

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0647

September Term, 2015

ANTWANN D. GIBSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Wright,

JJ.

Opinion by Wright, J.

Filed: December 6, 2016

*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.

Appellant, Antwann Gibson, appeals the Circuit Court for Dorchester County's decision to deny his motion to suppress. Gibson was charged with three counts of handgun possession in the District Court for Dorchester County. The case was transferred to the circuit court upon Gibson's request for a jury trial.

On May 4, 2015, the circuit court heard and denied Gibson's motion to suppress evidence of the handgun. On June 4, 2015, Gibson pleaded not guilty and proceeded on an agreed statement of facts. Thereafter, he was found guilty of wearing, carrying, and transporting a handgun, and he was sentenced to a suspended two-year sentence, with a three-year probation. Gibson presented the following question on appeal:

Did the circuit court err in denying appellant's motion to suppress?

We initially affirmed the circuit court's judgment in an unreported opinion filed on March 18, 2016. On September 28, 2016, the Court of Appeals vacated our judgment and remanded the case for further consideration in light of *Sellman v. State*, 449 Md. 526 (2016). Upon reconsideration, we now hold that the circuit court erred in denying Gibson's motion to suppress.

Facts

On December 1, 2014, around 3:00 p.m., Lieutenant Jeff Biskach of the Hurlock Police Department pulled over Devonya Adamson outside an apartment complex known as Prospect Heights for failure to stop at a stop sign. At Gibson's suppression hearing, Lt. Biskach testified that Prospect Heights is known to have an open-air drug market and

that over the course of his thirty-year career, he has “made hundreds of drug-related arrests there.”

When Lt. Biskach approached Adamson’s car, he saw that there were three other passengers inside: one in the passenger’s seat, one in the rear driver’s seat, and Gibson in the back passenger’s seat. Lt. Biskach testified that while he was speaking with Adamson, he noticed that Gibson:

appeared to be nervous to me more so than the other occupants inside of the vehicle. Lack of eye contact. Typically everybody watches the Officer . . . [Gibson] was not making any kind of eye contact. He was looking forward Not aggressively. He just seemed nervous.

Lt. Biskach further testified that based on his training, knowledge, and experience, such behavior was unusual from an individual. He then called for assistance, after which Officer Jake Garvey responded to the scene. Lt. Biskach expressed his concerns about Gibson to Ofc. Garvey, and asked Ofc. Garvey to check on Adamson.

Ofc. Garvey testified that when he “made contact with [Adamson, he] looked in the back seat there was a passenger on the driver’s side making eye contact with me, was speaking [sic]. The rear passenger [Gibson] would not make eye contact and was quiet the whole time.” Ofc. Garvey testified that it was not normal behavior for a passenger to avoid eye contact and interact with the officers, and “[m]ost of the time they will speak to you.”

After Lt. Biskach finished writing the warning for the traffic violation, he asked Adamson to exit her car and come to the rear of the vehicle “[b]ecause there was heavy traffic.” He asked her if there was any illegal contraband in the vehicle, to which,

according to Lt. Biskach, she responded that there was not, to her knowledge, but that he could search the car if he wanted. Lt. Biskach testified that because the vehicle was occupied by passengers, he got them out of the vehicle to conduct his search, as he normally does. He also explained that “we’ll pat them down one at a time and have them sit depending on the area either in the grass or the sidewalk.” He then clarified that they pat individuals “down for any weapons for Officer safety.” Ofc. Garvey testified as to his procedure in such circumstances, explaining, “I have every occupant step out of the vehicle one by one. As they get out pat them down make sure there is no weapons on their person, anything that’s going to harm us . . . [then] we’ll send them back to the back of the car. That way they’re not interfering with the search.”

Consistent with this practice, the officers asked Gibson to exit the car. Ofc. Garvey testified, “When I advised him I was going to do a pat down on him I turned to the car to do a pat down and he pulled away and said what are you doing.” Ofc. Garvey continued that he again informed Gibson that he was going to conduct a pat down of his person, and Gibson again pulled away. That is “when [Ofc. Garvey] took him to the ground,” after which Gibson “stated that he was scared and he had a piece in his pocket.” Based on his training, knowledge, and experience, Ofc. Garvey stated that he understood a “piece” to mean a gun or drugs.

