UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2116

September Term, 2015

BRYAN MAURICE ROBINSON

v.

STATE OF MARYLAND

Arthur,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 19, 2016

In this case, we are asked to determine whether police officers placed appellant, Bryan Maurice Robinson, under arrest prior to searching him. Appellant argues that because the officers did not arrest him prior to searching him, the search could not have been incident to arrest and hence the evidence should have been suppressed. We hold that the search here was a proper search incident to arrest and therefore affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

On March 13, 2015 at 5:41 P.M., Maryland State Trooper Stephen Hallman observed a 1994 Pontiac Firebird with a brake light violation in a well-known drug and crime area in Wicomico County.[1] Trooper Hallman initiated a traffic stop of the vehicle, and approached the driver's side to make contact with the driver. As he came closer, Trooper Hallman saw three occupants in the vehicle: a male driver identified as Brian Dunn, a female front passenger identified as Alicia Thomas, and appellant, who sat in the rear passenger's seat. As soon as Trooper Hallman approached the vehicle, appellant quickly moved his right hand down to his right side. Appellant's breathing rate appeared to be rapid, and he avoided making eye contact with Trooper Hallman.

The other occupants also appeared to be nervous. Dunn was so nervous that his hands shook as he attempted to hand requested materials to Trooper Hallman. Thomas, who was the registered owner of the vehicle, interrupted Dunn as he tried to answer Trooper

[1] Trooper Hallman was accompanied by Officer Engelbrecht. Officer Engelbrecht did not testify at the hearing on the motion to suppress.

Hallman's questions. Trooper Hallman also observed appellant reach around and along his legs, looking nervous and uncomfortable.

While Trooper Hallman was speaking with the occupants in the vehicle, Officer Zachery Converse and Trooper Kekich arrived on the scene to provide backup. After obtaining Dunn's identification, Trooper Hallman returned to his police vehicle. Based on the suspicious behavior of the occupants, Trooper Hallman requested a K-9 unit. Trooper Hallman then continued to perform his normal duties in issuing the appropriate paperwork for the traffic stop. Shortly thereafter, Deputy J.C. Richardson arrived with his dog, Diablo, to perform the requested K-9 scan.

Deputy Richardson asked Dunn to exit the vehicle and walked him to the back of the vehicle to wait with another officer. Officers also removed Thomas and appellant from the vehicle. Deputy Richardson then began scanning the vehicle with Diablo.

At the passenger side, Diablo signaled for the presence of drugs. Upon learning of the positive alert, Trooper Hallman told the officers that the occupants were not free to leave and instructed the officers to chase anyone who left the scene. The officers coordinated to maintain continuous contact with the occupants while other officers searched the vehicle.

The search of the vehicle revealed nothing. Trooper Hallman then instructed the officers to search the occupants. Inferentially, the officers found nothing illegal in searching Dunn and Thomas. Officer Converse searched appellant and found a small plastic baggie containing heroin residue in appellant's groin area. The officers then

transported appellant to the Maryland State Police Barrack to perform a more extensive search. At the barrack, officers discovered more heroin and cash on appellant's person.[2]

The State charged appellant with: possession of heroin with intent to distribute, possession of heroin, and possession of drug paraphernalia. Appellant filed a motion in the Circuit Court for Wicomico County to suppress the evidence seized from his person on the basis that the officers illegally searched him. At the hearing, appellant, through counsel, disputed the moment at which the officers arrested him. The following colloquy took place:

> [DEFENSE COUNSEL]: Mr. Robinson was arrested based on what was found at the search at the car, correct?
>
> [TROOPER HALLMAN]: Well, he was not free to leave prior to the search as in all the other subjects. He was the one taken before the Commissioner.
>
> [DEFENSE COUNSEL]: Correct, but he was placed under arrest after Officer Converse searched him, correct?
>
> [TROOPER HALLMAN]: Well, he wasn't free to leave before the search.
>
> [DEFENSE COUNSEL]: I'm not asking you whether he was free to leave or not, I'm asking you was he under arrest when he was standing on the side of the curb?
>
> [TROOPER HALLMAN]: Yes, at that time I had probable cause to arrest him based on the K-9 alert.

[2] The parties agree that the lawfulness of the search at the barrack depends upon the validity of the search at the scene of the traffic stop.

[DEFENSE COUNSEL]: Had you arrested him?

[TROOPER HALLMAN]: He was not free to leave.

[DEFENSE COUNSEL]: He was not free to leave but you had not arrested him, correct?

[PROSECUTOR]: Your Honor, I think she needs to clarify whether - -

[DEFENSE COUNSEL]: I will. When all three occupants were taken outside of the vehicle standing on the side of the road, were all three occupants under arrest?

[TROOPER HALLMAN]: They were not free to leave.

[DEFENSE COUNSEL]: I'm asking you were they under arrest.

[TROOPER HALLMAN]: They were not taken before a Commissioner.

On redirect examination, the State clarified the moment of arrest:

[PROSECUTOR]: When was the [appellant] under arrest?

[TROOPER HALLMAN]: At the point that the K-9 officer told me that there was a positive alert on that vehicle, those occupants would be what's considered under arrest. They were not free to leave.

