UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0205

September Term, 2015

DERRICK MOORE

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 12, 2016

Derrick Moore was charged in the Circuit Court for Wicomico County with possession with intent to distribute cocaine. Before trial, Mr. Moore moved to suppress the cocaine from evidence because, he argued, officers obtained it in a search that violated his Fourth Amendment rights. The court denied the motion, and Mr. Moore waived his right to a jury trial and proceeded with a not guilty plea on an agreed statement of facts. At the conclusion of the trial, the court found Mr. Moore guilty of possession with intent to distribute cocaine and sentenced him as a subsequent offender to ten years in prison. He appeals and contends that the trial court erred in denying his motion to suppress. We affirm.

I. BACKGROUND

On July 18, 2015, while on patrol in Wicomico County, Sheriff Michael Lewis observed a white Ford Fusion traveling at a high rate of speed in the fast lane on U.S. Route 13. After pacing the vehicle while it passed eight vehicles at a speed of 76 mph, Sheriff Lewis activated his emergency equipment and initiated a traffic stop. The vehicle did not stop right away, but instead moved to the slow lane and reduced its speed to the posted speed limit of 65 mph. As Sheriff Lewis continued to follow the vehicle, he could see the driver moving around, raising up in his seat and turning to the right towards a front seat passenger. The vehicle eventually slowed down, pulled to the right shoulder, and stopped.

Sheriff Lewis approached the vehicle from the passenger's side. While requesting the driver's license and registration, he detected an odor of alcohol coming from the vehicle, which had three occupants: Mr. Moore, the driver, an adult male in the front

passenger seat, and a fifteen-year-old female in the back. (Sheriff Lewis later determined that the alcoholic odor was coming from Mr. Moore's breath.) Because Mr. Moore had failed to stop in a timely fashion, Sheriff Lewis ordered Mr. Moore out of the car to pat him down for weapons. The other two passengers remained in the car.

Sheriff Lewis directed Mr. Moore to the rear of the vehicle, and as he walked, Sheriff Lewis saw him pushing on his groin area, just above his pubic bone, with the palm of his right hand—an action known, the Sheriff later testified, as "indexing." Fearing that Mr. Moore was concealing a weapon, Sheriff Lewis began the pat-down where Mr. Moore had been indexing and immediately detected two bulges just below the belt line, above the pubic bone. The bulges were each the shape of a small egg, one hard and one soft, and Sheriff Lewis immediately recognized them to be consistent with cocaine or drugs. Believing the objects were contraband, Sheriff Lewis lifted up Mr. Moore's shirt, pulled out his boxer shorts, and observed two baggies filled with a white substance consistent with compressed cocaine and powdered cocaine. The Sheriff then reached in and grabbed the baggies. At no point during the pat-down were Mr. Moore's genitals exposed, nor did the Sheriff have contact with any of Mr. Moore's intimate body parts.

II. DISCUSSION

Mr. Moore's only contention on appeal is that the trial court erred in denying his motion to suppress. He argues that the pat-down and eventual seizure of the contraband he was hiding in his pants violated his Fourth Amendment rights because it was unreasonable "[i]n light of the intrusive nature of this search, the complete lack of exigent

circumstances, and that fact it was conducted in public on a highway without any regard for [Mr. Moore's] privacy rights." The State counters that the pat-down "never went beyond an ordinary search in the area of Moore's waistline and not with a view of his private parts," and that even if the method of the search raised heightened Fourth Amendment concerns, "it was reasonable under the circumstances."

We review a denial of a motion to suppress evidence seized pursuant to a warrantless search against the record developed at the suppression hearing, *State v. Nieves*, 383 Md. 573, 581 (2004); *Laney v. State*, 379 Md. 522, 533 (2004), and consider the evidence in the light most favorable to the prevailing party, *Gorman v. State*, 168 Md. App. 412, 421 (2006), which in this case is the State. We "accept the suppression court's first-level factual findings unless clearly erroneous, and give due regard to the court's opportunity to assess the credibility of witnesses." *Id.* (internal quotations and citations omitted.) "We exercise plenary review of the suppression court's conclusions of law, and make our own constitutional appraisal as to whether an action taken was proper, by reviewing the law and applying it to the facts of the case." *Id.*

