UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1122

September Term, 2016

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DONALD G. REMBOLD

v.

STATE OF MARYLAND

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Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Alpert, J.

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Filed: August 3, 2017

*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.

Donald Rembold, appellant, was convicted by a jury sitting in the Circuit Court for Harford County of two counts each of sexual abuse of a minor and third-degree sex offense. After merging the sex offense convictions into the sex abuse convictions, the court sentenced appellant to 25-year terms of imprisonment, all but 20 years suspended, for both counts of sexual abuse, to run consecutively, followed by five years of probation. Appellant presents the following two questions on appeal:

I. Did the suppression court err in denying appellant's motion to suppress?

II. Did the trial court err in finding appellant incompetent without holding a hearing?

For the reasons that follow, we shall affirm the judgments.

**STANDARD OF REVIEW**

It is well-settled that when reviewing a lower court's ruling on a motion to suppress we look only to the record of the suppression hearing. *Owens v. State*, 399 Md. 388, 403 (2007), *cert. denied*, 552 U.S. 1144 (2008). We do not engage in *de novo* fact-finding but "extend great deference to the findings of the motions court as to first-level findings of fact and as to the credibility of witnesses, unless those findings are clearly erroneous." *Brown v. State*, 397 Md. 89, 98 (2007) (citation omitted). We also "'view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion[.]'" *Owens*, 399 Md. at 403 (quoting *State v. Rucker*, 374 Md. 199, 207 (2003)). As to whether a constitutional right has been violated, we make "an independent, *de novo*, constitutional appraisal by applying the law to the facts presented in a particular case." *Williams v. State*, 372 Md. 386, 401 (2002) (italics added).

## FACTS

Prior to trial, appellant filed a motion to suppress in which he argued that because he was detained without reasonable articulable suspicion, all the evidence gathered by the police after his illegal detention should be suppressed as fruit of the poisonous tree. At the ensuing suppression hearing, two police officers testified for the State. Appellant testified in support of his motion.

Harford County Sheriff's Deputy Paul Markowski testified that around 9:30 p.m. on January 27, 2014, he was in his police car patrolling the Joppatown shopping center off Route 40. A Redner's grocery store was located inside the center and was still open for business. The store's entrance and customer parking lot were located in front of the store; a large loading dock area was located behind the store. To one side of the loading dock area were the backs of several stores, one of which was a liquor store that was also apparently open.

As the deputy drove through the loading dock area, which had a street light in the corner of the parking lot but was otherwise "pretty dark," he saw a yellow Mustang parked in the "far corner" next to a wooded area. The car's engine was running, but it had no lights on. The car was backed into a car space, and there were no other cars in the lot. The deputy testified that he had often patrolled the loading dock area and had "[h]ardly ever" seen another car in the area.

The deputy drove slowly toward the Mustang, and when he was about 15 feet away, measured from the bumper of his car to the bumper of the Mustang, the officer turned his spotlight on and shone it into the Mustang. The deputy immediately saw a white male in

the driver's seat and a young female "come up from his groin area." He then saw the driver jerk upward, as if to pull up his pants, at which time the driver exposed his penis.

The deputy continued to "creep[]" forward and rolled to a stop when his car was about ten feet from the hood of the Mustang. The deputy testified that when he stopped his vehicle in front of appellant's car, appellant's car would have been unable to get around the deputy's car. The deputy exited his car, walked to the passenger side door of the Mustang, and asked the female to exit the car, which she did. He asked her age, and she replied that she was 13 years old. A back-up officer arrived about this time, and the two officers went to the driver's side door where appellant was sitting. Appellant's pants were down around his knees. He resisted arrest and, during the struggle, a condom fell off his penis.

The back-up officer, who also patrolled the Joppatown shopping center, testified that there was no entrance into Redner's grocery store from the back of the store. When asked how often he saw cars parked in the loading dock area, he said, "Not very often." He explained that "there really shouldn't be a reason for a vehicle to be parked there" and it was "kind of suspicious for a vehicle to be all the way in the back."

