UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 293

September Term, 2016

LUIS RAMIREZ-ALVARENGA

v.

STATE OF MARYLAND

Wright,
*Krauser,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: August 24, 2017

*Krauser, Peter B., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Convicted by a jury, in the Circuit Court for Montgomery County, of possession of cocaine with intent to distribute, Luis Ramirez-Alvarenga, appellant, contends that the circuit court erred in denying his motion to suppress as, during the traffic stop at issue, he did not consent to the searches of his person or his vehicle, nor was his continued detention supported by reasonable, articulable suspicion of criminal activity. For the reasons that follow, we conclude that the circuit court did not err in so ruling and affirm.

SUPPRESSION HEARING

Prior to trial, appellant and his co-defendant, Christian Villatoro, filed motions to suppress the cocaine found in appellant's vehicle and his wallet. At the suppression hearing that ensued, a single witness testified: Officer Larbi Dakkouni of the Gaithersburg City Police Department. He stated that, at 3:30 p.m. on December 28, 2014, while he was on patrol in a marked police cruiser, he observed a Nissan Pathfinder sport utility vehicle ("SUV") illegally turn left on a red light. At that time, the SUV was occupied by appellant, who was then driving the SUV, and a single passenger, Villatoro. After making a U-turn, Officer Dakkouni drove up behind appellant and activated his emergency lights to initiate a traffic stop. When appellant then pulled into a parking lot, Officer Dakkouni followed, parking his vehicle behind appellant's, which effectively "block[ed] him into the space."

After exiting his car and walking around the SUV, the officer observed Villatoro, who was in the back seat, "reach into his left and his right [pockets], as though . . . he was attempting to either retrieve or conceal either a weapon or some CDS." Then, upon reaching the driver's side window of the SUV, Officer Dakkouni observed that appellant

was "constantly looking around," "avoiding eye contact with" him, "mumbling his words," and "sweating," though the temperature outside was "[i]n the low 50's." As for Villatoro, the officer noted that, "the whole time" he was talking to Villatoro, Villatoro was "looking down towards his feet" and that his hands were "shaking."

Although appellant gave the officer his driver's license and registration, Villatoro was unable to produce any identification but identified himself as someone named "Monge," and, later, more specifically: "Christian Alexander Monge." Officer Dakkouni then walked back to his police cruiser and "ran" the names, "using several databases."

While Officer Dakkouni was "running the names," his "backup," Officer Justin Compton, appeared at the scene. Then, upon learning from his law enforcement database that "Monge" was, in fact, Villatoro, that he "had priors for possession of a concealed weapon" as well as "some CDS charges," and that he had "several cautions of being armed" and "dangerous," Officer Dakkouni asked Villatoro "to step out of the vehicle just to make sure he [did not] have any weapons on him, because of the cautions" he had received. After Villatoro complied with that request, Officer Dakkouni led him to the front of appellant's SUV and asked if he would consent to be searched. Upon obtaining Villatoro's consent, the officer searched Villatoro. Although he did not find either weapons or drugs, he did recover $431 in U.S. currency.

Then, seeking "to conclude the traffic stop," the officer asked appellant to step out of the vehicle. When he did, Officer Dakkouni advised appellant that he "was just giving him a warning for running the red light," and appellant thanked the officer. Officer Dakkouni then gave appellant the warning ticket and told him that he was "free to leave."

As appellant was walking back to his vehicle, Officer Dakkouni called out to him, at which point he turned around and started to walk back toward the front of his SUV, in the direction of Officer Dakkouni. Officer Dakkouni then asked him whether he had any weapons in his vehicle. When appellant responded that he did not, the officer asked him whether he thought that Villatoro had "concealed anything in the [SUV] that he want[ed] [Officer Dakkouni] to look at now, rather than him being pulled over in the future" and "get[ting] in trouble for something that Villatoro might have concealed in his vehicle." Appellant replied, "yeah, go ahead," thereby consenting to a search of his vehicle.