The trial court rejected appellant's contentions and denied the motion to suppress.

In order to preserve his right to appeal the denial of the motion to suppress, appellant entered a conditional guilty plea. The trial court found appellant guilty of possession with intent to distribute and sentenced him to four years of incarceration. Appellant timely appealed.

STANDARD OF REVIEW

"When reviewing the disposition of a motion to suppress evidence alleged to have been seized in contravention of the Fourth Amendment …, we 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." *Crosby v. State*, 408 Md. 490, 504 (2009). "Nevertheless, in resolving the ultimate question of whether the detention or attendant search of an individual's person or property violates the Fourth Amendment, we make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case." *Id.* at 505. When the trial court declines to make specific findings of fact, we will consider the facts in a light most favorable to the prevailing party on the motion. *State v. Funkhouser*, 140 Md. App. 696, 704 (2001). Here, the trial court declined to make specific findings of fact in denying appellant's motion to suppress. We will therefore assume the version of the facts most favorable to the State and make our own independent conclusions of law.

DISCUSSION

"[A] search conducted without a warrant supported by probable cause is *per se* unreasonable under the Fourth Amendment, subject to only a few exceptions." *Cherry v. State*, 86 Md. App. 234, 240 (1991) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One such exception is a search incident to a lawful custodial arrest. *Belote v. State*, 411 Md. 104, 112 (2009) (citing *United States v. Robinson*, 414 U.S. 218, 224 (1973)). A lawful arrest requires probable cause. U.S. Const. amend. IV. However, "An arrest that is made on the basis of what the search recovers will never be constitutional no matter how

instantaneously it may follow the search." *Funkhouser*, 140 Md. App. at 730-31. "The probable cause for arrest, therefore, must predate both the arrest and its search incident, whatever the secondary sequence between those two effects may be." *Anderson v. State*, 78 Md. App. 471, 480-81 (1989). What matters most, therefore, is that the basis for the arrest stem not from the search, but from extant probable cause. "Cause-and-effect in this particular manifestation becomes probable-cause-and-effect." *Id.* at 482.

I. Probable Cause to Arrest

Although appellant acknowledges that the officers had probable cause to arrest him after Diablo alerted to the presence of drugs, a brief discussion of probable cause is appropriate as part of our cause-and-effect analysis.

In *State v. Ofori*, 170 Md. App. 211, 229-30 (2006), we noted that a positive K-9 alert of a vehicle gives police officers probable cause to arrest the occupants of the vehicle. There, we held that, "in circumstances such as those involving a K-9 sniff, probable cause to search the vehicle is, *ipso facto*, probable cause to arrest, at the very least, the driver." *Id*. at 229. Relying on the Supreme Court decision *Maryland v. Pringle*, 540 U.S. 366 (2003), we noted that, "Because of the close association between contraband in a vehicle and the driver of (or other passenger) in the vehicle, either finding drugs in the vehicle, as in *Pringle*, or probable cause to believe that they are in the vehicle . . . necessarily implicates the driver and passengers." *Ofori*, 170 Md. App. at 229-30. A positive alert from a K-9, therefore, can constitute probable cause to arrest the passengers in a vehicle.

As noted above, appellant does not challenge that the officers had probable cause to arrest him. Instead, he asserts that the search cannot be justified as incident to arrest because he was not under arrest prior to the search. We disagree.

II. The Arrest

The Court of Appeals has "developed a working definition of arrest—the detention of a known or suspected offender for the purpose of prosecuting him for a crime." *Belote*, 411 Md. at 114 (internal quotation marks omitted).

Maryland courts recognize an arrest as,

> the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

Bouldin v. State, 276 Md. 511, 515-16 (1976). "It is said that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested." *Id.*

The analysis in *Morton v.* State, 284 Md. 526 (1979) is instructive in determining when a person is under arrest. There, the Court of Appeals was tasked with determining the moment that Morton was arrested. As part of a robbery investigation, Officer Herbert Rice relied on information from a pharmacist to perform a *Terry*[3] stop of Morton. *Id*. at 528. When the stop revealed nothing, Rice told Morton that he was free to leave. *Id.*

[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

Shortly thereafter, another officer informed Rice that Morton was possibly wanted. *Id*. Relying on this new information, Rice tracked Morton to a recreation center. *Id*. Inside, Rice told Morton "that he may have been wanted for something." *Id*. Rice instructed Morton to come with him, and to bring all of his possessions. *Id*. Rice then placed Morton in a patrol car with another officer and returned to the recreation center to search for items Morton had been seen carrying earlier that day. *Id*.

Inside the recreation center, Rice found the items that he had seen Morton carrying. *Id*. Rice searched the items, and discovered a handgun, marijuana, and photographs of Morton. *Id*. at 528-29. Rice then returned to the patrol car and informed Morton that he was under arrest. *Id*. at 529.