Appellant's testimony differed significantly from the State's witnesses. He testified that he had parked his car at the back of the shopping center because he had needed to urinate. As he was doing so, a police car came into the area, so he pulled up his pants and returned to his car. The officer stopped directly in front of his car, blocking him in, and shone a light into his windshield

After hearing the testimony and parties' arguments, the court denied appellant's motion to suppress. The court found that when the deputy saw appellant's car, the deputy had a right to investigate because the situation presented was "very unusual, if not seriously suspicious." Additionally, when the deputy shone his spotlight into the Mustang and saw the young girl, the deputy was also justified to investigate further. The court found that when the deputy stopped 10 feet in front of appellant's car, appellant was not "fully hemmed in" but could have pulled left or right, and that appellant was only detained when the officer stopped his car and approached appellant's car on foot.

## DISCUSSION

### I.

Appellant argues on appeal that the trial court erred when it denied his motion to suppress and he takes issue with two of the trial court's findings. He argues that the trial court erred in finding that he was not detained when the deputy's car was 10 feet away and stopped directly in front of his car. He also argues that the trial court erred in finding that idling his car in the parking lot was suspicious. Appellant concedes that once the deputy shone his spotlight in his car, the deputy had reasonable articulable suspicion to detain him, but argues that he was detained before that – when the deputy drove toward him but before he shone the spotlight in his car. The State responds that the suppression court did not err in denying the motion to suppress because when the deputy shone the spotlight in appellant's car and gained reasonable articulable suspicion that criminal activity may be afoot, appellant was not detained.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const., amend. IV. The Fourth Amendment, which is applicable to the States through the Fourteenth Amendment, protects against unreasonable government searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). From its plain language, the Constitution does not forbid all searches and seizures; just unreasonable searches and seizures – searches and seizures not supported by probable cause. *Stanford v. State*, 353 Md. 527, 532-33 (1999) (citing *Michigan v. Summers*, 452 U.S. 692, 700 (1981)).

There are three tiers of interaction between a citizen and the police for application of the Fourth Amendment: an arrest, requiring probable cause to believe that a person has committed a crime; an investigatory stop or detention, requiring reasonable, articulable suspicion to believe that a person has committed or is about to commit a crime; and a consensual encounter, which does not implicate the Fourth Amendment at all. *State v. Dick*, 181 Md. App. 693, 702 (2008) (quoting *Swift v. State*, 393 Md. 139, 150-51 (2006)). This is not a case concerned about whether an arrest occurred, but whether and at what point the interaction between appellant and the deputy became a detention, and if it did become a detention, whether the deputy had reasonable articulable suspicion. Accordingly, we shall look more closely at the law of investigatory detentions and consensual encounters.

In *Terry v. Ohio*, 392 U.S. 1, 21 (1968), the United States Supreme Court held that a police officer may stop and detain a person for a brief period of time when he can "point to specific and articulable facts which, taken together with rational inferences from those

facts," create reasonable suspicion that the person has been or is about to engage in criminal activity. The purpose of a *Terry* stop "is investigative – to verify or to dispel the officer's suspicion surrounding the suspect." *Hardy v. State*, 121 Md. App. 345, 355-56 (citing *Terry*, 392 U.S. at 22-23), *cert. denied*, 351 Md. 5 (1998). "The brief detention and limited intrusion permitted under the *Terry* exception are not deemed unreasonable when weighed against the governmental interests served[,]" including crime prevention and detection and the safety of the officer and others nearby. *Id*. at 356 (citing *Terry*, 392 U.S. at 16-27). The term "reasonable suspicion" does not reduce to a "neat set of legal rules" but rather is a "commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (internal quotation marks and citations omitted). *See United States v. Sharpe*, 470 U.S. 675, 685 (1985)(noting that "[m]uch as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.").

The Court of Appeals has described a consensual encounter as follows:

> Encounters are consensual where the 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. . . . The guarantees of the Fourth Amendment are not implicated in such an encounter unless the police officer has by either physical force or show of authority restrained the person's liberty so that a reasonable person would not feel free to decline the officer's requests or otherwise terminate the encounter.

*Swift*, 393 Md. at 151 (citations omitted).

