Circuit Court for Baltimore City
Case No. 116049019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 761

September Term, 2016

BURLEY WALLER

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Rodowsky, Lawrence F.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: July 24, 2017

After a court trial on an agreed statement of facts, Burley Waller was convicted by the Circuit Court for Baltimore City of possession of a controlled dangerous substance, specifically cocaine. To this Court, Mr. Waller initially raised two issues, which we have reworded:

> 1. Did the court err in denying his motion to suppress?
>
> 2. Did the trial court improperly coerce him into accepting a plea of not guilty on an agreed statement of facts?

Through his counsel, Mr. Waller withdrew the second contention after oral argument. We conclude that the circuit court did not err when it denied his motion to suppress and will affirm his conviction.

Background

Mr. Waller filed a motion to suppress the cocaine found on his person and statements he made to the detective during their encounter. The only witness at the hearing was Baltimore City Police Detective Michael O'Sullivan. The following uncontested evidence was presented at the suppression hearing:

Detective O'Sullivan was in an unmarked vehicle in the parking lot of the T.G.I. Fridays near the Mondawmin Mall in Baltimore around 10:30 p.m. on February 2, 2016. He was patrolling that area because in his experience, a mall parking lot is a common location for drug distribution activity. He observed Mr. Waller get into an SUV parked a few spaces from his own. After a "very brief time"— less than a minute in the detective's estimation—Mr. Waller exited the SUV and returned to his own car, placing an object in

his pocket as he did so. The SUV then drove away rapidly. Detective O'Sullivan then pulled his vehicle behind Mr. Waller's, activated his emergency lights, and asked Mr. Waller step out of his car. Upon questioning, Mr. Waller denied being in the SUV, and made a statement to the effect that he had nothing illegal and that the detective should go ahead and do a search because he wouldn't find anything.[1] Detective O'Sullivan did conduct a search, during which he found a plastic bag in the pocket of Mr. Waller's hoodie which contained a white powder which proved to be cocaine. Mr. Waller then made an additional statement, protesting that he was going to be arrested for "some powder."[2] At that point, Detective O'Sullivan placed Mr. Waller under arrest. Mr. Waller filed a motion to suppress the cocaine and his statements to the police officer.

The suppression court characterized the initial stop by Detective O'Sullivan as an investigatory stop based on the detective's reasonable articulable suspicion that Mr. Waller had just participated in a drug transaction. The court concluded that Detective O'Sullivan's search of Mr. Waller's person was consensual, based on Mr. Waller's statement that the detective should go ahead and search. The court also concluded that

[1] Detective O'Sullivan testified that, "Mr. Waller said he hadn't been in the SUV and had nothing illegal on him… [H]e then stated, go ahead, search. You ain't gonna find nothing."

[2] Detective O'Sullivan testified,

> [W]hen I recovered it [the bag], Mr. Waller made a statement about you going to lock me up for some powder.
>
> * * *
>
> You're going to arrest me for some powder, cocaine. I'll just tell the judge I'm an addict and get treatment. I know the game.

Mr. Waller's invitation to the police officer to search him and his question as to whether he was going to be arrested for "some powder" were voluntary statements made in a non-custodial environment prior to the time of arrest, and thus before *Miranda* warnings would have been required. The court characterized the statements as having been made "probably very unwisely, but voluntarily[.]" Therefore, the court denied the motion to suppress.

The Standard of Review

In *Sizer v. State*, 230 Md. App. 640 (2016), *cert granted*, (Md. 2017), we stated the standard of review for a motion to suppress: "'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 "the tilt on appellate review will go decisively in favor of the prevailing party" when considering diverging versions of facts presented by the State and the defendant. *Id*. at 644.

However, we consider *de novo* the legal significance 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:
>
> > "An appellate court, however, under an independent de novo review standard, must consider the application of the law to those facts in

> determining whether the evidence at issue was obtained in violation of the law, and, accordingly, should be suppressed."

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

Analysis

Mr. Waller argues that the trial court erred in finding that Detective O'Sullivan had reasonable articulable suspicion on which to conduct an investigatory stop because the objective facts provide no basis for suspicion of criminal activity. In particular, Mr. Waller notes that the behavior that roused the detective's suspicion could just as easily have had a perfectly innocent explanation. He points out that the windows of the SUV were tinted, and when pressed at the suppression hearing, the detective admitted that he was unable to see the interior of the car while Mr. Waller was inside. Therefore, Mr. Waller argues, the detective never saw anything that was actually criminal, such as drugs or money changing hands. Mr. Waller contends that he could have had many innocent reasons for getting into the SUV, such as completing an eBay transaction or getting an item from a friend, and he states that what he was seen putting into his pocket could have been any number of non-drug related items. Additionally, Mr. Waller questions the detective's basis for finding that the parking lot was a hotbed of drug activity, and notes that even if it were, presence in a high crime area is not in and of itself a basis for an investigatory stop. *Crosby v. State*, 408 Md. 460, 512-13 (2009); *Ransome v. State*, 373 Md. 99, 111 (2003). In short, Mr. Waller takes the position that because the initial stop was illegal, the resulting conviction must be overturned.

The State counters that reasonable articulable suspicion is determined by looking to the totality of the circumstances. *United States v. Sokolow,* 490 U.S. 1, 8 (1989). While individual aspects of an encounter may seem innocent when considered in isolation, when taken together they may be sufficient to provide a particularized and objective basis for a valid *Terry* stop. *United States v. Arvizu*, 534 U.S. 266, 277 (2002). The State notes that, even when a trained police officer is unable to see money or items being exchanged, he or she may nonetheless have reasonable articulable suspicion that a drug buy is occurring based on the totality of the circumstances, including the behavior of the parties, the location, and other factors. We agree with the State.