In determining the exact moment that Rice arrested Morton, the Court of Appeals held, "We think it clear that [Morton] was arrested when Rice removed him from the recreation center and placed him under guard in the police patrol car." *Id*. at 530. In support of its holding, the Court noted, "On the record before us, Rice's manual seizure of [Morton] and the subsequent restraint of his liberty plainly constituted an arrest, there being nothing to show that [Morton] voluntarily consented to the restrictions placed upon his freedom by the arresting officer." *Id*.

The Court held that the arrest occurred before Rice told Morton that he was under arrest. *Id*. at 529. When Morton was arrested, he was not in handcuffs, nor were any officers physically restraining him. *Id*. at 529-530. Instead, the restraint on Morton's liberty coupled with Rice's intent to take him into custody sufficiently qualified as an arrest. *Id*. at 530.

Here, several officers surrounded appellant once the K-9 provided a positive alert for drugs. Trooper Hallman explained to the officers that the occupants were not free to leave, and that the officers would chase any individual who tried to leave the scene. As in *Morton*, appellant was neither handcuffed nor physically held by police officers. No evidence was introduced at appellant's hearing on the motion to suppress to indicate that appellant attempted to leave the scene. Instead, appellant submitted to the authority of the police officers who made clear their authority and intent to control his movements.

Appellant's case contrasts sharply with *Barnhard v. State*, 325 Md. 602 (1992). In *Barnhard*, police officers responded to a report of a stabbing at a bar. *Id*. at 604. Upon arriving at the bar, police encountered Barnhard intentionally blocking the front entrance. *Id*. In response to the officers' requests that he move, Barnhard shouted obscenities and told the police that the only way to remove him from the entrance would be to kill him. *Id*. at 604-605. When more officers arrived, Barnhard finally moved away from the entrance to allow the officers access to the bar. *Id*. at 605.

While officers were investigating the scene, Barnhard attempted to walk through a roped-off area. *Id*. at 606. Nearby officers attempted to obtain Barnhard's name, but Barnhard refused. *Id*. One officer told another, "if he doesn't give us his name we're going to take him into custody." *Id*. In response to these comments, Barnhard told the officers that they would have to lock him up. *Id*. Barnhard removed his jacket, threw it at a nearby pinball machine, and shouted at the officers, threatening to kill one of them. *Id*. In response, one of the officers touched Barnhard's shoulder and told him that he was under

arrest. *Id*. The officer attempted to handcuff Barnhard, but Barnhard fought back and began swinging the loose handcuff at the officers. *Id*.

The Court of Appeals considered whether the officers arrested Barnhard when they advised him that he would be taken into custody if he did not identify himself. *Id*. at 611. In holding that the officers had not yet arrested Barnhard when they advised him to identify himself, the Court noted that Barnhard "was not physically restrained or otherwise subjected to the control of the police officers." *Id*. Barnhard also lacked the intention to submit to the police. *Id*. In response to the ultimatum to identify himself or be taken into custody, Barnhard threw his jacket at a pinball machine, clenched his fists, and threatened to kill one of the officers." *Id*. The Court held that "Barnhard did not intend to submit to the police, and, therefore, as a matter of law, he was not arrested at the point when he was informed he would be taken into custody if he failed to disclose his identity." *Id*. at 612.

Unlike in *Barnhard*, there was no evidence that appellant challenged the officers at the scene. Appellant remained by the side of the vehicle, guarded by police officers prior to his search. He would have been chased had he left the scene. When asked by the prosecutor when appellant was arrested, Trooper Hallman replied, "At the point that the K-9 officer told me that there was a positive alert on the vehicle, those occupants would be what's considered under arrest. They were not free to leave." Though neither handcuffed nor physically restrained, the restraint of appellant's liberty, under the circumstances, constituted the arrest.

III. Search Incident to Arrest

Having established that appellant was arrested with probable cause, we briefly turn to the "search incident to arrest" component of the analysis. We have previously stated that,

> At the most fundamental level, the exception [to the warrant requirement], by its very name as well as by its *Raison d'être*, is "search incident to arrest" and not "arrest incident to search." Although the precise sequence between the incidental search and the arrest is not of critical importance, the cause-and-effect relationship is.

Anderson, 78 Md. App. 480-81. We reiterated, "An arrest that is made on the basis of what the search recovers will never be constitutional no matter how instantaneously it may follow the search." *Funkhouser*, 140 Md. App. at 730-31. For a search incident to arrest to meet constitutional muster, the basis for the arrest must not stem from the search. *Id.*

Trooper Hallman had probable cause to arrest appellant after the K-9 sniff yielded a positive alert. Appellant was under arrest based upon the K-9 alert for drugs. In the cause-and-effect analysis articulated in *Funkhouser* and *Anderson*, the arrest plainly occurred before the search of appellant's person.[4] The circuit court correctly concluded that appellant was searched incident to arrest.

CONCLUSION

The trial court correctly denied appellant's motion to suppress. The officers developed probable cause to arrest appellant when the K-9 alerted to the presence of drugs

[4] Indeed, there is no requirement that the arrest literally precede the search. "It is enough that they are essentially contemporaneous." *Anderson*, 78 Md. App. at 481.

in the vehicle. Trooper Hallman objectively arrested appellant based on probable cause. Finally, the search was incident to the arrest. Therefore, we affirm.

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