In determining whether an officer employed coercive tactics raising a consensual encounter into a stop, the Court of Appeals has listed the following factors that might indicate a seizure: "a threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, approaching the citizen in a nonpublic place, and blocking the citizen's path." *Id*. at 150 (citations omitted). Additionally, the Court of Appeals in *Ferris v. State*, 355 Md. 356, 377 (1999), set forth the following relevant factors to determine whether a reasonable person would have felt free to leave: 1) the time and place of the encounter; 2) the number of officers present and whether they were uniformed; 3) whether the police moved the person to a different location or isolated him or her from others; 4) whether the person was informed that he or she was free to leave; 5) whether the police indicated that the person was suspected of a crime; 6) whether the police retained the person's documents; and 7) whether the police demonstrated any threatening behavior or physical contact to indicate to a reasonable person that he or she was not free to leave.

In distinguishing between a consensual encounter and a *Terry* stop, the Court of Appeals has stated:

> Although there is no "litmus-paper test for distinguishing a consensual encounter from a seizure," the Supreme Court has made clear that "[l]aw enforcement officers do not violate the Fourth Amendment by *merely* approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . ." [*Florida v.*] *Royer*, 460 U.S. [491] at 497, 506 [(1983)] (emphasis added). Consensual encounters, therefore, are those where the 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. The request by a law enforcement officer to examine a person's identification does not, in and of itself, make an encounter non-consensual. *See INS v. Delgado*, 466 U.S. 210, 216 (1984); *Royer*, 460 U.S. at 501[.] Neither does an officer's request to search an individual's belongings make an encounter *per se* non-consensual. *See Florida v. Bostick*, 501 U.S. 429, 435 (1991); *Royer*, 460 U.S. at 501[.] Fourth Amendment protections are implicated, however, when an officer, by either physical force or show of authority, has restrained a person's liberty so that a reasonable person would not feel free to terminate the encounter or to decline the officer's request. *See* [*United States v.*] *Mendenhall*, 446 U.S. [544] at 553–54 [(1980)]. The United States Supreme Court explained in *California v. Hodari D.*, 499 U.S. [621] at 626–27 [(1991)], that under the *Mendenhall* standard, seizure based on a show of authority does not occur unless the subject yields to the authority.
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> An encounter has been described as a fluid situation, and one which begins as a consensual encounter may lose its consensual nature and become an investigatory detention or an arrest once a person's liberty has been restrained and the person would not feel free to leave. As the Supreme Court observed in *Terry*, 392 U.S. at 19 n.16, "[w]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." In determining whether the person has been seized, "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.'" *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. [567] at 569 [(1988)]).
>
> In *Chesternut*, 486 U.S. at 575, Justice Blackmun identified examples of police conduct that would communicate to a reasonable person that he would not feel free to leave, including the activation of a siren or flashers, commanding a citizen to halt, display of weapons, and operation of a car in an aggressive manner to block a defendant's course or otherwise control the direction or speed of a defendant's movement. . . . If a reasonable person would feel free to leave under the circumstances, however, then there has not been a seizure within the meaning of the Fourth Amendment. Applying these principles, we consider whether petitioner was seized within the meaning of the Fourth Amendment.

*Swift*, 393 Md. at 151–53 (secondary citations omitted).

Appellant argues that prior to the deputy shining the light in his car, the officer had detained him without reasonable articulable suspicion, conceding that after the officer shone the light in his car and saw what appeared to be an illegal sex act, the trooper had reasonable articulable suspicion. Our focus then is on whether a reasonable person would have felt detained prior to the shining of the light in the car. The testimony showed that the deputy was patrolling the loading dock area behind the Joppatown shopping center at 9:30 on a January night, and that the lot was empty, save a lone car parked in the far corner next to the tree line. Redner's grocery store was open, as was apparently another store nearby, however, there was no customer parking in the loading dock area, and as both officers testified, they rarely, if ever, saw a car parked in the lot. The deputy drove forward to investigate. As the deputy did so, the Fourth Amendment was not implicated because there was no interaction between the deputy and appellant, let alone an encounter.