Before trial, Gibson moved to suppress the statement about the “piece” in his pocket and any evidence seized from him because the frisk and the related pat down were

unlawful. According to Gibson, there was no reasonable, articulable suspicion that Gibson was armed to justify the frisk. The circuit court denied the motion, explaining:

Well, the evidence that we have is that Lieutenant Biskach made a routine traffic stop for failing to obey a traffic control devices. He made a stop on a car being driven by a lady. There were four individuals in the car. Lieutenant Biskach's attention was drawn on a particular individual on the back seat on the passenger side who unlike the other individuals did not make eye contact, appeared to be nervous. Based on Officer Biskach's twenty-nine years['] experience he determined that the conduct of the Defendant including the nervousness which could be if you separately may be innocent conduct it can when considered in conjunction with other conduct or circumstances warrant further investigation.

In this case Lieutenant Biskach knew the vehicle was coming from an area that was known as a[n] open drug market, an area in which he had made multiple arrests. So the stop is lawful. The person that exercised control over the vehicle gave the Lieutenant and the Hurlock Police Department . . . her consent to search the vehicle after indicating there was nothing illegal in the vehicle.

The Police officer then in order to effect the search and any search would have to being with bringing the occupants of the car out of the vehicle. There is no evidence other than the fact that Officer Garvey tried to effect a pat down search on the Defendant to detect if there were any weapons, but before he could get to do that in almost a split second the Defendant pulled away, was tackled and blurted out that he was scared and had a piece which apparently indicates that Lieutenant Biskach's instincts were accurate.

Given the state of the law the Court finds there is no problem with the series of events in this particular case. The Court finds that it was reasonable for the Officer's safety to conduct a very nonintrusive *Terry*^[1] pat down to make sure no one had any weapons. The Police directed their suspicion at a person who was acting differently than the other occupants of the vehicle in a matter that was consistent with perhaps having some criminal issue.

¹ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

So the court finds that . . . the Officers were entitled to pat down Mr. Gibson for weapons and that the weapon seized was a result of this event may be used as evidence in these charges.

Background

The Supreme Court, in *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), held that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.” It explained:

[A]s a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Id. at 413-14.

Beyond a brief detention, “other intrusive police actions are permitted when they are conducted in furtherance of the goal of protecting the safety of the officer Pat-down searches, known commonly as frisks, “[are] not to discover evidence, but rather to protect the police officer and bystanders from harm.”” *Longshore v. State*, 399 Md. 486, 508 (2007) (internal citations omitted). An officer can conduct a pat-down when he “has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” *Id.* at 508-09 (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). We must give weight to the officer’s “specific reasonable inferences which he is entitled to draw from the facts in light of his

experience” when determining if his actions were reasonable. *Id.* at 509 (quoting *Terry*, 392 U.S. at 27).

While reasonable suspicion is “more than an ‘inchoate and unparticularized suspicion or ‘hunch,’” *id.* at 508 (citation omitted), it is also a “common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent people act.” *Crosby v. State*, 408 Md. 490, 507 (2009) (quotations and citation omitted). The court must determine whether an officer acted with reasonable suspicion “based on the totality of the circumstances,” meaning that the court cannot “parse out each individual circumstance for separate consideration.” *Id.* (citations omitted).

An appellate court reviewing the circuit court’s grant or denial of a motion to suppress considers “only the facts and information contained in the record of the suppression hearing.” *Longshore*, 399 Md. at 498 (citations omitted). We view all evidence and draw all reasonable inferences in the light most favorable to the prevailing party, in this case, the State. *Id.* (citations omitted). Although deference is paid to the circuit court in its findings of fact when facts are in dispute, unless they are clearly erroneous, “the reviewing court makes its own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case.” *Jones v. State*, 343 Md. 448, 457 (1996) (citation omitted).

