seems to suggest that because Detective Wood initially could not affirmatively state the relative position of the cars, the State was unable to meet its burden of showing that the stop was lawful. We disagree.

The suppression court found, based on the evidence presented, that *after* Detective Wood smelled marijuana, the driver of the Acura had tried to leave the area, and therefore, appellants could not have been seized when the police initially arrived. The evidence also shows that Reaves, the rear passenger, also apparently believed that he and his fellow occupants could have left because, after Detectives Wood and Shank reached the car, he told Kirby, the driver, “to go.” Additionally, although Detective Wood testified that he did not know whether the Acura was blocked in when they initially arrived on the scene, after extensive examination and review of the body camera footage, he testified that it did not appear that the Acura was blocked in when they arrived. Moreover, even though 47 seconds into the video the police vehicle can be seen in a position that would have blocked or impeded the Acura from driving forward, Detective Wood explained that another detective was still driving the police vehicle and could have moved it when the Acura first rolled forward, which occurred after he smelled marijuana coming from the Acura.

Two cases involving the position of a police cruiser in relation to a suspect’s car are relevant but ultimately distinguishable from the case before us. In *Mack*, 237 Md. App. at 491, two officers in separate police cars were dispatched to a “high drug” area for two men selling drugs from a silver Honda, and when the officers turned onto the street, they saw two men sitting in a silver Honda. One officer parked directly in front of the Honda, and the other parked directly behind it. *Id.* The suppression court denied the motion to suppress, and we reversed on appeal. We held that police restraint on a person’s physical ability to leave the scene is not one factor to consider in a totality of the circumstances analysis but may constitute a seizure all on its own, and under the circumstances presented,

the immobilization of the Honda constituted an illegal seizure under the Fourth Amendment because it was not supported by reasonable articulable suspicion. *Id.* at 493.

In *Pyon v. State*, 222 Md. App. 412, 432 (2015), an officer was dispatched to a location for suspected drug activity by two black males in a Toyota, and there was a mention of a gray Honda SUV. When the officer arrived, she did not see the described Toyota but saw two men in a Honda. *Id.* She parked her car cater-cornered and to the rear of the Honda and testified at the suppression hearing that the Honda could have backed up and left, if it chose. *Id.* at 434. She approached the Honda and obtained the license from the driver. *Id.* at 450. When backup arrived, she approached the passenger side and asked the passenger, Pyon, for his license. *Id.* at 456. As he handed her his license, she detected the odor of raw marijuana coming from inside of the car. We held on appeal that under the totality of the circumstances the stop was illegal because a reasonable person in Pyon's position would not have felt free to leave when the officer parked her car as she did and asked him for his license, and the seizure was not supported by reasonable articulable suspicion. *Id.* at 459-60.

Mack and *Pyon* are distinguishable from the instant case because, unlike those cases, the suppression court concluded factually (and legally) that the police did not seize the Acura until after Detective Wood smelled marijuana. The suppression court's conclusion was based on evidence elicited at the suppression hearing, and when viewed in the light most favorable to the State, we find nothing clearly erroneous in the court's fact finding. Because the initial contact encompassed only a consensual encounter not implicating the Fourth Amendment, when Detective Wood smelled marijuana he could detain the

appellants to investigate further. *See Robinson*, 451 Md. at 125. Accordingly, we shall affirm the suppression court’s denial of appellants’ motion to suppress.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.