Officer Dakkouni and appellant then "walked to the front of" Officer Dakkouni's police cruiser, which was still parked behind appellant's vehicle, blocking its path out of the parking lot. When Officer Dakkouni asked appellant whether he "had anything on him," he replied that he did not. But, after appellant consented to a search of his person, the officer found, in his wallet, a "bag of cocaine" and a "credit card that was cut," that is, a makeshift cutting tool. The search of appellant's SUV that ensued uncovered seven bags of cocaine in a storage pouch attached to the back of one of the vehicle's seats. After appellant and Villatoro were placed under arrest and transported from the scene, a "more thorough search of [appellant's] wallet" yielded five additional bags of cocaine.

At the conclusion of the suppression hearing, the circuit court denied the motions to suppress of appellant and his co-defendant, ruling that both defendants had consented to the searches at issue.

DISCUSSION

I.

"Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial." *Grant v. State*, 449 Md. 1, 14 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)). In performing that review, we accept the circuit court's factual findings unless clearly erroneous and "view the evidence adduced at the suppression hearing, and the inferences fairly deductible therefrom, in the light most favorable to the party that prevailed on the motion," which, in this instance, would be the State. *Crosby v. State*, 408 Md. 490, 504 (2009) (quoting *State v. Williams*, 401 Md. 676, 678 (2007)). As for the circuit court's ultimate legal conclusions, however, "we 'make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.'" *Id.* at 505.

"The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances[.]'" *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)); *accord State v. Green*, 375 Md. 595, 611 (2003). And, given that voluntariness is a question of fact, a "trial court's factual finding of voluntariness is not to be set aside unless clearly erroneous." *McMillian v. State*, 325 Md. 272, 285 (1992). Finally, it is the State's burden to prove, by a preponderance of the evidence, that a defendant voluntarily consented to a search. *Schneckloth*, 412 U.S. at 222; *McMillian*, 325 Md. at 285.

II.

Appellant contends that the circuit court erred in denying his motion to suppress evidence. He reasons that, because the searches of his person and vehicle were conducted after the traffic stop had concluded, the continuing encounter between him and the police amounted to a second detention, which, to be lawful, required either his voluntary consent to be searched or a reasonable, articulable suspicion that he was concealing contraband and because neither of those conditions was met the searches at issue violated the Fourth Amendment. The State counters that the searches of appellant's person and vehicle were lawful because he voluntarily consented to them. For the reasons that follow, we conclude that the circuit court did not err in concluding that appellant voluntarily consented to the searches at issue and, consequently, it is unnecessary, as that court observed, to reach the issue of whether there was, at the time of the searches, a reasonable, articulable suspicion that appellant was concealing contraband.

"A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 575 U.S. __, 135 S. Ct. 1609, 1614 (2015). The "tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'" — that is, "to address the traffic violation that warranted the stop" and "attend to related safety concerns[.]" *Id.* (citations omitted). *Accord Ferris v. State*, 355 Md. 356, 372 (1999). "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." *Ferris*, 355 Md. at 372 (citation omitted). Consequently, "once the underlying basis for the initial traffic stop has concluded, a police-driver encounter which implicates the Fourth Amendment is

constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot." *Id.* (citation omitted).

In determining whether a defendant voluntarily consented to a search, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). As for the circumstances surrounding the encounter in question, the circuit court found the following:

> (1) that the overall tenor of the traffic stop was not coercive and remained non-confrontational when backup arrived, an event which the circuit court characterized as a "Sunday stroll";
>
> (2) that, during the time period from initiation of the traffic stop until Officer Dakkouni sought appellant's consent to have his person and vehicle searched, neither police officer drew a weapon, placed a hand on his holster, or made any other intimidating gesture;
>
> (3) that the non-confrontational atmosphere of the encounter was confirmed when Officer Dakkouni told appellant that he was going to give him a warning, instead of a citation, for the traffic violation, and, when the officer did so, he returned appellant's driver's license and registration to him, along with the warning ticket, telling him that he was "free to leave," and moreover, at no time did the officer "grab him" or "stand between him and the door" of his vehicle;
>
> (4) that, although Officer Dakkouni's police cruiser was then blocking appellant's vehicle, it would have taken the officer, as he testified at the suppression hearing, "two seconds" to move it, and "absolutely nothing" prevented appellant from

