Circuit Court for Charles County
Case No. 08-J-16-000200

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1681

September Term, 2016

IN RE A. C.

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

JJ.

Opinion by Alpert, J.

Filed: August 22, 2017

The Circuit Court for Charles County, sitting as a juvenile court, found A.C., appellant, involved in the delinquent act of possessing a concealed air gun[1] and subsequently placed him on probation. Appellant presents a single question for our review: Did the suppression court err in denying his motion to suppress? For the reasons that follow, we shall affirm.

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).

SUPPRESSION HEARING FACTS

Prior to trial, appellant moved to suppress his statement to the police and the air gun recovered pursuant to a police frisk, arguing that they were the fruits of an investigatory

[1] *See* Charles County Code, §51-1(b)(2)(a).

stop that lacked reasonable articulable suspicion. At the ensuing suppression hearing, Corporal Jackson and Officer McKimmie, both of the Charles County Sheriff's Office, testified for the State.[2] A. C. testified in support of his motion.

Corporal Jackson testified that he was in uniform, driving a marked patrol car, when a call went out for "armed suspicious subjects" running toward Stoddert Middle School. He was in the immediate area, and when he pulled into the school, he saw between five and seven male juveniles, one of whom matched the description provided in the dispatch. The juveniles were standing around a vehicle, which was stopped in the semi-circle in front of the school and in which an elderly woman sat. The corporal stopped his car at an angle behind the other vehicle, which could have pulled away. The corporal was about 15 to 25 feet from the juveniles.

Corporal Jackson opened his car door, stood half outside of his car and, although he could not remember the exact words he initially used to gain the juveniles attention, he asked them where they were coming from. They said they were coming from the bike path, which was consistent with the dispatch report. The corporal then asked them whether they had anything on their person that they should not have, like a weapon, and three of the juveniles, including A.C., responded in the affirmative.

Around this time, several officers arrived and pulled in behind Corporal Jackson's car. The officers exited their car and then patted down the three juveniles. An officer recovered a black Airsoft gun concealed in appellant's coat pocket. Corporal Jackson

[2] The first names of the officers were not given at the suppression hearing.

testified that about a minute elapsed from the time he started to get out of his car to when the juveniles were frisked.

A.C. testified in support of his motion. He testified that when the officer pulled up behind the stopped car, he got out of his car and told the group: "[P]ut y'all hands up." The group put their hands in the air. A.C. testified that he did not feel free to walk away. The officer then asked if anyone had a weapon, adding that it was in their best interest to tell the truth to avoid any more trouble. A.C. testified that the officer was holding his gun in his hands, but he did not point the gun at him.

After hearing the above testimony and the parties' arguments, the magistrate stated that it did not believe A.C.'s version of events. The magistrate concluded that initially only a consensual encounter occurred, and that once the juveniles signaled that they had weapons, the officers had the right to pat them down for their safety. Defense counsel filed exceptions, which the circuit court denied. The circuit court accepted the magistrate's findings of fact, agreeing that A.C.'s inculpatory assent to the presence of a weapon was given in the context of consensual encounter, and that even if it had been an investigatory stop, the officer had reasonable articulable suspicion.

DISCUSSION

Appellant argues on appeal that the suppression court erred when it denied his motion to suppress. He argues that prior to his affirmative response that he had a weapon, he was subject to an investigatory stop that lacked reasonable articulable suspicion because the information known by Corporal Jackson through the dispatch was insufficient and too vague to support the stop. The State disagrees, arguing that the suppression court correctly

found that only a consensual encounter occurred, but even if it was an investigatory stop, the officer had reasonable articulable suspicion to support it.

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 purposes 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) (citing *Swift v. State*, 393 Md. 139, 150-51 (2006)). This case concerns whether the interaction between A.C. and the corporal was a consensual encounter or an investigative stop, and if the latter, whether the stop was supported by reasonable articulable suspicion. Accordingly, we shall look more closely at the law of consensual encounters and investigatory detentions.

In *Terry v. Ohio*, 392 U.S. 1, 21 (1968), the United States Supreme Court held that a police officer may stop 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 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. *Hardy v. State*, 121 Md. App. 345, 356 (1998) (citing *Terry*, 392 U.S. at 16-27). The term "reasonable articulable 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) (quotation marks and citations omitted).

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 facts 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,] 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* [*U.S. v.*]*Mendenhall*, 446 U.S. [544,] 553–54 [(1980).] . . .
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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,] 569 [(1988)]. . .).
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> 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.

Viewing the evidence in the light most favorable to the prevailing party, we find no error by the suppression court in ruling that a consensual encounter occurred. There was no credited testimony that Corporal Jackson activated his siren or flashers, displayed a weapon, or commanded appellant to "halt." Corporal Jackson did not tell the juveniles that they were under arrest, he did not touch them, and he did not draw his weapon. He spoke to the juveniles from 15 to 25 feet away and engaged them in a group conversation. He testified that they were free to leave the scene, although he never communicated that to

them. The magistrate found appellant not credible and accepted the corporal's version of events. Because the initial contact encompassed only a consensual encounter not implicating the Fourth Amendment, when the juveniles affirmatively responded that they were carrying weapons, the officers could frisk them for officer safety under *Terry*, *supra*.

Appellant directs our attention to a colloquy between defense counsel and Corporal Jackson on cross-examination. When defense counsel asked, "[W]hen you initially began to approach the suspects, did you tell them to stop? Did you . . . did you yell anything to get their attention?" the corporal responded, "I'm sure I did, but I don't know my exact statements[.]" When defense counsel pressed the issue by asking, "But, it wouldn't surprise you if you kind of said hey, stop, what are you doing . . . something . . . to get their attention[,]" the corporal responded, "Well, yeah, I mean, I . . . I got their attention[.]" Citing *Grant v. State*, 449 Md. 1, 29-30 (2016), appellant argues that because the corporal claimed a lack of memory regarding his show of authority, "the State cannot meet its burden of showing that the stop was lawful." We disagree and find *Grant* distinguishable.

