

Circuit Court for Baltimore County
Case Nos. 03-K-15-0006 & 03-K-15-0007

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1245 & 1324

September Term, 2016

MELVIN RUST

&

OTIS COBB

v.

STATE OF MARYLAND

Wright,
Kehoe,
Shaw Geter,

JJ.

Opinion by Kehoe, J.

Filed: March 12, 2018

*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. *See* Md. Rule 1-104.

Appellants Melvin Rust and Otis Cobb were arrested on drug charges and tried together in the Circuit Court for Baltimore County. They entered conditional guilty pleas¹ and were both sentenced to five years' incarceration. They filed the present appeals, which have been consolidated, raising the following issue:

Did the trial court err in denying the appellants' motion to suppress evidence?

We will affirm the judgment of the trial court.²

Background

Rust and Cobb filed a motion to suppress all evidence seized by the police on the basis that they were unlawfully arrested. Over two days of hearings, first on October 7, 2015 and then on January 5, 2016, the Circuit Court for Baltimore County heard testimony and arguments on the appellants' motion to suppress evidence, which we will now summarize.

The State's witnesses were John Sullivan and Mark Fisher. Both were, at the time of the arrest, detectives with the Baltimore County Police Department and were assigned to the Department's Community Drug Unit.

The officers testified that the arrests took place at the parking lot of the WalMart shopping center on Washington Boulevard in Baltimore County. The parking lot is near

¹ Cobb pleaded guilty to one count of distribution of heroin. Rust pleaded guilty to one count of possession of a large amount of narcotics.

² Rust filed a motion asking this Court to adopt the transcripts provided by Cobb for the purposes of both appeals. We grant the motion.

the junction of I-695 and I-95, making it easily accessible to travelers from other areas. The officers were familiar with the location, as both had made previous narcotics arrests there.

Detective Sullivan testified that an anonymous caller, who claimed to be an employee of a nearby business, called the police and described a series of what the caller believed were drug transactions. The caller stated that a silver minivan with two occupants would park in the lot between 1:30 and 2:30 in the afternoon, during which time numerous vehicles would appear, individuals would make exchanges with the minivan occupants, and then all parties would leave before the police arrived. The caller provided license plate information as well.

The police placed the lot under surveillance, looking for the activity described by the tipster. At around noon on December 9, 2014, an officer reported that two women in a red Jeep were parked in the WalMart parking lot, and that the occupants were looking around and appeared to be waiting for something. A check of the vehicle's registration showed it was registered in Anne Arundel County, thus fitting into a pattern Sullivan described of individuals coming to Baltimore from suburban areas to buy drugs. Sullivan also testified that the registration check showed that the vehicle's owner had past "CDS" contacts.³

³ Neither police witness explained what precisely those "contacts" consisted of.

When the report came in, Sullivan went to the parking lot together with Detective Fisher and his supervisor, Sergeant Calhoun. Sullivan drove past the Jeep to begin surveillance, and by the time he had parked, a grey Toyota sedan had pulled in and parked next to the Jeep. Sullivan observed that one of the occupants of the Jeep had gotten out her car, went to the Toyota, leaned down next to a window for a few seconds, and then returned to her vehicle. Based on his prior experience, Sullivan concluded that this behavior was consistent with a drug transaction, and on that basis the officers decided to investigate further.

Sullivan stopped his vehicle in a way to block the rear driver's side of the Toyota. Calhoun pulled in to block the rear passenger's side of the vehicle, and Fisher pulled in front of the Toyota. The police vehicles were unmarked and the officers were in plain clothes, but Sullivan said he had his badge and ID card around his neck, and Fisher had on a vest that had police printed on it. As the officers got out of the car to advance on the Toyota, they shouted that they were police and not to move. Sullivan said he had his weapon displayed because guns are often present at drug transactions, the Toyota's windows were tinted so the officers were unable to see movement inside, and a vehicle itself can be used as a ramming device.

Fisher testified that from his position in his car in front of the Toyota, he made eye contact with Rust, the driver, and had the sense that he was panicked to see the police. Rust immediately put the car into reverse, hitting Sullivan's and Calhoun's vehicles. Fisher went to the driver's side of the Toyota to get the keys and stop the car. At that

point, he saw capsules of heroin strewn across the floorboard on the passenger's side. Cobb and Rust were subsequently arrested.

The State also introduced surveillance video of the events in question, which the officers testified about. The video showed one of the women get out of the Jeep go to a store in the shopping center before returning to the vehicle prior to the officers' arrival on the scene. The video also revealed that the Jeep occupant who Sullivan observed in the suspected drug transaction had actually gotten inside the Toyota before getting out again and returning to the passenger side window.⁴

Both appellants testified at the suppression hearing. Rust, who was the driver, stated that as the car reversed, it hit the vehicles blocking him in from the back of his parking space. He said that he then saw the police van in front of his vehicle and an officer got out and came toward him, weapon drawn, shouting, "Let me see your hands." Another officer then came around the side of the vehicle to Rust's window and he too had his weapon drawn. On cross examination, the State elicited that Rust was convicted of distribution of narcotics in 2010.