> simply "getting in his car, starting his car up, and then just waiting for the officer to move his car";
>
> (5) that appellant understood that he was free to leave was further demonstrated by his action in walking back to his vehicle after Officer Dakkouni had given him the warning ticket along with his license and registration and had told him that he was "free to leave";
>
> (6) that, although appellant did not have to turn around and continue talking to the officer, he nonetheless did so, freely and voluntarily; and
>
> (7) that, under these circumstances, appellant validly consented to the searches of his person and vehicle.

The circuit court's finding, that appellant freely and voluntarily consented to the searches at issue in this case, was not clearly erroneous. *McMillian*, *supra*, 325 Md. at 285; *Gamble v. State*, 318 Md. 120, 129 (1989). We agree with the court below that, in the words of the Supreme Court: "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was . . . at liberty to ignore the police presence and go about his business.'" *Bostick*, *supra*, 501 U.S. at 437 (quoting *Chesternut*, *supra*, 486 U.S. at 569).

It is clear that the traffic stop ended when Officer Dakkouni gave appellant the warning ticket, returned his driver's license and registration, and told appellant that he was "free to go," whereupon appellant proceeded to walk, unimpeded, back to his vehicle. As he did, Officer Dakkouni struck up a new conversation, suggesting that appellant might find it in his interest to consent to searches of his vehicle and person. Appellant freely agreed.

Nonetheless, appellant, relying upon *Ferris v. State*, *supra*, 355 Md. 356, claims that the searches at issue were illegal because the continuing encounter between him and the police, after the traffic stop had concluded, amounted to a second detention, which, to be lawful, required either his voluntary consent to be searched or a reasonable, articulable suspicion that he was concealing contraband and that neither of those conditions was satisfied. That reliance is misplaced. Ferris was driving his car along Interstate 70 in Washington County when a Maryland State Trooper, using a "laser speed gun," found him to be driving 92 miles per hour in a 65 miles-per-hour zone. Activating his emergency lights, the trooper initiated a traffic stop and pulled up "approximately twenty feet behind" Ferris's vehicle on the shoulder of the highway. *Id.* at 362. After obtaining Ferris's driver's license and registration, the trooper returned to his patrol car to issue a citation, leaving Ferris and his passenger, Michael Discher, in Ferris's vehicle. *Id.*

Meanwhile, a Washington County sheriff's deputy arrived and parked "ten feet behind" the trooper's vehicle, activating his "emergency flashers" as he did so. *Id.* The deputy then walked up to the trooper's vehicle and informed the trooper of his observation that Ferris and his passenger were "moving around in the vehicle a lot and looking around." *Id.* at 363. By then, the trooper had finished writing the citation, and the two law enforcement officers approached Ferris's car on foot. The deputy walked to "the rear of the passenger's side of the vehicle," while the trooper approached the driver's side door. The trooper then handed the citation to Ferris, who signed it, whereupon the trooper handed him a signed copy of the citation and returned his driver's license and registration. *Id.* Significantly, the trooper did not inform Ferris that he was free to leave but, instead, asked

Ferris "if he would mind stepping to the back of his vehicle to answer a couple of questions." *Id.* Ferris responded, according to the trooper, that "he didn't mind." *Id.*

Ferris then accompanied the trooper to the rear of Ferris's vehicle, while the deputy kept his eye on the passenger. *Id.* While standing at the rear of Ferris's vehicle, the trooper began an interrogation of Ferris by asking him whether "he had smoked any drugs prior to the traffic stop." *Id.* Ferris denied that he had, but the trooper persisted, asking Ferris whether he was "sure that he hadn't smoked any drugs because of the fact that his eyes were bloodshot, extremely bloodshot and he didn't have alcohol on his breath." *Id.* at 363-64. As he questioned Ferris, the trooper "remained within two or three feet of Ferris." *Id.* at 364.

