Circuit Court for Cecil County
Case No.: C-07-CR-19-000482

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1227

September Term, 2019

STEVEN D. BEHRENSHOUSER

v.

STATE OF MARYLAND

Graeff,
Arthur,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: May 17, 2021

Appellant, Steven D. Behrenshouser, was charged in the Circuit Court for Cecil County with possession of fentanyl with the intent to distribute and other related counts. After his motion to suppress was denied, appellant entered a plea of not guilty pursuant to an agreed statement of facts, and he was convicted of possession of fentanyl with intent to distribute. The court imposed a sentence of six years' incarceration. On appeal, appellant contends that the circuit court erred in denying his motion to suppress.

For the reasons set forth below, we disagree, and therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2019, Officer Dennis Lasassa and Officer Saulsbury, members of the Elkton Police Department, were conducting a drug investigation.[1] The suspect in the investigation cooperated and gave consent to search his phone. When the police searched the phone, they "found that that suspect . . . was working with [appellant] in reference to selling fentanyl heroin mix."

Later that day, as the police were driving their unmarked patrol vehicle, they saw appellant and two other individuals walking across westbound Route 40, causing traffic to slow. Officer Lasassa testified that, although he had not been looking for appellant when he saw him on Route 40, he "automatically recognized" appellant and "knew who he was" based on the prior investigation.

[1] Officer Saulsbury's first name is not included in the record.

Officer Lasassa activated his emergency lights and pulled his patrol vehicle to the side of the road. Officer Saulsbury got out and made initial contact with appellant and the two individuals. The officers' intent was to advise the three individuals "that they were crossing traffic unsafely."

As Officer Lasassa approached, he observed a clear plastic vial in a zip-lock bag "sticking out" of appellant's back pants pocket. Based on Officer Lasassa's training and experience while working in drugs and narcotics, he "knew that that was packaging material used for CDS." He explained that, when he worked in Baltimore City, he had encounters with narcotics in plastic vials "very similar to what [appellant] had on his person." Typically, those types of vials contained a "heroin fentanyl mix."

Based on this observation of suspected CDS paraphernalia, Officer Lasassa handcuffed appellant and placed him under arrest. Pursuant to protocol, he transported appellant to the Elkton police department, where a more thorough search occurred. During a strip search, the police retrieved a sock from appellant's "groin area" that contained: 143 bags of white wax paper with suspected heroin fentanyl mix; 35 white wax papers containing the same suspected mix; 39 clear plastic vials containing a suspected heroin fentanyl mix; a blue zip-lock baggie containing suspected methamphetamine; and two needle syringes. Appellant also had $363 in his wallet.

Officer Lasassa initially testified that he did not know any purpose for the vials other than drugs. He subsequently acknowledged that they could be used for science experiments. In his experience, however, they were used for packaging drugs. That was

one of the things he considered when he determined that the vial seen in appellant's pocket was intended for packaging and distribution of CDS.

At the conclusion of the testimony, the State argued that appellant was lawfully arrested following Officer Lasassa's observation, in plain view, of what he believed to be CDS packaging material. This observation "fit with their ongoing investigation of [appellant] as a suspect of someone who was distributing controlled dangerous substances."

Appellant argued that there was not probable cause to arrest because the vials were "intrinsically innocuous" and legal for consumer use. He asserted that, to constitute paraphernalia, there needed to be a nexus between the vials and a controlled dangerous substance, and that nexus was lacking in this case.