In *Terry v. Ohio,* 392 U.S. 1 (1968), the Supreme Court held that officers may "stop and frisk" someone without violating the Fourth Amendment's ban on unreasonable searches and seizures so long as two conditions are met: *first*, the investigatory stop must be lawful; *second,* to proceed from a stop to a frisk (or pat-down for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous. *Id.* The frisk must also be reasonable in scope, as the Fourth Amendment "prohibits bodily intrusions

that 'are not justified in the circumstances, or which are made in an improper manner.'" *Paulino v. State*, 399 Md. 341, 351 (2007) (quoting *Schmerber v. California*, 384 U.S. 757, 768 (1966)). Mr. Moore concedes that the (traffic) stop was lawful, and he doesn't challenge the pat-down. He argues instead that the search exceeded its constitutionally permissible scope when the Sheriff went inside his pants and boxer shorts to retrieve the bags containing contraband.

The trial court heard and denied Mr. Moore's motion to suppress the contents of the search on December 12, 2014, and we agree with the court that the search was not an unreasonable invasion of Mr. Moore's privacy. Our agreement with the court flows in substantial measure from our disagreement with one of the factual underpinnings of Mr. Moore's argument. His characterizations of the search, however it ultimately is labeled, proceed from the premise that the Sheriff viewed Mr. Moore's private areas or had contact with intimate parts of his body. But the record developed at the suppression hearing reveals otherwise, that the search stopped well short of Mr. Moore's intimate areas:

> [SHERIFF LEWIS]: As soon as I got his identification, I ordered him to step from the vehicle and step to the rear. I kept a close eye on him as he stepped out of the car because I was on the passenger's side, and when he got to the rear of the vehicle, I told him I was going to pat him down after advising him that it took him a long while to stop.
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> As he was walking towards the rear of the vehicle with his right hand, he appeared to be pushing on his groin area just above the pubic area but just below the belt line, and I noticed he was pushing with the palm of his hand, what I call indexing something in this particular area.
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> * * *

He was consistently pushing just above the pubic area but below the belt line as if he was trying to maintain awareness or control of something in that area, and that would be consistent with what I saw him doing while I was attempting to stop the vehicle.

[THE STATE]: And have you attended or how many times have you attended enforcement training on officer's safety?

[SHERIIF LEWIS]: In my career, hundreds.

[THE STATE]: And have you ever taught classes on officers' safety?

[SHERIFF LEWIS]: I have.

[THE STATE]: And the term "indexing," could you explain that to us briefly?

[SHERIFF LEWIS]: Yes, sir.

It's an observation that's made of individuals on traffic stops at the scene of a crime, during a foot pursuit, who are trying to maintain control or awareness of something on or about their person. It could be in the waist. It could be around the ankle. It could be in the small of the back. What I saw this individual doing while I was attempting to stop the car, raising up, then going back down, turning towards the center console, and then when he was ordered from the vehicle and stepped out of the driver's door as he walked down the left side of the car towards the rear area in front of my Tahoe, I saw him make contact with the same area, and I've seen this in hundreds of cases before.

[THE STATE]: Approximately how many times did he index or touch that area of his pants?

[SHERIFF LEWIS]: Four to five times.

[THE STATE]: And why is that concerning to you?

[SHERIFF LEWIS]: I feared he was armed at that point in time.

[THE STATE]: How many stops have you made in your career where someone is indexing and you have located a weapon where the person is indexing?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[SHERIFF LEWIS]: Where I have located weapons, hundreds of times. Where I have located guns, probably 70 to 100 times.

[THE STATE]: As a result of indexing?

[SHERIFF LEWIS]: In the waist band, yes sir.

[THE STATE]: What happened next?

[SHERIFF LEWIS]: When I patted down this particular area for a weapon, I immediately felt two bulges just below the belt line above the [pubic] bone. One bulge felt very hard. One bulge felt very soft and round. They felt approximately the shape of a small egg, not necessarily a chicken egg, but of a bird egg. Again, but one was hard, and one was soft. And right away, I felt it to be consistent with perhaps cocaine or drugs, and I pulled the shirt up, pulled that area out, and immediately observed two baggies of a white substance. One was hard, what I believed to be compressed powdered cocaine later found to be a cutting agent for cocaine.

[THE STATE]: And was at any point, did you have to go below the waist line and into the defendant's pants or was this all above the belt line?

[SHERIFF LEWIS]: It was actually below the belt line, but above the pubic bone precisely where I saw him indexing.