Ferris ultimately "admitted that he and his passenger had smoked a 'joint' in Philadelphia about three hours earlier," but that admission did not end the interrogation. *Id.* The trooper then asked Ferris whether his passenger was in possession of any illicit substances, and "Ferris acknowledged that [his passenger] possessed a small amount of marijuana." *Id.* Thereafter, the trooper recovered, from Ferris's passenger, "a small baggie containing marijuana," and an ensuing search of Ferris's car yielded "a gallon-sized plastic baggie" containing additional marijuana. *Id.* Ferris was thereafter convicted of possession of marijuana with intent to distribute, and, after that conviction was affirmed by this Court, he sought review in the Court of Appeals.

The Court of Appeals reversed Ferris's conviction, concluding that the trooper's questioning of Ferris, following the issuance of the traffic citation and the return of Ferris's driver's license and registration, was not a "consensual encounter." *Id.* at 373. In fact, it

amounted to a second detention, unsupported by a reasonable, articulable suspicion of wrongdoing, reasoned the Court, because "a reasonable person in Ferris's position would not have believed that he was free to terminate the encounter with [the trooper] when the trooper asked him 'if he would mind stepping to the back of his vehicle.'" *Id.* at 377. Among the circumstances deemed most important, by the Court of Appeals, in finding that the trooper's prolongation of the traffic stop was "more coercive than consensual," were: that there had been a prior, lawful, "traffic seizure of Ferris"; that Ferris was "never" told that "he was free to leave"; that "the trooper's 'request' of Ferris to exit the vehicle seamlessly followed the pre-existing lawful detention"; that the trooper "removed Ferris from his automobile" and "separated Ferris from the passenger"; that "there were two uniformed law enforcement officers present"; that "the police cruiser emergency flashers remained operative throughout the entire encounter"; and that "it was 1:30 a.m. on a dark, rural interstate highway." *Id.* at 378-79.

Although some of these factors were also present here, the facts of the instant case differ substantially from those of *Ferris* in several crucial respects. First, and perhaps most significantly, appellant, unlike Ferris, was told that he was free to leave after his license and registration were returned, enabling him to do so. *Id.* at 379-80 (explaining that, although "the police are not required to inform citizens that they are free to leave before getting consent to search a motor vehicle," the failure of a law enforcement officer to do so "is a significant factor suggesting a continued seizure under the Fourth Amendment"). *See United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980) (emphasizing that a person's knowledge "that she was free to decline to consent to the search" was "highly relevant to

the determination that there had been consent" because that knowledge "substantially lessened the probability that" the police officers' conduct "could reasonably have appeared to her to be coercive") (internal quotation marks and citation omitted); *accord Robinette*, 519 U.S. at 38.

Second, whereas the *Ferris* Court gave considerable weight to the fact that the trooper "affirmatively sought to move Ferris from the relative comfort of his vehicle to a more coercive atmosphere between [his vehicle] and the two patrol cars," *Ferris*, 355 Md. at 382, appellant was walking back to his vehicle, after being told that he was free to leave, when Officer Dakkouni sought his consent to the searches.

Third, and finally, unlike in *Ferris*, where "the geographic and temporal environment of the encounter," "late at night on the side of a presumably desolate, rural interstate highway," would have "been unsettling to a reasonable person in Ferris's position," thereby "heighten[ing] the coerciveness of the encounter," *id.* at 383, the time and location of the encounter, here, were mid-afternoon, in a parking lot in a heavily populated area of Montgomery County, circumstances that would have been far less "unsettling to a reasonable person" in appellant's position and, therefore, not contributing to "the coerciveness of the encounter."

In short, we believe that *Ferris* presents a very different set of facts than those presented by the instant case, and those factual differences only serve to highlight why we must reach a different result in the case before us. We therefore hold that the circuit court did not err in finding that appellant voluntarily consented to the searches that were

performed by the officers in this case and that there was no violation of appellant's Fourth Amendment rights. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.