Discussion

The circumstances examined by the Court of Appeals in *Sellman* are nearly identical to the case at hand. In *Sellman*, the petitioner challenged the denial of a motion to suppress evidence of possession of narcotics and a firearm obtained after a *Terry* frisk. 449 Md. at 537. *Sellman* was a passenger in a vehicle that was stopped due to a broken rear tail light, in a high crime area late at night, by officers who were in the area investigating property theft from cars. *Id.* at 531-32. After the driver of the vehicle consented for the officers to search the car, the officers instructed each passenger, individually, to exit the car, and conducted *Terry* frisks to ensure that none of them were carrying anything that could harm the officers. *Id.* at 536. The frisking officer found a handgun in *Sellman*'s possession.² *Id.* *Sellman* argued that the frisk was unconstitutional because the officers lacked a reasonable basis to believe that he was armed and dangerous. *Id.* The circuit court, however, denied *Sellman*'s motion to suppress because there was reasonable articulable suspicion to frisk *Sellman*, because the officers “were outnumbered at that point in time; They were in a high-crime area [and] it was late at night; [*Sellman*] from a dark area; His [rigid and nervous] behavior in the vehicle led to

² A further search of *Sellman* led to the discovery of narcotics. *Id.* n.8.

some suspicion on their part” *Id.* at 537. This Court originally affirmed the denial and the Court of Appeals granted certiorari. *Sellman v. State*, 446 Md. 218 (2016).

Subsequently, the Court of Appeals held that the evidence was seized in violation of the Fourth Amendment and was, therefore, inadmissible. *Sellman*, 449 Md. at 538. The *Sellman* Court clarified that the frisking officer “must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity[.]” *Id.* at 543 (quoting *Crosby*, 408 Md. at 508). The Court further stated that, “where reasonable suspicion that the occupant(s) is armed and dangerous is absent, the frisk of an occupant is an unreasonable intrusion on Fourth Amendment protections.” *Id.* at 557. The Court of Appeals stated that “the officers did not explain why, based on their observations of Sellman, he was suspected of criminal activity.” *Id.* at 546. The officers also failed to explain how the circumstances testified to would connect Sellman to the suspected criminal activity. *Id.* The officers further did not testify that they were concerned for their safety. *Id.* Lastly, the Court held that Sellman’s “display of nervousness coupled with his compliance in answering [the officer’s] questions and exiting the vehicle when ordered to do so, and the blatant lack of other suspicious circumstances ‘are too weak, individually or in the aggregate, to justify reasonable suspicion of criminal activity.’” *Id.* at 554-55 (quoting *Ferris v. State*, 355 Md. 356, 387 (1999)).

In light of *Sellman*, we now hold that the circuit court erred in denying Gibson’s motion to suppress. Just as in *Sellman*, the record here lacks any articulation by Lt.

Biskach and Ofc. Garvey regarding how the circumstances created reasonable suspicion that Gibson was involved in criminal activity and that they were concerned for their safety. The court denied the motion due to the legality of the traffic stop, Gibson's nervousness, and because the vehicle was "coming from" a high crime area. These circumstances are arguably less indicative of reasonable suspicion of criminal activity than those discussed in *Sellman*. At the time of the stop, the vehicle was not *in* a high crime area and the officers were not investigating a particular crime. In addition, the stop occurred in the middle of the day, Gibson's nervousness was not exceptional, and the passengers did not have conflicting stories. As in *Sellman*, "[t]he officers did not observe furtive gestures, evasive maneuvers, bulges, bags or containers, or any instruments associated with [criminal activity]." *Id.* 546. Furthermore, the record does not contain any articulation from Lt. Biskach or Ofc. Garvey as to why, if at all, the officers felt reasonably concerned enough for their safety to frisk Gibson.

The record is more indicative that this frisk, like those examined in *Sellman* and *State v. Simpler*, 318 Md. 311 (1990), was more cautionary, verging on routine, than reactive to articulable and reasonable suspicion of criminal activity and concern for safety. Thus, we echo the *Sellman* Court's reiteration: "While there undoubtedly is some risk to the police in every confrontation, *Terry* has never been thought to authorize a protective frisk on the occasion of every authorized stop." 449 Md. at 545 (quoting *Simpler*, 318 Md. at 321). Even in a light most favorable to the State, Gibson's motion to suppress was inappropriately denied because the evidence he sought to keep out was

obtained during the course of an unconstitutional frisk conducted without reasonable articulable suspicion nor articulable concern for safety.

**JUDGMENT OF THE CIRCUIT COURT
FOR DORCHESTER COUNTY
REVERSED. CASE REMANDED FOR
PROCEEDINGS NOT INCONSISTENT
WITH THIS OPINION. COSTS TO BE
PAID BY DORCHESTER COUNTY.**