On cross-examination, defense counsel asked Sheriff Lewis how he had conducted the pat-down:

[SHERIFF LEWIS]: I got behind him—

[DEFENSE COUNSEL]: Uh-huh.

[SHERIFF LEWIS]: -- and with both hands, I was patting him down.

[THE STATE]: Around the front?

[SHERIFF LEWIS]: That's correct. And then I felt the bulges. When I did that, I came around to the front of him and pulled the clothing up, and it was actually right there at the belt line, the two bulges that I felt, one was hard, one was soft. Both were powder, but one was compressed powder.

[DEFENSE COUNSEL]: When you patted him down, you knew at that point it was not a weapon, is that true?

[SHERIFF LEWIS]: I knew at that point it was dope. It felt like dope that I recovered thousands of times on traffic stops.

[DEFENSE COUNSEL]: So at that point, you weren't—you were coming around to check it because you figured it was an illegal substance in his pants, but you knew it wasn't a weapon, or that's what you thought?

[SHERIFF LEWIS]: I knew it wasn't a gun, yes, ma'am.

[DEFENSE COUNSEL]: Okay. So when you came around to the front, is it not true, and if you need to refer to your supplemental report as I remember there was something in there about you indicating that you actually pulled his boxer shorts out and checked inside, and that's when you found the object?

[SHERIFF LEWIS]: Once I felt the object, that's precisely what I did, yes, ma'am. To recover them.

[DEFENSE COUNSEL]: Okay. So you felt them from the back—you felt them, you came around to the front. And at that point, you felt again or what - or are you just pulled out his - went into his pants and pulled the objects out?

> [SHERIFF LEWIS]: I came around to the front, pulled his shirt up, pulled the pants out, [and] recovered the two objects.
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> [DEFENSE COUNSEL]: Okay.
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> [SHERIFF LEWIS]: And then I secured them and placed him in handcuffs.

Mr. Moore's own description of the search made no mention of the Sheriff (or others) viewing or touching his intimate areas:

> [H]e asked me to put my hands up so he could search me or pat [me] down, and . . . went down to my pocket, then came back up. As he came back up, that's when he felt the top of the bags—he felt the bags around there, and that's when he—that happened he was pulling out.
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> But as far as him just going around to my waist, that was after he had passed by, went down in the pockets, and then came back again, and then went back around the waist and inside the boxers, that's when he pulled it out.

Despite the absence of testimony that Mr. Moore's private parts were exposed or that Sheriff Lewis had contact with them, the defense argued at the hearing that the pat-down invaded Mr. Moore's privacy:

> So [Sheriff Lewis] is saying based on his training and experience and what he felt he believed that there was illegal substances in there, but he knew it was not a weapon. And based on that, he actually—he pulled out on the side of the road, he basically pulled out my client's boxer shorts and went inside and pulled out the objects, Your Honor.
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> And I think that there is where we have our problem. The articulable suspicion to be doing a pat-down for weapons is very different from proceeding at that point into going inside somebody's boxer shorts and pulling out objects when you

> know or you assume from your experience that there is nothing dangerous there.
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> * * *
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> But it's after the fact of the pat-down that we get into the invasion of my client's privacy, the fact that he is on the side of the road, and the officer is going into his boxer shorts to pull out objects. At that point, we have gone beyond, way beyond a pat-down search.

The State countered that Sheriff Lewis had conducted a lawful pat-down and was permitted to seize the objects pursuant to the plain feel doctrine:

> [T]he plain feel doctrine is applicable when an officer lawfully pats down a subject's outer clothing, which we have conceded to, feels an object whose contour or mass makes its identity as contraband immediately apparent.
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> . . . During the course of a valid Terry pat-down, and the officer very specifically described the objects he found and that he knew them to be cocaine.

The trial court acknowledged the plain feel doctrine, as first articulated in *Minnesota v. Dickerson,* 508 U.S. 366 (1996), and then denied the motion:

> Well, there was reasonable articulable suspicion for the traffic stop. There was a reasonable belief on the part of Sheriff Lewis to conduct the pat-down based on obvious facts of which we have all covered.
>
> Sheriff Lewis also observed the so-called indexing by the defendant with the palm of his hand at his waist band area toward his pubic area which allowed Sheriff Lewis to make a pat-down. And in the process of doing that, he felt an object which he, based on his training, knowledge and experience of over 30 years, recognized to be contraband. And at that point, he had the right to seized [sic] it.