Appellant argues that the deputy was "bearing down" on him as he drove forward to investigate. We disagree. The evidence was that the deputy was "creeping" toward appellant's car and only blocked it in, by the deputy's own admission, when he was 10 feet away. There is no evidence that appellant was blocked in before that and appellant does not argue to the contrary. We note that prior to shining the light into appellant's car, there was no evidence that the deputy had on his flashers, had yelled out for appellant to stop, or had blocked him in or displayed a weapon. Before shining the light in the car, the deputy had not curtailed appellant's direction, caused him to change directions, or positioned himself so that appellant was not free to leave. Accordingly, no interaction triggering a Fourth Amendment analysis occurred until after the officer shone his spotlight on the

Mustang at which time the officer had reasonable articulable suspicion to detain the car.[1] As to appellant's argument that the suppression court made two errors in its findings of fact, even if we were to assume that the court erred in those findings of facts, it has no bearing on our conclusion that there was no Fourth Amendment violation.

**II.**

At a hearing prior to trial in which appellant expressed his wish to discharge counsel, the Assistant State's attorney recommended that appellant receive a psychiatric evaluation. After interacting with appellant during the hearing, which comprised roughly 20 pages of typed transcript, the motions court agreed and ordered an evaluation. Within a couple of weeks a preliminary evaluation was performed and a report was issued that concluded appellant was incompetent and a danger to himself and others. That day the motions court issued an order, ruling that appellant was incompetent and committed him to the Department of Health and Mental Hygiene for treatment at Spring Grove Hospital. Roughly seven months later, a hearing was held at which, based on a report of competency from Spring Grove, the court, after asking and receiving no objection from the State or defense counsel, found appellant competent and released him from Spring Grove. Appellant was tried roughly another seven months later.

[1] We note that shining a spotlight light into appellant's car does not trigger a Fourth Amendment inquiry. *Cf. Scales v. State*, 13 Md. App. 474, 477 (1971)(it is well-established in Maryland that "the shining of a flashlight into a darkened vehicle does not render observations made thereby constitutionally improper") (citation omitted).

Appellant argues that we should reverse his convictions because the motions court violated his procedural due process rights when it found him incompetent and committed him to Spring Grove for evaluation without holding a hearing. Specifically, he argues that "notwithstanding the subsequent finding that he was competent and his release from the hospital, the trial court's failure to hold a hearing resulted in an illegal involuntary commitment for an extended period, which delayed his trial and violated his due process rights." We note that appellant does not challenge the finding that he was competent to stand trial, only that the court found him incompetent without holding a hearing.

It appears appellant has not preserved this argument for our review. Appellant's attorney incorporated his lack of a hearing argument into a speedy trial motion, which the lower court denied, almost a year after he was committed to Spring Grove. Appellant does not appeal the denial of his speedy trial motion. He seems to argue that he also incorporated his lack of a hearing argument in a habeas corpus petition he filed after he was committed to Spring Grove, which the lower court also denied, and from which he also has never appealed. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Even if appellant had preserved his argument for our review, however, we believe it does not have merit.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992) (citations omitted). A defendant is considered incompetent to stand trial if he is not able, "(1) to understand the

nature or object of the proceeding; or (2) to assist in one's defense." Md. Code Ann., Criminal Procedure (CP), § 3–101(f). "[T]he substantive prohibition against the criminal prosecution of an incompetent defendant is protected by certain guarantees of procedural due process." *Peaks v. State*, 419 Md. 239, 251 (2011) (citing *Trimble v. State*, 321 Md. 248, 254 (1990)).

Md. Code Ann., CP, § 3-104, governing the determination of competence, provides in pertinent part that, "If, before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, *the court shall determine*, *on evidence presented on the record*, whether the defendant is incompetent to stand trial." Section 3-104(a) (emphasis added). The statute further provides that "If, after receiving evidence, the court finds that the defendant is competent to stand trial, the trial shall begin as soon as practicable[.]" Section 3-104(b). The Court of Appeals has said that Maryland General Assembly intended by the above language that "every accused, whose competency was called into question, to have at least one guaranteed review of his or her competency status." *Peaks*, 419 Md. at 252 (internal quotation marks and citation omitted). In *Roberts v. State*, 361 Md. 346, 356 (2000), the Court of Appeals held "that when a defendant makes an allegation of incompetency to stand trial and there is *no evidence in the record* as to the defendant's incompetency to stand trial, as opposed to a proffer, an accused must be afforded an opportunity to present evidence upon which a valid determination can be made."