Although the defense argued that Officer Lasassa said that his sole reason for arresting appellant was the vial, the court noted that it had to look at "all the information that the officers had at the time." It stated:

> THE COURT: [P]art of that evidence is that on March 11th of 2019 Officer Lasassa, along with other officers of the Elkton police department working the street crimes unit, came into contact with some other individual who gave consent to search their cell phone with regard to drug-related activity, and within that phone the officers found the defendant's information and it had to deal with [the] combination of heroin fentanyl mix that the person had on their person that presumably was received from the defendant. Sometime later that same day, I'm not sure how much later, but this was about 3:00, that's when the officers driving down Route 40, which is a four lane highway in Cecil County here, going in the opposite direction observed the defendant along with other individuals cross improperly Route 40 to the extent that it caused traffic to slow down in order to make contact. The officer said that some of the cars nose dipped. The officers I guess turned around and approached the group and, as Officer Lasassa said, at that point as he approached the defendant approximately three to four feet away he observed

> in plain view this baggy which contained these clear plastic vials. The officer testified that based on his training and experience both here in Elkton, Cecil County, Maryland and his prior police experience in Baltimore City, that these vials are used in his experience exclusively for the distribution of drugs, and I think he specifically said heroin/fentanyl. He testified that the bag was in plain view, clearly in plain view, part of it was sticking out, and based on that he did seize the bag and at that point, in the Court's mind, lawfully placed the defendant under arrest and [conducted] a subsequent search incident to that arrest.

At that point, defense counsel asked to supplement her argument. Counsel stated that the court should not consider the prior investigation because the defense was not provided discovery relating to that investigation. Counsel also argued that, pursuant to the factors set forth in Md. Code Ann., Crim. Law Article ("CR") § 5-619 (2002, 2012 Repl. Vol., 2019 Supp.), the vial did not meet the definition of "drug paraphernalia."

The court initially noted that the testimony of Officer Lasassa was consistent with the information in the statement of probable cause. It also noted that the officer testified that the only use he had seen of the vials was for distribution of drugs, and although counsel argued that they could be used for other things, there was no evidence to support that argument. The court then ruled:

> [T]he Court is going to deny the motion for hopefully all the reasons I stated. And, again, I believe the information that the officers had prior to this chance encounter do go to determining whether these vials were or are drug paraphernalia as defined, and there's certain factors that the Court shall consider, and I think those factors, some of those factors, deal directly with the information the officers had shortly before they came into contact with the defendant.
>
> So for all those reasons, the Court's going to deny the motion to suppress.

STANDARD OF REVIEW

Our review of a circuit court's denial of a motion to suppress evidence is "limited to the record developed at the suppression hearing." *Pacheco v. State*, 465 Md. 311, 319 (2019) (quoting *Moats v. State*, 455 Md. 682, 694 (2017)). The record is examined "in the light most favorable to the party who prevails on the issue that the defendant raises in the motion to suppress." *Norman v. State*, 452 Md. 373, 386 (quoting *Varriale v. State*, 444 Md. 400, 410 (2015)), *cert. denied*, 138 S. Ct. 174 (2017). The trial court's factual findings are accepted unless they are clearly erroneous, but on the ultimate issue of the constitutionality of a search or seizure under the Fourth Amendment, this Court performs an "independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Grant v. State*, 449 Md. 1, 15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)). *Accord Pacheco*, 465 Md. at 319–20 ("[W]e review *de novo* the 'court's application of the law to its findings of fact.'") (quoting *Norman*, 452 Md. at 386).

DISCUSSION

Appellant contends that the motions court erred by denying his motion to suppress, arguing that there was no probable cause to support his arrest. Specifically, appellant asserts that the officer's observation of a single plastic vial in his back pocket did not provide probable cause to believe that he illegally possessed "drug paraphernalia" or "controlled paraphernalia" pursuant to CR §§ 5-619 and 5-620.

The State contends that the court properly denied appellant's motion to suppress. It asserts that there was probable cause to believe, under the totality of the circumstances, that appellant illegally possessed drug paraphernalia.

Although there were numerous issues raised at the suppression hearing, the only issue before this Court is whether there was probable cause to arrest appellant at the time Officer Lasassa saw the vial protruding from his pocket. If there was probable cause to arrest, the search incident to the arrest was proper. *See Pacheco*, 465 Md. at 322–24.