> I understand your argument, but I believe the State is on firm ground here, so the motion to suppress is denied.

The court did not, however, address specifically whether the pat down was an unreasonable invasion of Mr. Moore's privacy rights. So although we agree with the court's ruling, a more in-depth analysis of the pat-down is warranted.

Mr. Moore characterizes the pat-down as a highly invasive search—at a minimum a strip search, or a reach-in search, or some variation of a body cavity search. But we disagree that Mr. Moore was subjected to a strip search or body cavity search: none of his clothing was removed, none of his private parts exposed, and none of his body cavities manipulated or inspected in any way. *See Paulino*, 399 Md. at 352-53 (specifying three separate categories of searches: a strip search, which "generally refers to an inspection of a naked individual" or is "any search of an individual requiring the removal or rearrangement of some or all clothing to permit the visual inspection of the skin surfaces of the genital areas, breasts, and/or buttocks"; a "visual inspection of the anal and genital areas", and a "manual body cavity search.") (internal quotations and citations omitted.) This could fairly be called a "reach-in" search, which is a search that "involves a manipulation of the arrestee's clothes such that the police are able to reach in and retrieve the contraband without exposing the arrestee's private areas." *Id.* at 359 n.6. And although a reach-in search is less invasive than a strip search or a body cavity search, it can still be intrusive and demeaning if it allows an officer to view a person's private areas. *Allen v. State,* 197 Md. App. 308, 322-23 (2011). If the officer is able to view the person's private parts during the search, the reasonableness of the search must be determined by reference

to the four factors set forth by the Supreme Court in *Bell v. Wolfish*: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; and (4) the place in which it is conducted. *Allen*, 197 Md. App. at 323 (quoting *Bell*, 441 U.S. 520, 559 (1979)).

But we don't need to reach the *Bell* factors because, as discussed above, we disagree that Mr. Moore's privacy was invaded to that extent. And even if we were to assume it was, the search passes muster. A "reach-in" search may be conducted only if there is reasonable suspicion to believe that drugs are concealed on a suspect's body. *Id.* Mr. Moore admits that the initial pat-down for weapons was warranted, then argues that the reach in was unnecessary once the officer knew the objects were not a weapon. We disagree: the Sheriff testified that, based on his training and thirty years of experience, he recognized the objects he felt in Mr. Moore's pants as drugs. Once he immediately recognized them, he was lawfully permitted to seize the contraband pursuant to the plain feel doctrine.

With regard to the scope, manner, and location of the search, Mr. Moore contends that the search was unreasonable because of its "intrusive nature," "the complete lack of exigent circumstances, and that fact it was conducted in public on a highway without any regard for [Mr. Moore's] privacy rights." A "reach-in" search that exposes a person's private parts would be invasive, but there is no evidence or testimony that Mr. Moore's private areas were in fact exposed. To the contrary, the record from the suppression hearing demonstrates that the search took place in Mr. Moore's waistband area, below the belt and

above the pubic bone. Nobody testified, including Mr. Moore, that his private areas were publically exposed or viewed by the Sheriff, that the Sheriff made contact with Mr. Moore's private parts, or that passengers or passersby could have viewed Mr. Moore's private areas. Mr. Moore's clothing was not removed—the Sheriff pulled Mr. Moore's pants and underwear away from his waist, reached in, and removed the contraband. And although the search took place on a public street, there is no testimony or evidence that anyone saw the search.

Citing *Paulino*, Mr. Moore contends no exigent circumstances justified the search or the invasion of his privacy, but his reliance on *Paulino* is misplaced. 399 Md. 341 (20017). The facts in *Paulino* were substantially different: There, the police conducted a search in the bay of a car wash, then placed Mr. Paulino on the ground in a prone position while one of the detectives put gloves on, lifted up Mr. Paulino's shorts, and "manipulated his buttocks to allow for a better view of his anal cavity." *Id.* at 353. The Court held that the search was both a strip search and a visual body cavity search, and that because the search was highly invasive and the officers took no steps to protect Mr. Paulino's privacy, exigent circumstances were required before such a search in a public place was reasonable. *Id.* at 359, 360. But the search at issue here was not nearly so invasive. There is no evidence that the Sheriff viewed, touched, or exposed Mr. Moore's private parts, nor that

Mr. Moore was exposed to any public viewing. We see no error in the circuit court's decision to deny the motion to suppress.

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