Cobb, who was a passenger in the vehicle, testified that he did not notice that the officers were on the scene until Detective Fisher yelled to put their hands up. Additional detectives then surrounded the car, at least three of whom Cobb believed had their guns

⁴ During the suppression hearing, Sullivan testified that he later contacted the woman from the Jeep and that she admitted that she had purchased heroin from Cobb and Rust. But this took place after the stop and was therefore not relevant to the issues before the suppression court or this Court.

drawn. Cobb indicated that from that point forward, he did not feel he was free to leave the scene.

The parties presented similar legal arguments to the suppression court as they do here. We will address these shortly.

The trial court denied the motion to suppress. The court found that the officers had reasonable articulable suspicion that a drug transaction was afoot, which authorized them to initiate an encounter with appellants. It was appropriate for the officers to have their weapons drawn for their own safety because the windows of appellants' vehicle were tinted, and "drugs and guns, quite frankly, often go together." After Rust put the car into reverse and accelerated into the unmarked police vehicles behind him, the police were justified in approaching appellants, and the heroin in the vehicle was in plain view when the officers looked into appellants' vehicle.

The Standard of Review

In *Sizer v. State*, 230 Md. App. 640 (2016), *aff'd*, No. 1, Sept. Term 2017, 2017 WL 5711850 (Md. 2017), we addressed the relevant standard of review: "When an appellate court reviews a trial court's grant or denial of a motion to suppress evidence under the Fourth Amendment, it will consider only the facts and evidence contained in the record of the suppression hearing." *Id.* at 643-44 (quoting *Longshore v. State*, 399 Md. 486, 498-99 (2007)). The hearing judge is shown deference in fact-finding regarding conflicting evidence, although when the parties present alternate versions of the facts,

“the tilt on appellate review will go decisively in favor of the prevailing party[.]” *Id.* at 644.

However, we consider *de novo* the legal significance that those facts should be given:

Once the evidence has been presented, however, and once the hearing judge has made possible findings of fact, there remains the ultimate issue of determining the legal significance of the accepted facts. On this legal issue, the appellate court will make its own *de novo* determination[.]

Sizer, 230 Md. App. at 645 (quoting *Longshore v. State*, 399 Md. at 499).

Analysis

As we explained in *Williams v. State*, 212 Md. App. 396 (2013), there are, for Fourth Amendment purposes, three levels of encounters between police officers and members of the public:

The first and least intrusive of such interactions is a “consensual encounter,” that is, where 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. This lawful encounter may be conducted without any suspicion of criminal conduct or intention.

The second type of police encounter permits the police to temporarily limit the freedom of the subject of the encounter. As we previously explained, this interaction is an “investigatory stop.” An investigatory stop is less intrusive than a formal custodial arrest and must be supported by reasonable suspicion that a person has committed or is about to commit a crime and permits an officer to stop and briefly detain an individual.

The third and most intrusive encounter is an arrest, which must be based on probable cause to satisfy the Fourth Amendment. But, there are no *per se* rules or bright lines to determine when an investigatory stop and frisk becomes an arrest.

Id. at 417–18 (citations, brackets, emphasis, and some quotation marks omitted).

1. The initial encounter was an investigatory stop, not an arrest.

Appellants devote the majority of their argument to the contention that they were illegally arrested. They argue that the officers' show of force, namely blocking appellants' vehicle in and drawing their weapons, elevated the encounter beyond a mere investigatory stop and turned it into an arrest. Further, they assert that the arrest was illegal because it was not supported by probable cause. We do not agree with appellants' premise.

Whether a seizure is an arrest rather than an investigatory stop is determined after considering the totality of the circumstances. *In re David S.*, 367 Md. 523, 535 (2002). However, a show of force alone is not enough to distinguish one from the other: “Not every seizure of a person is “elevated automatically into an arrest,” simply because the police used “measures . . . more traditionally associated with arrest than with investigatory detention.”” *Riggins v. State*, 223 Md. App. 40, 62 (2015) (quoting *Barnes v. State*, 437 Md. 375, 391 (2014)). As the Court of Appeals has explained,

This Court has, however, recognized certain limited circumstances when the use of force will be considered reasonable as part of an investigative detention: where the use of force is used to protect officer safety or to prevent a suspect's flight. The burden is on the State to prove that such special circumstances existed in order to justify the officer's use of force in an investigative detention.

Elliott v. State, 417 Md. 413, 429 (2010) (some citations omitted).

We are satisfied that the police officers articulated legitimate safety concerns.

Sullivan testified that he was concerned for officer safety, as, in his words, “usually drugs

and weapons go hand in hand.”⁵ That possibility, combined with the heavily tinted windows masking activity within the Toyota, substantiate the safety issue. We have noted that, “[s]tanding alone, the mere fact that an officer displays his service weapon during the course of an investigatory stop does not elevate the seizure into one requiring probable cause.” *Smith v. State*, 161 Md. App. 461, 478 n.2 (2005).