In *Langworthy v. State*, 46 Md. App. 116, 128–30 (footnote omitted), *cert. denied*, 288 Md. 738 (1980), *cert. denied*, 450 U.S. 960 (1981), we discussed the competency process:

> With respect to the necessity for a hearing, all competent and responsible parties were agreed that the appellant was incompetent and no such adversary hearing was required. . . . The report from Clifton T. Perkins was unequivocal that the appellant was incompetent. *The only person who now claims that he should have been permitted to contest the finding of incompetency is the one person who, by virtue of that incompetency, was ineligible to participate in or contribute to an adjudication in any way*.
>
> We hold, moreover, that the hearing required by Art. 59, § 23[[2]], once competency is a genuine issue in the case, is a hearing at which the trial judge must be satisfied beyond a reasonable doubt that the defendant is competent before the defendant may be required to go forward and stand trial. *Colbert v. State*, 18 Md. App. 632 [(1973)]; *Rozzell v. State*, 5 Md. App. 167 [(1968)]; *Strawderman v. State*, 4 Md. App. 689 [(1968)]. This is the thing that was done by Judge McCullough on April 22, 1977, when he found beyond a reasonable doubt that the appellant was competent and when he required the trial process to resume its movement. *Such a requirement by no means suggests*, *by necessary implication*, *the converse requirement of such a hearing or such a burden of proof before trial is deferred on the grounds that a defendant is incompetent. Due process protects an incompetent defendant from being forced to the trial table*, *not from being withheld from the trial table*. The Supreme Court pointed out in *Pate v. Robinson*, [383 U.S. 375] at . . . 378 [(1966)] that, "The conviction of an accused person while he is legally incompetent violates due process." As Judge Horney pointed out for the Court of Appeals in *Hamilton v. State*, 225 Md. 302, 307 [(1961)], "The basic purpose of these code sections . . . is and has always been paternalistic in nature." The federal cases as well point out that such statutes are designed to protect defendants, where competency is in doubt, from having to stand

[2] In *Peaks*, 419 Md. at 255, *Roberts v. State*, 361 Md. at 361-62 (2000), and *Sangster v. State*, 312 Md. 560, 566-73 (1988), the Court of Appeals traced the lineage of Article 59, § 23 to CP §3-104.

> trial, not vice versa. *United States v. Miller*, 131 F.Supp. 88 (D.Vt. 1955); *United States v. Muncaster*, 345 F.Supp. 970 (M.D.Ala. 1972).
>
> *The thrust of all of the case law is that the deferral of trial and even the hospitalization of the defendant until there has been an appropriate determination that such defendant is, indeed, competent is not punishment or penal sanction of any sort but is solely for the benefit of the defendant.*

(Emphasis added) (secondary citations omitted).

It appears the lower court here was under no obligation to hold a hearing so that appellant could challenge the trial court's finding of incompetency. As stated in *Langworthy*, "all of the safeguards shielding a possibly incompetent defendant from the trial process cannot be turned around the other way without, by that very process, destroying those interests which those safeguards were designed to protect." 46 Md. App. at 130. In any event, the court found appellant incompetent based on the psychiatric report ordered by the trial court, which meets the requirement of "evidence presented on the record" in § 3-104(a). *See Sangster v. State*, 312 Md. 560, 566-69 (1988) (citation omitted).

Appellant seems to recognize this necessary result. Citing *Peaks*, 419 Md. at 256, appellant concedes that no formal hearing must be held before ruling that a defendant is incompetent. He acknowledges in his appellate brief that an issue is moot when there is no longer a controversy between the parties or when the court can no longer fashion an effective remedy. *See Suter v. Stuckey*, 402 Md. 211, 219–20 (2007) (citations omitted). Citing *Sangster*, 312 Md. at 568 and *Peaks*, 419 Md. at 252, appellant also concedes that an expert's psychiatric evaluation and a trial court's personal observations of the subject of a competency determination meet the due process requirements of "evidence presented

on the record" for an incompetency finding. In sum, under the circumstances presented, we shall not reverse appellant's convictions.

**JUDGMENTS AFFIRMED.**

**COSTS TO BE PAID BY APPELLANT.**