The Fourth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" *Lewis v. State*, 470 Md. 1, 17 (2020); U.S. Const. amend. IV. "A warrantless arrest made in a public place is not unreasonable, and accordingly does not violate the Fourth Amendment, if there is probable cause to believe that the individual has committed either a felony or a misdemeanor in an officer's presence." *Allen v. State*, 197 Md. App. 308, 318 (2011) (quoting *Donaldson v. State*, 416 Md. 467, 480 (2010)).

"Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonable trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Freeman v. State*, 249 Md. App. 269, 275 (2021) (emphasis omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)). It is a "practical, nontechnical conception that deals with the factual and practical considerations of everyday

life on which reasonable and prudent men, not legal technicians, act." *Lewis*, 470 Md. at 21 (quoting *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)).

"Probable cause, moreover, is 'a fluid concept,' 'incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.'" *Pacheco*, 465 Md. at 324 (quoting *McCracken v. State*, 429 Md. 507, 519–20 (2012)). "To determine whether probable cause exists, 'the reviewing court necessarily must relate the information known to the officer to the elements of the offense that the officer believed was being or had been committed.'" *McCormick v. State*, 211 Md. App. 261, 269 (2013) (quoting *Belote v. State*, 199 Md. App. 46, 54 (2011)). "It 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)). "Probable cause 'is not a high bar.'" *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)).

Here, the question is whether the police had probable cause to believe that appellant illegally possessed drug paraphernalia. CR § 5-619(c) provides, in pertinent part, as follows:

> (c) (2) Unless authorized under this title, a person may not use or possess with intent to use drug paraphernalia to:
>
> (i) plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, pack, repack, store, contain, or conceal a controlled dangerous substance; or
>
> (ii) inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance.

"Drug paraphernalia" is defined, in pertinent part, as "equipment, a product, or material that is used, intended for use, or designed for use" in various ways, including packaging, storing, or containing CDS. CR § 5-101(p)(1)(i). This includes "a capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging small quantities of a controlled dangerous substance." CR § 5-101(p)(2)(ix).

CR § 5-619(a) sets forth factors to consider to determine whether an item is drug paraphernalia, which includes, in addition to other "logically relevant factors," the following:

> (3) the proximity of the object, in time and space, to a direct violation of this section or to a controlled dangerous substance;
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> * * *
>
> (5) direct or circumstantial evidence of the intent of an owner or a person in control of the object to deliver it to another who, the owner or the person knows or should reasonably know, intends to use the object to facilitate a violation of this section;

Here, the record supports the suppression court's finding that Officer Lasassa had probable cause to arrest appellant. Officer Lasassa testified that he previously had received information that appellant was involved with the distribution of a mix of fentanyl and heroin. Later that day, he encountered appellant, who he recognized from the prior drug investigation. As Officer Lasassa approached appellant he saw protruding from appellant's pocket a "clear plastic vial in a zip-lock bag," an object which, in his experience, was used for packaging drugs.

Officer Lasassa's prior investigation, which indicated that appellant was involved with distributing a fentanyl/heroin mixture, along with his observation of a container that,

in his experience, was used to hold drugs, was sufficient to "warrant a man of reasonable caution" to believe that appellant possessed drug paraphernalia to contain, package, or conceal a controlled dangerous substance pursuant to CR § 5-619(c). *Freeman*, 249 Md. App. at 275 (2021) (quoting *Brinegar*, 338 U.S. at 175–76). *See Coley v. State*, 215 Md. App. 570, 585–86 (2013) (Officer's belief, based on his experience, that plastic baggies were drug paraphernalia was bolstered by knowledge that Coley had been a prior heroin user, and those facts combined produced probable cause to search the vehicle.); *United States v. Freeman*, 360 F.Supp.2d 43, 47 n.5, 47–48 (D. D.C. 2003) (Although possession of a scale may not be a criminal offense, under the totality of the circumstances, the officer had probable cause to believe that the scale constituted illegal drug paraphernalia, and therefore, he had probable cause to arrest Freeman and search him incident to arrest.)

Officer Lasassa had probable cause to suspect that appellant possessed the vial in violation of CR § 5-619. The circuit court did not err in denying appellant's motion to suppress.

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