As for the issue of flight, the officers’ concern that Rust and Cobb might try to escape were borne out within seconds when Rust reversed the Toyota into the police vehicles parked behind him the moment he saw Fisher. Moreover, we have already held that the use of police vehicles to bar flight does not transform a stop into an arrest. *Williams*, 212 Md. App. 396, 421 (2013).

We conclude that the officers’ actions in blocking in the appellants’ vehicle and approaching them with guns drawn did not elevate the initial encounter to the level of an arrest. This is because their actions were reasonable ones to avoid unnecessary risk to the officers.

⁵ There is no shortage of Maryland appellate authority supporting the nexus between drugs and weapons. *See, e.g., Bost v. State*, 406 Md. 341, 360 (2008) (“Guns often accompany drugs, and many courts have found an ‘indisputable nexus between drugs and guns.’” (quoting *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998))); *Dashiell v. State*, 143 Md. App. 134, 153 (2002), *aff’d*, 374 Md. 85 (2003) (“Persons associated with the drug business are prone to carrying weapons.”).

2. The investigatory stop was supported by reasonable articulable suspicion.

Appellants contend that, even if the encounter was an investigatory stop, the police did not have the requisite reasonable articulable suspicion. They take the position that the officers were on the scene for such a short amount of time, and what they observed was potentially innocuous behavior, so they could have no more than a hunch rather than the more concrete basis they would need to instigate a stop. Their arguments are not persuasive.

When determining whether the police appropriately initiated an investigatory stop, we consider the “‘totality of the circumstances’ in each case to determine ‘whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing.’” *Holt v. State*, 435 Md. 443, 460 (2013) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). The process involves several levels of analysis:

First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. . . . The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

Id. at 179-80 (quoting *Holt v. State*, 435 Md. 443, 460-461 (2013)) (some citations omitted).

While we require an officer’s decision to undertake an investigatory stop to be supported by articulable facts, we “assess the evidence through the prism of an

experienced law enforcement officer, and ‘give due deference to the training and experience of the... officer who engaged the stop at issue.’” *Id.* at 461 (quoting *Crosby*, 408 Md. at 509).

The anonymous tip drew the police to the scene, but once there they observed ample facts that would give rise to a reasonable articulable suspicion that appellants were selling drugs. The behavior exhibited by the occupants of the Jeep suggested they were in the lot to meet someone. This was borne out by the activity the officers observed, with individuals approaching appellants’ vehicle for apparent drug transactions. The scenario that the officers observed was familiar to them because drug buyers and sellers often use busy parking lots near highways as convenient places for would-be purchasers to buy drugs. During these transactions, the occupants of the vehicles involved tend to wait around in parking lots without patronizing the businesses in the area and to leave quickly once their transactions are complete.⁶ That is precisely what the officers observed, and their conclusion that they had in all likelihood just witnessed a drug transaction was supported by their training and experience in police work.

We are satisfied that the officers had reasonable articulable suspicion to initiate an investigatory stop for the purposes of confirming or dispelling their suspicions that a drug transaction was occurring.

⁶ The surveillance video that was viewed and discussed at the suppression hearing showed that one of the occupants of the Jeep went into a store prior to the police arriving on the scene. However, that information was not available to the police at the time they began their surveillance.

3. Appellants were not actually seized until after Rust backed into the police cars.

While there was reasonable articulable suspicion to support the officers' stop of Rust and Cobb, they were not actually seized at the moment the officers moved in on them. An individual is "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Bellard v. State*, 229 Md. App. 312, 347, *aff'd*, 452 Md. 467 (2017) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). However, as we recently discussed in *Darling v. State*, 232 Md. App. 430, 450 (2017), when an individual flees the police, he or she has not submitted to the assertion of authority by the police, and therefore has not yet been seized at that time.

While Rust and Cobb were blocked in by the police, they were not yet under the officers' control. Rather, after Fisher identified himself as a police officer, Rust immediately put the car into reverse in order to flee. While the attempt was unsuccessful, appellants nonetheless were on the move rather than submitting to police authority. Therefore, they were not actually seized until their car came to a rest after hitting the police vehicles and officers were able to obtain control of the situation.

Once appellants' vehicle backed into the police cars, the officers were justified in detaining Cobb and Rust to determine what had occurred and to ensure officer safety, let alone to continue the already attempted stop to investigate the suspected drug transaction. Additionally, the heroin Fisher saw in the car was within plain view. *See, e.g., Peters v. State*, 224 Md. App. 306, 352 (2015), *cert denied*, 445 Md. 127 (2015) ("That doctrine is

an exception to the warrant requirement that permits a police officer to seize an item in plain view when the officer has probable cause to believe that the item is contraband or evidence of a crime.”)

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY ARE AFFIRMED. APPELLANTS TO PAY COSTS.