Unreasonable search and seizure by the government is prohibited by the Fourth Amendment, a restriction which also applies to state governments via the due process clause in the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 654-55 (1961). However, not all interactions with a police officer trigger Fourth Amendment protections. The possible scenarios are grouped into three categories, with the degree of protection afforded increasing in response to the level of intrusiveness:

> 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. *See Terry v. Ohio,* 392 U.S. 1, 34 (White, J., concurring). . . .
>
> 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.

Williams v. State, 212 Md. App. 396, 417–18 (2013) (citations, brackets, emphasis, and some quotation marks omitted).

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)).

We agree with Waller that he was seized at the scene when the detective pulled in behind Waller's car to block his path and turned on the emergency lights on his vehicle, and he yielded to the detective's show of authority by getting out of his car. This conclusion is supported by *Williams v. State*, 212 Md. App. 396 (2013), in which we noted that an officer's activation of emergency lights are a show of authority made as a prelude to a seizure, and that the use of police vehicles to block the doors of a car to prevent the defendant's escape was consistent with a seizure. *Id.* at 408, 419-421.

But a seizure is not tantamount to an arrest. An individual is arrested "'(1) when the arrestee is physically restrained, or (2) when the arrestee is told of the arrest and submits[,]' which may occur by means of '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.'" *Riggins v. State*, 223 Md. App. 40, 61 (2015) (quoting *Little v. State*, 300 Md. 485, 510 (1984)). Neither of those things occurred in the initial phase of Mr. Waller's encounter with the detective. As we stated in *Williams,* 212 Md. App. at 419-421, the use of the police car to block the defendant's vehicle fell short of an arrest. We conclude that Mr. Waller was subjected to an investigative stop requiring reasonable articulable suspicion.

We are satisfied that Detective O'Sullivan's suspicion that Mr. Waller was involved in criminal activity was reasonable. The detective in this case had more than an unparticularized hunch. While we require an officer's decision to instigate 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.'" *Holt v. State,* 435 Md. 443, 461 (2013) (quoting *Crosby*, 408 Md. at 509). At the time of the suppression hearing, Detective O'Sullivan had been with the Baltimore Police Department for 15 years, and since 2008 his assignments have focused on drug and handgun violations. The trial court accepted him as an expert in street level drug distribution, identification of controlled substances, and drug sales. At the suppression hearing, Detective O'Sullivan provided his reasoning for characterizing the parking lot as a likely location for drug sales activities. A T.G.I. Friday's located at the mall and other surrounding businesses were open late, ensuring consistent traffic entering and exiting the parking lot, and a nearby MTA bus stop also attracted a lot of coming and going. In the

detective's experience and based on his training, locations such as these enable drug dealers and customers to meet unnoticed then to make a quick exit once the sale is completed. Detective O'Sullivan also described what he observed in the parking lot: Mr. Waller walked immediately to the SUV after parking his vehicle; he spent a very brief amount of time in the SUV; he immediately placed a small item in the pocket of his hoodie as he exited the SUV, and, finally, that the SUV left promptly after Mr. Waller exited. All of these factors were consistent with drug distribution activity.[3]

To be sure, a zealous and capable appellate advocate, such as Mr. Waller's, may proffer a variety of scenarios in which a criminal defendant's actions are susceptible to innocent interpretations. However, the possibility of an innocent explanation is not conclusive. By the same token, such an advocate may point to appellate decisions that

[3] Although the issue in *Williams v. State*, 188 Md. App. 79, 92-93 (2009), was whether the arresting officer had probable cause to make an arrest, our analysis is instructive because its facts are very similar to those in the case before us. A police officer observed Williams engaging in what the officer believed was a drug buy, and arrested him. Williams was convicted of possession with intent to distribute cocaine. He challenged the trial court's finding that the officer had probable cause to arrest him, as he argued that the officer merely saw two men trade items in a high crime area, and the officer was unable to specify what the items exchanged were. *Id*. at 89-90.

We disagreed, noting that the totality of the circumstances, including the suspect's behavior, the location, environmental factors such as time of day, the officer's experience, and other aspects, were all relevant to the determination of whether there was probable cause. *Id*. at 92-93. The court concluded that the officer "did not need absolute certainty in regard to the objects that were exchanged here" because the totality of the circumstances provided probable cause, despite the potential innocent explanations for the suspect's conduct. *Id*. at 96-97.

In the present case, the State confronts a lower bar: our concern is whether the police officer had a reasonable articulable suspicion of wrongdoing, as opposed to probable cause to make an arrest.

held that *Terry* stops were valid based upon factors that were not present in this case. "But, our analysis focuses on what factual circumstances *did* exist, not those that *did not.*" *Holt v. State,* 435 Md. 443, 467 (2013) (emphasis in original).

Courts decide whether a police officer acted based on reasonable suspicion by considering the totality of the circumstances rather than each individual aspect in isolation. *Chase v. State*, 449 Md. 283, 297-98 (2016); *Crosby v. State*, 408 Md. 490, 507 (2009). After our own independent review of the suppression court record, we are satisfied that, taking the encounter as a whole, Detective O'Sullivan officer in question had reasonable articulable suspicion to begin an investigative stop.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.