In *Grant*, a police officer stopped the car Grant was driving for speeding, a warrantless search ensued, and marijuana and contraband were discovered. *Id.* at 7-9. At the ensuing suppression hearing, the officer testified that he smelled the odor of marijuana upon "initial contact," but he also testified that he "wouldn't be surprised" if he smelled marijuana after his head crossed the threshold of the vehicle's window. *Id.* at 9-10. A DVD of the traffic stop was played, and although it was not clear from the video when the officer detected the odor of marijuana, the suppression court acknowledged that the officer's head appeared to cross the window pane into the interior of Grant's vehicle. *Id.*

at 11. The circuit court denied the motion to suppress, finding that there was probable cause for the search. *Id.* at 11-13. In its ruling, however, the court did not resolve when the officer smelled marijuana, stating, "it was *not clear* whether . . . [the officer's] head was inside . . . the window" when he smelled what he believed smelled like marijuana. *Id*. at 12 (some emphasis omitted).

On appeal, both parties argued that the suppression court's ruling about when the officer detected the odor of marijuana was ambiguous, but they disagreed about the result. *Id*. at 13-15. The appellant argued that the suppression court erred because the ambiguous ruling meant that the State failed to satisfy its burden to justify the warrantless search. *Id*. The State argued there was no error. *Id*. The State explained that the ambiguity could be resolved in their favor, the prevailing party, based on the supplemental rule of interpretation, meaning that we could draw inferences in favor of the State to conclude that the officer detected the smell of marijuana before placing his head inside the window, and therefore, there was probable cause for the search. *Id.* at 14. We agreed with the State and affirmed. The Court of Appeals reversed, holding that the suppression court erred in denying Grant's motion to suppress because the evidence was unclear about the timing of the officer's detection of the odor of marijuana. *Id.* at 15. The Court emphasized that the case's resolution "hinged" on the "critical" factual determination of when the officer smelled marijuana, and in the absence of a finding of fact, "the State did not satisfy its burden regarding the lawfulness of the search." *Id.* at 15, 32.

The Court of Appeals discussed our prior application of the "supplemental rule of interpretation," which it characterized as "generally employed by the Court of Special

Appeals to resolve fact-finding ambiguities and fill fact-finding gaps in cases where a trial-level judge's fact-finding was either ambiguous, incomplete, or non-existent." *Id.* at 31 & n.8 (citing *Morris v. State*, 153 Md. App. 480 (2003)). The Court noted that it had not formally adopted the rule and declined to do so in this case because the inference that the officer detected the odor of marijuana prior to inserting his head into the passenger window of appellant's car was inconsistent with the evidence in the record and because of the "not clear" statement by the suppression court. *Id*. at 32.

Neither the holding in *Grant* nor the supplemental interpretation rule are applicable here because the magistrate resolved any ambiguity in Corporal Jackson's testimony in favor of the State, and we do not find the magistrate's factual findings clearly erroneous. In reaching its decision that only a mere accosting occurred here, the following colloquy between defense counsel and the magistrate is illustrative:

> THE [MAGISTRATE]: I mean, did…did…did the officer even stop these people...the…the juveniles? The testimony I have is that the officer pulls up behind a lady…not them…didn't say lady pull over or juveniles in this car pull over…the officer pulled up behind a car that was parked at Benjamin Stoddert. There were some juveniles. The officer got out and said where you guys been? Does anybody have anything that they shouldn't have? And,…
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> [DEFENSE COUNSEL]: Your Honor, the testimony was that…about the…the individuals was that they…they were walking. They had come from the walking path. The officer said he pulled up. He got their attention to get them to stop and pay attention to him.
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> THE [MAGISTRATE]: No, that wasn't…I don't believe that's what the officer said. The officer never said he stopped these individuals. He said he pulled up. There was a car parked there. There was a lady in the car. And, there were five to seven juveniles standing around the car. That's what the officer said.

[DEFENSE COUNSEL]: It's an investigative Terry stop.

THE [MAGISTRATE]: But, it…it's…they didn't stop…he didn't stop anybody.

[DEFENSE COUNSEL]: You don't have to pull someone over with lights and sirens to be stopped.

THE [MAGISTRATE]: Okay.

[DEFENSE COUNSEL]: You can be accosted on the sidewalk, which is what the police officers did.

THE [MAGISTRATE]: You can certainly finish your argument if you want to, but…but…but the testimony that I heard from this officer did not lead me to believe that he stopped anybody. They were there milling around a car that they may have gotten out of. Maybe didn't get out of. Maybe it was their grandmother. Maybe it was…the only thing I know is that the officer said the car was there. He pulled up behind the car. There was an elderly lady. And, five to seven juveniles were standing around the car. That was the testimony, I didn't…I…I do not believe there was…the officer said anything about stopping any of those juveniles. So, I don't believe there is an issue with the stop here because I don't believe the officer ever stopped these juveniles.

Given the facts elicited, the magistrate concluded factually (and legally) that the corporal did not tell the juveniles to stop nor did he engage them in a stop. In sum, the magistrate resolved any factual ambiguity over what the corporal might have said in favor of the State, and we find nothing clearly erroneous in the conclusion, which was adopted by the circuit court. Therefore, there is no ambiguity for us to resolve. Accordingly, we shall affirm.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.